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Administering International Criminal Justice through the African Court

Opportunities and Challenges in International Law

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1. INTERNATIONAL LAW AND REGIONAL ARRANGEMENTS

As you may know or recall, in 2014, during their Summit in Malabo, the African Union (AU) adopted a protocol for the stated purpose of conferring criminal jurisdiction upon the African Court of Justice and Human Rights (AC or African Court).

In reflecting upon the opportunities and challenges in international law that lie for the African Court, as an instrument of international criminal justice, a primary normative question of law concerns the attitude of international law towards such a regional arrangement. That is to say: Does international law stand against criminal jurisdiction for the African Court – perhaps out of a perceived need to protect the ICC?

The short and simple answer to that question is: No. International law does not stand against criminal jurisdiction for the African Court – certainly not out of any need to protect the ICC. In fact, no provision in the Rome Statute forbids criminal jurisdiction for a regional court like the AC. Nor, should it.

Notably, the UN Charter recognises regional arrangements – and even positively encourages them. In that regard, article 52 of the UN Charter provides as follows:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific

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settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

And quite significantly, in relation to the administration of international justice, the following may be noted. Having established the ICJ, the UN provided as follows in article 95 of the Charter: 'Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future'.

So, it is that the European Court of Justice, the African Court of Justice and Human Rights, Ecowas Court of Justice, the East African Court of Justice, the Caribbean Court of Justice, etc, can exist despite the ICJ. And, if they can exist alongside the ICJ, there is very little reason to worry that the mere existence of the ICC is a reason in law against giving criminal jurisdiction to the AC.

It may thus be said with some confidence that international law – certainly in light of the precedents in the UN Charter – is positively disposed towards apparently competing regional arrangements, as long as existing arrangements are not deliberately undermined in bad faith.

2. ADMINISTERING INTERNATIONAL JUSTICE THROUGH THE AFRICAN COURT: OPPORTUNITIES

Having addressed the question of the normative attitude of international law towards regional arrangements, of which the AC (exercising criminal jurisdiction) is certainly a part, we will next consider the substantive question whether the world is – in whole or in part – improved by conferring criminal jurisdiction upon the AC.

Other things being equal – and I stress that caveat, 'other things being equal' – there is potentially immense value in conferring criminal jurisdiction upon the AC.

A. *Non-ICC Crimes*

We see this value in its clearest relief in relation to crimes on which the Rome Statute is silent.

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There are 14 crimes proscribed in the AC amended Protocol,[1] as compared to four crimes (including aggression) recognised in the Rome Statute. Ten (10) of the AC crimes are crimes that the Rome Statute does not deal with. They include:

- Piracy (the oldest international crime)
- Mercenary activities
- Treasonous usurpation of political power
- Corruption

Upon a fair, objective view, it may be that some of these additional crimes speak to especial concerns that African leaders are entitled to have. Take corruption or kleptocracy, for example, some may say that the human toll of corruption can be just as devastating in the long run as the ravages of armed conflict. The point is adequately made in the following words of UN Secretary General Kofi Annan, in a foreword he wrote in 2004 to a publication on the UN Convention against Corruption, he went even further, saying:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.
>
> This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment.

[1] The 14 crimes are as follows:

(1) ***Genocide***
(2) ***Crimes Against Humanity***
(3) ***War Crimes***
(4) The Crime of Unconstitutional Change of Government (this proscribes the commission or ordering of certain acts aimed at illegally accessing or maintaining power)
(5) Piracy
(6) Terrorism
(7) Mercenarism (prohibiting the recruitment, use, financing or training of mercenaries)
(8) Corruption (in both the public and private sector)
(9) Money Laundering
(10) Trafficking in Persons
(11) Trafficking in Drugs
(12) Trafficking in Hazardous Wastes
(13) Illicit Exploitation of Natural Resources
(14) ***The Crime of Aggression***

> Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[2]

African States are thus, without doubt, entitled to take collective regional action against corruption and other troubling crimes – in the face of the silence of the Rome Statute on those crimes.

It is also notable that the AC dispensation recognises the attribution of criminal responsibility to corporations [article 46C].

The foregoing thus shows us how it is that the value of criminal jurisdiction for the AC is seen most clearly from the perspective of the crimes over which the ICC currently lacks jurisdiction

B. *ICC Crimes*

But, even for crimes under the Rome Statute, there is much value in giving the AC jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression.

The point may be appreciated from the perspective of extension of the notion of complementarity – that being the hallmark of ICC's jurisdiction. Conferring criminal jurisdiction to the AC over Rome Statute crimes involves an extended notion of complementarity in more ways than one. First, it involves 'intermediation of complementarity'. This is by the recognition of another adjudicatory forum between the current polarities of national jurisdictions and that of the ICC: all with the viewing to ensuring accountability – with ICC remaining a court of last resort in any event. Second, it also connects rather well with the idea of 'positive complementarity' – an ICC-OTP idea – that enables national jurisdictions to try residual cases that the ICC cannot try, in view of limited capacity and resources.

There is thus nothing wrong with systematically building capacity at the regional level to try ICC crimes as well. It fully complements the OTP's vision of seeing national jurisdictions positively enabled to try the crimes that the ICC is unable to try.

From the foregoing considerations then, there is no doubt at all in my mind that the world – from the particular perspective of Africa – is improved immensely by conferring criminal jurisdiction upon the African Court. Provided there is no obstacle to the role of the ICC as a court of last resort, in relation to those AC crimes over which the ICC also has jurisdiction. The idea being that where either the national jurisdiction or the AC is unable or

[2] United Nations, Office of Drugs and Crime, *United Nations Convention against Corruption* (2004) p iii.

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unwilling to investigate or prosecute, the situation will by default remain admissible at the ICC.

3. AUTOMATIC DEFERRAL AS A MAJOR CHALLENGE

Having settled the question of the value of conferring criminal jurisdiction to the AC, we now turn to the challenges presented. I recall the lecture topic: 'Administering International Criminal through the African Court – Opportunities and Challenges in International Law'. The question now is whether we have reason to worry. Should we worry that the rosy vision of the opportunity of administering international criminal justice through the AC stands in danger of being undermined? The direct answer is: Yes, indeed. There is a great big reason to worry.

A normative reason for that worry lies in the automatic deferral that the AU has prescribed for serving Heads of States and senior state officials as an integral part of the AU's conferment of criminal jurisdiction upon the AC.

A. *The Troubling Provision: Deferral v. Immunity*

The troubling provision appears in article 46A*bis* of the amended AC Statute. It provides as follows: 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'

Notably, article 46A*bis* is not presented in the manner of bare-faced immunity for the officials concerned. Indeed, article 46B(2) eschews such immunity on its face, by providing as follows: 'Subject to the provisions of Article 46A*bis*, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.'

Strictly speaking, then, article 46A*bis* does not prevent investigation or prosecution. It only defers them automatically until the suspect has left office.

B. *Article 46A*bis*: Anti-Crime Prevention*

But, this automatic deferral of investigation or prosecution (of a very broad category of serving officials) is directly significant to the question of the potential value of the AC as an instrument of transnational criminal justice – and crime prevention. This is because the automatic deferral has immense potential to give unwitting cover to potential beneficiaries of the deferral possibly giving them an incentive to either attain power or to retain it in any way that they can in order to delay or escape criminal proceedings.

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And that presents a particular paradox even to the AU's own purpose of criminalising treasonous usurpation of political power. That is to say, there is the curious scenario where anyone who accesses power through treasonous means will be protected by article 46A*bis* – giving him refuge to engage in further violations of the sub-regional norm against treasonous maintenance of power until he chooses to leave or is ousted. It is thus immediately clear that article 46A*bis* constitutes a serious contradiction to an important regional norm of the AU – as it potentially does to all of AU's efforts in proscribing all the crimes contemplated in the Malabo Protocol, to the extent that such crimes can be committed by a Head of State inclined to commit them.

C. *The Flawed Premise of Article 46*Abis

What is especially worrisome about the normative circumstances of article 46A*bis* is the false premise that apparently underlies it. That premise is encapsulated in the following AU position statement made by a leading African statesman in 2013 – one year before the adoption of article 46A*bis*: 'Our position is that certain Articles of the Rome Statute are of grave concern to Africa. In particular, Article 27 which denies immunity to all persons without regard to customary international law, conventions and established norms, must be amended.'[3]

It helps to recall that article 27 of the Rome Statute (as referred to) is the provision that forbids official position immunity, even for Heads of States. It provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The quote from the leading AU statesman, complaining against article 27, has two important elements of interest. The first element is in the coded text 'certain articles of the Rome Statute are of grave concern to Africa.' It engages

[3] See text of President Jonathan's speech at the 11–12 October 2013 Extraordinary Session of the African Union Assembly.

the question as to what it is about the provisions of the Rome Statute that should be 'of grave concern to Africa'?

In the temporal context of the statement, it is not difficult to think of the complaints often heard from certain quarters to the effect that: the ICC is an instrument of western imperialism and neo-colonialism and is being used as such to target African leaders.

The second element of the leading AU statesman's speech engages the suggestion that international law (either by treaty or by custom) normally or normatively affords immunity to State officials, while in office.

Taken together, the two elements present the composite idea that by denying immunity to even Heads of States and senior states officials – while in power – article 27 of the Rome Statute is a mischievous, legally aberrant provision, which makes it easy for the ICC to be used as an instrument of neo-colonialism, for the illicit purpose of targeting African Heads of State and senior state officials.

There is no doubt that article 46A*bis* was motivated by that premise. Seen in that light, article 46A*bis* thus becomes a corrective that supposedly shows how the Rome Statute must be amended, with a particular view to taming the aberration appearing in article 27, in order to comport it to international law. But, it is a mistaken premise.

D. *Article 27 of the Rome Statute as a Codification of the Third Nuremberg Principle*

In order to appreciate why it is a mistaken premise, it is necessary to consider that a major event in the history of customary international law, as regards not only individual criminal responsibility but also the rejection of immunity for State officials including Heads of State, was the UN's approval of the principles of law distilled from both the Nuremberg Charter and the judgment of the Nuremberg Tribunal.

In resolution 95(I) adopted on 11 December 1946, the UN General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. And the UN General Assembly tasked the International Law Commission to formulate the Nuremberg Principles '*as a matter of primary importance*'.

During their second session in 1950, the ILC submitted to the UN General Assembly the Commission's report covering the work of that session. Included in the report were the Principles of International Law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, including commentaries.

The third of the Nuremberg Principles appears as follows: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'

The development did not have African leaders in mind or sight. It had Nuremberg in mind and hindsight. From then on, every international law basic document establishing an international criminal tribunal – from the ICTY,[4] to the ICTR,[5] to the SCSL,[6] to the ICC[7] – has repeatedly restated the Third Nuremberg Principle. The repetition thus firmly established the exclusion of the plea of official position immunity including for Heads of State – as a norm of customary international law, concerning cases before international criminal courts.

As observed earlier, the Third Nuremberg Principle did not have African leaders in mind when it was formulated in 1950.

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E. *A Distinction: Foreign Immunity in National Courts:* Par in Parem Non Habet Imperium

But, in excluding official position immunity, the focus of the Third Nuremberg Principle is prosecution before international courts exercising criminal jurisdiction. That is the generally accepted understanding.

Conversely, it is not generally accepted that the Third Nuremberg Principle operates in relation to national courts. For, in that regard, customary

[4] See Art. 7(2) ICTYSt.: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[5] See Art. 6(2) ICTRSt.: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[6] See Statute of the Special Court for Sierra Leone, Art. 6(2): 'The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

[7] See Art. 27 of the Rome Statute: '1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'

international law does indeed recognise immunity for foreign sovereigns in criminal proceedings before national courts.

The immunity that foreign sovereigns enjoy before national courts follows from the principle of sovereign equality of States – a cardinal principle of international law – notably expressed in article 2(1) of the UN Charter: 'The Organisation is based on the principle of the sovereign equality of all its Members.' And the principle of sovereign equality of States anchors the idea that among equals none has dominion: *par in parem non habet imperium*. In my view, the doctrine of sovereign equality of States is the only rational basis for foreign sovereign immunity before national courts. There is no other basis for it.

The doctrine of sovereign immunity before national courts operates to exclude prosecution even for international crimes.[8] Hence, the full value of the Third Nuremberg Principle is to preclude immunity before international courts exercising criminal jurisdiction.

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But how come it was a Nuremberg Principle? It was so because the principle appeared in article 7 of the Nuremberg Charter of 1945, which provided as follows: 'The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.' Article 6 of the Charter of the Tokyo Tribunal contained a similar provision. So, too, did the Control Council Law No 10 (CCL No 10).[9] It was thus that the Nuremberg Tribunal tried Grand Admiral Dönitz – who had succeeded Hitler as the Head of State of Germany. Similarly at the Tokyo Tribunal, Prime Minister Hideki Tojo was tried. Dönitz was convicted and sentenced to ten years jail term. Tojo was convicted and hanged. They weren't African leaders.

F. *The Provenance of the Third Nuremberg Principle*

But, was article 7 of the Nuremberg Charter an accident? No, it was not. It resulted, rather, from a deliberate policy decision taken at the London Conference of 1945, to bar the plea of immunity during the Nuremberg trials.

[8] See ICJ judgments in both the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, International Court of Justice, 14 February 2002, ICJ Reports (2002) 3; and the *Jurisdictional Immunity of the State (Germany* v. *Italy)*, International Court of Justice, 3 February 2012, ICJ Reports (2012) 99.

[9] Art. II(4)(a) of the Control Council Law No 10 also prohibited official position immunity in proceedings before national or occupation courts exercising jurisdiction in Germany, pursuant to article 6 of the London Agreement of 8 August 1945.

Notably, Justice Robert Jackson (the US representative to the London Conference) played a leading role in championing the norm stated in article 7 of the Nuremberg Charter. He argued fervently for it. And he sought its approval from President Truman in a report that he made to Truman in June 1945. In the report, Jackson repudiated 'the obsolete doctrine that a head of state is immune from legal liability.' And, he continued as follows:

> There is more than a suspicion that this idea is a relic of the doctrine of the divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the law".[10]

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Mind you, he was writing all of this to his own Head of State – President Truman. And quite significantly, Truman accepted the propositions as the American position. And these are the makings of customary international law in 1945, culminating in the exclusion of immunity for Heads of State and State officials, as eventually articulated in article 7 of the Nuremberg Charter [also article 6 of Tokyo Charter and article II(4)(a) of CCL No 10].

That is the immediate provenance of the norm that is now known colloquially as the Third Nuremberg Principle – which got eventually codified in article 27 of the Rome Statute (adopted in 1998) for purposes of the ICC. The development of the norm had nothing at all to do with any plot to prosecute African leaders at the ICC. Rather, the norm enabled the prosecution of the leaders of the most powerful States in Europe and Asia during World War II.

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And, it is worth repeating for emphasis that the norm does not then become part of a plot to target African leaders, merely because that old norm has now been restated in article 27 of the Rome Statute. I called it 'that old norm' not merely because it was firmly established 71 years ago in the Charters of the Nuremberg and the Tokyo tribunals. Of course, by all accounts, a norm that is 71 years old is ripe enough to qualify as an 'old norm' indeed.

[10] Justice Jackson's Report to the President on Atrocities and War Crimes on 7 June 1945. Available online at http://avalon.law.yale.edu/imt/imt_jack01.asp

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Notably, still, the repudiation of immunity of Heads of States from the jurisdiction of international criminal tribunals is traceable to the Versailles Treaty of 1919 – making it almost 100 years old – 97 years old to be precise. We see it reflected in article 227 of the Versailles Treaty, according to which the States Parties 'publicly arraign[ed] William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.' That agreement also anticipated the creation of a 'special tribunal . . . to try the accused . . .'

And, mark this. Article 227 of the Versailles Treaty similarly was not an accident. In fact, at the drafting stage, Robert Lansing, the American Secretary of State had vigorously objected to the provision, when it was being discussed within the Versailles Treaty's Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. In addition to being the US Secretary of State, Lansing was both the Chairman of the Commission, as well as the head of the US delegation to the Commission. But his objection was emphatically opposed and roundly rejected by the majority of the Commission, spearheaded by Great Britain. Notably, in their report, the Commission expressed themselves as follows:

> It is quite clear from the information now before the Commission that there are grave charges which must be brought and investigated by a court against a number of persons. In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

That marked the international community's earliest contemplation of an international criminal court. It also marked the international community's earliest statement of the idea of individual criminal responsibility for violation of international law. And it also marked the earliest repudiation of immunity for Heads of State for purposes of the jurisdiction of an international criminal tribunal. That was almost 100 years ago – almost 80 years ahead of the adoption of the Rome Statute in 1998. It had nothing at all to do with the

need to prosecute African leaders. The norm was conceived out of the need to prosecute the most powerful European leader during World War I.

4. ACCOMMODATING EXTRAORDINARY DUTIES OF STATE AT THE HIGHEST NATIONAL LEVEL

It may be possible to consider that the concern of article 46A*bis* of the amended AC Statute is to prevent disruption to the daily or regular functioning of a national government: if a State's senior officials are exposed to criminal prosecution. But, the remedy to that mischief could have been achieved with the insertion into the amended AC Statute of a provision similar to rule 134*quater* of the Rules of Procedure and Evidence of the ICC. Rule 134*quater* of the Rules provides that an accused who (on the one hand) is summonsed to appear at trial and who (on the other hand) is mandated to fulfil extraordinary public duties at the highest national level may waive the right to be present at trial, and be excused from continuous presence at trial – if he is represented by counsel.

This judicial determination may be made if alternative measures are inadequate, if it is in the interests of justice and if the rights of the accused are fully ensured.

Rule 134*quater* is a 'special procedural rule' designed for the benefit of persons mandated to fulfil extraordinary duties at the highest national level. But it contemplates neither immunity from the jurisdiction of the Court nor automatic deferral of a case. To the contrary, its aim is to ensure that accused persons mandated to fulfil extraordinary duties at the highest national level will remain within the jurisdiction of the Court, with their trials conducted with minimum interruption as a result of the legitimate demands of their public office. Clearly excusal from presence at trial and deferral of investigation or prosecution are different matters.

5. CONCLUSION

There is immense value in conferring criminal jurisdiction to the AC – both as regards crimes within the Rome Statute and more so as regards crimes over which the ICC has no jurisdiction. It is much to be regretted, however, that such immense value is severely undermined by the regime of automatic deferral of cases against Heads of States and other senior State officials. The challenge will be to find ways of maximizing the opportunity presented, while minimizing the challenges.