HOME

Should international courts exempt African leaders and their senior officials from genocide and war crimes prosecution?

The fact that some still seem to be above the law, now appears to be used to form the argument that *all* should be above the law. What is on the table at the African Union this week is the legalisation of impunity.

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The new chairman of the African Union, Mohamed Ould Abdel Aziz, visits the headquarters in Addis Ababa. Demotix/Gazetegnaw Zega. All rights reserved.

This is a rhetorical question, provocative nonetheless. And there are different answers depending on your vantage point. If you are a delegate at the twenty-third African Union summit this week, involved in the deliberations about whether to give sitting Heads of State and senior officials immunity from prosecution at the African Court of Justice and Human Rights, you are being encouraged to say 'yes'. For the victims of mass killings and rapes, war crimes and crimes against humanity, the answer would be a resounding 'no'. What is most important about justice is that it happens; impunity should simply not be tolerated, anywhere.

I recall a number of years ago I was at a meeting with human rights defenders mainly from Africa and Europe. The debate turned to the issue, which remains a concern today, that the focus of international justice appears to be on Africa and not on other regions. It is African leaders and senior officials who are being prosecuted by the International Criminal Court, and courts in Europe are doing the prosecuting of international crimes cases concerning Africa on the basis of universal jurisdiction.

The question, posed by one representative of an international human rights organisation based in Europe was, '*Well, isn't the answer to promote more prosecutions by courts in Africa; wouldn't this bring better parity, wouldn't this help the cause of international justice*?' The response from one of our human rights defender colleagues from Africa who also happens to be a victim of horrific abuses, was: '*When we listen to what you say about Africa we notice that human rights could very well become a phenomenon that is going to disappear. If you leave aside crimes committed in Africa, it is as if international justice only made decisions on the basis of geography, on the basis of race*.' His point was a simple one: international justice is for victims wherever they are located. Geography should play no part. If there are victims of international crimes in Africa, they too should benefit from international justice, particularly when justice in their home country alludes them.

This is not to say that perpetrators of international crimes from other regions should evade justice. The whole purpose of international justice is that it is global – that the space for impunity shrinks to the point where it is no longer exists. But, we have not yet achieved this goal. There is not yet any justice for victims in Syria, Sri Lanka, Chechnya or Guantanamo Bay.

Perhaps this perception problem of double standards is slowly shrinking with the ICC Prosecutor's announcement that she is re-opening the preliminary examination into allegations of systematic detainee abuse in Iraq involving the responsibility of United Kingdom officials. Nonetheless, the perception still remains. And it is the current limits of international justice, the fact that some still seem to be above the law, that now appears to be used to form the argument that *all* should be above the law. If the victims of Syria or Sri Lanka do not yet have justice, why should the victims in Africa? But who is making these arguments? Certainly not the victims.

We should remember that five of the situations currently before the ICC have been referred by African states themselves: Uganda, Central African Republic, Democratic Republic of the Congo, Mali and Ivory Coast. So why are these arguments of double standards being made?

This perspective of the victims, who yearn for justice wherever it can take hold, who cannot countenance impunity in any form, is a perspective that is being ignored this week at the African Union. Instead of pressing for global adherence to the no impunity principle, what is on the table is the legalisation of impunity.

The African Union is discussing the proposed expansion of the jurisdiction of the African Court of Justice and Human Rights to include criminal matters. The Court is not yet operational as it still needs to be ratified by fifteen AU Member States. Having a criminal court in Africa to judge international crimes taking place on the continent is not in itself a bad thing. The International Criminal Court is under-resourced, there are massive and systematic crimes being perpetrated in several African countries and a wide-scale problem of impunity. In principle, a new African criminal jurisdiction could work in complement to the International Criminal Court, though this does not appear to have been the intention. However, there are many concerns about the establishment of such a court, including whether it will have negative implications for the overall system of human rights protection on the continent, and whether its establishment is politically motivated to reduce the scope for the International Criminal Court to act in Africa.

In May this year, the African Union (AU) Ministers of Justice and Attorneys General met in Addis Ababa and agreed in principle that the new African Court would afford all Heads of State and 'senior state officials' immunity from prosecution while they are in office. The immunity would apply for any crime covered by this new criminal jurisdiction, including acts of genocide, war crimes and crimes against humanity. This provision is slotted for debate at the end of the week.

There are a number of problems with this immunity clause.

The first is that the provision contradicts the International Criminal Court statute which binds most African Union member states. Article 27 makes clear that the 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. 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." If the proposed African Court of Justice and Human Rights is to have jurisdiction over international crimes, then immunities should have no role.

In its consideration of the immunities clause, delegates have emphasised that certain categories of persons enjoy functional immunity from prosecution while they are in office in order to preserve their ability to carry out their responsibilities. The International Court of Justice has indeed recognised that Heads of State and foreign ministers may have functional immunity, however, and this is a large caveat – the immunities they enjoy are immunity from the courts of another sovereign state; that is all. The immunities do not represent a bar to prosecutions. Such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts. In addition, the suspects can still be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.[1] Again, if the African Court of Justice and Human Rights is to behave like an international court, then immunities should have no role.

Secondly, 'senior state officials' is an overly vague and broad concept, going well beyond any notion of functional immunity recognised by the International Court of Justice. The purpose of functional immunity is to preserve the ability of a Head of State of Foreign Minister to travel to other countries to carry out foreign relations. How many officials will have that role?

Thirdly, the immunity provision is contrary to many of the basic tenets upon which the African Union and its institutions stand. Article 4(h) of the Constitutive Act of the African Union allows the Union to intervene in a Member State upon the decision of the Assembly when there are grave circumstances, namely war crimes, genocide and crimes against humanity. Article 4(h) amounts to a statement that impunity for these crimes is unacceptable to AU Member States. The Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, which is binding for the 12 states that have ratified the 'Great Lakes Pact', explicitly says that the Protocol applies to all persons suspected of these crimes irrespective of their official status: "the official status of a Head of State or Government, or an official member of a Government or Parliament, or an elected representative or agent of a State shall in no way shield or bar their criminal liability."[2] Guideline No. 16 of the *Robben Island Guidelines* adopted by the African Commission on Human and Peoples' Rights – the main operational organ of the AU monitoring State compliance with the African Charter, provides that "in order to combat impunity States should: … ensure that there is no immunity from prosecution for nationals suspected of

torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law."

In its case law concerning countries as diverse as Ivory Coast, Malawi, Mauritania, Sudan and Zimbabwe, the African Commission on Human and Peoples' Rights has repeatedly underscored the obligation to investigate and prosecute serious human rights violations amounting to crimes under international law and victims' right to judicial protection. It has even held that conditional immunities which can be lifted at the discretion of the head of the service where the suspect is employed, 'would be making a mockery of justice.'[3]

This amendment, if adopted, would be the supreme mockery of justice. It seriously calls into question the African Union's commitment to ensuring justice for victims of serious crimes under international law. This is a law to shield the strong and the powerful; it does nothing to protect the victims of horrendous crimes in Africa.

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[1] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, para 61

[2] International Conference on the Great Lakes Region, 'Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination', 29 November 20006, Article 12.

[3] Monim Elgak, Osman Hummeida and Amir Suliman v Sudan, Communication 379/09, Admissibility decision, August 2012, para. 67.

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All of this is of course true, appalling, and demoralizing, but the elephant in the room is the wide-ranging impunity clauses from ICC prosecution that the USA wrangled from a hundreds countries or so, including several African countries, and even (at least temporarily) from the UNO.

If the USA can get away with it, then it is understandable that African countries are itching to try that trick too -- especially since they have been the sole target of the ICC, and the principal target of international human rights courts for the past decades.

I am afraid we will see similar initiatives in other regions as well.

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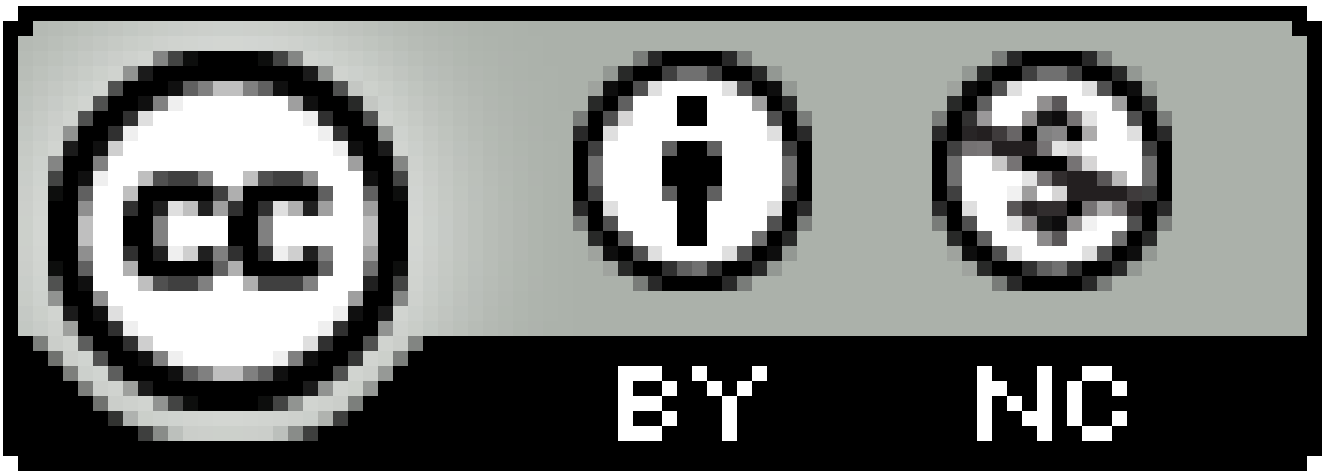

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