No. 35
June 2021

AFRICA POLICY BRIEF

Decolonising human rights protection in Africa: impunity rhetorically repackaged?

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Pointing out the need to decolonise human rights protection in Africa, authorities at the level of the African Union (AU) and its member states have initiated a number of institutional reforms. Purportedly aimed at enhancing accountability for human rights violations, in reality these continental mechanisms offer very little prospect to victims. In terms of the individual criminal responsibility of perpetrators, the 2014 Malabo Protocol is no more than an empty shell. In the area of state responsibility, the African Court on Human and Peoples' Rights is facing an existential threat because of AU member states withdrawing their declarations to allow individual victims and NGOs to directly access the Court. Ultimately, the rhetorical hijacking and political misuse of the decolonisation paradigm is leaving African victims of human rights violations worse off.

INTRODUCTION

Decolonisation is a hot topic. Calls for the decolonisation of public spaces, academic research, the workplace, education, international partnerships (formerly known as development cooperation), museums, the media and other domains have spread globally in tandem with the Black Lives Matter movement. In the area of human rights protection in Africa, calls for decolonisation are, however, not a recent phenomenon. They multiplied in the aftermath of international judicial action undertaken against incumbent political and military leaders, either by intergovernmental bodies - most notably the International Criminal Court – or based on national universal jurisdiction laws. They rhyme with calls for pan-African cooperation, 'African solutions to African problems', regional integration, continental self-determination and other values. Yet, a value-oriented perspective only reveals part of the story as recent developments are primarily interest-driven rather than motivated by a desire to reinforce human rights protection at the continental level.

This policy brief analyses to what extent institutional reforms that are rhetorically framed as aimed at improving and decolonising human rights protection in Africa offer prospects to victims. It will look at two types of accountability for human rights violations. The first section deals with the individual criminal responsibility of perpetrators. The next section deals with state responsibility for human rights violations. The analysis shows that, applied to human rights protection in Africa, calls for decolonisation – the true meaning of which clearly needs to be refined – may well be hijacked by political leaders for their own interests. Advocates of decolonisation – including the author – may thus find themselves in the company of strange bedfellows. This policy brief concludes by suggesting four avenues for further academic reflection and policy debate on how decolonisation may enhance human rights protection in Africa.

THE MALABO PROTOCOL: AN EMPTY SHELL AND A PAPER TIGER

In August 2017, in a report to the United Nations (UN) Human Rights Council, the UN Commission of Inquiry on Burundi recommended that the International Criminal Court (ICC) *'"Should initiate, as soon as possible, an investigation into the crimes committed in Burundi'* since April 2015, when the announcement of the candidacy of incumbent president Pierre Nkurunziza for a third term unleashed a severe political and humanitarian crisis.[1] Shortly before the start of the September 2017 session of the UN Human Rights Council, African Union (AU) Peace and Security Commissioner Smaïl Chergui reacted to the report and rejected ICC involvement in Burundi, stating that *'We have our own approach as [the] African Union. You know that we are promoting our African court to really be the first respondent at the level of the continent to such situations where the internal courts in our member states did not have the chance to resolve this.'* [2]

Previously, ICC investigations and indictments relating to the situations in Sudan (in 2009) and Kenya (2011) also met with fierce criticism by African leaders who branded the ICC as a neocolonial institution targeting Africa.[3] The AU viewed ICC's involvement in the situation in Libya as *'Part of an arsenal of weapons deployed to secure regime change.'*[4] In October 2016, together with South Africa and The Gambia (both of which later revoked their withdrawal), Burundi was the first country ever to withdraw from the ICC Statute which it had ratified in 2003. Not only political leaders, but also some scholars have argued that the ICC *'Is part of the colonial project which started with slavery and is now in the coloniality phase.'* [5]

What is the alternative, allegedly post-colonial, AU approach Commissioner Chergui hinted at? In June 2014, at its summit in Malabo (Equatorial Guinea), the AU adopted a Protocol on Amendments to the Protocol (of June 2008) on the Statute of the African Court of Justice and Human Rights. The Malabo Protocol adds an international criminal law section to the African Court of Justice and Human Rights, which furthermore will consist of a general affairs section and a human and peoples' rights section. As of today, only the African Court on Human and Peoples' Rights – to which I will return in the next section – is operational. It was

established in 2006. The merger of the African Court on Human and Peoples' Rights with the Court of Justice of the African Union, provided for in the AU Constitutive Act of 11 July 2000, was laid down in the Protocol adopted in June 2008. So far, however, the required number of ratifications of that June 2008 Protocol has not been reached and the merged African Court of Justice and Human Rights exists only on paper. In other words, the Malabo Protocol is set to amend a Protocol which has not entered into force yet. So far, 15 of the 55 AU member states have signed the Malabo Protocol. The most recent signature[6] dates back to April 2019. More importantly, seven years after its adoption, no single AU member state ratified the Malabo Protocol, while 15 ratifications are required for its entry into force.

Compared to the ICC Statute, the Malabo Protocol is highly ambitious in terms of its material jurisdiction, less so in terms of its personal jurisdiction. The international criminal law section of the Court shall have jurisdiction over an impressive list of international crimes: genocide, crimes against humanity, war crimes, unconstitutional changes of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking (in persons, drugs and hazardous wastes), illicit exploitation of natural resources and aggression. Like the ICC, the Court shall have complementary jurisdiction (i.e., when the national level is either unwilling or unable to conduct the investigation or prosecution). Its temporal jurisdiction is limited to crimes committed after the entry into force of the Protocol (which is still uncertain, as explained above). Only the – yet to be created – Office of the Prosecutor can submit cases to the Court.

In terms of personal jurisdiction, the Malabo Protocol is, on the one hand, at the forefront in providing for the international criminal liability of legal persons, including companies involved in the above-mentioned crimes. On the other hand, however, the Protocol clearly reflects the self-interest of its drafters. The Protocol states that the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment. Yet, an important distinction with the ICC Statute is that the Protocol grants immunity to a *'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.'*[7] During their term of office, no charges shall be commenced or continued. An open letter from some 140 Africa-based human rights NGOs rejecting the immunity provision went unheeded.

In summary, at first sight, the 2014 Malabo Protocol constitutes an unprecedented attempt at creating an African continental criminal justice mechanism. In reality, it has so far remained an empty shell and, with zero ratifications, the prospects for its establishment in the coming years are very bleak. Furthermore, even after its establishment, the Malabo Protocol will have created a paper tiger with an ambitious material scope but toothless because of the immunities that shield the incumbent senior officials (very often identical to 'those most responsible' as per the ICC Statute) who, as a result, have every interest in prolonging their term of office, at whatever cost.

Around the time of the adoption of the Malabo Protocol, Kenya proposed two amendments to the ICC Statute that were clearly inspired by the Protocol. First, it suggested exempting senior state officials from prosecution by the ICC during their term of office. Second, it proposed that the ICC shall be complementary not only to national but also to regional criminal jurisdictions, an implicit but clear reference to the Malabo Protocol.[8]

THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: STATES CLOSING THE DOOR TO UNWANTED VISITORS

As noted above, the African Court on Human and Peoples' Rights was established in 2006 on the basis of a Protocol adopted in June 1998. Based in Arusha (Tanzania), it deals with state responsibility for violations of the African Charter on Human and Peoples' Rights (and other international human rights instruments). In December 2020, the DRC was the latest state to ratify the Protocol, bringing the number of member states up to 31 (out of 55 AU member states). Cases are submitted to the Court either by the African Commission on Human and Peoples' Rights (the African Charter's non-judicial supervisory body, based in Banjul, The Gambia), state parties or African intergovernmental organisations. As of March 2021, the Court has received 318 applications. Out of 318, only three cases were referred to the Court by the Commission. Not a single case was referred to the Court by a state party or an African intergovernmental organisation. However, an important additional modality of access to the Court is laid down in Article 34(6) of the June 1998 Protocol. Of the total of 318 cases, 315 were based on this modality.[9] Hence, Article 34(6) is a crucial entry point to the African Court. And this is where the Court recently faced a worrisome trend.

Article 5(3) of the Protocol enables the Court to directly receive applications from NGOs with observer status and from individuals against states that, in addition to their ratification of the Protocol, made a declaration under Article 34(6) of the Protocol. Without such an additional declaration by the state party, NGOs and individuals do not have direct access to the Court. Of the 315 applications filed on the basis of Article 34(6) declarations, individuals filed 294 applications and NGOs filed 21. Out of 31 states that ratified the June 1998 Protocol, only 10 made a declaration under Article 34(6). These are, in chronological order, Burkina Faso (in 1998), Malawi (2008), Mali (2010), Tanzania (2010), Ghana (2011), Rwanda (2013), Côte d'Ivoire (2013), Benin (2016), Tunisia (2017) and The Gambia (2020). However, four of these states have since withdrawn their declarations. These are Rwanda (in February 2016), host state Tanzania (in November 2019), Benin (in March 2020) and Côte d'Ivoire (April 2020). As a result, as of today, only six states continue to accept applications filed by NGOs and individuals.

What explains the withdrawals? Rwanda motivated its withdrawal referring to *'A genocide convict who is a fugitive from justice'* who secured a right to be heard by the Court, an implicit reference to the case brought by opposition politician Victoire Ingabire.[10] Tanzania referred to the implementation of the declaration in a way that was *'Contrary to the reservations submitted by Tanzania when making its Declaration.'* For Amnesty

International and 19 other human rights NGOs, the withdrawal – which came shortly after a Court order to remove the mandatory imposition of the death penalty on persons convicted of murder from the penal code – *'Is evidence of the government's disregard for human rights and accountability.'*[11] Benin motivated its withdrawal by arguing that the Court caused a serious disruption to the internal legal order and legal insecurity (*'Une grave perturbation de l'ordre interne juridique interne et l'instauration d'une veritable insécurité juridique'*). Analysts however see a link with an application filed by an opposition politician.[12] Côte d'Ivoire did not motivate its withdrawal, which – coincidentally or not – came shortly after a judgment on provisional measures in which the Court ordered the suspension of an arrest warrant against presidential candidate Guillaume Soro.[13]

Contrary to how AU member states frame their resistance against the ICC, the states withdrawing their declarations did not blame the African Court of being neocolonial. Quite worryingly, the recent withdrawals rather suggest, above all, a resistance of the governments concerned against an independent judiciary, whether African or not, in particular when politically sensitive cases are handled by the Court. It is too soon to tell whether more withdrawals will follow, further weakening one of the – potentially – crucial institutions in charge of human rights protection in Africa. For now, the recent withdrawals are likely to have created an intimidating environment for the Court which, as the application statistics show, might lose its very *raison d'être* if additional states close the door to victims and NGOs to directly access the Court.

CONCLUSION

From a principled human rights perspective, it is of course impossible to oppose the very concept of decolonisation. Applied to the contemporary reality of human rights protection in Africa, advocates of decolonisation are however likely to find themselves siding with strange 'allies'. As shown above, the value of decolonisation can easily be – and has been – hijacked by incumbent African elites for purposes that have little to do with accountability or victims' rights but are instead driven by their own political interests. The current calls for decolonisation may thus objectively and (possibly) unintentionally endorse what amounts to little more than the rhetorical repackaging of impunity and absence of accountability, both in terms of individual criminal responsibility of perpetrators as well as of state responsibility.

Blindly embracing the discourse of decolonisation of human rights protection in Africa might therefore be highly counterproductive. Refraining from criticising the human rights record of African governments and/or entrusting accountability for human rights violations to the above-mentioned AU institutions may well be in line with decolonisation claims, but they in no way serve the cause of human rights protection. For Belgian and other European policymakers, one of the challenges therefore is to critically disentangle and unmask the rhetorical abuse of the decolonisation paradigm, while avoiding accusations of neo-colonial interference with internal affairs (at national or African continental level).

This gives rise to another question which goes beyond the scope of this policy brief: What does decolonisation of human rights protection on the African continent actually mean? Four perspectives, each of which should ideally be the subject of more in-depth academic research and/or policy debate, come to mind. A first decolonisation trajectory might be to bypass the (central) state and to explore the potential of local, non-state mechanisms for human rights protection. However, while it is tempting to look at non-state, local level, indigenous – sometimes called 'traditional' – institutions as the more meaningful level for human rights protection in everyday life, the responsibility of states and political and military leaders is unlikely to be addressed at that sub-state level. A complementary, second analytical angle is to unravel the continued coloniality of the post-colonial state and, as a result, of the African Union and other continental intergovernmental organisations.[14] A related, third perspective looks at the very nature of international human rights law itself, which some scholars qualify as inherently colonial,[15] other scholars look instead at strategies to enhance their local relevance.[16] Finally, yet another approach is to encourage active reciprocity, with African states and societies critically monitoring the human rights record of 'Western' countries, instead of the latter turning a blind eye to the abuses committed in the former: reciprocal non-indifference, rather than mutual silence. Indeed, African victims of human rights violations will not be better off when non-African voices, for fear of being labelled neocolonial, refrain from criticising the rhetorical abuse of the decolonisation discourse and the systemic shortcomings of the continental African human rights protection system.

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Endnotes

[1] United Nations Human Rights Council (2017) *Report of the Commission of Inquiry on Burundi*. UN Doc. A/HRC/36/54, 18.

[2] https://www.youtube.com/watch?app=desktop&v=rEIKPrU-NMg

[3] Arnould, V. (2017) *A court in crisis? The ICC in Africa, and beyond*. Brussels: Egmont Institute, Paper N°93, 6.

[4] Oloka-Onyango, J. (2020) 'Unpacking the African Backlash to the International Criminal Court (ICC): the case of Uganda and Kenya'. *Strathmore Law Journal* 4(1), 60.

[5] Benyera, E. (2018) 'Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States.' *Politeia* 37(1), 1.

[6] A signature does not establish the state's consent to be bound. It usually expresses the state's willingness to continue the treaty-making process but a signature is not always followed by ratification.

[7] African Union (2014) *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*. Article 46A bis

[8] Assembly of States Parties to the ICC (2015). *Informal compilation of proposals to amend the Rome Statute*, 10-11.

[9] These numbers are based on the statistics published on the website of the Court: www.african-court.org

[10] In their analysis of various types of resistance against the African Court, Daly and Wiebusch provide more details on the Rwandan withdrawal: Daly, T.G. and Wiebusch, M. (2018) 'The African Court on Human and Peoples' Rights: mapping resistance against a young court'. *International Journal of Law in Context* 14, 294-313.

[11] Amnesty International et al (2015) *Joint statement condemning Tanzania's withdrawal of individual access to the African court*.

[12] International Justice Resource Center (2020) *Benin and Côte d'Ivoire to withdraw individual access to African court* (https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/)

[13] Ibidem

[14] For a recent literature review and case-study, see Fasakin, A. (2021) 'The coloniality of power in postcolonial Africa: experiences from Nigeria'. *Third World Quarterly*, online at https://doi.org/10.1080/01436597.2021.1880318

[15] See, e.g., the November 2016 lecture by Abdullahi Ahmed An-Na'Im at the University of London Centre for Law and Society in a Global Context (https://www.qmul.ac.uk/law/events/podcasts/clsgc-policy-lecture-professor-abdullahi-ahmed-an-naim-emory/) and his forthcoming book *Decolonizing Human Rights* (Cambridge University Press, July 2021).

[16] De Feyter, K. et al (2011) *The local relevance of human rights*. Cambridge University Press.