Résumé

La responsabilité pénale individuelle pour crimes de guerre est entrée en droit international à la fin de la seconde guerre mondiale, alors que c’est la souveraineté étatique conçue comme une souveraineté absolue, qui était restée pendant longtemps le dogme dominant des relations internationales dans lesquelles les violations des droits humains étaient reléguées à l’arrière-plan. Depuis lors, le concept de souveraineté étatique a fortement évolué au point de perdre son caractère absolu pour laisser une certaine place à la responsabilité individuelle dans la commission des crimes. Partant de certaines affaires déjà jugées par la Cour pénale internationale, cet article réfléchit sur le phénomène de la souveraineté étatique devant cette instance en relevant que cette souveraineté qui a cessé d’être considérée comme étant absolue a perdu son importance par rapport à la souveraineté individuelle, basée sur la responsabilité de l’individu, un concept qui néanmoins revêt encore une importance marginale en Afrique. En raison du fait qu’elle a été instituée pour poursuivre et juger les crimes de génocide, les crimes de guerre, les crimes contre l’humanité et les crimes d’agression, la Cour pénale internationale innove en privilégiant la protection de l’individu et sa souveraineté et la justice universelle à la souveraineté des États.

Keywords:  Africa; African State; Human Rights; Individual Responsibility; International Criminal Court Sovereignty; Universal Justice
Introduction

When sovereignty is defined in terms of the state it refers to “the absolute authority a state holds over a territory and people” and as such the state has authority over the people who constitute a territorial community (Weber 1995: 1). The international community has witnessed gross violations of human rights and “state sovereignty is blamed for the violent condition of world affairs” (Sadat 2002: 8).

Sovereignty remains one of the major controversial concepts in international relations in the 21st century, due to its evolving character in the world order (Krasner 1999). Initial challenges to the scope of sovereignty emerged after World War II and abuse of sovereignty and individual responsibility for criminal conduct in international law arose (Nagan, FRSA & Hammer 2003). The end of the Cold War, and interests in humanitarian intervention and collective responsibility also lent to the uncertainty of the concept of sovereignty (Bierkester & Weber 1996).

The Nuremburg trials captured the aspect of individual responsibility and established the principle for trying state officials and leaders for criminal offences under international law, particularly the concept of collective authority and justice (Sands 2003). The notion of collective responsibility has furthered the evolving character of the concept of state sovereignty particularly contributing to the conflict between state and individual sovereignties and universal jurisdiction in international law (Broomhall 2003). State sovereignty initially focused on absolute political power and power of the sovereign over internal affairs within its territory. However the world social process and its participants such as the International Criminal Court (ICC) have restricted the concept of sovereignty (Nagan, FRSA & Hammer 2003). State sovereignty now carries with it the primary responsibility to protect persons within their territories.

States are now at the service of their people owing to the spreading awareness of individual rights (ICISS 2001). According to former UN Secretary General Koffi Annan, “sovereignty is not eroding, it is morphing and currently it is the peoples’ sovereignty rather than the sovereign’s sovereignty that is of importance in the international community” (Annan 1999: 49-50). The Rome Statute is designed to protect individual sovereignty, which is based on the human rights of the people. Francis Deng (1993) argues that sovereignty is “responsibility” and that human security has contributed to the changing nature of the concept of sovereignty.

There exists a marginally chartered relationship between state sovereignty and individual sovereignty vis-a-vis the Rome Statute. Individual sovereignty encompasses the right of the individuals within the states (ICISS 2001). States have in the past been able to commit human rights violations within their territories or fail to protect their citizens with no repercussions. However, the shifting focus to individual rights has changed this and now “state sovereignty, in its most basic sense, is being redefined……States are now widely understood to be instruments at the service of their peoples, and not vice versa” (Annan 1999: 49-50).

Political culture plays a role in state sovereignty, and the culture of the political rule in post-independence Africa has been authoritative with a major focus on power and a lack of emphasis on people centeredness (Wunsch & Olowu 1990). Culture is an important aspect of state sovereignty and African state sovereignty may be viewed as one of state absolutism (Martin 2006).
Due to internal and international pressures, African states have been transforming, moving away from authoritarian traditional forms of authority (Wunsch & Oluwu 1990) to adopt democratic systems of governance (Diamond & Plattner 1999; Nagan, FRSA & Hammer 2003).

The Post-Colonial African State Sovereignty: Implications for Individual Sovereignty

African states had structures long before the era of colonization. They also had some forms of political formations and territorial systems in place (Wunsch & Olowu 1990). Ayittey (1991) identifies two broad categories of African pre-colonial political formations, namely stateless societies such as the Mbeere of Kenya and states with centralized authority administrative mechanisms and judicial organizations such as the Zulu in South Africa and the Buganda kingdom in Uganda (Wa Muiu & Martin 2009). Stateless societies were the majority in the African continent and they incorporated several conquered or voluntarily submitted societies with centralized authority, which were embodied in an administrative leader (Ayittey 1991).

The African pre-colonial state was founded on consensus (Wunsch & Olowu 1990). Ayittey held that “consensus was the cardinal feature of the indigenous African political system” (Ayittey 1991: 99). African pre-colonial political organizations such as the Somalis of Somalia and the Tallensi of Ghana had common attributes and the concern for welfare of every individual was a major attribute of the state. The state was also politically organized on the basis of lineage. It was connected to the institution of family. This ensured the state maximum popular support (Ayittey 1991). Stateless societies in pre-colonial Africa were weary of the “theoretical possibility of autocracy and tyranny which centralized government represented” (Olowu 1994:5). In the instances where centralized kingdoms existed, they instituted checks and balances against totalitarianism (Gennaioli & Rainer 2005). Wunsch and Olowu (1990) dismissed the theoretical assumption of centralized extensive and limitless powers in Africa as untrue since powers were actually limited. The republic was viewed as an integral part of the African state and the citizens were indoctrinated to be devout and loyal to it. The citizens were also involved in state activities and tasks (UNECA 2007). The citizens’ rights in the African pre-colonial state were highly regarded.

Hunt (1973) argues that the African state went through radical changes through the period of colonization.

Philosophically, the colonial state was “elitist, centrist and absolutist” (Wunsch & Olowu 1990: 23). It was based on a theory of racial superiority. The colonial state did not have enough personnel to affect its dominant schema of wheedling out resources for the benefit of the metropolis (Lugard 1965). Therefore, the colonial system of governance predominantly employed the indirect rule system of governance, which included the use of local chiefs to maintain law and order (Hunt 1973).

The colonial system of governance changed the African system of governance and in some regard introduced absolutism (Herbst 2000). This system set the pace for the current problem of African states regarding state sovereignty above that of the individuals. The colonial state brought major changes to the African pre-colonial state and the African-post colonial state has taken on more elements of the colonial state than those of the pre-colonial state.
Olowu (1994: 7) observes that “the legacy of the colonial state is.... the dominance of power...” and this is what prevails in the post-colonial African state where state sovereignty is placed above the sovereign rights of the individuals. In Olowu’s view, “the African state is disconnected from the past; the African state is disconnected from the mass of the people of Africa; and lastly, the African state is norm less or best at amoral” (Olowu 1994: 7).

Specifically, the African post-colonial state is reliant on imported Western conceptions of authority and institutions. African leaders wield a lot of power and control the state (Conteh-Morgan 1997). Olowu (1994) and Martin (2006) argue that due to the role they played in the struggle for independence, African leaders appropriate the state as their personal property. The state apparatus is viewed as paramount and the people are not given the same regard. Wunsch and Olowu (1990) submit that the African state is only formally centralized while in reality it is decentralised because the mass of the people operate outside it and independently of it. Individuals’ rights in the African state have not received due attention and continue to take a backseat to the state apparatus.

The African post-colonial state has generally a one man rule system of governance and this system is a form of brutality on the consciousness of African people and has led to a distrust of African leaders as well as that of the formal structures of governance. The centralized state in Africa has made these states ungovernable (Olowu 1994). Favouritism on ethnic grounds also led to political violence, turmoil, secession and civil wars (Nnoli 1998). Ethnic violence has become a part of the African state. African governments have continually abused the rights of the individuals and the 1990s witnessed grave violations of human rights (Burja 2008).

Olowu (1994) submits that the way to ethnic accommodation lies on decentralization of power, which since decolonization has been fiercely contested by those who wield state power. The disconnection of the African state from the past has led to a disconnection from the masses (Olowu 1994). Two implications arise out of the African states’ disconnectedness from the people. First, governments operate without caring for the impact of their policies on the public and the use of force is high, making the African state unresponsive (Thomson 2010). The second implication is that the African state is not accountable, the African state places very little premium on the notion of accountability (Obiama 2001). Institutions that promote accountability are weak and they are therefore able to disregard the rights of the individuals and execute their own purposes (Thomson 2010). The state has an amoral character because of its two systems of morality that are in sharp contrast with one another. The first system consists of traditional norms and this is what the majority of the population subscribes to.

The second is made of modern norms that are “associated with the larger state system and its institutions which emphasise universalism, objectivity and neutrality” (Olowu 1994: 11). The African state has two publics; the civic public and the formal public which is exploited to enrich the former (Ekeh 1975). Riggs (1964) argues that the two norms co-exist and enrich one another, but the existence of the two norms has led to conflict.

21st century African states are primarily founded on the principle of non-intervention. The manner in which Africa was colonized and the legacy left behind continue to impact African thinking on intervention, particularly with respect to the intervention of non-African powers.
The fact that European countries used humanitarian grounds as a reason for colonizing African states has made African states inherently wary of external allegations of munificence or humanitarian protection (Samkange 2002). Samkange (2002) further reiterates that:

> the exploitation and degradation that resulted from African societies
> losing sovereignty and control to a foreign colonial entity, has prompted
> post-colonial states in Africa to be fiercely attached to international rights,
> protections and the recognition of that regained sovereignty (Samkange

African states do have a worry on their sovereignty and state sovereignty has and continues to be placed at the top of their bilateral and multilateral diplomacy, which is a departure from the rest of the international community where the state is viewed as an instrument in the service of its people (Annan 1999). State sovereignty in the African continent is regarded above that of the individuals and this is due to the focus on the apparatus that runs the country and the power that is laid on the sovereign (Samkange 2002).

Despite the introduction of the principle of non-indifference and the responsibility to protect by the AU, the principles of non-intervention and self-determination appear to still be practiced in the continent, and this leads to the protection of state sovereignty. According to Murithi (2009) the AU does not have the capacity to implement this doctrine of non-indifference, as the culture of African governments seems to be deeply rooted in the principles of non-intervention. The African systems of government have subjugated their role to protect the rights of the individuals and instead they are the ones in violation of these rights (Burja 2008).

The culture and collective identity of the African state is culturally pluralistic. Esedebe (1994) argues that the collective values of the African states are captured in concepts such Pan-Africanism which is the unification of African people on the continent. Murithi (2005) posits that the African Union (AU) is the embodiment of African continental and governmental unity. Pan-Africanism is representative of African identity politics (Esedebe 1994). Pan-Africanism exemplifies concepts about culture, society, and values that are shared on the continent and it is imperative to take note that this is the foundation for the African Union (Murithi 2005).

**The African Union: African Sovereignty in Perspectives**

As has been earlier discussed, the African Union represents the institutionalization of Pan-Africanism. The AU was created and to ensure good governance and the rule of law” (AU 2000, Preamble). The AU shall “defend the sovereignty, territorial integrity and independence of its Member States” (AU 2000, Article 3). The AU’s objectives include the promotion of African states sovereignty as well as the promotion of human rights within its member states. The AU has the right to intervene “in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity” (AU 2000, Article 4).

In 1986, African states adopted the African Charter on Human and Peoples’ Rights (AfCHPR), also known as the Banjul Charter, to “promote and protect human and peoples’ rights” (AU 1986, Preamble & Article 3).
The Banjul Charter created the African Commission on Human and People’s Rights. In 1998, the then Organization of African Unity (OAU) adopted a protocol establishing an African Court of Human and People’s Rights. At an AU Summit of Heads of State and Government held on 1st July 2008, African leaders resolved to merge this Court with the African Court of Justice established by the AU Constitutive Act and the new court is now known as the African Court of Justice and Human Rights (ACJHR). The African Charter and the Rome Statute establishing the International Criminal Court (ICC) were formed on the same foundational basis, which is the protection of the individuals’ human rights.

The Banjul Charter created the African Commission on Human and People’s Rights. In 1998, the then Organization of African Unity (OAU) adopted a protocol establishing an African Court of Human and People’s Rights. At an AU Summit of Heads of State and Government held on 1st July 2008, African leaders resolved to merge this Court with the African Court of Justice established by the AU Constitutive Act and the new court is now known as the African Court of Justice and Human Rights (ACJHR). The African Charter and the Rome Statute establishing the International Criminal Court (ICC) were formed on the same foundational basis, which is the protection of the individuals’ human rights.

The African Court of Justice and Human Rights ordered provisional measures against Libya in 2011. However, the AU refused to cooperate with the ICC after it issued an arrest warrant for the now deceased former Libyan President Muammar Gaddafi. The AU has categorically declared its support for African leaders who have been accused of violating the rights of their citizens (Stearns, 2011). African states through the AU have refused to cooperate with the ICC, and the AU has accused the ICC of having a discriminatory agenda against Africa (Stearns 2011).

The AU also adopted a regional instrument to “promote the universal values and principles of democracy, good governance, human rights and the right to development” (AU, 2007, Preamble). The African Charter on Democracy, Elections and Governance (ACDEG) has been signed and ratified by 39 out of the 53 AU member states (AU 2007). One of its principles is “respect for human rights and democratic principles” (AU 2007, Article 3). Its objectives include the protection of individuals within the electoral process and the promotion of democratic institutions in Africa (Kane 2008). All the developments above have contributed to undermining states sovereignty.

The International Criminal Court and Africa

The International Criminal Court has thus far initiated cases exclusively in Sub-Saharan Africa. As of 2014, the Court has 21 cases in nine situations, all of them pertaining to crimes allegedly committed African states, namely Kenya, Sudan (Darfur), Uganda (the Lord’s Resistance Army, LRA), the Democratic Republic of Congo (DRC), the Central African Republic (CAR) I and II, Libya, Cote d’Ivoire and Mali.

Situations may be referred to the ICC in one of three ways: by a state party to the Statute, by the ICC Prosecutor, or the United Nations Security Council (UNSC) (UN Doc.A/CONF.183/9, 2002). As of 2014, according to the ICC, cases were referred to the Prosecutor by the governments of four state parties to the ICC, namely Uganda, CAR, DRC, and Mali. The UNSC referred two situations to the Prosecutor, the situations in Sudan (Darfur) and Libya, both non-state parties (Arief et.al. 2011). The situation in Kenya went through investigation following an application by the ICC Prosecutor who opened his investigations on his own volition. ICC jurisdiction in Cote d’Ivoire was granted by virtue of a declaration submitted by the Ivorian Government on 1 October 2003. The President of Cote d’Ivoire, Alassane Ouattara, on 14 December 2010, confirmed by way of a letter, Cote d’Ivoire’s recognition of the Court’s jurisdiction (ICC, n.d.). The table below illustrates all of the ICC’s activities in Africa: situations and investigations.

<table>
<thead>
<tr>
<th>Country</th>
<th>Suspect Details</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central African Republic I State Referral</td>
<td>Former Congolese rebel leader turned transitional vice president and Senator Jean-Pierre Bemba Gombo</td>
<td>Suspect has been in ICC custody from July 2008. The trial was initiated in November 2010 and closed with a decision pending.</td>
</tr>
<tr>
<td></td>
<td>Aime Kilolo Musamba, Fidele babala Wandu and Narcisse Arido</td>
<td>They were all released from ICC custody, charges confirmed, awaiting trial.</td>
</tr>
<tr>
<td></td>
<td>Jean-Jacques Mangenda Kabongo</td>
<td>In ICC custody, to be released as the charges were confirmed to await trial.</td>
</tr>
<tr>
<td>Central African Republic II</td>
<td>Investigation initiated</td>
<td>Charges confirmed and trial is set to begin.</td>
</tr>
<tr>
<td>Côte d'Ivoire Declaration under article 12-3 of the Rome Statute, 18 April 2003</td>
<td>Former President Laurent Gbagbo</td>
<td>In ICC custody, confirmation of charges pending</td>
</tr>
<tr>
<td></td>
<td>Charles Ble Goude</td>
<td>Arrested in 2011, in custody of Ivorian authorities</td>
</tr>
<tr>
<td></td>
<td>Simone Gbagbo</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Sudanese President Omar Hassan al-Bashir</td>
<td>Arrest warrant issued in March 2009 for war crimes and crimes against humanity. Additional arrest warrant issued for genocide in July 2010.</td>
</tr>
<tr>
<td>Country</td>
<td>Information</td>
<td></td>
</tr>
<tr>
<td>---------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
</tbody>
</table>
| Democratic Republic of Congo    | Alleged militia leader Thomas Lubanga Dyilo  
Alleged militia leaders Germain Katanga and Mathieu Ngudjolo Chui  
Former militia and rebel leader turned DRC army officer Bosco Ntaganda  
Alleged militia leader Calixte Mbarushimana  
Convicted and sentenced in July 2012 to 14 year’s imprisonment.  
Germain Katanga sentenced in May 2014 to 12 years’ imprisonment. Mathieu Chui was acquitted in December 2012.  
In ICC custody, trial to begin in 2015.  
Charges dismissed in December 2011. |
| Guinea                          | Preliminary examination.                                                                                                                   |
| Kenya                           | Politician William Ruto; Minister of Industrialization Henry Kosgey; and journalist Joshua Arab Sang  
Deputy Prime Minister Uhuru Kenyatta; Cabinet Secretary Francis Muthaura and former Chief of Police, Maj. Gen (Ret.) Hussein Ali  
Journalist Walter Barasa  
Case against Ali dismissed in 2012. Case against Muthaura was withdrawn before trial in 2012. Case against Uhuru Kenyatta confirmed in 2012.  
Fugitive at large |
| Libya                           | Muammar Mohammed Abu Minyar Gaddafi (Muammar Gaddafi) Now deceased. Saif Al-Islam Gaddafi Abdullah Al-Senussi  
Case against Muamar concluded as he died in 2011.  
Case against Senussi concluded as it was found to be inadmissible. Saif Al-Islam was arrested in November 2011 and is in custody of Libyan authorities. |
| Mali                            | Investigation opened                                                                                                                     |
| Nigeria                         | Preliminary examinations                                                                                                                  |
| Uganda                          | LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya  
Vincent Otti and Raska Lukwiya are alleged to be dead. The remaining suspects are at large. |
The Court has been exercising its jurisdiction in Africa against crimes against humanity, war crimes and genocide. It is imperative to evaluate the cases individually to understand the role in ICC is playing Africa.

**The International Criminal Court in Sudan**

In 2004, an International Commission of Inquiry on Darfur was launched by the UNSC under Resolution 1564, which led to the referral of the situation in Darfur to the ICC Prosecutor in 2005 (UNSC 2005). The Office of the Prosecutor initiated its own investigation in June 2005 while the Sudanese government created its own special courts for Darfur (Arief et al 2011).

The ICC publicly issued arrest warrants for former Sudanese Interior Minister Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), an alleged former Janjaweed leader in Darfur in May 2007. The two Sudanese leaders were indicted for war crimes and crimes against humanity allegedly committed in Darfur in 2003 and 2004. The government of Sudan refused to comply with the warrants of arrest (Arief et al. 2011).

In May 2009, ICC pre-trial judges issued summons against Bahar Idriss Abu Garda, one of the three alleged Sudanese rebel commanders, for targeting peacekeepers and aid workers in Darfur (Arief et al 2011). Abu Garda reported to the ICC voluntarily. In February 2010, he walked free as the ICC judges declined to confirm the Prosecutor’s case, citing insufficient evidence to hold Abu Garda criminally responsible for the attack on peacekeepers (Bouwknegt 2011). The voluntary surrender of the two remaining rebel commanders Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus in June, witnessed a proactive ICC movement in Sudan (Arief et al 2011). On March 4, 2009, the ICC judges issued an arrest warrant for Sudanese President Omar Hassan al-Bashir, the first arrest warrant issued to a sitting president by the Court. President Bashir was held criminally responsible for crimes against humanity, war crimes and genocide (ICC 2009). The Sudanese president is the first individual to be accused of genocide before the Court. In 2009, the judges found, by a ruling of two-to-one, that the Prosecutor had “failed to provide reasonable grounds to believe that the Government of Sudan acted with specific intent” to target particular ethnic communities (ICC 2009). The Prosecutor appealed, and on July 12, 2010, ICC judges issued a second warrant of arrest for Bashir for three counts of genocide (ICC, 2009).

It is important to note that the UN Commission of Inquiry concluded in its January 2005 report that the violence in Darfur did not amount to genocide (Du Plessis & Gevers 2005). Sudan replied by accusing the ICC of being part of a “neo-colonialist plot against a sovereign African and Muslim state” (Arief et al.2011: 14). Sudan also rejected the jurisdiction of the Court over Darfur and claimed that it was a violation of its sovereignty.

The Sudanese opposition groups also reacted to the arrest warrant against Bashir. The Sudan People’s Liberation Movement (SPLM), which is the former southern rebel group and partner in the Government of National Unity (GNU) under the 2005 Comprehensive Peace Agreement (CPA) and the official ruling party in Southern Sudan following the successful independence referendum in January 2011, stood firm with the State of Sudan and President Bashir (Arief et al. 2011). Some SPLM officials were reportedly concerned that the ICC actions could endanger the CPA (Adar et al. 2004).
The Sudanese government received support from many Arab and African leaders, and regional organizations such as the AU (Magliveras 2009). African governments are against the ICC decision to prosecute a sitting head of state. In July 2009, the AU decided not to cooperate with the ICC in carrying out Bashir’s arrest and AU heads of state adopted a similar resolution in July 2010 after the second warrant of arrest was issued against Bashir for the crimes of genocide citing the hampering of peace efforts (Arief et al. 2011; BBC 2008; AU 2010). Bashir has travelled to countries that are state parties to the ICC and member states of the AU such as Chad, DRC and Kenya which declined to arrest him.

The International Criminal Court in the DRC and Uganda

The Ugandan and the DRC cases are both state referrals. The cases may be examined together as they are both viewed as failures on the part of the prosecutor, Schabas (2007) maintains the prosecutor took up the cases and did not give precedence to the countries’ national judicial systems, perhaps loosing sight of his main concern.

The government of Uganda referred the situation concerning the Lord’s Resistance Army (LRA) to the ICC in 2003. In October 2005, the first unsealed warrants in the international community were issued by the ICC for the LRA leader Joseph Kony and commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya (Arief et.al. 2011). The ICC Prosecutor’s charges against the LRA include, “crimes against humanity and war crimes consisting of murder; forced abduction; sexual enslavement; and mutilation” (ICC 2009). As of early 2012, none of the suspects are in the ICC custody (Arief et al. 2011). The Prosecutor is also reportedly investigating actions by the Ugandan military in northern Uganda.

The government of Uganda referred the situation concerning the Lord’s Resistance Army (LRA) to the ICC in 2003. In October 2005, the first unsealed warrants in the international community were issued by the ICC for the LRA leader Joseph Kony and commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya (Arief et.al. 2011). The ICC Prosecutor’s charges against the LRA include, “crimes against humanity and war crimes consisting of murder; forced abduction; sexual enslavement; and mutilation” (ICC 2009). As of early 2012, none of the suspects are in the ICC custody (Arief et al. 2011). The Prosecutor is also reportedly investigating actions by the Ugandan military in northern Uganda.

The ICC activities in Uganda have received both national and intercontinental opposition. In Uganda, particularly in the North, leaders are calling for indigenous peace, namely, mato oput (Bangura 2008). Mato oput is an Acholi term that means, “to drink a bitter potion made from the leaves of the ‘oput’ tree”, it is a forgiveness and reconciliation mechanism used by the Acholi people in Northern Uganda (Katshung 2006). International and national debates in Uganda are centred on justice and peace; justice for the war-torn communities of northern Uganda and the on-going process for the peace agreement (Bangura 2008). A landmark agreement bringing to an end the aggression was reached between rebel and government representatives in August 2006 (Dagne 2011).

The government and the LRA have since reached a number of momentous agreements, the most notable being a permanent cease-fire in 2008 (Arief et. al. 2011). However, the LRA has specified a requirement that is the annulment of the ICC arrest warrants as a prerequisite to a final agreement (Bangamwabo 2009).

The Ugandan government has initiated domestic prosecutions with the government offering a combination of amnesty and domestic prosecutions for the LRA fighters (Apuuli 2008). The Ugandan parliament passed legislation known as the International Criminal Court Bill, which “creates provisions in Ugandan law for the punishment of genocide, crimes against humanity, and war crimes” in March 2010 (Arief et. al.2011:21). Ugandan attempts to prosecute the LRA leaders domestically may be viewed as a contest to the admissibility of the LRA cases before the ICC under the principle of complementarity, which stipulates that the local tribunals take precedence over the jurisdiction of the Court (Schabas 2007).
The DRC signed the Rome Statute on 8 September 2000 and ratified the Statute on March 30, 2002. The DRC government referred the situation of crimes against humanity and war crimes committed in the DRC to the ICC Prosecutor in April 2004. This was done by means of a letter written by the Head of State in which the State requested the Prosecutor investigate persons responsible for the crimes and also committed to cooperate with the International Criminal Court (ICC 2004). The DRC held national elections in 2006, preceding the end of the five-year civil war in 2003. However, since then, the state still experiences armed conflict predominantly in the unstable eastern regions bordering Rwanda, Uganda, and Burundi (Sapiano 2010).

The ICC has issued five arrest warrants in the DRC investigation, which focuses on the eastern Congolese district of Ituri, where an inter-ethnic war erupted in June 2003 with reported involvement by neighbouring governments (ICC 2004). A second investigation focuses on sexual crimes and other abuses committed in the eastern provinces of North and South Kivu in the DRC. One case with links to the Kivu investigation has been made public and the suspect was arrested in France in October 2010 (AMICC 2006).

The domestic barriers to accountability are strong in the state of DRC (Adjami & Mushiata 2010). According to DRC legislation; the Congolese Parliament amended the country’s military criminal codes, and granted military courts exclusive jurisdiction over international crimes after the ratification of the Rome Statute (Loi No. 023/2002 and Loi No. 024/2002). The preamble to the military criminal code recognized that DRC had ratified the Rome Statute, although “it did not adopt the Statute’s definitions of genocide, war crimes, and crimes against humanity; instead the code proposed alternate, unclear definitions” (Adjami & Mushiata 2010: 3). It is imperative to note that the national prosecutions in the military courts have failed to target high-ranking military officials. Adjami and Mushiata (2010) credit this in part, to procedural limitations and lack of judicial independence.

The domestic institutions in DRC as well as in Uganda are not willing to work with ICC, as have been highlighted above. These states may be viewed as having disregarded individual sovereignty and instead protecting their own sovereignty, undermining the central premise of the Rome Statute, which is to protect individuals.

The International Criminal Court in Libya

The former Libyan President Muammar Gaddafi was brutally killed by the Libyan National Transitional Council (NTC) fighters in late 2011.

The Libyan case at the ICC is thus far the most contentious case, one reason being that it is put forth as not only a case of humanitarian intervention but also one of military intervention (ICC, 2011). The ICC states that the U.N. Security Council referred the Libyan situation to the ICC. The ICC issued arrest warrants for the now deceased former President Muammar Gaddafi, his son Saif Al-Islam Gaddafi and the intelligence chief Abdullah Al-Senussi, Gaddafi and Saif Al-Islam. They are being held criminally responsible as indirect co-perpetrators for two counts of crimes against humanity, murder and persecution (ICC 2011). This is in accordance with article 7(1) (a) and (h) of the 2002 Rome Statute.

The arrest warrant that was issued for the deceased Muammar Gaddafi is based on the Courts own investigation (ICC 2011).
The AU rejected the investigations the ICC carried out, but at the same time the AU has had varied reactions to the situation. The AU prepared a statement on the situation in Libya at the 17th African Union summit held June 2011, in Malabo, Equatorial Guinea. The statement included immediate ceasefire, humanitarian access and a transition to democratic elections (ISS, 2011). Libya is essentially not a member state of the Rome Statute and in response to the arrest warrant that was issued for Muammar Gaddafi, a press release issued by the leadership explicitly put forth that Libya is not a member of the ICC and that the Libyan President is protected by international customary law (Langa & Galiani 2011).

The situation in Libya aggravated Africa’s stand on state sovereignty as the case in Libya has been viewed by many African states as a proclamation of war against Africa and black people everywhere. The intervention in Libya by NATO and other actors with the approval by the UN seemed to have roused African policy on non-intervention.

In as much as Ghadafi is dead, it is imperative to note that the African Union rejected his arrest warrant. The AU executive Jean Ping stipulated that the ICC is discriminatory and only pursues crimes committed in Africa, not taking into account those carried out by Western states in places like Iraq, Afghanistan and Pakistan (Callimachi 2011).

The International Criminal Court versus African State Sovereignty

Justice versus peace is a key argument that captures the competing arguments when analysing African state sovereignty and the ICC. In Africa, the competing interpretations have been particularly prominent in relation to the Lord’s Resistance Army, Darfur, Kenya and Uganda (Arief et al. 2011). There is trepidation in relation to the argument by those opposed to the Rome Statute, they argue that the ICC prosecutions could destabilize the fragile political truces (Ngugi 2011). The Court’s actions have brought about the contention that to get long running peace, peace deals mustn’t sacrifice justice (Sriram & Pillay 2009).

ICC actions have provoked debates over the Court’s credibility due to its choices of cases, its prioritization of Africa over other regions, and the potential effect these prosecutions may have on peace processes in the African continent (Arief et al. 2011) further argues that the ICC may be potentially jeopardizing political settlements that may keep the peace in pursuit of an often-abstract justice.

The reaction of the African states to the issuance of the arrest for Bashir by the ICC and their opposition to the actions of the ICC may serve as testimony that African states are regarding their sovereignty above the individuals whose rights they are not respecting.
Conclusion

The pre-colonial and post-colonial African state majorly influenced the 21st African state, which still appears to be founded on the principles of non-intervention regardless of the adoption of the doctrine of non-indifference by the AU. Due to issues of colonialism African states became weary of any form of intervention from the western states. The administrations that have preceded the colonial government have centralized power and employed policies that favor the state over the individual.

The African continent does have a worry on their sovereignty and state sovereignty has and continues to be placed at the top of their bilateral and multilateral diplomacy. The regarding of state sovereignty above that of the individuals’ sovereignty is due to the focus on the apparatus that runs the country and the power that is laid on the sovereign.

The AU has indeed created various human rights instruments such as the African Charter on Human and Peoples’ Rights also known as the Banjul Charter. The Banjul Charter and the ICC were formed on the same foundational basis, which is the protection of the individual’s human rights. The Banjul Charter has however failed as human rights violation go on in the African continent and the African Court of Justice and Human Rights (ACJHR) has not been successful at securing any cases with the exception of Libya where it issued an order for provisional measures against Libya (AU 2009).

An analysis of the ICC cases in DRC, Sudan, Uganda and Libya found that African states do place their state sovereignty above that of individual sovereignty. The AU has been in support of African states and has publicly refused to cooperate with the ICC in various situations, citing a discriminatory nature of the Court, stating its affinity to the African continent. The role that the AU plays in the protection of state sovereignty is in contravention to the instruments it has created to promote good governance, end human rights violations and bring criminal justice to the perpetrators of human rights violations. Through ratification of the Rome Statute, African states are contractually obligated to protect the sovereign rights of individuals, and they appear to be in contravention of this obligation. The responsibility to protect individuals by the African states has been relegated.
References


June Wanjiru Gichuki


