4 Postcolonialism and sovereignty v international justice: The case of Angola

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Abstract

In February 2017, the Portuguese prosecution service (Ministério Público) criminally charged Angola's Vice-President of the Republic, Manuel Vicente. This process led to a dispute between Angola and Portugal that highlighted issues such as the strength of constitutional immunities in relation to corruption, the role of sovereignty in a post-colonial context and the clash of different concepts of law. This contribution focuses on confrontation between postcolonial sovereignty and international justice, highlighting the decrease in the scope of immunities in relation to corruption, the affirmation of African judicial sovereignty in the sense of wanting to judge its own cases, distrusting international justice and the permanent dangers of the privatisation of sovereignty. In the end, this text is concerned in balancing sovereignty and justice with respect to corruption in a postcolonial context. Beyond legal discussions, this contribution concludes that, in the end, when it comes to law and international relations, political facts are often more determinative than legal prescriptions.

1 Introduction

In February 2017, the Portuguese prosecution service (Ministério Público) charged Angola's Vice-President of the Republic, Manuel Vicente, and several Portuguese co-defendants, with several crimes, mostly of corruption and money laundering in Portugal.[1] The case is of particular interest because at the time, a former colonial power (Portugal) was suing in its courts an important leader of its former colony (Angola) for corruption.[2] This case has an international dimension in the sense that it involves a foreign jurisdiction, the justice of Portugal, trying to place an Angolan authority on trial in a foreign country, Portugal.[3]

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1 *Ministério Público (The Portuguese Prosecution Office) v Manuel Vicente* 333/14.9TELSB, Lisbon Criminal Courts.

2 Manuel Vicente, when charged, was Vice President of the Republic of Angola.

3 The Case 333/14.99TELSB was held at the Lisbon Court.

The progression of the case raised especially important questions, such as the scope of immunities, the inquiry if corruption is a crime which according to international law, the strengths of which immunities are fading, as well the debate on whether international justice is biased when referring to Africa. Most of all, the case confronts Angola's own concept of law, which played an important role in its attitude and what Achille Mbembe described as the 'privatisation of sovereignty'.[4]

As mentioned the purpose of this contribution concerns balancing sovereignty and justice with respect to corruption in a postcolonial context. It will start by describing the case that involved the then Vice-President of the Republic of Angola in Portuguese justice, emphasising the discussion about his immunities (part 2), then it will discuss the clash between justice and sovereignty in a postcolonial context (part 3). In the following sections, it will address the relevance of corruption and the privatisation of sovereignty in legal cases involving senior figures of the state and conclude by the prevalence of politics over law (parts 4-6).

2 The charges against the vice-president of Angola and his immunities

The criminal case against Angola's vice-president started in 2017, when the Portuguese Public Prosecution Office (Ministério Público) charged him and various co-defendants with having committed several crimes.[5] The former colonial power, Portugal, produced charges against the incumbent at the time,[6] Vice-President of the Republic, Manuel Vicente, on grounds that he had perpetrated crimes of active corruption in aggravated form, money laundering and document forgery.[7] Specifically, the core of the indictment describes Vicente as a corruptor of Portuguese public prosecutor Orlando Figueira, who is suspected of favouring Vicente's interests in two judicial cases.[8]

At the time, the Portuguese judiciary authorities expected to give official notice of the charges to Manuel Vicente by means of a *letter*

4 A Mbembe *On the postcolony* (2001) 78.

5 Detailed below.

6 February 2017.

7 For a full description of the indictment, see L Rosa 'O que levou à acusação de corrupção contra Manuel Vicente?' ('What led to the corruption charge against Manuel Vicente?') *Observador* 21 February 2017 http://observador.pt/especiais/o-que-levou-a-acusacao-de-corrupcao-contra-manuel-vicente/ (accessed 25 September 2017).

8 As above.

rogatory addressed to the Angolan judiciary authorities.[9] Nevertheless, the Angolan authorities refused to comply, so it was not possible to give official notice of the indictment personally to Vicente.[1011] The Angolan authorities found that Portugal's request for assistance offended the Constitution of the country, since Angolan law granted Manuel Vicente, as vice-president, the right to immunity in and out of functions.[12] Such a status, the Angolans argued, is absolute.[13] That is, it is equally valid in any international criminal jurisdiction.[14]

Absolute immunity, the Angolan authorities argue, derives from the immunity accorded to the President of the Republic – to whom the Angolan Constitution of 2010 confers a lifelong immunity for acts practiced in the exercise of their functions (*ratione materiae*), apart from the crime of bribery and treason and five years of provisional suspension of inquiries regarding acts unconnected with his duties (*ratione personae)* after holding office.[15] The Angolan judicial authorities considered that Vicente could just respond to the Supreme Court of Angola and only after 2022, since the Angolan Constitution gives the same presidential special prerogatives to the Vice-President of the Republic.[16]

The Angolan judicial authorities also claim that, according to a 2011 resolution of the Institute of International Law, these immunities have legal validity in international criminal jurisdictions. Additionally, in refusing to comply with the *letter rogatory* sent by Portugal, Angola invoked the Convention on Mutual Assistance in Criminal Matters between the States of the Community of Portuguese-Speaking Countries and violation of the fundamental principle of the international law of sovereign equality between states.[17] In closing its response, the Angolan judicial authorities suggested the Portuguese judiciary consider the possibility of transferring

9 As above.

10 L Rosa 'Angola recusa notificar Manuel Vicente da acusação de corrupção' ('Angola refuses to notify Manuel Vicente of corruption accusation') *Observador* 23 August 2017 http://observador.pt/2017/08/23/angola-recusa-notificar-manuel-vicente-da-acusacao-de-corrupcao/ (accessed 26 September 2017).

11 See Case 333/14.9TELSB at the Lisbon Criminal Court.

12 Article 131 of the Angolan Constitution.

13 Rosa (n 10).

14 As above.

15 As above.

16 That argumentation is faulty vis-à-vis Angola's law, but that is not the point to discuss here.

17 Rosa (n 10).

the suit against Manuel Vicente to the Angolan jurisdiction, so it would be resolved in the country.[18]

The response of the Angolan authorities unequivocally poses the question regarding the scope of the immunities guaranteed to its vice president by the country's Constitution and the protection accorded by international law.[19] Under international law, one state owes to another the obligation not to entertain criminal proceedings against leading official political figures and certain office holders.[20] This means that a state may be compelled not to pursue cases against certain figures from foreign states. This is a standard of international law.[21] Such immunity from criminal jurisdiction is usually split into two categories: immunities *ratione personae* or personal immunity, and immunities *ratione materiae* or functional immunity.[22] Functional immunity shields public officials from incurring responsibility for actions performed in respect of their official function and in their official capacity on behalf of a state or its organs'.[23] It is justified 'in the idea that the official activities of state organs are performed on behalf of the state and in accordance with the principles of state sovereignty'[24] and implies that a 'state official with functional immunity enjoys such immunity for the duration of his tenure in office and cannot be prosecuted for official acts conducted during that period'.[25] In the current case, immunity *ratione materiae* would be relevant if Manuel Vicente's possible criminal acts were made in his official capacity as Vice-President of the Republic. None of this happened. In fact, the case refers merely to events that occurred before, when Vicente was CEO of Sonangol (Angolan oil company) and not Vice-President of the Republic. Moreover, it is alleged that the imputed acts were committed in his capacity as a private citizen. Therefore, the immunity ascribed to Vicente was *ratione personae* as a holder of a state constitutional job. Although the Portuguese suit continued after Manuel Vicente's departure as Vice-President, the Angolan Constitution gave him immunity *ratione personae* as former holder of the job.

18 As above.

19 As above.

20 R O'Keefe *International Criminal Law* (2017) 406.

21 As above.

22 As above.

23 R Venter & M Bradley *Heads of state in violation of the law: A typology of the responsibility framework and its effectiveness from a domestic, regional and international perspective* (2020) 71-72.

24 As above.

25 As above.

Personal immunity 'is attached exclusively to individuals holding a particular office, for instance heads of state or diplomats. Personal immunity has been described as absolute immunity in that it bars every act of the official, private or otherwise, from prosecution in a foreign jurisdiction'.[26] Consequently, Angola's refusal was bound in an immunity *ratione persona*.[27]

Angola's response and Portugal's rejection to consider any immunity raises the debate about the possibility of excluding some crimes, particularly corruption, from the immunity scope. Usually, these include genocide, crimes against humanity and war crimes.[28] In a way, this begs the question about the present international status of corruption and money laundering immunities.

The International Law Commission Special Rapporteur on Immunity advanced several crimes for which she expected that immunity was not granted. In her fifth report on immunity of state officials from foreign criminal jurisdiction, Concepción Escobar Hernández argued that:[29]

> [T]aking into account judicial practice and the fact that the suppression of corruption at the national and international levels constitutes a key objective of international cooperation, it might be appropriate to include in the draft articles a provision that expressly defines corruption as a limitation or exception to the immunity of state officials from foreign criminal jurisdiction.

The special rapporteur mentions that it is nebulous to characterise any corrupt act as *ratione materiae*.[30] In fact, possible corrupt official acts are performed for private benefit, creating, therefore, a grey area between what is official and private. For this reason, it cannot be affirmed that the legal reasoning leading to the exclusion of corruption from immunities does not apply to every act of corruption that the government official practices when in office, be it in a private or official capacity. Accordingly, in what concerns corruption, the distinction between immunity *ratione materiae* and *personae* ends up being problematic and needs a legal clarification.[31] This conclusion is based on the arguments of Concepción Escobar Hernández

26 Venter & Bradley (n 23) 72.

27 This is my deduction, not an official affirmation, as the public statements never used this terminology.

28 Venter & Bradley (n 23) 75.

29 C Escobar-Hernández 'Fifth report on immunity of state officials from foreign criminal jurisdiction, International Law Commission' (2016) 90-91.

30 As above.

31 As above.

on the difficulties of distinguishing between acts derived from the exercise of the function for private purposes and private acts practiced during the time in which the official function is exercised.[32]

Especially in cases such as Angola's, where the immunity *ratione personae* is broadly invoked protecting official and private acts and legal regimes did not differ too much, the distinction becomes challenging. Therefore, based on the evolution of the legal debate regarding corruption and its nature, the notion was introduced in International Law Commission discussions that the crime of corruption could not benefit from any immunity, except in specific cases of immunity *ratione personae.*[33] This definition overcame the difficulty of qualifying corruption as a public or private act when performed within the framework of official functions.[34] In this context, it is important to highlight the decision held *a propos* of the Fifth Report mentioned above, emphasising that in 2017 the International Law Commission provisionally adopted draft article 7(b) of the Immunity of State officials from foreign criminal jurisdiction in which it is established that immunity shall not apply to crimes of corruption except persons who enjoy immunity *ratione personae* during their term of office.[35]

At the debate regarding the article, the special rapporteur explained that she had:

> [C]oncluded that it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report concluded that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction were extant in the context of immunity *ratione materiae*.[36]

Interestingly enough, she clarified one detail: 'that the enjoyment of immunity *ratione personae* was time-bound, which meant that the *limitations and exceptions to immunity would apply* to the troika[37] *once they had left office*'[38] (my emphasis). Consequently, the immunity of *ratione personae* extension

32 As above.

33 UN General Assembly, Report of the International Law Commission: Sixty-ninth session (1 May-2 June and 3 July-4 August 2017) UN Doc A/72/10 (2017).

34 As above.

35 Report of the International Law Commission (n 33) 164.

36 Report of the International Law Commission (n 33) 166.

37 Heads of State, Heads of Government and Ministers for Foreign Affairs.

38 Report of the International Law Commission (n 33) 167.

beyond the term of office that the Angolan Constitution provides for is not protected or guaranteed by this proposal of international law codification.[39]

In the same debate, the intervention of the Portuguese representative, Ms Galvão Teles, deserves a mention. In relation to corruption, she argued that corrupt acts could not be considered acts 'performed in an official capacity and should therefore not fall under the scope of immunity *ratione materiae*'[40] and to clarify the matter, such acts should be included in the draft of article 7, which effectively occurred. Additionally, she made what could be read as an oblique reference to Vicente's case when quoting the special rapporteur:[41]

> A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime, stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity.

It could be a reference to the Vicente case, as everything about it occurred in Portugal and the Portuguese authorities did not give him immunity. However, he had entered the country as an ordinary citizen with the consent of the Portuguese authorities and was no longer there.[42] Nevertheless, it could be argued that if Vicente entered Portuguese territory as a citizen without special immunities and committed a crime, he would be unable to subsequently invoke any immunity referring to the facts.

In the end, the discussion about international law developments and debates regarding corruption shows that it should not be considered protected by an immunity *ratione materiae,* and regarding an immunity *ratione personae,* the rationale of any law should be just to enforce this safeguard during tenure.[43] If domestic law prolongs such immunity, such a step should not be accepted by the international order and other foreign legislations.

39 See arts 127 and 131 of the Angolan Constitution.

40 International Law Commission, Sixty-ninth session (first part): Provisional summary record of the 3361st meeting, 14 June 2017, UN Doc A/CN.4/SR.3361 (2017) 10.

41 ILC (n 40) 10.

42 Vicente used to make many private visits to Portugal, without any objection of entry and exit by the authorities.

43 Author´s conclusion.

There is an additional argument regarding the exclusion of corruption from immunity protection that can be found in the Statute of Rome applied by the International Criminal Court in The Hague. The International Criminal Court was established to try certain typical crimes detailed in its founding rule. These crimes are as follows: genocide, war crimes, crimes against humanity and crimes of aggression. These are crimes linked to violence and war. The plundering of a country's natural wealth, money laundering in the international financial system, national and international corruption and other similar situations, at the outset, do not fall within the literal provisions of the Statute. However, a more detailed analysis of its norms makes it possible to come up with a hypothesis. This hypothesis is supported by article 7(1)(k) of the Rome Statute. This article considers as a crime: 'Other inhumane acts of a similar character, intentionally causing great suffering or serious harm to physical integrity or to mental or physical health'. Article 7(1)(k) is what is called a residual provision, which indicates that the list of acts expressly indicated in the previous articles is not closed. This standard reflects the feeling that it is not possible to create a definitive list of crimes and allows the consideration of severe cases of corruption. Ben Bloom states that: 'As a general principle, grand corruption meets the Article 7(1)(k) requirements for great harm and suffering'.[44] So, there is a possibility that very serious corruption is included in the catalogue of crimes considered by the Rome Statute.

Obviously, Manuel Vicente's case in Portugal was not one of grand corruption, so this line of reasoning does not apply to the concrete case, but it weakens Vicente's overall position. The Portuguese authorities were, at first, impervious to the legal arguments of Angola about immunity,[45] contending that the legal question was about private acts committed in a Portuguese territory involving Portuguese actors, echoing the reasoning of the country's representative at the International Law Commission referenced above.

3 Sovereignty and international jurisdiction

Angola's argument to avoid Manuel Vicente's trial in Lisbon relied on the sovereign powers of the country and refused any claim to universal justice.[46] To preserve independent sovereignty and defend itself from colonial/postcolonial incursions, the Angolan government was adamant

44 B Bloom 'Criminalizing kleptocracy? The ICC as a viable tool in the fight against grand corruption' (2014) 29 *American University International Law Review* 627 at 656.

45 There were no official statements, but the simple fact that the judicial process continued proves the claim.

46 Author´s argument.

not to adopt any global law beyond the traditional forms that guarantee and enhance national sovereignty. For that reason, Angola was hesitant to ratify the Protocol to The African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[47] Adding to their resistance was the fact that the so-called Southern African Development Community (SADC) Tribunal, which is sometimes considered a regional court in which Angola participated, had ceased to exist, a process in which Angola was active. The Tribunal was de facto suspended at the 2010 SADC Summit – a decision in which Angola played a leading role. The same Summit also adopted the notion that a new tribunal should be created although its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between member states.[48] That means that Angola did not want to be part of any international court with sweeping powers. Obviously, Angola was not part of the International Criminal Court (ICC). In February 2017, the Angolan Foreign Minister stated:

> [The ICC] is not compatible with the interests of the countries, particularly for Africans, who have, in general, been victims of this court. We have examples of cases of people who have been arrested, even when they were not in the slightest bit guilty. For this reason, this court is not considered to be a court for African people.[49]

This was the prevalent approach in Angola. The authorities expressed defiance and distrust of international or human rights justice and adhered only to international/regional courts established to solve problems between countries and with reduced scope of intervention, such as the International Court of Justice where in contentious cases only states can appear before the court and no jurisdiction to try persons accused of war crimes or crimes against humanity exists.[50]

47 Angola only signed it on 22 January 2007, according to information updated on 16 January 2017 by the African Union.

48 See 'Communiqué of the 30th Jubilee Summit of SADC heads of state and government' (SADC, 17 August 2010). http://www.sadc.int/files/3613/5341/5517/SADC_Jubillee_Summit_Communique.pdf.pdf (accessed 28 September 2017).

49 G Chikoti 'Angola advocates the replacement of the ICC with the African Court of Justice' (*Embaixada de Angola no Reino da Bélgica, Grão Ducado do Luxemburgo e Missão junto da União Europeia*) 10 February 2017 http://www.angolaembassy.be/angola-advocates-the-replacement-of-the-icc-with-the-african-court-of-justice/ (accessed 28 September 2017).

50 As above.

Regarding Vicente's case, official notes from the Angolan government that accompanied its legal positions were incisive in protecting sovereignty. The Angolan government warned that:

> [T]he Portuguese authorities embark on a manifestly political route that translates into an unfriendly act incompatible with the spirit and the letter of equal relations, the only ones that can guide the development of friendship and cooperation between the two mutually respectful sovereign states.[51]

Another note from the Ministry of Foreign Affairs of Angola aimed to 'vehemently protest and repudiate this procedure practiced by Portuguese judicial bodies, which it considers to be an unfriendly act that damages Angolan sovereignty'.[52] Again, it was claimed that the vice-president of Angola 'enjoys immunity under international law and the Angolan Constitution' and can only respond to the Angolan justice system. The diplomatic note added that:

> The Angolan State, to safeguard its sovereignty, national independence, and dignity, reserves the right to adopt in its defence pertinent and necessary … in view of the continuous illegal international act practiced by the Portuguese Republic. [53]

The idea of sovereignty promoted by the Angolan authorities is linked to a postcolonial approach that seeks to find similarities between legal globalisation/regional integration and colonialism. This is grounded on the thesis of scholars such as Siba N'Zatioula Grovogui, according to whom some determinative aspects, such as its dependence on Western culture and the way international law was structured to preserve Western hegemony in the international order, contribute to denying the universal applicability of international law.[54] Naturally, when Angolans authorities invoke 'international law' they are thinking about a different content from the one developed after World War II with its emphasis on fundamental rights and worldwide application.[55]

51 Note from the Mirex-Minister of Foreign Affairs to the Republic of Portugal leaked to press, Luís Claro, Angola. Luanda ameaça romper relações diplomáticas com Portugal, I (Lisboa, 26 September 2017) 2.

52 As above.

53 As above.

54 SN Grovogui *Sovereigns, quasi sovereigns, and Africans: Race and self-determination in International Law* (1996) 1-9.

55 For a good description of post-World War II international law with an emphasis on peaceful understanding and fundamental rights different from previous Grotian international law, which was based on the use of force, see OO Hathaway & S Shapiro *The internationalists: How a radical plan to outlaw war remade the world* (2017).

The reasoning behind this Angolan legal thinking could be summarised as follows: In the past, colonialism opposed the ideal of a civilised Western law to multiple local customs, considered tribal, barbaric, archaic and outdated. Today, in the former colonial states, law appears as autonomous, objective, impartial, impersonal and universal – an heir to the modern conception of universal reason, the Enlightenment Agenda, portrayed in theories that postulate the untouchability of private property rights, the subordination of law to markets and the contraction of the political sphere. Nevertheless, this is the former colonial hegemonic law under new vestments, now globalised under false pretences. It is not only created to be exported but must be exported in order to maintain the predominance of former colonies.

The doubts about Western law are reinforced as global theorists argue for the understanding of the term the 'Other' as key to the imaginary in which this case progresses, using the words of Achille Mbembe,[56] as it is a fundamental concept of postcolonialism.[57] The 'Other' is considered to be the African sub-human whom the Europeans dominated and colonised.[58] The basic idea was that Europeans created an imaginary 'Other' that allowed its domination.[59] This kind of framework originated a reversal. The previously nominated 'Others', after independence adopted such a duality, inverting it, and now the Europeans were represented as something to avoid.[60] It is important to further develop this notion. First, the Europeans created an imaginary of the 'Other' African considering him the animal that should be subjugated or treated with sympathy, once a Hegelian or Bergsonian attitude was taken,[61] and thus adopting a dualist thinking-Me-Other and developing a narrative to justify such a relationship of domination.[62] Afterwards, the newly independent regimes inverted the imaginary, transforming the Europeans as the 'Other' that should be impeded to continue to control African affairs. As Alpana Roy [63] writes, referring to postcolonial theories, 'The ideological effects of colonial laws continue to have contemporary relevance as they continue to be used as an instrument of control in this postcolonial world'. Law, such as the Western

56 Mbembe (n 4) 25.

57 A Roy 'Postcolonial theory and law: A critical introduction' (2008) 29 *Adelaide Law Review* 315 at 321; and B Ashcroft, G Griffiths & H Tiffin *Post-colonial studies: The key concepts* (2000) at 169-171.

58 As above.

59 As above.

60 As above.

61 Mbembe (n 4) 26-27.

62 As above.

63 Roy (n 57) 319.

conception of the rule of law, manages to present itself convincingly as universal, to impose itself and to marginalise other local conceptions as outdated. Peter Fitzpatrick annotates the unwillingness of liberal law to take a view from other positions, which promotes substantive inequality.[64]

Angola was referring to a neo-neo colonialism or judicial neo-colonialism that takes the shape of Western countries trying to impose their values through international courts and justice,[65] as echoed in the words of Mahmood Mamdani, who considered the ICC a Western court established to try African crimes against humanity turned into an assertation of neo-colonial dominance. Mamdani went further to note that: 'The absence of formal political accountability has led to the informal politicisation of the ICC. No one should be surprised that the United States used its position as the leading power in the Security Council to advance its bid to capture the ICC'.[66]

The relationship of African Union (AU) members to the ICC and Western claims of universal jurisdiction have been controversial. Martin Mennecke emphasises that:

> This dispute goes back to 2008, when the AU for the first time called on European states to stop an 'abuse' of this principle.[67] The debate referred to bias and selectivity, bordering on neocolonialism.[68]

African states additionally ascertained that universal jurisdiction cases violate core rules of international law.[69] Since then, the African Union and the European Union (EU) have tried to reach some consensus about the balance between the pursuit of justice against leaders that depleted and destroyed African countries and the enablement of state sovereignty.[70] In 2016, a certain harmony was put in practice through the trial of former Chadian President Hissène Habré, before the Extraordinary African Chambers in Senegal.[71] The AU hailed it, stating that '[t]he judgment is a

64 P Fitzpatrick *The mythology of modern law* (1992) 107-117.

65 R Schuerch *The International Criminal Court at the mercy of powerful states: An assessment of the neo-colonialism claim made by African stakeholders* (2017) 3.

66 M Mamdani 'Darfur, ICC and the new humanitarian order' *Pambazuka News* 17 September 2008 https://www.pambazuka.org/governance/darfur-icc-and-new-humanitarian-order (accessed 26 September 2017).

67 M Mennecke *The African Union and universal jurisdiction* (2017).

68 Mennecke (n 67) 10.

69 As above.

70 As above.

71 *Hissène Habré v Republic of Senegal* ECOWAS Judgment ECW/CCJ/JUD/06/10

vivid demonstration that the AU does not condone impunity and human rights violations'.[72] The African court decision was unprecedented and included two firsts: the first time that an African court with the support of the AU tried and convicted a former ruler for crimes against humanity;[73] and the first time that the courts of one African country have prosecuted the former ruler of another African country.[74]

This decision, somehow, is the result of the tensions originated by Western insistence on prosecuting African leaders through international courts, which led to an escalation of accusations between the AU and EU and culminated in the constitution of an advisory Technical Ad Hoc Expert Group covering both the AU and EU.[75] This group produced an Expert Report on the Principle of Universal Jurisdiction.[76] Although some authors considered the report as conducing to 'little obvious avail',[77] it can be said that it represented a turning point in the AU's attitude that culminated with the Habré trial. The truth is that after the report, the AU went on to draft an AU Model Law on Universal Jurisdiction and embarked on several steps to create an African system of human rights justice.[78]

The basic principles that can be extracted from these developments are that the AU admits the necessity to put some officials of member countries on trial, but such events should be made in Africa by Africans. Broad fundamental rights jurisdiction and fight against corruption, yes, but regionally enforced. This kind of argument was present in the responses of the Angolan government to Portugal. Angola considered the possibility of submitting Vicente to a trial, but in Luanda, not in Lisbon.[79]

However, initially, the Portuguese position did not change.[80] The Portuguese courts continued to want to try Vicente, not least because they considered that he would never be tried in Luanda due to a previous

(18 November 2010).

72 AU Press Releases 'AU welcomes the judgment of an unprecedented trial of Hissène Habré' (1 June 2016).

73 Author's argument.

74 As above.

75 African Union 'AU-EU technical ad hoc expert group on the principle of universal jurisdiction: Report' (2009).

76 As above.

77 O'Keefe (n 20) 372.

78 Mennecke (n 67) 18.

79 As above.

80 No official statement. The procedure continued without interruptions.

Angolan Amnesty Law that extinguished the punishment of his crimes.[81] Consequently, justice would never be done. Responding to the Angolan pressure, in a first instance, the Portuguese government adopted a formal speech saying that the executive respected the separation of powers and judicial independence, so it was not going to violate those basic constitutional tenets and interfere.[82]

Therefore, the file continued its path in Portuguese courts. The first court session was scheduled for January 2018. However, as will be detailed below, on this date the part of the judicial process concerning Manuel Vicente was separated and did not proceed together in the Portuguese courts with the other defendants from that time onwards. It was sent to Luanda where it remains to date, with no resolution.

4 Beyond legal arguments: Corruption in Angola and the privatisation of sovereignty

The legal arguments cannot be detached from events. The fact is that the case resulted from the context of the widespread corruption of Angola's elite class. Vicente's suit was linked to the worldwide perception of the Angolan elites as a corrupt group.

Tom Burgis has perfectly described the dealings of Vicente when he was chairman of Sonangol, noting that, on his watch, at least '$4.2 billion was completely unaccounted for'.[83] The same author portrayed Angola clearly as a corrupt country.[84] Ricardo Soares de Oliveira also spoke of the 'rentier ambition' of the Angolan presidency and the role that Sonangol has played in managing sophisticated operations through offshore accounts in which large sums of money have typically gone unaccounted for, running what amounts to a parallel budget without the oversight of Angolan institutions and behaving in an aggressively monopolistic manner that detracts genuine entrepreneurs from investing, while cornering appetising business opportunities for regime cronies.[85] The important point is that the assertions of Burgis or Soares de Oliveira correspond to the general present perception of the Angolan government and leadership as very

81 Lei n.º 11/16, de 12 de Agosto (Amnesty Act 2016).

82 A Lusa 'Costa manifesta empenho em prosseguir 'cooperação política e económica' com Angola' *Público* (Lisboa, 24 February 2017) 4.

83 T Burgis *The looting machine* (2015) 12.

84 Burgis (n 83) 9-28.

85 RS De Oliveira 'Business success, Angola-style: Postcolonial politics and the rise and rise of Sonangol' (2007) 45 *Journal of Modern African Studies* 595 at 619.

corrupt.[86] At the same time, the Portuguese judiciary have embarked on a campaign of 'judicial activism' fighting corruption, in some ways following the path of Brazil's Sergio Moro, or Italy's Di Pietro.[87] A former prime minister of Portugal, José Sócrates, has been detained and is under investigation, with the same thing happening to former powerful bankers and important national personalities from sports to members of the police.[88] Accordingly, Vicente's case appears in this context of judicial activism against corruption. The Portuguese judiciary felt a certain moral legitimacy to follow the case.

After independence, the African regimes embarked on their majority in authoritarian experiences that ended in corrupt governments. Ali Mazrui speaks of a democracide that happened in Africa.[89] The models of colonisation were adapted and maintained for imposing unfair regimes in several African countries, and instead of revolution, 'a situation of extreme material scarcity, uncertainty, and inertia' was established.[90]

Using Mbembe's framework helps to explain the realities in which Angola's leadership was functioning.[91] Mbembe describes the main features that could be found in most postcolonial African societies.[92] The first one is a *regime d'exception*, which implies the privatisation of sovereignty. The Cameroonian author writes that such a regime departed from common law:

> This departure from the principle of a single law for all went hand in hand with the delegation of private rights to individuals and companies and the constitution by those individuals and companies of a form of sovereignty drawing some features from royal power itself.[93]

The second *commandement* involves a regime of privileges and immunities, a third characteristic being the lack of distinction between ruling and

86 'Transparency International Index 2016 puts Angola in 164th place where 176th is the most corrupt' Confer Transparency International (2016). Transparency International 'Corruption perceptions index 2016' (25 January 2017) https://www.transparency.org/news/feature/corruption_perceptions_index_2016 (accessed 26 September 2017).

87 R Verde *Juízes: o novo poder* (2015) 20-30.

88 As above.

89 A Mazrui 'Democracide: Who killed democracy in Africa? Clues of the past, concerns of the future' in A Mazrui & F Wiafe-Amoako (eds) *African institutions: Challenges to political, social and economic foundations of Africa's development* (2016).

90 Mbembe (n 4) 24.

91 As above.

92 Mbembe (n 4) 29.

93 As above.

civilising, implying that coercion and corruption were justified forms of exercising power.[94]

If it is true that those characteristics were first imposed through the colonial process, in fact they were adopted by postcolonial regimes, which also relied on developing a dominant state. Thus, the road was paved to create an 'unprecedented privatisation of public prerogatives' and the socialisation of arbitrariness, constituting those two features the 'cement of postcolonial African authoritarian regimes'.[95]

Obviously, the Portuguese judiciary authorities were mindful of their function to fight against corruption and were afraid that Vicente was using the benefits of constitutional immunity to protect his private acts; in fact, making the perfect example of Mbembe's privatisation of sovereignty.

5 Politics and Angola's concept of law

Legally, both positions were entrenched. Portugal insisted on pursuing Vicente's trial in Lisbon, arguing that he committed the possible crime in Portugal as a private citizen affecting Portuguese interests and allowing the judiciary to carry out its own anti-corruption agenda. Contrarily, Angola refused any collaboration with Portugal in the matter, insisting that the former colonial power's request violated the country's sovereignty and Vicente's constitutional immunities. It was a clear remnant of the colonial past.

Although employing legal arguments, Angola simultaneously maintained strong political pressure on the Portuguese government. First, it took two symbolic political steps. The first was to postpone 'sine die' the visit to Angola of the Portuguese Minister of Justice, Francisca Van Dunem. At the same time, the official visit of Portuguese Prime Minister António Costa to Angola was also suspended.[96] After the inauguration of the new President of the Republic of Angola, João Lourenço, and the departure of Manuel Vicente as vice-president, Angola's political pressure mounted. Obviously, the new president wanted to make the issue an affirmation of national sovereignty.[97] António Costa, the Portuguese Prime-Minister, was not invited to the inauguration and at his inaugural

94 As above.

95 As above.

96 'Adiada visita a Angola de Francisca Van Dunem' ('Francisca Van Dunem's visit to Angola postponed') *Arquivos* 23 February 2017 https://arquivos.rtp.pt/conteudos/adiada-visita-a-angola-de-francisca-van-dunem/ (accessed 27 March 2021).

97 Author's argument.

speech,[98] Lourenço 'forgot' to mention Portugal as one of the main strategic partners of Angola, mentioning the United Kingdom, the United States and Spain, when the only president from European countries present was the Portuguese President.[99] That was humiliating for Portugal.

The Angolan perspective discloses a different concept of law and a diverse view of international relations, beyond, naturally, the feeling that the country was being unduly treated by the former colonial power. Angola's governmental elites' legal culture is bound by an understanding of the law as an operational concept of the political field, so they do not accept that there is no political agenda behind the Portuguese attitude.[100]

It would not be out of place to associate this view with the notion of critical theory in law that emerged in the late 1960s, with support for the ideologies of Karl Marx.[101] Law then began to be seen as an area capable of generating real and profound social changes through the political attitudes of its applicators.[102] That is the school of thought that deeply influenced Angolan elites, which received, simultaneously, Marxist concepts of law from their studies in the Soviet Union, and the Portuguese adapted Marxist concepts from their studies in Lisbon and Coimbra.[103]

Regarding legal history and culture, the relevant point to emphasise is that the structural approach, from Angolan leadership to law and the rule of law, is Marxist, which has a concrete meaning for the questions of justice.[104] The ideas of the rule of law or of the impartiality of justice were not imbedded in the legal discourse. Engels thought the rule of law was an idealised expression of bourgeois society,[105] and generally, Marxist theorists thought of law as another instrument of the dominant classes, so law did not have the meaning of neutrality or balanced resolution of matters. On the contrary, it was another controlling technique. That

98 J Lourenço Discurso Pronunciado pelo Dr João Lourenço, na Cerimónia de Investidura como Presidente da República de Angola (Copy of the Inauguration Speech 26 September 2017). Personal archives of the author.

99 As above.

100 R Verde *Angola at the crossroads: Between kleptocracy and development* (2021) 11.

101 I Ward *Introduction to critical legal theory* (2004).

102 As above.

103 A Pita 'A recepção do marxismo pelos intelectuais portugueses' Centro de Estudos Sociais (1989).

104 'Marx's critique of law, justice, and morality' in M Tabak *Dialectics of human nature in Marx's Philosophy* (2012) Chap 5, 107.

105 F Engels 'Letter to C Schmidt (October 27, 1890)' in K Marx & F Engels *Selected works* (1970).

view was fairly widespread among Angolan intellectuals.[106] Adding to that, the rule of law was seen as a hindrance to the military, social and economic aims of the newly established state. Agostinho Neto, the first President of the People's Republic of Angola,[107] when confronted in 1977 with a possible coup from within his party, the People's Movement for the Liberation of Angola (MPLA), was adamant, saying: 'Let's not waste time with law trials', and, following this remark, a severe and deadly repression occurred.[108]

This is a first point: Angolan leadership *Weltanschauung* considered law as an instrument of the dominant power and not a quest for justice.[109] This presents a different cultural concept from the one that is observed nowadays in Portugal and generally in the Western world. The above-mentioned perception is at the background of the Angolan government's rejection of the Portuguese indictment. In this view, the legal system is the result of the power relations that are established in each society and not an independent system with its own rules and methods.

The other origin of the rejection is much easier to explain. The MPLA won the war against Portugal and then won the war against the National Union for the Total Independence of Angola (UNITA), so Portugal has no right to interfere with Angola and its leaders, which are sovereign and immune. Angola is a relatively young country, having achieved independence only in 1975, after a 13-year war with its colonial power Portugal. After independence, the country embarked on a prolonged civil war till 2002.[110] One of the liberation movements that fought in the independence war, the MPLA,[111] assumed central political power in 1975, never to leave it. It has governed since without interruption, first within a dictatorial Marxist framework, and after 1992 in a formal democratic arrangement. In August 2017, the MPLA won, again, the general elections with 61.7 per cent of the votes.[112]

106 Agostinho Neto, poet and first President of the Republic, and several prominent members of MPLA such as Lúcio Lara, Carlos Dilolwa, Iko Carreira and António Jacinto.

107 As it was called then. Now it is just the Republic of Angola.

108 J Reis *Angola: 27 de Maio – Memórias de um Sobrevivente* (2017) 20.

109 Author´s argument based on the previous paragraphs.

110 For a summarised and balanced approach of Angola's history, see D Birmingham *A short history of modern Angola* (2015). Regarding the civil war, see J Pearce's *Political identity and conflict in Central Angola 1975–2002* (2015).

111 MPLA-Movimento Popular de Libertação de Angola (People's Movement for the Liberation of Angola).

112 'CNE divulga resultados finais das eleições gerais de 23 de Agosto' *CNE* 7 September 2017 http://www.cne.ao/noticias.cfm?id=746 (accessed 25 September 2017).

This is the second aspect to emphasise: the factual political legitimacy of MPLA's power comes from victories in war, first against Portugal, then against UNITA. Only after those military victories did the MPLA go on to win elections peacefully (2008, 2012 and 2017) and to write a Constitution (2010).[113] Therefore, there is an element of sheer power at the background of Angola's governmental structure. As Ricardo Soares de Oliveira observes: 'Through the old-fashioned medium of destroying the enemy, the ruling party achieved an uncompromising mastery over Angola'.[114]

In the end, Angola thought that what was at stake was a question of political power, law being just one of the strands to be considered.

6 Postcolonialism, sovereignty, justice, and the case decision (so far …)

What began as a legal case turned out to be an intense political dispute between the two countries. Angola was adamant that it was not a question of justice, but of its own sovereignty, and that Portugal was using legal mystifications to wield power against its former African colony.[115] Portugal maintained that it was searching for justice, and that to corrupt a Portuguese judiciary official in Portugal was a very serious matter, alleging, regarding the political aspects, that the government was powerless to intervene within the legal system.[116]

However, this history is not typical of neo-colonialism,[117] not in its old form as continuous economic dominance of the colonial power over the new country, nor in what can be called a new neo-colonialism or 'neo-neo colonialism' of judicial intervention as described above. It is a more complex situation that should be duly framed, as the 'strong' country is not the former colonial power and the 'weak' country is not the previous colony. In some ways, there is a predominance in the relationship of Angola due to the financial capacity of its leadership, although that is counterbalanced by the know-how and expertise that Portugal still offers to Angola in several fields from engineering to law.

Opposition parties argue that the elections were not free and fair, and never have been. The matter will not be discussed in this paper, as, in fact, it deserves a thoroughly independent analysis.

113 Verde (n 100) 27.

114 RS de Oliveira *Magnificent and beggar land: Angola since the civil war* (2015) 5.

115 This is the summary of the positions described in the text.

116 As above.

117 For traditional neo-colonialism, see S Amin *Neo-colonialism in West Africa* 1st ed (1973).

The position of Portugal since the independence of its African colonies has been a weak one. In fact, after losing its colonies in 1975, the country went almost bankrupt three times[118] and is deeply indebted. Therefore, it needs constant financing, and among the biggest financers of the Portuguese economy are Angolans. Some prominence of Angola over Portugal is shown by Angola's opposition parties, who are always accusing Portugal of 'squatting' as concerns Angolan power.[119] David Birmingham rightly emphasises that Portugal became dependent on Angola's investment and migration to survive its economic and financial crisis after 2008.[120] Thus, in this situation it is difficult to foresee any seed of neo-neo-colonialism.

Consequently, due to its financial and economic dependence, Portugal deferred to Angola in the end. In January 2018, after almost a year of contentious relations between the two countries, at the beginning of the trial phase, the Portuguese judge separated the file against Vicente from the other co-defendants, pursuing the case only against the Portuguese.[121] Those, after some months on trial, were condemned to time in prison in December 2018.[122]

Vicente, now alone in a detached judicial file, immediately appealed against the decision to submit him to judgment in Portugal to the Lisbon Appeal Court.[123] After some not very discreet pronunciations of preoccupation from the Portuguese government regarding the negative impacts the case was having on the bilateral relationship,[124] the Court of Appeal of Lisbon decided in May 2018 to send the file to Luanda.

118 JC Neves *As 10 Questões da Recuperação* (2013) 25.

119 'MPLA está a chantagear Portugal' ('MPLA is blackmailing Portugal') *Jornal8* 2 8 February 2017 https://jornalf8.net/2017/mpla-esta-chantagear-portugal/ (accessed 27 March 2021).

120 Birmingham (n 110) 185.

121 IP Machado 'Portugal: caso Manuel Vicente separado da Operação Fizz' ('Portugal: Manuel Vicente case separated from Operation Fizz') *RFI* 22 January 2018 https://www.rfi.fr/pt/angola/20180122-portugal-caso-manuel-vicente-separado-da-operacao-fizz (accessed 27 March 2021).

122 LUSA 'Operação Fizz. Orlando Figueira e Paulo Blanco condenados por corrupção e branqueamento' ('Operation Fizz. Orlando Figueira and Paulo Blanco convicted of corruption and money laundering') 7 December 2018 https://24.sapo.pt/atualidade/artigos/operacao-fizz-orlando-figueira-e-paulo-blanco-condenados-por-corrupcao-e-branqueamento (accessed 27 March 2021).

123 S Simões 'Tribunal da Relação decide enviar processo de Manuel Vicente para Angola' ('Court of Appeal decides to send Manuel Vicente's case to Angola') *Observador* 10 May 2018 https://observador.pt/2018/05/10/relacao-decide-enviar-processo-de-manuel-vicente-para-angola/ (accessed 27-03-2021).

124 Changing the previous tone of declaring the matter to be a purely judicial one.

Therefore, Vicente and Angola's government won the day. He was not to be tried in Lisbon, but in Luanda. When the process arrived in Luanda, however, it stalled.[125] Angola's authorities are, apparently, waiting for the end of his immunity *ratione personae*, which will occur in 2022.[126] Most probably after that, Angola's courts will declare that Vicente is covered by the 2016 amnesty law and so the legal process will end, without any consequence. Since May 2018, the case was wrapped in a mantle of silence that continues until today (March 2021), and no development has occurred in Luanda`s courts.

7 Conclusions

The purpose of this chapter was to balance and evaluate the tensions that occurred between postcolonial sovereignty and the demands of international justice, in what concerns the fight against corruption. In the case of the corruption charges against Manuel Vicente, described in this chapter, a former colonial power was suing the Vice-President of the formerly colonised country for criminal offences. The evolution of the case demonstrated that after an initial stand-off, the sovereign pressure of Angola to protect its leader was superior to any objective application of the rule of law.

The first observation was that there is a trend in international law to limit the immunities regarding corruption. The most influential thinking considers that no immunity *ratione materiae* should be given to corrupt acts, just a limited immunity *ratione personae* during tenure, this ending exactly at the moment the office holder departs from her/his functions.

A second observation is linked to the simultaneous reaffirmation of African sovereignties. Recognising the existence of a corruption problem, Africa, in this case Angola, following the African Union policy, understands that it is up to its judicial system and not distant European countries to judge its offenders. There is, thus, a strong streak towards the solution of African legal matters by African institutions. In the case under scrutiny, to enforce such a policy, Angola did not just use legal arguments, it interweaved strong political ones, and demonstrated its own understanding of law as something politically orientated. In the end, politics were more important than law. Angola won the contention, as Portugal decided to send the case to Luanda.

125 Public and notorious fact.

126 Article 131 of the Angolan Constitution.

It remains to be seen if and when Angolan leadership speaks about sovereignty, they are speaking about 'private sovereignty', while immunities refer to the ones they consider attached to their private endeavours. It could be said that the case under enquiry is an exemplary case of the privatisation of public prerogatives, since the indicted acts of Vicente are not public acts, but strictly private ones, and he used the full machinery of government to defend himself.

Angola's sovereignty has been strengthened by this case. Only by 2022 will it be known if justice is also served.