

Will Rexit follow Brexit? Is there an African case for leaving the Rome Statute?¹

The European Union

[1] The origins of the European Union (EU) can be traced back to the setting up of the European Coal and Steel Community (ECSC) in 1951,² and the European Economic Community (EEC) in 1957.³ The original members were known as “the Inner Six”: the three Benelux countries - Belgium, the Netherlands and Luxemburg - together with the economic powerhouses France, Italy, and West Germany. Their two principal aims were political and economic:

- the political aim - to forge a European-wide alliance, ensuring the peace and stability required to avoid any repeat of the horrors of WW2.
- The economic aim - to provide a tariff-free common market, which would enable commerce to flourish.

[2] The EEC was renamed as the European Community (EC) in 1993, and subsequently absorbed into the European Union following the Lisbon Treaty in 2009. The EU now comprises 28 states (with a total population of 510 million).

[3] Over the years, a fully functioning internal single market has evolved through a standardised system of laws that apply in all member states. At its core the EU, is committed to:

- safeguarding the free movement of people, goods, services, and capital within the internal market;
- maintaining common policies on trade, agriculture, fisheries, and regional development;
- enacting legislation in justice and home affairs;

¹ Rexit - a portmanteau of “Rome” and “exit”, meaning departure from the Rome Statute; Brexit a portmanteau of “British” and “exit”, meaning UK departure from the EU.

² Treaty of Paris, 1951

³ Treaty of Rome, 1957

- Abolishing all passport controls;⁴
- The promotion of a monetary union – the Euro.⁵

The UK and the EU

[4] Seeing how well the new trading bloc was doing, the UK applied to join in 1963 and again in 1967. On both occasions accession was blocked by French President Charles De Gaulle who feared that, due to its alliance with the United States, the UK would become some sort of “Trojan Horse” for American interests. Following De Gaulle’s departure, the UK (along with the Republic of Ireland) was admitted on 1 January 1973.

[5] The UK has always had an uneasy relationship with Europe. As early as 1975, a referendum was held on withdrawal. 67% of the population voted to stay, the only two districts in the UK voting to leave were Shetland and the Outer Hebrides.

[6] In 1983 the Labour Party’s election manifesto included a commitment to leaving Europe without a referendum. Fearing that workers’ rights were under threat from Prime Minister Mrs Thatcher, Labour changed its mind and has been largely pro-Europe ever since.

[7] The same cannot be said for the Conservative party. It has wrestled with the issue from the start; hard-liners continually criticizing a perceived gradual loss of sovereignty. Throughout the 1980’s and 1990’s successive Conservative governments kept Europe at arms length; steadfastly refusing to join the Euro currency, maintaining passport controls and, more recently, opting out of a suite of key criminal justice measures.

[8] Meanwhile, the UK Independence Party (UKIP) led by the charismatic Nigel Farage, and fuelled by concern about large-scale immigration from Eastern Europe, made great in-roads in more deprived parts of the country

⁴ Only applying to those countries in the so-called “Schengen area”, created by the Schengen agreement in 1985 and the Schengen convention of 1990. The UK and Ireland opted out.

⁵ Established in 1999 and came into full force in 2002. 19 EU member states signed up

plagued by years of unemployment and lack of investment. There has also been widespread, and often exaggerated, press criticism of the EU institutions' supposed fondness for bureaucracy and mindless regulations (such as EU regulation 2257/95 on the abnormal curvature of bananas).

[9] Worried about a steady haemorrhage of support to UKIP, and steady sniping from Eurosceptic backbenchers,⁶ Conservative David Cameron called a referendum on 23 June 2016. The result was entirely unexpected, even to the leaders of the Brexit campaign - 52% of the population voted to leave.

[10] As for the causes of the result, a substantial majority of people in the more deprived areas of England and Wales voted to leave, partly for the reasons described above, but also because they felt they had nothing to lose - if you are unemployed, living in borderline poverty with no stake in society, why would you not vote for change?

[11] Scotland and Northern Ireland, by contrast, voted to remain (62% and 56% respectively). With regard to the Northern Irish vote, research indicates that many people exercised their vote along ethno-national lines.⁷ There may also have been an appreciation as to how NI had benefitted financially from EU grants and subsidies over the years, and also as to the dangers posed by departure, both to the economy and, perhaps more importantly, to the peace process - dangers which were almost entirely overlooked by the British parliament and media.

[12] Why did Scotland vote so overwhelmingly to remain? There were perhaps four factors that contributed to this:

- Since the 1950s Scotland has not had a good relationship with the Conservative party. Only a year earlier, the SNP had lost a keenly fought independence referendum and feelings against the Conservative government were running high;

⁶ Referred to by Conservative prime Minister John Major as "the Bastards!".

⁷ Research indicates that 87% of those identifying as Irish voted to remain, whereas the figure was 40% for those identifying as British.

- Scotland had not had the waves of immigration from mainland Europe. As a result, there was not the same anti-Europe target for general disaffection;
- Many parts of Scotland, aside perhaps from fishing communities, have benefitted greatly from EU membership to the extent that it is scarcely possible to find a new road or rural development that is not adorned with the EU flag;
- Fourthly, it is suggested that Scotland has always been a more outward-looking nation than its next-door neighbour. Before the Act of Union in 1707, Scotland's "auld alliance" was with France and it has maintained close ties with Europe since that time.

Economic Consequences

[13] There is near-unanimous agreement among economists that leaving the European Union will adversely affect the British economy in the medium and long-term. For example, the Institute for Fiscal Studies recently published a report warning that the UK would lose up to £70 billion in reduced economic growth if it

did not retain Single Market membership. Trade deals can be very protracted affairs and one imagines that the UK would be in a relatively weak position in attempting to accelerate matters.

[14] A further concern is the likely negative impact on the financial services industry, not to mention the role of the UK, and London in particular, as a forum for dispute resolution.

Political consequences

[15] The day after the referendum, a stunned David Cameron resigned as Prime Minister, to be succeeded by Theresa May.

[16] On 29 March 2017, the UK gave two years notice of its intention to depart the EU.⁸ This means that in less than a year from now, the UK will either enter a period of managed departure following a deal with the EU - known as "soft brexit"; or will simply leave, with no deal having been achieved – known as a

⁸ In terms of article 50(2) of the Treaty

“hard brexit”.⁹ Despite repeated claims of Prime Minister May that “no deal is better than a bad deal”, the consequences of the former outcome are, to say the least, alarming.

[17] Although agreement is said to have been reached on the three initial “divorce” issues - how much UK requires to pay; what happens to EU residents in the UK and vice versa; and, how the border between Northern Ireland/Ireland will be affected¹⁰ – issues surrounding trade, travel and security are still to be resolved.

[18] The age-old Scottish question remains. Those that warned against Scottish independence in the 2015 referendum argued strongly that, should Scotland leave the UK, it could never rejoin the EU as a separate state. Although doubt as to the viability of a new Scottish currency was a more central issue, there is no doubt that this fear impacted on the vote against independence.¹¹ Now that Scotland is to be taken out of the EU against its will, essentially shackled to the English Brexit vote, it appears inevitable that the independence issue will resurface.

[19] There has been some support for a further EU referendum once the details of any deal are known, but with only limited support for this in the Conservative and Labour parties, departure in one form or another appears inevitable.

Constitutional consequences

[20] Anxiety about the Scottish position, along with greater concerns about a lack of Parliamentary involvement have come under judicial consideration. Campaigners, led by investment manager Gina Miller, argued that denying the UK Parliament a vote was undemocratic and in breach of long-standing constitutional principles, and that the Government should not be allowed to trigger article 50 without an Act of Parliament. Following a historic hearing

⁹ Also known as a “cliff-edge brexit”

¹⁰ It seems that this question has not yet been fully answered. Following the conclusion of preliminary negotiations, the UK said that it had guaranteed, as a back-stop, that there will be no “hard” border. The EU said that guarantee was that

¹¹ 55% voted against separation from the UK

before all eleven justices, the Supreme Court agreed. Delivering a summary of the 48,000 word judgment,¹² Lord Neuberger said:

“Withdrawal effects a fundamental change by cutting off the source of EU law, as well as changing legal rights. The UK’s constitutional arrangements require such changes to be clearly authorised by Parliament.”

[21] Albeit the Government was able to secure enough votes in Parliament to get the bill through and invoke Article 50, the case is very significant in terms of upholding the principle of Parliamentary supremacy over the executive.¹³

[22] The Supreme Court also rejected arguments that the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly should be allowed to vote on Article 50 before it was triggered, holding that relations with the EU were a matter solely for the UK government.

Legal consequences

[23] The EU (Withdrawal Bill), known as the Great Repeal Bill seeks to retain, in post-Brexit domestic law, the following:

- (a) EU-derived domestic law (e.g. UK legislation implementing EU);
- (b) direct EU legislation (e.g. EU Regulations);
- (c) directly effective rights under treaty articles; and,
- (d) the case law of the UK courts and the European Court of Justice (CJEU) in relation to sources (a)-(c), but in each case only up to the date of Brexit.

[24] At the date of Brexit EU law is, essentially, to be frozen in time and incorporated into UK law for the sake of legal continuity. There are to be no

¹² R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review [2017] UKSC 5. See also Para [82]

references to the CJEU on the interpretation of such retained law. The UK courts are not to be bound by the CJEU's decisions made after Brexit, and the UK courts are not obliged to have regard to such decisions, but may do so if they consider it "appropriate", though quite how appropriateness is to be determined is unclear.

[25] It is of course possible that there may be some divergence in approach by the CJEU and UK courts, but this should not be over-stated. CJEU rulings have become embedded in UK jurisprudence and it is unlikely that they will suddenly be departed from, especially in the area of Criminal Justice where it should be obvious and desirable that a consistent approach is applied in both jurisdictions.

[26] It is in the field of Criminal Justice, where there is arguably the greatest cause for concern. The UK is to withdraw from European Arrest Warrant (EAW) scheme. For many years the use of the EAW has facilitated the arrest and transfer of suspects to and from the UK. Cases which prior to the EAW scheme might have taken up to ten years to resolve, are now dealt with in months. Apart from the desirability of expedient transfer to the UK, it would be unfortunate if the UK was to become some sort of bolt-hole for European fugitives from justice.

[27] Departure from key European bodies such as Eurojust and Europol (currently based in the UK) is also, potentially, very problematic. These bodies perform hugely important functions in terms of ensuring cross-border law enforcement, judicial and prosecutorial co-operation, and the sharing of vital intelligence and it is to be hoped that steps can be taken to ensure that the UK is not rendered less safe as a result.

The ICC

[28] The International Criminal Court is a result of the Rome Statute, which came into force in 2002. The ICC has jurisdiction to prosecute individuals, who are nationals from states under ICC jurisdictions, for the international crimes of genocide, crimes against humanity, and war crimes. The first bench of 18 judges was sworn in in February 2003.

[29] Although 123 states are parties to the statute, there are some notable absentees among the 42 states that have neither signed nor yet ratified; for example, China, India, Indonesia, Turkey and Pakistan all voted against the ICC's creation, while states that have not ratified include Russia, the United States and Israel.

The ICC's record

[30] Thus far the following have been convicted:

- 2012. Thomas Lubanga – a rebel leader in the Democratic Republic of Congo – found guilty of war crimes relating to the use of child soldiers and sentenced to 14 years imprisonment;
- 2014. Germain Katanga – another rebel leader in DRC (12 years imprisonment);
- 2016. Jean-Pierre Bemba – The Congolese Vice-President, found guilty of crimes against humanity including sexual violence and war crimes (18 years imprisonment).

[31] 39 individuals, all African, have been indicted, including:

- Sudanese President Omar al-Bashir,
- Kenyan president Unuru Kenyatta,
- Ivorian president Laurent Gbagbo, and

[32] It is therefore not surprising that there has been significant disquiet regarding an apparent bias towards the prosecution of African individuals, to the extent that several African states are considering withdrawal from the ICC regime.

South African position

[32] South Africa first signaled its discontent in 2012. This was amplified in 2015 with a pledge to leave the court's jurisdiction in response to criticism that it had ignored an order by the tribunal to arrest President Omar al-Bashir of Sudan. Mr. Bashir, who faces charges of war crimes, crimes against humanity and genocide in the Darfur region of Sudan, was allowed to leave

South Africa after a visit at that time, even though a local court had ordered the government to prevent his departure because of a warrant for his arrest.¹⁴

[33] In 2016 South Africa indicated its withdrawal from the ICC but the instrument of withdrawal was found to be unconstitutional and invalid in early 2017. In July 2017, the ANC voted to reaffirm its decision to withdraw.

Is bias a reality?

[33] It should be noted that getting prosecutions into court takes time; there have, after all, only been three convictions in the last fifteen years. Although there has been much focus on African situations, and the notable atrocities therein, ICC prosecutors are investigating or conducting preliminary examinations in countries as widespread as Georgia, Colombia, Iraq, Palestine, Greece, Cambodia, Venezuela, Ukraine and the Philippines where President Duterte has just signaled that state's intention to leave the ICC.

[34] Additionally, there is no suggestion that the ICC trial process is unfair. For example, there was an acquittal in the DR Congo case. If innocent accused are being acquitted and the guilty are being punished, is the loss of this opportunity a price worth paying for a withdrawal based on a perceived, and perhaps explainable, bias? It is suggested that it is not and that the work of the ICC should be supported.

Improving the situation.

[35] There needs to be more publicity and transparency about the ICC's work; it cannot be assumed that there is widespread knowledge of its current extensive and widespread workload.

[36] Greater efforts should be made to encourage larger and more influential states to submit themselves to the court's jurisdiction. Without this, the stench of hypocrisy will be difficult to eliminate.

¹⁴ Under the Rome Statute, states are obligated to arrest anyone sought by the tribunal.

[37] States should be encouraged to include such crimes in their domestic law and to create alternative institutions that can investigate, prosecute and try such matters.

Conclusion

[38] It seems clear that both the creation and subsequent criticism of the EU and the ICC have largely been based on politics. It may be difficult to identify other direct parallels between the two bodies, but any organization that seeks to bring countries together, to protect their citizens, to enshrine basic rights and to enforce those rights is surely one that is to be cherished rather than abandoned.

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