

African Response to the International Criminal Court. Implications For International Legal Justice

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Abstract: *The ephemeral legal relationship between Africa and the International Criminal Court has yielded sour grapes. African states have grown a strong aversion to the court, accusing this institution of last instance of selective justice and an exclusive focus on Africa. The Darfur referral by the Security Council on President Omar Hassan Ahmad al Bashir has finally led to the severance of ties between the African Union and the ICC. With powerful and affluent states such as the United States of America, Russia and China not part to the Rome Statute and hence non-members of the ICC, the absence of African states will further jeopardise the existence of the court. The veto of prosecution which the Permanent Five (P5) possesses has been a bone of contention and a source of disgruntlement amongst many signatories, non-signatories and potential signatories to the Rome Statute.*

I. Introduction

Overview:

“The International Criminal Court has been put in place only for African countries, only for poor countries. Rwanda cannot be part of colonialism, slavery and imperialism.” – Paul Kagame – Rwandan President. The International Criminal Court lost credibility and legitimacy in almost all African states. The court has been lampooned for alleged selective justice, targeting weaker and poor states, mainly in Africa. Incumbent and former heads of states and government have come out clear in their pessimistic stance towards the court. Initially, when the court came into existence by the Rome Statute of 1 July 2002, many African states had welcomed the move as well as the legal institution of the highest order with jubilation and a quest to ending impunity as well as world crimes of an egregious nature. States such as Uganda, Central African Republic and the Democratic Republic of Congo had actually made state referrals to the court and throwing all their support to it. Now it’s the turn of the tide as almost all African states perceive an unbalanced legal playing field which does not tilt in Africa’s favour.

II. The African Union Versus The International Criminal Court

The African Union: Unity in Defiance

The African Union severed relations with the International Criminal Court, and the bone of contention that led to the separation was the Darfur Referral by the International Criminal Court to the United Nations Security Council, which sent arrest warrants to President Omar Hassan al Bashir of Sudan as well as his government officials Bahr Abu Garda, Abdallah Banda, Ahmed Haroun, Saleh Jerboand Ali Kushayb over the Darfur atrocities, crimes against humanity and war crimes. The African Union repudiated the idea of surrendering Omar al Bashir to the International Criminal Court as he is instrumental in the Darfur – Sudan peace process. Surrendering him would worsen the peace process which African heads of states and government are working collectively to initiate. Apart from achieving a great milestone by creating and granting independence to South Sudan, there are even speculations that African Union leaders are cajoling President Bashir to relinquish the Darfur region so that it becomes a self governing and autonomous state such as South Sudan. This therefore makes the African Union to assert its stance of repudiating to hand over Bashir to the International Criminal Court.

On 3 July 2009 the African Union resolved not to cooperate with the International Criminal Court regarding the indictment of the Sudanese President Omar Hassan al Bashir. An abridged version of the African Union statement to the International Criminal Court clearly noted that the International Criminal Court’s request

to the African Union to Surrender al Bashir to the International Criminal Court had neither been heard nor acted upon. The African Union made it abundantly clear that it would not cooperate, pursuant to the provisions of Article 98 of the Statute of Rome of the International Criminal Court regarding immunities, for the arrest and surrender of President Omar al Bashir of Sudan. The African Union pointed out that in doing so; it will be safeguarding the continent's territorial integrity, dignity, sovereignty and independence. Pursuant to their objectives, the African Union in 2013 had to shift its summit from Malawi to Addis Ababa Ethiopia. This was because the former Malawian President Joyce Banda had sworn that Omar al Bashir would regret the day he was born if he sets foot in Malawi. Joyce Banda had promised to arrest Bashir and surrender him to The Hague. This change of venue by the African Union was thus meant to shield Bashir from the legal apocalyptic axe, as well as to stick to the goals and aspirations of the African Union and Pan-Africanism.

It is also important to note that anyone who is on an arrest warrant by the International Criminal Court may not visit a state party to the Rome Statute since he or she may face arrest upon arrival. African states have ignored such a rule as a move to protect their fellow statesmen. Omar al Bashir has visited several states parties to the Statute of Rome with impunity and this includes states such as Kenya, Ethiopia, Eritrea Chad and Djibouti, which are states parties to the Statute of Rome.

III. Kenya And The International Criminal Court

Uhuru Kenyatta And William Ruto

Uhuru Kenyatta was indicted on five counts of crimes against humanity during the Kenyan 2007 election debacle, whilst William Ruto was also indicted on three counts against humanity. Kenyatta and Ruto were indicted together with their fellow political bigwigs such as Henry Kosgey, Francis Muthaura and Joshua Sang. Kenyatta, a supporter of former President Kibaki, a Deputy Prime Minister and Minister of Finance, he is accused of having coordinated, facilitated, financed and planned violence against his opponents. All the charges levelled against him as well as William Ruto were confirmed by Pre-Trial Chamber II in 2012. Kenyatta threw his towel in the presidential campaign in collaboration with his counterpart William Ruto, against Raila Odinga and his subordinates.

Prior to the Kenyan elections, the western diplomats, particularly from the European Union and the United States of America, as well as western non-Governmental Organisations, had sought to use the International Criminal Court as a tool to influence political inclination to the Kenyans, influencing them to vote for Odinga instead of the Kenyatta and Ruto Jubilee Alliance, whose leaders were inductees of the International Criminal Court. Western non-governmental organisations sought to bar Kenyatta and Ruto from contesting, using the Kenyan Constitutional Court. However, the court dismissed the application, stating that whether Kenyatta and Ruto are eligible to be leaders or not, will be left to the Kenyan voters. Kenyatta and Ruto defied all odds by vanquishing Odinga and his allies in the March elections. Kenyatta becomes the third sitting president to be indicted by the International Criminal Court, third from Omar al Bashir and Muammar Gaddafi. The Kenyan case becomes the first case whereby a president and his vice president are all inductees of the International Criminal Court, and the first case where all the inductees are members of the elite. It is also the first case whereby a sitting president and his vice president have appeared at the International Criminal Court for proceedings.¹ Kenya's political elite have responded aggressively to the ICC's indictments and on 22 December 2010 Kenya's parliament passed a resolution calling for Kenya's withdrawal from the Rome statute.

Alleged Manipulation Of The International Criminal Court For Political Expediency By Western Nations And Non-Governmental Organisations. The Kenyan Case

Allegations that the International Criminal Court is a Western neo-colonial institution and a tool of imperialism came to light in the Kenyan case. The International Criminal Court is really a Western political vehicle that is used by the West to influence political decisions, choice of leaders and domestic policies of African states. In the run up to the 2013 Kenyan elections, United States foreign non-governmental organisations and European Union envoys had urged Kenyans not to vote for Kenyatta and Ruto as they were inductees. They had threatened Kenyans with sanctions and isolation if they vote for the ICC inductees. This political interference and meddling in the domestic affairs of a sovereign state, with the ICC acting as a weapon, shows that the court is a Western one with an imperialist and neo-colonial connotation.

The United States assistant secretary of state for African Affairs, Johnny Carson, was at it, interfering and uttering inflammatory statements aimed at influencing voters' choices in the elections to come. Carson noted that People should be thoughtful about those they choose to be leaders, the impact their choices would have on their country, region or global community. Individuals have histories, individuals have images, and

[1]. ¹ M du Plessis and C Gevers 'International Justice: Kenyan Case a good test of ICC founding principles' *Business Day*, 28 January 2011.

individuals have reputations. When they are selected to lead their nations, those images, histories and reputations go along with them.²

The French Ambassador to Kenya, Etienne De Poncins also followed the same meddling path by trying to influence Kenyans on whom to vote for. Poncins remarked that,

There will be consequences based on characters elected. Many programmes and international relations will be determined by whom Kenyans choose. It is not a surprise the choice of leaders to be elected will greatly determine the place of Kenya with other countries within and outside the continent. France will have limited contact with Kenya as it is the policy of other countries who are signatories to the (ICC's) Rome Statute.³

Following the same trend, the British High Commissioner to Kenya, Christian Turner, was also at it, trying to influence local opinion and using the ICC as a deterrent. Turner noted that, "The policy of my government remains that we do not have contact with ICC inductees unless it is essential. That is not only the policy of my government but also the policy of all the European Union and indeed most other international partners".⁴

However, Western envoys and non-governmental organisations' aspirations were turned inside out by the Kenyans, who turned tables to such speeches and instead voted for leaders of their choices, namely Ruto and Kenyatta. Kabukuru notes that, "When Western ambassadors in Nairobi joined the fray and opposed Uhuru and Ruto's candidacy, they simply fell into the trap and were presented as Odinga's 'masters'".⁵ The Kenyan case is charismatic because the state came to support the inductees after realising that Western envoys were trying to use the ICC as a deterrent as well as to influence voter's decisions. The state then made a u-turn and did what was not expected. Kay notes that, "The critical difference between Kenya and other situations handled by the ICC is that the state here has a vested interest in the cases. In principle the state ought to support the trials. It does not. Instead, it has chosen to support the incumbents".⁶

Zambia And The International Criminal Court

Michael Sata, the former and late Zambian president, shared the same views with his Ugandan counterpart president Yoweri Kaguta Museveni in reiterating that the ICC has no jurisdiction to try Kenyatta. Sata asserted that Africans should not allow foreigners to meddle in African affairs. Sata noted that,

It's time that Africa should handle its own affairs. We should not allow foreigners to be coming to interfere with us ... If you find Kenyan president or Zambian resident is at fault with the Kenyan or Zambian people, let the Kenyan or Zambian people deal with him, not somebody in The Hague. Why can't they (Westerners) try their own relatives?⁷

President Sata further repudiated ICC jurisdiction in Kenya by remarking that,

What jurisdiction do they have? You have to look at the jurisdiction. Where do you find a European court that has jurisdiction in Africa? There are more cases in Europe which they are not dealing with. They are going back to old colonial era. It is time all the Africans ... because in charge of your own affairs because during this struggle, we were not going to court in London. We were not going to court in The Hague. They were taking us to local courts in our own countries. Why should we be going somewhere else to be tried? You the Kenyan people, if during the struggle or during elections you killed each other, the people who killed – you book.⁸

Rwanda And The International Criminal Court

Rwanda dismissed the ICC as a court of imperialism, colonialism and slavery. The Rwandan president Paul Kagame expressed discontent with how the institution at The Hague is administered. Kagame notes that, "The ICC has been put in place only for African countries, only for poor countries. Rwanda cannot be part of colonialism, slavery and imperialism".⁹ Rwanda therefore will have no problems with a Jubilee government of Kenyatta and Ruto. Kagame further notes that "Our priority is business. The ICC is not an issue. We are interested in big markets and general stability in the region".¹⁰

[2]. ² Carson, J. 2013. "What Western Envoys Said" *News African*, April, p.10

[3]. ³Poncins, E.D. 2013. "What Western Envoys Said" *News African*, April, p.10

[4]. ⁴Turner, C. 2013, "What Western Envoys Said". *New African*, April, p.10.

[5]. ⁵Kabukuru, w. 2013. "Uhuru and the Catholic Connection". *New African*, April, p.12

[6]. ⁶ Kay, S. 2013. "ICC: Justice on Trial". *Africa Report*, June, p.22

[7]. ⁷ Sata, M. 2013. "ICC has no jurisdiction to try Kenyatta: Sata". *The Post Newspapers Zambia/Bloomberg.com*

[8]. ⁸Ibid, 2013.

[9]. ⁹ Kagame, P. 2012. "ICC Justice: The World Reacts" *New African*, April, pp. 22-24.

[10]. ¹⁰Ibid, 2013. "Regional Implications" *Africa Report*, April, p.33.

Uganda And The International Criminal Court

Uganda had previously been a staunch supporter of the International Criminal Court and both signed and ratified the Rome Statute. Presently, Uganda is in the vanguard in attacking the ICC for deviating from its supposedly roles. Uganda made state referrals to the ICC over the destabilising activities of the Lord's Resistance Army (LRA), leading to arrest warrants being sent to Joseph Kony, Dominic Ongwen, Vincent Otti, Okot Odhiambo and Raska Lukwiya. Uganda accuses the ICC of fuelling regime changes in weak states, double standards and selective justice. At President Uhuru Kenyatta's inauguration, president Yoweri Museveni was in the forefront lambasting western diplomats who were meddling in Kenyan political affairs, trying to influence voters to vote for Odinga. Museveni notes that,

I want to salute the Kenyan voters on the rejection of the blackmail by the ICC and those who seek to abuse this institution for their own agenda. I was one of those that supported the ICC because I abhor impunity. However, the usual opinionated and arrogant actors using their careless analysis have distorted the purpose of that institution. They are now using it to install leaders of their choice in Africa and eliminate the ones they do not like. Instead of a thorough and thoughtful process we have individuals engaged in legal gymnastics".¹¹

Ethiopia And The International Criminal Court

Ethiopian Prime Minister, Hailemariam Desalegn, who is also the former chairperson of the African Union, also castigated the ICC for its present failure, accusing the court of being race-biased. Desalegn notes that, "The African leaders have come to a consensus that the process the ICC is conducting in Africa has a flaw. The intention was to avoid any kind of impunity, but now the process has degenerated into some kind of race-based witch-hunt. We object to that".¹²

South Africa And The International Criminal Court

South Africa signed and ratified the Rome Statute that gave rise to the ICC. African Union Commission Chairperson and South African cabinet minister Nkosazana Dhlamini Zuma is of the view that the ICC is not a suitable platform to solve the problems bedeviling Africa. Africa is unique and its problems can only be dealt with internally, thus requiring home grown solutions and not imported justice. Zuma notes that, "When we talk about Africa solutions for African problems, it is because we know how the guns can be silenced."¹³

Other Statesmen And Academics' Views On The International Criminal Court

Former African Union Commission Chairman Jean Ping (Gabon) also stated that the ICC was being abhorred for practicing double standards. He castigated the former ICC Chief Prosecutor Luis Moreno Ocampo for initiating the Darfur referral to the United Nations Security Council yet he (Ocampo) has never been to Darfur to assess the situation on the ground. Ping notes that,

We are against Ocampo who is rendering justice with double standards. The ICC's active cases all target crimes against humanity committed in the African states of Sudan, Democratic Republic of Congo, Central African Republic, Uganda and Kenya. Why not Argentina, why not Myanmar (Burma) ... why not Iraq?¹⁴

Sudan has called Resolution 1593 (United Nations Security Council referral to Darfur) a violation of its sovereignty and Sudanese President Omar Hassan al Bashir swore thrice in the name of Almighty Allah that he shall never hand any Sudanese national to a foreign court. On a similar note, former Ghanaian President Jerry Rawlings urged African states to refrain from imported justice and develop their indigenous judicial systems. Rawlings notes that,

It is simply humiliating that in the 21st century our continent finds some of its leaders hounded to The Hague like lambs to the slaughter, while we are supposed to have the capacity to judge our own. We have to leave The Hague to those who cannot control their destiny. After fifty years of independence, Africa should have all the knowhow to bring justice to its own citizens and do away with imported justice ... We stand in danger of allowing a new form of colonialism to engulf our continent, enslaving us into puppets of the international community. Let us combine our efforts to take a strong stance against such a looming threat.¹⁵ Dov Jacobson, Associate Professor in International Law and International Criminal Law at Leiden University, observes that there will never be any change of the ICC's judicial outlook and functional processes even when currently the Chief Prosecutor is an African (Fatou Bensouda). Jacobson notes that the court will simply change from, "An African court to prosecute Africans, to an African court to prosecute Africans by an

[11]. ¹¹ Museveni, Y. 2013. "The ICC: Out of Steam and Losing Credibility Fast!" *New African*, July, p.27.

[12]. ¹² Desalegn, H. 2013. "The ICC: Out of Steam and Losing Credibility Fast!" *New African*, July, p.27.

[13]. ¹³ Zuma, N.D. 2013. "The ICC: Out of Steam and Losing Credibility Fast!" *New African*, July, p.27.

[14]. ¹⁴ Ping, J. 2012. "ICC Justice: The World Reacts". *New African*, April, p.23.

[15]. ¹⁵ Rawlings, J. 2012. "ICC Justice: The World Reacts". *New African*, April, p.23.

African”.¹⁶ Lord Aikins Adusei also castigates selective justice by the then ICC Chief Prosecutor Ocampo for using his powers “proprio motu” in Africa only, as if it is the only continent where heinous crimes were committed, or are being perpetrated. Adusei remarks that,

When we say colonial and Cold War crimes, we are talking about the thousands of Kikuyus in Kenya who were killed or imprisoned by the British in the 1950s. We are also talking about the French criminality in Algeria in the 1960s that resulted in tens of thousands of deaths. We also mean the slaughtering of Angolans and Mozambicans by Portuguese forces in the 1970s. We mean the 1904 German genocide and enslavement of the Nama and Herero people of Namibia ... We are also talking about King Leopold II and Belgian atrocities against the people of Congo in the 1950s. We are referring to the apartheid policies in South Africa, which were strongly supported by the United States of America and the Netherlands, on whose territory the ICC is now headquartered.¹⁷

United Nations Security Council Referrals Allegedly Selective

The United Nations Security Council expeditiously sent arrest warrants to Omar al Bashir and Muammar al Gadhafi, who was engulfed in a debilitating civil war in Libya, but procrastinated in sending arrest warrants to the perpetrators of the Syrian war. The United Nations Security Council only sent those warrants after years of world outcry and the decision was then vetoed by Russia and China for the two warring parties to appear before the International Criminal Court. The United Nations Security Council also failed to send arrest warrants to the Georgian authorities for their pre-emptive attacks against the people of South Ossetia. The Security Council also turned a blind eye to Tony Blair for authorising the Bombardment of Belgrade and Baghdad which results in massive deaths, and neither did it indict George Bush for his bombardment of Iraq and Afghanistan which resulted in alarming deaths. The Yemeni President Ali Abdullah Saleh and the King of Bahrain Hamad bin Kalifa have all been spared from the legal apocalyptic axe. The Security Council has also turned a blind eye to the situation in Gaza and has never indicted the Myanmar (Burma) authorities for crimes against humanity. The Security Council has also failed to send arrest warrants to Afghanistan and Cambodia, which have obvious violations of a callous nature.

However, it is important to note that situations in the Democratic Republic of Congo, Uganda and Central African Republic were state referrals as upheld in the Katanga Case. Only the Darfur and Libya cases were United Nations Security Council referrals. The Kenyan case is the only case where the Chief Prosecutor used his powers ‘proprio motu’ (Ocampo). Therefore, African leaders should not wholly cast the blame on the International Criminal Court or the Chief Prosecutor because they are the ones who ran into murky waters by signing and ratifying the Rome Statute voluntarily. No one forced them to sign and ratify the Rome Statute, and therefore those states that signed and ratified should be prepared to bear the sundry consequences. Fatou Bensouda, the current ICC Chief Prosecutor (Gambia) supported this view by consolidating that,

You have to recall that the International Criminal Court is a voluntary organisation. Countries have not been forced to ratify the Rome Statute. They have done that with their eyes open. It is a legal obligation that rises as a result of that action you take by signing and ratifying the Rome Statute. The next step is that this commitment implies that if you cannot [try the case locally], then the ICC comes in. This is the implication which the states have signed and ratified, and this gives the ICC the jurisdiction to intervene.¹⁸

Bensouda however did not elaborate or comment on the United Nations Security Council referrals which can indict nationals even for states which are not parties to the Statute of Rome such as Sudan and Libya. This is rather an unfair international law practice because by indicting nationals whose states are not part to the Rome Statute, this is tantamount to compelling a non-signatory to be part of a treaty that he/she never signed or ratified. Simbeye consolidates by noting that,

It would appear that by including the Security Council option the framers have created a paradox. As a treaty, the obligations in the Rome Statute bind its parties only, whereas Security Council under Chapter VII binds all United Nations member states. When the Security Council refers a case under Chapter VII, states not party to the Rome Statute, or accepting the ICC’s jurisdiction, may find that they have to accept its jurisdiction because they are members of the UN. It would appear that this provision violates the Treaty Convention as third states will find themselves having to accept treaty obligations for a treaty they have not ratified.

However, their obligation stems from the Security Council resolution rather than the Rome Statute. Nonetheless states will be placed in a difficult situation and just how this problem will be resolved is open to question. Perhaps if all UN member states ratified the Rome Statute, it need not become a problem.¹⁹ Unfortunately, not all UN member states are signatories to the Statute of Rome.

[16]. ¹⁶ Jacobson, D. 2012. “ICC Justice: The World Reacts”. *New African*, April, p.24.

[17]. ¹⁷ Adusei, A. 2012. “ICC Justice: The World Reacts”. *New African*, April, p.24.

[18]. ¹⁸ Bensouda, F. 2012. “We Are Not Targeting Africa”. *New African*, March, p.21.

[19]. ¹⁹ Simbeye, Y. 2004. *Immunity and International Criminal Law*, California: Ashgate Publishing.

United Nations Security Council's Veto Power: An Alleged Form Of Selective Justice

The veto of prosecution that the Permanent Five (P5) members possess is allegedly a form of selective justice because the P5, though potential perpetrators of nefarious crimes, will never be indicted since they have power to block or veto such a decision or decisions. This is also a privilege that they can also extend to their friends or to those states that they have interests in, for example Russia and China vetoed a decision calling for the two warring parties in the Syrian war to appear before the ICC. This means that the P5 and their allies, though they are potential perpetrators, will never be indicted and only those states which do not have the veto power or those that do not have allies which can veto on them will suffer the consequences. This means that in international law, there are states which are above the law and which are immune to prosecution, whilst others will not be. It also means that these are states which can escape justice whilst others cannot.

India noted that it was hard to grasp the powers conveyed to the UNSC as the powers would be tantamount to obstruction of international justice. Hoile says that India noted that,

On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the council so decrees. The moment this argument is conceded, the conference accepts the proposition that justice could undermine international peace and security.²⁰

Courts Not A Remedy To Political Problems: The Kenyan Case

Analyst and scholars such as Professor Mahmood Mamdani are of the view that the ICC will not afford to convict a sitting president as well as his vice president. It is also unimaginable that such a scenario will happen considering that Kenya is an economic giant of East Africa. Kenya is too important to fall and the ICC will not likely make such a suicidal and almost impossible and unimaginable move. How the ICC will let the two highest office bearers off the hook will be the Court's own business, but this is what the ICC will do. Mamdani notes that,

The credibility of the ICC was already slim. The Kenyan cases will simply confirm that this is a court whose proceedings are unduly influenced by political considerations. The ICC is politically answerable to the United Nations (UN) Security Council, and the Security Council is politically controlled by its permanent members who have the critical power of veto: they are Britain, China, France, Russia and the USA [known as the P5]. No one doubts that the ICC is unlikely ever to indict one of the permanent members of the UN Security Council, no matter the gravity and the scale of crimes the member country in question may commit.²¹

These sentiments were earlier echoed by the former and later British Foreign Secretary Robin Cook who reiterated that the ICC will never indict Western leaders, especially those of British and American origin. Cook remarked that, "If I may say so, this is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States".²² This means that the world has an ICC whose rules are made up of only five states, and strictly speaking, one state, the USA, which is also referred to as the 'P1', which is the leading member of the Security Council. The rules of the ICC therefore exempt this small group or minority of countries grouped under the three Western permanent members and their allies but seeks to hold accountable all of the rest of the states of the world.

Professor Mamdani further notes that, "We therefore have a global system in which the five permanent members of the UN Security Council are sovereign, but the overwhelming majority of states in the world are not".²³ The rule of law in this regard should not be selective, neither can it be elitist or be put aside to please one state. It should apply to all states equally and universally, even to those that make the laws, but not just on some states. The current scenario makes the P5 immune to prosecution and hence above the law. The Kenyan cases were not therefore designed to fail, but were a failure by design by referring those entirely political issues to an international criminal court. Mamdani further postulates that, "The real problem with the Kenyan cases was not that they were taken to the ICC instead of to a local court. The problem was with the attempt to solve political problems through the courts".²⁴

In 2007 in Kenya there was a civil strife after a disputed election, and both opposing sides were involved as perpetrators and as victims as well. No side can therefore claim absolute innocence; hence both sides are tainted with illegality. Mamdani remarks that, "The problem with judiciary proceedings is that they are set up to declare one side guilty and another innocent. That is precisely why the courts are inadequate to settle questions of civil war where neither side is wholly innocent nor neither is wholly guilty".²⁵

Implications For International Legal Justice

[20]. ²⁰ Hoile, D. 2010. *The ICC – Europe's Guantanamo Bay*, London: Africa Research Centre.

[21]. ²¹ Mamdani, M. 2013. "You Cannot Solve Political Problems Through The Courts". *African Report*, June, p.25.

[22]. ²² Cook, R. 2012. "The Politics of International Criminal Law." *New African*, March, p.29.

[23]. ²³ Mamdani, Ibid, 2013.

[24]. ²⁴ Ibid, 2013.

[25]. ²⁵ Ibid, 2013.

The International Criminal Court operates on a complementarity principle, pursuant to paragraph 10 of the preamble of the Rome Statute which stipulates that, “The ICC established under this Statute shall be complementary to national criminal jurisdictions”. Shaw remarks that, “A key feature of the ICC, and one that distinguished it from the two international criminal tribunals, is that it is founded upon the concept of complementarity, which means essentially that the national courts have priority”.²⁶ Primary responsibility therefore rests with states parties to prosecute cases utilising their internal remedies. This means that one of the fundamental founding cornerstones of the ICC will be practically defunct since African states are no longer and will no longer complement the ICC. Arresting, litigating or surrendering perpetrators of awful crimes to the ICC will definitely come to a grinding halt, as has been witnessed in the al Bashir case. This will also mean that other states that have perpetrators of ICC crimes such as Uganda and the Democratic Republic of Congo will be reluctant to hunt, net the perpetrators and surrender them to the ICC.

Because of the bad legal blood that now exists between the ICC and Africa, it means that those African states that are either unwilling or unable genuinely to prosecute will not make such cases admissible to the ICC. They will just sit on the cases since there will be no any international court or a court of last instance worth submitting the cases to. Schabas consolidates by remarking that, “Consequently, they have required that the state’s own courts get the first bite at the apple. Only when the domestic courts are unwilling or unable to prosecute can those cases be admissible to the ICC”.²⁷ This therefore means that due to the current polarised situation between the ICC and Africa, even those African states that are unwilling or unable to prosecute genuinely will never surrender the ‘apple’ to the ICC even after their first bite.

The International Criminal Court does not have a police force. Neither does it have an army to enforce its obligations such as the issuing of arrest warrants or the capturing and arrest of perpetrators of heinous crimes. The ICC relies on member states that perform all the duties (delivering of arrest warrants, capturing and arresting) of fugitives and submission of those fugitives faithfully to the court. The court thus relies on member states that execute all these duties on behalf of it. Because of the current legal discord between the ICC and African states, it is most likely that those individuals who are perpetrators of egregious crimes and who are on the ICC wanted list will be impossible to arrest. States that house these fugitives will thus be reluctant to hunt them down, to arrest or surrender them to the ICC since there is no longer any cooperation or good legal rapport between the ICC and African states. States such as Uganda will no longer devote their time and resources to hunt down, arrest and surrender members of the Lord’s Resistance Army who are on the ICC wanted list. This means that all African states with ICC fugitives are also likely to follow that similar non-cooperation move by ignoring the hunt down, arrest and capture of persons who are on the ICC wanted list.

All ICC inductees currently are African. Now that African states have cut the legal umbilical cord that joined them symbiotically to the ICC, it means that the ICC will have no support. Considering that three of the members of the Security Council, (USA, Russia and China) are not part to the Rome Statute, and African states pulling out as well, the ICC will be like a ladder without perches. This means that finally and with time, the ICC will just be a nominal court with no support from supposedly states parties.

IV. Conclusion

African states have resorted to unity in defiance towards the International Criminal Court. The first bone of contention is the Darfur referral which the ICC seeks to indict President Bashir, and which the African Union repudiates for the sake of the continent’s territorial integrity, sovereignty and independence. The second bone of contention is based on selective justice, whereby all the inductees so far are African, as if Africa is the only Alcatraz of awful crimes, yet there are many other areas worldwide where heinous crimes have been and are being perpetrated. Political interference from foreign envoys and non-governmental organisations in the domestic affairs of African states in general and Kenya in particular, using the ICC as a weapon as well as a deterrent, has been the court’s undoing. The court’s inability to dichotomise between legal and political issues and to know which issues to deal with and which issues to make unjusticeable, has also been the court’s Achilles’ heel. This has lately made African states in unison to call for African solutions to African problems rather than imported justice. These rambunctious factors are threatening to engulf the court, leading to its legal demise.

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