

**AFRICA AND THE INTERNATIONAL CRIMINAL COURT (ICC):
A TRILATERAL ASSESSMENT**

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Abstract

The lessons of world war I and II include the adoption of a multilateral approach and framework to the issues contending with global peace and security, but the persistence of these issues - poverty, wars, conflicts, terrorism, etc. had caused the international community and humankind to seek the ever elusive “perpetual peace”. For the African states, by virtue of being members and signatories to the United Nations Charter makes it binding, but the snag here is the fact almost all organs of the UN are controlled and dominated by nations with power, thus these organs being used as an instrument of penetration and control of nations without power. The adoption of the Rome Status meant and translated to International Criminal Court of Justice (ICC) came into being with the first line charge of helping the UN in prosecuting crimes against humanity. The discharge of the first line charge of the ICC had caused great uproar and misgivings in some states, especially those in the African continent. Only recently, some African states are known to have served the International Criminal Court notices of withdrawal from the Rome (Treaty) Statute. The actions of the African states elicited some questions that include (1) why are African states serving the court (ICC) with notices of withdrawal and (11) how did these African states arrive at this decision. Through the instrumentality of political economy approach, the paper did arrive at several conclusions among which is the systemic bias against the continent, thus the recommendations canvassed herein.

Keywords: International System, International Adjudication and Arbitration, Sovereignty, Security Council, African Union, International Policies and Relations

Introduction

The numbers of deaths recorded from the war war I and II jolted the current international system and humankind into soughting after the “perpetual peace” through the setting up of the current international legal framework. The international community believed that all civilized nations will pursue peace through the legal framework. The current international legal framework has the International Court of Justice (ICJ) at its apex and, only recently, a

new addition by the name International Criminal Court (ICC) was made to current international legal framework. The International Criminal Court (ICC) came into being in July, 2002, through the Rome Statutes and with great enthusiasm. According to article 3, 5 (2), 6, 7 and 8 of the ICC, the ICC is to have jurisdiction over crimes of aggression, genocide, crimes against humanity, and crimes of wars, etc. Many of those that welcomed the International Criminal Court (ICC) were initially Africans and African states. Despite the promising beginning of the ICC, it has run into “troubled waters” with some African states and the African continent. The current posture of the ICC in the course of carrying out its duties in Africa and the current posture of some African states towards the ICC had necessitated the question - what factors underpin the position of African states that are serving the ICC with notices of withdrawal?

Ojukwu-Ogba (2016) stirred his answer(s) to the question from a historical realm or perspective by noting that in March, 2013, the ICC was established as a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes and crimes of aggression, thus a legitimate platform for carrying out its first line charge. In extending the frontiers of Ogba’s answer, Hoile (2012) added that the ICC can only prosecute crimes committed only after July 1st, 2002, the date the Rome Statutes entered into force. Consequently, it meant crimes committed before July 1st cannot be prosecuted. But the snag here is that the African continent is the only part of the globe where the fang of the ICC is mostly felt, thus the need for a further question – whether it is only in Africa that crimes against humanity are committed. The attempt at proffering answers to the questions raised necessitated the need for a historical and trilateral examination of the performances of the ICC in relation to Africa.

Since the advent of the Europeans in the “black continent”, Africa had continually struggled to break away from the shackles of “imperialism” and “colonialism”. This desire of Africa is what is now manifesting in some African states as serving notices of withdrawal to the International Criminal Court (ICC). To most scholars and policy makers at the level of society in the continent, the recurring question is whether the leaders of Burundi, Gambia and South Africa are right in their line of thought(s) and conclusion(s) in serving the court (ICC) notices of withdrawal. The arrival of these African states at the decision of withdrawal from the International Criminal Court (ICC) cannot be effectively understood without considering the continents experiences under “imperialism” and “colonialism”. Consequent upon this logic, it is imperative for this paper to delve into certain aspects of the colonial history of Africans in order to effectively proffer answers to the questions raised in the introductory part of the paper and effectively situate the trilateral assessments.

Africa and the International Criminal Court (ICC)

The relationship between Africa and the international system can best be understood from the prism of “imperialism” and “colonialism”. Imperialism and colonialism are responsible for the effective incorporation of Africa into the current international system that had been aptly described by Akinyemi (2002) as the legitimization of “power over justice”. The description of Akinyemi (2002) of the international system did bring forth the issue of “power” into the equation of subjugation and control of the African continent. The dynamics of “power” in the colonial efforts of the Europeans in Africa was captured in the analysis of Ake (1992), Thomas (2011), Ademola (2005), Aja (2009), Alli (2006), Amin (1988) and Ankomah (2013). The conclusion(s) of these authors is that Africa, through the dynamics of “power”, was incorporated into the current international system not as “equal” but as servants, market for the finished products of the European factories and theatre of proxy wars between the ideological block of East and West.

The trend in all the conclusions of the scholars noted above is the fact that Africa remains and will continually remain vulnerable in the face of international politics due to the prevalence of the incidence of poverty, high mortality rate, woeful economies, unemployment and underemployment, deaths from intra and inter wars, sit-tight rulership, etc. The vulnerabilities faced by Africa in the current international system is what gave impetus to the questions and declarations of Copper, quoted in Mbeki (2012):

...How should we deal with the pre-modern chaos, as manifested in various areas of the world? What form should intervention take? The most logical way to deal with the chaos, and the one most employed in the past is colonization. But colonization is unacceptable to post modern states and as it happens to some modern states too. It is precisely because of the death of imperialism that we are seeing the emergence of the pre-modern world...all the conditions for imperialism are there, but both the supply and demand for imperialism have dried up, yet the weak still need the strong and the strong still need an orderly world. A world in which the efficient and well-governed export stability and liberty and which is open for investment and growth...what is needed then is a new kind of imperialism, one acceptable to a world of human rights and cosmopolitan value...

The line of reasoning and thoughts as expressed by Copper in the above quotation is a representation of the thoughts of “nations” with “power” in the current international system towards “nations” without “power”. These thoughts of the “nations” with “power” are encapsulated and manifested in their policies and politics used progressively in shaping their

dealings with “nations” without power” and shaping the current international system. The clandestine dealings of “nations” with “power” with “nations” without “power”, especially, those in Africa had been extended to dealings in international institutions. Premised on this logic, the International Criminal Court (ICC) was established fundamentally along the lines of these policies used by “nations with power” in dominating the current international system and also shaping their foreign relations and politics with “nations without power”. From the standpoint of the historical reality of these policies being to dominate the current international system, elicited the declaration from Courtenay Griffins (2012) that “neo-colonialism is here” and Mbeki (2012) re-echoing same in his words “Africa is there for the taking”. Simply put, the establishment of International Criminal Court (ICC) was to increase the vulnerabilities and penetration of the African continent in the international system through the legal framework of international adjudication and arbitration. The vulnerabilities and penetration of the African continent did make Africa susceptible to “Neo-Colonialism” through the instrumentality of international criminal law. Thus, Griffins (2012) noted that:

The enforcement of these legal norms (i) mediated by relationships of relative power (ii) selective in its application and (iii) some circumstances unsuited to the historical, social, cultural and other practical realities present in many of societies in which they are sought to be imposed...

The import of Copper and Griffins analysis on this paper is the fact that the vulnerabilities and penetration of the African continent is real, and this is due to the systematic bias against the continent. The systemic bias did bring forth two known positions which are - the African continent got involved in the Rome Statutes from a position of weakness and, secondly, Africa remains a veritable frontier in the new economic race amongst the “three spiders” – European Union, United States and China. While profiling Africa politically, Ojukwu-Ogba (2008) argued that the profile of the continent includes the disrespect for human rights, corruption and sit-tight leadership, wars, problems of refugees, and conflicts that are having serious international (crimes) implications - genocides, war crimes and crimes against humanity. All of these crimes, to Ojukwu-Ogba (2005), are widespread in the African continent. But the hitch in Ojukwu-Ogba’s (2008) analysis and profiling is the fact that he failed to explicitly take into cognizance the factors that underpin conflicts and wars in the African continent and the correlation between African wars and international politics. Furthermore, another question raked up by Ogba’s analysis was: how and when the African continent got to the point where crimes of great international implications are being committed in the continent.

Again, in an attempt to answer the question raised in the discussion so far, the paper is forced to rely on Ojukwu-Ogba's analysis (2008) once more. He noted:

... After the second world war and following the final conclusion of proceedings at the war crimes tribunals at Nuremberg and Tokyo, the United Nations General Assembly in 1948, recognized the need for a permanent international court to handle matters related to the kind of atrocities that had been witnessed in the war... The Rome Statute of the International Criminal Court is the treaty which crystallized the thinking of world leaders beginning from the later part of the 1940s. This statute established the international court (ICC) as a permanent tribunal to preside over prosecution of persons accused of the offences of genocide, crimes against humanity and wars.

From the standpoint and views of Ojukwu-Ogba's (2008), the International Criminal Court (ICC) was made part of the international legal framework by design and in structure, with the underlining charge - the desire of punishing the guilty and bringing nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity. How was Africa brought into the purview of the court (ICC)? The interplay of the vulnerabilities of the African continent and international politics did position Africa as a recipient of history and a continent that is incapable of resolving her conflicts. Africa's incorporation into the current international system through the dynamics of "power" was relatively easy. The elevation of the rules of "realism" meant the usage of the instrumentality of "power" to accelerate the effective incorporation of Africa. Africa was effectively brought into the purview of international legal framework.

At present, thirty African countries or states are signatories to the statutes of the International Criminal Court (ICC). Nigeria signed on to the Rome Statute on June 1, 2000, and became a state party on 27th September 2001 when the statute of court was ratified. Burundi and Liberia joined on 21st September 2004 and 22th September 2004 respectively. Other countries that signed the Rome Statute as state parties are Chad and Madagascar in January 2007 and on March 4, 2008, respectively.

The pendulum of cooperation between Africa and the International Criminal Court (ICC) had swung to the arena of non-cooperation, with countries like Burundi, Gambia and South-Africa serving the Court notices of withdrawal from the Rome Statute. For reasons of power and the clandestine international politics and vulnerabilities of Africa, the continent has been turned into a pond in the chess game of countries with power in international politics. The powerlessness of the African continent in the current international system has made interference in the affairs of African states by powerful states/nations in the current

international system rather easy. Adibe (1994) had noted that due to the expanding notion of “security”, it was rather easy for nations with power to interfere in the affairs of “nations without power” (Adibe, 1994; Dienne, 2016). Premised on this logic of interference in the affairs of African states by states with power caused Makumbe (2015) to argue that the circumstance of the African continent in international politics caused the International Criminal Court (ICC) to take states of the continent that ratified the Rome Statute for granted. Makumbe (2015) in buttressing his logic and arguments further isolated the cases involving Kenya vs the International Criminal Court, Zambia vs International Criminal Court, Rwanda vs the International Criminal Court, Uganda vs the International Criminal Court, Ethiopia vs the International Criminal Court and Sudan vs International Criminal Court to buttress his stance. The salient conclusion of Makumbe (2015) is that by virtue of Africa being positioned as a “recipient of history” by international politics, all the crimes and vices that the International Criminal Court (ICC) was to tackle were made the sole prerogative of the continent. Makumbe (2015) used these cases to bring forth Africa’s grouse and misgivings with the ICC. The grouse of the African continent with the Court can be summarized as follows:

1. The ICC is bias and selective in its application and extension of its drag nets.
2. That the Rome Statute is greatly flawed, as good laws take longer gestation period to mature.
3. The Rome Statute was rushed through in four weeks by Western NGOs on “take it or leave it basis”.
4. Article 13 and 16 of the ICC’s own statute grant special “prosecutorial” rights, to refer or deter an ICC’s investigation or prosecution, to the UN Security Council or more specifically to the five permanent members of the Security Council.

Additionally, the ICC is also logistically dependent on UN and EU. The ICC was established by multilateral treaty which states that it can exercise territorial jurisdiction or personal jurisdiction only in relation to states that are parties to the Rome Statute (Makumbe, 2015; Hoile, 2010; Adusel, 2012; Dienne, 2016).

All of these grouse had caused some serious misgivings in the African continent, especially when cognizance is given to the handling of African the cases noted above by the Court. In the Sudan case, the bone of contention between the ICC and the African continent was the Darfur referral by the International Criminal Court (ICC) to the United Nations Security Council that sent out the arrest warrants for president Omar Hassan al Bashir, Bahr Abu Garda, Abdallah Banda, Ahmed Haroun, Saleh Jerboand Ali Kushayb over Dafur crisis, crime against humanity and war crimes. The Africa Union, in its reaction, expressed concern on the warrant of arrest issued by the International Criminal Court, noting “she will not cooperate” in the pursuit of the provisions of the articles of the Rome Statute of the

International Criminal Court in relation to immunities, arrest and surrender of president Omar Bashir. The position of the African Union was premised on safeguarding Africa's territorial integrity, dignity, sovereignty and independence (Makumbe, 2015; Hoile, 2010; Adusel, 2012).

In the Kenyan case, Uhuru Kenyatta and William Ruto were indicted on five counts of crimes against humanity and three count charge against humanity, respectively. Others indicted alongside Kenyatta and Kuto are Henry Kosgey, Francis Muthaura and Joshua Sang. At the heart of the Kenyan case was the clandestine politicking of the European Union in using the International Criminal Court (ICC) in attempting to influence the outcome of Kenyan elections in favour of Odinga. All the charges in the Kenyan case were confirmed by the Pre-Trial Chamber II, in 2012. It is pertinent to note that the United States Assistant Secretary of State for African Affairs, Johnny Carson, was known for his meddlesomeness in the elections of Kenya. Carson was known to have warned Kenyans to be mindful of those they choose to be leaders, as the impact of their choices could have negative consequences on their country, region and global community at large. Simply put, Carson attempted to tactfully sway Kenyans in support of Odinga. The hurdle in the Kenyan case was that the state and the majority of Kenyans chose to support the incumbents, as the duo of Kenyatta and Ruto won the elections, thus the "sore taste" in the "mouth of the west" (Makumbe, 2015; Hoile, 2010; Adusel, 2012). The Kenyan nation was greatly polarized as a result of the intense political rivalry between the duo of Kenyatta and Ruto and Odinga. The rivalry caused a rupture in the Kenyan society that led to several deaths and loss of properties and, consequently, the trial of Kenyatta and Ruto by the ICC. No mention or reference was made to meddlesomeness of key European powers in the elections by the court.

The International System and the International Criminal Court (ICC)

As already noted, the current international system is structurally divided - developed and underdeveloped. From the treaty of Westphalia (1684) that ushered in the state system, through the period of imperialism and colonialism, the developed nations had always dominated the international system and they are able to do this through improvement in science and technology, communication and the instrumentality of international institutions, international law and clandestine politics. In other words, the developed nations have continued in their dominance of the current international system. Africa has been "progressively" and "wickedly" sidelined from all key institutions of the international system. The sidelining of the African continent in all of the strategic institutions was done through clandestine politics and international law. But worthy of mentioning is the fact that the international legal framework of which international adjudication and arbitration is an

index, has been manipulated by European states (powers) to reinforce their preeminence position in the international system.

The wars of imperialism and colonialism, that manifested as the world war 1 and II, claimed well over 20 million lives gave impetus to the coming into being of the current international legal framework and did elevate European jurisprudence to the position of preeminence, thus corroborating this fact. This fact and logic (premise) stirred the focus of the paper towards the thoughts of John Rosenthal, an American commentator, quoted in Hoile (2012) who opined that “in the form in which it emerged in Rome, the ICC is more humbly and realistically just a project of the European Union”. By extension, it means a European product that will enhance European preeminence position in Africa. This fact was acknowledged in the keynote speech to Europeans and Parliamentarians in October 2009 by judge Sang-Hyun Song (President of ICC), where he acknowledged that the EU (European Union) played a pivotal role in the “coming to being” of the ICC. The European parliament, according to the judge, was instrumental in mobilizing and galvanizing efforts that brought the ICC into being and also contributed financially in its sustenance. In other words, the European Union, in galvanizing the forces that brought the ICC into being, provided the financial muscle to the Parliamentarians for the Global Action (PGA) and other civil society proponents of International Criminal Court Justice. By virtue of EU’s role in the coming into being of the ICC, the European Union clearly stated her desire to dominate the International Criminal Court (ICC) financially and administratively and the African continent, hence the question at the level of society in Africa - how effective has the world insulated the International Criminal Court (ICC) from international politics (Makumbe, 2015; Hoile, 2010; Adusel, 2012).

The attempt at addressing the cesspool of questions raised in the paper brought forth the first major fire in the direction of the International Criminal Court (ICC) bordered on the inability of the international system to insulate the court from international politics, thus the questioning of its jurisdiction. Its jurisdiction is not universal, though Ojukwu-Ogba (2016) argued and believed the contrary. In expressing its views, Ojukwu-Ogba (2016) gave evidence against himself by positing that:

The court is fixed with international jurisdiction in the mould of that of International Court of Justice at the Hague. The Jurisdiction of the ICC is qualified by certain provision of the ICC statute; unfortunately, the issue of jurisdiction for the International Criminal Court appears to be most sensitive and controversial of the areas covered by the ICC statute...This is far from the case. If anything, the jurisdiction of the ICC, though special in nature, is

complementary to that of the municipal courts in the effective enforcement of world order and international criminal justice administration.

The logic of Ojukwu-Ogba (2016) in the views of Dienne (2016) was rather weak, as Dienne (2016) did argue that because of the presence of the following indices - politics, economics, “power”, polymorphous nature of international law, the desire of the custodians of the current international system in unifying international law, under the auspices of European law, had robbed ICC of any iota of universal jurisdiction. By extension, it follows that what the ICC statute is enjoying is quasi-universality. Again, from the standpoint of the ICC, just like (ICJ) International Court of Justice, being an instrument in the hands of powerful nations in penetrating less powerful nations, the ICC, too, had become an instrument in the hands of powerful nations used in penetrating the affairs of weaker nations. Dienne’s (2016) summation of the relationship between the international system and the International Criminal Court (ICC) is likened to the relationship of a mother and the fetus in her womb. The current international legal framework that came into being as a result, and the fall out of European crudity and greed in the world war I and II, gave speed to the birth of the International Criminal Court. Furthermore, the crude, violent and clandestine politics and tactics of the Europeans in the current international system had helped position the African continent as helpless, recipient of history and a pond in the chess game of the Europeans.

The Security Council of the United Nations and the International Criminal Court (ICC)

The relationship between the International Criminal Court (ICC) and the Security Council of the United Nations was founded on the usage of “referrals” and “coercive power” of members of the Security Council; and no African state had been worthy of this elite club, since the foundation of the UN. This fact was acknowledged in 13 (b) and 16 of the statute of Rome. Furthermore, the statute also empowers individuals or organizations to submit information on crimes within the jurisdiction of the ICC. These submissions by individuals and organizations are known and referred to as “communications” or “complaints”. But the hurdle here is that the focus of the office of prosecutor (ICC) appears to be on Africa. Under Moreno Campo’s reign (July, 2009) as Prosecutor, announced receiving over 8,137 communications from more than 130 countries, yet the ICC, out of the whole lot, only deemed it fit to start investigation into communications emanating from African countries, namely: Uganda, DR Congo, Central African Republic, Sudan, Kenya, Guinea, Cote d’Ivoire and Libya, and indicted 27 persons, all from Africa. The quick usage of its “referral powers” by the ICC, especially as it concerns Africa, had caused the Security Council of the United Nations to issue warrants of arrest for some Africans like Gadaffi, Omar al Bashir, Gbagbo and Taylor. In other words, the leveraging on the powers of the Security Council

by the International Criminal Court places on the shoulders of the Security Council of the United Nations a great moral responsibility of fairness to all. But this is not the case, as the actions of the Security Council have shown in the African cases to be biased.

The Security Council and ICC had acted in a manner that suggested that crimes of genocide, crimes against humanity, war crimes and crimes of aggression are solely the prerogative of the African continent. The same Security Council had failed to issue warrant of arrest against the perpetrators of crimes against humanity in the Syrian, Iraqi, Afghan, Libyan, and Yemen wars. The Security Council again failed to issue warrant of arrest for Georgian leaders that brazenly led the raping of Ossetia. The blind eye of the Security Council has also extended to Belgrade. The fact underpinning the conduct of the Security Council has to do with the global interest of members of the Council. For example, America, not wanting to put its global interest and role as the policeman of the world into jeopardy, decided not to ratify the Rome Statute. Washington objected the Rome Statute on the pretext that it lacks adequate checks and balances on the power of the persecutor, judges.

The United States continued in its complaint of the Rome Statute lacking in due process and the absence of juries, thus making the Rome Statute susceptible to abuses and bias. The ambassador of Large David Sheffer in the Clinton administration did alert the world to the fears of the United States of America towards the Rome Statute, noting that the treaty, purported to establish an arrangement whereby US Armed Forces operating overseas could be conceivably prosecuted by the ICC even if the US has not agreed to be bound by treaty. The fears expressed by David Sheffer led the United States of America to promulgate the American Service Members Protection Act of 2002 (the Hague Invasion Act). This law targeted American lawyers with legal actions should they take on cases involving US citizens put forward by the ICC. This was quickly followed by another law known as the Bilateral Immunity Agreement (BIAS) and as article 98 agreements. The “Nethercut” amendments was to penalize ICC state parties that refuse to sign the Bilateral Immunity Agreement (BIAS) with the United States of America with the cutting of foreign aids and assistance.

The unsure nature and role of the ICC (International Criminal Court) within the framework of international criminal justice system had caused countries like Russia, China, Japan, India, Indonesia and USA to stay outside the umbrella of ICC. The import of these countries staying out meant over 70 per cent of world population staying outside the jurisdiction of ICC, yet Ojukwu-Ogba talks of the universal jurisdiction of the ICC (Makumbe, 2015; Hoile, 2010; Adusel, 2012; Dienne, 2016). From the positioning of international politics and its calibration that had positioned the African continent as a recipient of history makes the

ICC court for less-powerful nations, especially those in Africa. The United Nations had not decided to address this shortening.

Conclusion

The trilateral assessment of Africa within the purview of the International Criminal Court (ICC), the international system and the United Nations did buttress the fact that the African continent is greatly vulnerable, especially in the face of international politics. These vulnerabilities – hunger, woeful economies, collapse of social amenities, high infant mortality rate, wars and sit-tight leadership, etc - have intricate connection with international politics and the continent's colonial history. The vulnerabilities associated with the colonial history have progressed and transcended into the post colonial period and history. And there is no appreciable progress on the part of Africa in addressing the vulnerabilities that had made her pond in the chess game of countries with power in the current international system. In the words of Mbeki (2012), the African continent has progressively sunk to the lowest ebb in international politics, especially in the post cold war era due to woeful economies, sit-tight leadership and corruption that have permeated every facet of the society. All of this negative curriculum vitae is clandestinely supported by the Europeans. The increasing vulnerabilities of the continent have the underpinnings of local and external factors. The interplay of these factors does make conflicts and crime against humanity the sole prerogative of the African continent, especially in the eyes of the “custodian” of the current international system. Africa, for reasons of these vulnerabilities had been positioned as a recipient of history and incapable of tackling the problems highlighted in this paper, thus the bearing down of the ICC on Africa. African states that are currently serving the court with notices of withdrawal are correct in their actions and it is the way to go for the African continent.

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