

The International Criminal Court and the Place of Africa in International Justice System

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Human rights have been flouted indiscriminately and deliberately in the international system. To that effect, the ICC was established to ensure that perpetrators of massive and systematic violations of human rights are brought to justice in the international system. The aim of this paper is to examine the effectiveness of the International Criminal Court in the discharge of its mandate in the global system. The central argument in the paper is that the ICC has made significant progress in the prosecution of some cases, but all in Africa. Meanwhile, there are cases within its jurisdiction that have been ignored in other parts of the world, especially when advanced countries are involved. Neoliberalism was adopted as the theoretical framework. The study adopted secondary method of data collection. The data was content analyzed. It was established that the ICC is faced with challenges and that the long term viability depends on how successfully it overcomes its challenges. This study advocates for: first, fairness in the UNSC referrals. Second, America's taming of its unilateralism. Third, financial contributions without string attached. Fourth, United States ratification of the Rome Treaty; and fifth, ICC prosecution of all the cases within its jurisdiction in every part of the globe.

Key Words: Africa, international criminal court, international justice system

Introduction

Peace is not the absence of conflict, but the presence of justice. The primary vision of the United Nations was to save the future generations from the scourge of war, reaffirm faith in the fundamental human rights and better living standards. The first paragraph of the preamble to the United Nations Charter stated: *We the people of the United Nations determine to save the succeeding Generations from the scourge of war, this twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights in the dignity and worth of the human person, in the equal rights of men and women of the nations large and small and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in larger freedom.*

The international community under the umbrella of United Nations, in its attempt to establish an international justice system fashioned the international criminal court (ICC) to be one unique universal instrument for justice in the area of human rights.


The ICC came into force on July 1, 2002, as a standing international court to judge crimes such as genocide against a group (ethnic or religious), war crimes, aggression and crimes committed against humanity. The court has made positive impact as an instrument of restorative justice in a fractured

world for the promotion of international peace, justice and reconciliation, since 2002, that it came into existence. However, the court has been accused of focusing its attention on Africa. The ICC has been alleged to be a creation of advanced countries to target Africans. Thus, this paper seeks to consider the Court - its background, structure, jurisdiction, mode of operation, ICC as a tool for international justice system and the place of advanced countries and Africa in that justice system based on the activities of the ICC. The long viability of the court depends on how successfully the International Criminal Court (ICC) can indict and administer justice to people who committed crimes within its jurisdiction all over the world.

Theoretical Framework: Neoliberalism

The liberal counterpoint to realism, originally called idealism, has its latest version called neoliberalism. Neoliberalism grants some assumptions of neorealist, but claim that the neorealist's pessimistic conclusions about international cooperation do not follow (Goldstein 2001).

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The core concepts of realism hold that states which are the central actors in international relations use power to pursue their own interests in the context of an anarchic system lacking central enforcement mechanisms. This was possible when European kings and queens played war and traded territories as property. The theory is no longer tenable in this present globalized world, where states are now interconnected and borders are becoming porous making territorial integrity of state untenable.

Neoliberal theory stressed the importance of international institutions in reducing the inherent conflict that realists assume in an international system. Kegley (2007:37) avers neoliberalism is “a theoretical perspective that accounts for way international institutions promote global change, cooperation, peace and prosperity through collective programs for reforms.” This approach advocates international institutions as a means to achieve international cooperation and peace.

This paper adopts neoliberalism because the ICC is an institution designed to be an international cooperative approach with respect to human rights crimes which are heinous and cannot be addressed by national courts. However, to achieve international justice in the area of human rights through the instrumentality of the world court, there must be fairness in the prosecution of the cases within the jurisdiction of the ICC committed anywhere in the world.

The Establishment of the International Criminal Court

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) was a stepping stone to the establishment of the permanent international criminal court which has powers to prosecute any massive and systemic violation of human rights. The cases that have been brought to ICC rely on “universal jurisdiction” which holds that certain crimes are so heinous that those who commit such crimes may be tried anywhere in the world these criminals are regarded as *hostes humani generis* (enemies of all mankind). This means that these crimes are not committed against the victims only, but against all human beings (Lutz 2003).

For Kofi Annan (1998), “the establishment of the court is still a gift of hope to future generations and a giant step forward in the march towards universal realization of human rights and rule of law.” The ICC is established to achieve international justice in the area of human rights and human dignity. On July 17, 1998, a series of meetings were held in Rome with the aim of establishing an international criminal court and 120 countries voted in favour of the statute for the creation of the court. The statute, known as “Rome Statute” came into force on July 1, 2002, when it was ratified by 60

countries. As of April 1, 2015, 123 countries have joined the ICC treaty. The countries that have ratified the treaty are called State Parties to ICC (ICC 2015). The ICC has four organs or arms: i) The presidency ii) The judicial divisions, iii) The office of the prosecutor and iv) The registry.

The Presidency comprises of three judges of the court. One of the judges is elected the Presidents, while the other two become Vice-Presidents. They are elected by their fellow judges for a maximum of two-three year terms. The Judicial Divisions carry out judicial functions of the court. It is organized into three divisions, that is, the Pre-Trial Division, the Trial Division and the Appeals Divisions. The Office of the Prosecutor is responsible for conducting investigations. It consists of a chief prosecutor and one or two deputy prosecutor (s) elected by the assembly of States Parties in a secret ballot. The prosecutor may open investigation under three circumstances: i) When referred to a situation by a State Party to ICC treaty. ii) When referred to a situation by the United Nations Security Council (UNSC); or iii) When authorized by the pre-trial chamber to open an investigation.

Finally, the Registry is headed by the Registrar who holds the office for a five year term. It carries out non-judicial aspects of administration of legal aid matters, the detention unit, and the traditional services provided by administrative organizations (Shelton 2009). The ICC has jurisdiction over any person over 18 years of age, who committed any crime under article 5 of the Rome statute as from July 1, 2002, when it came into force article 11 (1) of the treaty states that the court has jurisdiction only with respect to crimes committed after its entry into force. While Article 11 (2) of the treaty states that if a state becomes a party after its force, the court may exercise the court may exercise the jurisdiction only with respect to crimes committed after the entry into force of the statute for that state. The court investigates and prosecutes individual when: i) The individual is a citizen of the ICC member state. ii) The alleged crime took place on the territory of ICC member state. iii) The UNSC demands the court to open an investigation and iv) Countries voluntarily accept ICC jurisdiction.

The International Criminal Court and Africa

In carrying out its mandate, the ICC has nine (9) situations before it. Four out of the nine situations in the ICC were referred by state parties to the Rome statute-Uganda, the Democratic Republic of Congo (DRC), the Central African Republic (CAR) and Mali. The UNSC referred two situations-Sudan (Darfur) and Libya. Both Sudan and Libya are non-States Parties. The Pre-Trial Chamber II authorized the prosecutor to open an investigation in the situations in Kenya, Cote D’Ivoire and the second situation in Central African Republic (CAR), in 2010,

2011 and 2014, respectively. There are a total of twenty three (23) cases in the nine situations that are before the ICC (ICC 2015).

Since the inception of the ICC, its activities have so far been on African countries that have leaders who are alleged to have committed the crimes under its jurisdiction. All the cases before the ICC have been cases in African countries and the court is making frantic efforts to bring all the perpetrators of the crimes to court issued a warrant of arrest for Sudanese President, Omar Hassan Al-Bashir, and to South African government to ensure he does not leave South Africa after the AU summit which held June 14-15, 2015. The South African failure to arrest Al-Bashir made the ICC to request South African government to make submissions to it by October 5, 2015 (Department of International Relations and Cooperation 2015).

The ICC has been making desperate efforts to arrest Al-Bashir. First, the ICC in June 2015, issued order to South African government to bar Al-Bashir, who was in South Africa to attend African Union summit, from leaving the country. Second, the Office of the Prosecutor in a written statement to *The Hindu* (2015) that "it is important to note that United Nations Security Council resolution 1593 urged all international organizations, to cooperate fully with the ICC. This includes arresting Al-Bashir". The Prosecutor, Fatou Bensouda also said that "by arresting and surrendering the ICC suspects, India can contribute to the important goal of ending impunity for the world's worst crimes". The ICC wrote to India-Africa summit which is to be held in October 26-29, 2015. Fifty-two (52) out of fifty-four African countries have confirmed their acceptance of the invitation to the conference. Among the expected guest to the meeting is the Sudanese President, Omar al-Bashir, who is seriously wanted by the ICC for war crimes. However, India is not a State Party to the ICC. The Indian Ministry of External Affairs (MEA) officials told *The Hindu* (2015) that the United Nations Security Council resolutions is not binding on non-member states. The spokesperson of MEA, Vikas Swarup avers that the Minister of External Affairs V. K. Singh, personally invited Bashir to the India-Africa summit during a visit to Khartoum on September 19. It is important to know that the Head of Human Rights Watch, Kenneth Roth, quoted in *The Hindu* (2015) joined to call for India arrest of the Sudan President. He said "it is difficult to understand under what principle India, a nation known for the rule of law and belief in the value of human dignity, would coddle a man accused of slaughtering his people rather than his countless victims".

All the nine (9) situations and twenty-three cases are all from Africa. Among the case before the ICC is the prosecution of a former African head of state from Ivory Coast, Laurent Gbagbo, who is in the Court's custody.

The International Criminal Court and the Advanced Countries

In 2003, the United States of America invaded Iraq during which American British forces fired thousands of missiles and bombs. This resulted to the deaths of many civilians, especially women and children died. The civilians were denied medicine, hospital equipment, and ambulance and portable water. The ICC has been in existence before this incident took place. Neither the prosecutor, nor the UNSC both of which have the power to refer situations to ICC referred the situation to the Court (Roy 2003).

Lendman (2015) avers that the International Criminal Court (ICC) was established to prosecute culpable individuals crimes of war against humanity and genocide. He went further to emphasize that the mandate of the Court calls for an end to the impunity for the perpetrators of the most serious crimes of concern. He stated that United States and Israeli officials are guilty of the highest crimes against humanity, yet none of their officials were held accountable, either by their national courts or the ICC. The international Court operates on the principle of complementarity. This means can only prosecute cases governments would not or cannot prosecute even against officials of the non ICC member countries like America and Israel. Lendman further opines that America commits these crimes and others against one country after another, as well as, persecuting its own most disadvantaged people in violation of international and constitutional laws. It partners with the high crimes of key allies like Israel. It prohibits providing funds to the ICC and adopts every necessary measure to protect United States military personnel and other elected and appointed officials of the United States government against criminal prosecution by an International Criminal Court. This includes the pressuring of over 100 countries to sign Bilateral Immunity Agreements assuring that they will never surrender a United States official or soldier to the ICC. From the foregoing, it is obvious that America acts in unilateralism in the international system and has no respect to international laws.

Another massive violations of human rights, which the ICC has ignored is the Russian incursion into the Ukrainian territory. This incursion started in 2014 and is on-going. According to BBC News of June 4, 2015, online: "more than 6,400 people have been killed in Eastern Ukraine since the conflict began in April 2014 when rebels seized large parts of the two eastern regions." There is an agreement that the Russian activities in Ukraine are destabilizing security in Europe and have also violated several international legal norms. Russia has been employing intelligence agents and plain-clothes forces called little green men. This has worsened in recent times by deploying of thou-

sands of troops, backed up by artillery and armor. Russia grave violations of international humanitarian norms, especially armed conflict supposed to be criticized by the West, attracting a decisive response in the form of diplomatic and economic sanctions, as well as, investigations at the ICC at the Hague. Unfortunately, the West and the advanced countries pretend not to notice the Russian misconduct, not to talk of taking necessary actions against it as a deterrent to future misconduct (Dobriansky 2015).

According to Dobriansky, “Moscow’s annexation of Crimea and its invasion of eastern Ukraine constitute aggression in violation of the U.N. Charter, numerous European treaties and other international undertakings, but the ICC currently lacks jurisdiction to prosecute crimes of aggression. It does have ample authority to investigate crimes against humanity and certain types of war crimes, namely grave violations of the 1949 Geneva Conventions”. She further stated that: “there is no doubt that numerous war crimes have been committed by Russian troops and Russian-controlled Ukrainian separatists. The most prominent examples include the July 17 downing of Malaysia Airlines flight 17 and Jan. 24 missile attack on the market in Mariupol. Both involved non-military targets, and hundreds of civilians perished”. Dobriansky pointed out that the Court’s failure to take action against Moscow’s war crimes casts doubt on the integrity of the ICC because the Court was created to ensure that war criminals would no longer enjoy impunity. The failure to call Russia to account for its crimes against humanity only emboldens Moscow to continue on its course of action.

In recent times, the Chief Prosecutor says she has enough evidence to open an investigation over alleged war crimes between Russia and Georgia during Russian-Georgian conflict. The Chief Prosecutor argued that there was reasonable basis to believe that war crimes and crimes against humanity were committed by both sides during their fighting. The conflict between South Ossetian separatists and Georgian forces in July 28 in which Russia joined in the war on the side of South Ossetian in August, 2008. The Chief Prosecutor, Fatou Bensouda carried out an investigation over the incident and the investigation suggests “113 ethnic Georgian civilians may have been killed by South Ossetian forces as part of a forcible displacement campaign in the breakaway region. A further 13,400 to 18,500 Georgians are thought to have been displaced from their homes with more than 5,000 Georgian dwellings allegedly destroyed” (Arvinth 2015). While filing the case to ICC judges. Bensouda was quoted in Arvinth (2015) to have said: “there is also a reasonable basis to believe that war crimes of wilful killing, pillage and destruction of enemy’s property, as well as, crimes against humanity consisting of acts of murder, forcible trans-

fer of population and persecution were committed against the ethnic Georgian population of South Ossetian by Ossetian forces. There is also a reasonable basis to believe that members of the peacekeeping force headquarters, including the Georgian and Russian contingents, were at separate times the subject of intentional attacks constituting war crimes”.

Arvinth stated that Bensouda argued that it is necessary that ICC probe the Russian-Georgian conflict because Georgia indefinitely suspended its investigation into alleged war crimes during the conflict. Consequent on that fact, Bensouda avers that based on the evidence gathered by the Office of the Prosecutor in the course of investigation, the Prosecutor may request ICC judges to issue either summons to appear before the Court or arrest warrants for the perpetrators, believed to be most responsible for the war crimes and crimes against humanity, irrespective of the status of the perpetrators. However, although Russia is a signatory to Rome Statute that established the ICC, it has not ratified the treaty. This means that Russia has no legal obligation to submit to the jurisdiction of the ICC.

The Achievements and Challenges of International Criminal Court

The ICC has been in existence for the past thirteen (13) years. On the tenth anniversary of the ICC, Aljazeera English (2012) said this about the court:” the creation of the International Criminal Court (ICC) on July 1, 2002, was without doubt the greatest achievement for justice in the past years. Today, governments, human rights organizations and ordinary people around the world are celebrating its tenth anniversary—But we must not lose sight of the threats and challenges it still faces. Thanks to the ICC, victims of genocide, crimes against humanity and war crimes who have been traditionally ignored are left to suffer now have some hope of international justice and reparation when their governments fail to act.” Thomas Lubanga Dyilo is the First convicted case in the ICC. He was convicted by the court on March 14, 2012. And on July 10, 2012; he was sentenced to fourteen years imprisonment. However the time he spent in the ICC custody was deducted from the period of the imprisonment.

The merits of the ICC include: First, permanency. The court is not an ad hoc establishment like the two above—mention tribunals (ICTY and ICTR). Second, the Court does not regard immunity. The ICC can try anybody, irrespective of the individual’s military, political or social status. No perpetrator can plead immunity. Third, the ICC created the principle of complementarities which gives jurisdiction first to national courts. The Court investigates and prosecutes cases in which the domestic or national courts are handicapped due to the position of the individual involved in the matter

as in the case of Sudan. The ICC has made significant impact in the global system of justice, but for the ICC to continue to fulfill its purpose, there are some challenges it has to overcome. And the long term viability of the court depends on how successfully it could handle the challenges.

The first challenge before the court is the problem of funding. Finance is very crucial for the smooth running of organization and the ICC is not an exception. The ICC has a lot of financial responsibilities in the areas such as staffing, investigation and prosecution of cases, protection and support for the victims and / or their beneficiaries before, during and after court proceedings in the maintenance of its branch offices. The ICC is primarily funded by states parties, but it also receives fund from governments, international organizations, corporations and other entities on a voluntary basis. The States of America, China and Israel as signatories hinders the ICC's ability to raise sufficient fund for its operation (ICC Forum 2015).

Second, the ICC is faced with the challenge of unipolarity. Unipolarity is a structure of the international state system in which a single state dominates the system. Kegley (2007:11) defined unipolarity as "a condition in which an international system has a single dominant power centre, or pole, able to exercise supreme authority by its superior economic resources and military capability. "The end of cold war led to America hegemony interest as the super power .Since then, there has been a unipolar power structure. The United States of America stands at the apex of the international hierarchy. In 2003, the United States with the support of Britain invaded Iraq, which led to the death of Iraqis, particularly women and children, but up till date the ICC, has done nothing about that issue. The United State of America seems not to care about international rule of law if it affects her interests". After the Rome Treaty establishing the ICC came into force in 2002, the U.S government pressured most of the world's countries to try to get them sign bilateral agreements promising not to surrender Americans or U.S. employees to the newly established court" (Kelly 2007).

The United States has been on the forefront in human rights advocacy. The United States supported the ideal that those who commit serious rights violations should be held accountable. It was the United States that insisted that the fundamental human rights and freedoms be included among the purposes of the United Nations, despite Soviet objections. The United States played significant role in the promotion of international humanitarian law, for example the Geneva Conventions. The U.S. also supported the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) to prosecute gross violations of human rights. Again, the U.S. participated in the effort to

create the ICC in the 1990s. Afterwards, America's support waned because it felt that the ICC is flawed. Ever since then, the United States has refused to be a State Party to ICC with political manipulation, possession of authority without accountability to the United Nations Security Council, and violates national sovereignty. The U. S. interaction with the ICC is restricted through acts such as the American Service-Members Protection Act (ASPA) of 2002, in order to protect U.S. nationals band officials from the ICC (The Heritage Foundation 2015).

Third, another issue that will hinder ICC from the realization of its potential is the issue of the hypocrisy of the permanent five members of the United Nations Security council (Great Britain, the United State of America, Russia, France and China) has been accused of hypocrisy over the crimes committed against humanity by Israel and Hamas. The Israeli (Military and Hamas have been accused of war crimes in Gaza by the United Nations Humans Rights Council on October 17, 2009. As a result of the war crimes committed when Gaza was attacked in January, 2009, a committee was set up. "The report written by the committee led by the South African Judge, Richard Goldstone, recommends that both sides should be referred by the UNSC to the ICC in the Hague if they fail to act against those allegedly responsible for war crimes within six months" (Bardsley 2009). The UNSC has done nothing about the issue, and is likely not to do anything on the matter. Meanwhile, the UNSC has power to refer situation to the ICC. Fourth, African perception of the ICC is another serious challenge. The ICC has been alleged to be a creation of the Western powers, a tool designed to target Africans, Jean ping, the former chairperson of the African Union (AU) argued that the ICC, instead of administering justice around the world, including cases such as Columbia, Sri Lanka and Iraq, the court focuses only on Africa. Ping complained that all the cases before the court since it came into force are African (Plessis 2008). Mahmood Mamdani, an African scholar, posits that the ICC is a part of some new "International Humanitarian Order" in which there is the worrying emphasis on "big powers as enforcers of justice". According to him, the court is a component of this new order which draws on the history of modern western colonialism and shares an aim of "mutual accommodation" with the world's only super power. Mamdani argues that its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are United States adversaries and ignored actions the United States does not oppose, like those of Uganda and Rwanda in Eastern Congo, effectively conferring impunity on them (Mamdani cited in Plessis 2008).

African perception of the ICC is based on the fact that the efforts of the Court to bring war criminals to justice is intense only in Africa as if the crimes within the jurisdiction of the Court is being committed only in Africa. The perpetrators of war crimes and crimes against humanity since the ICC came into force are not only in Africa. Therefore, the serious concentration of the ICC to bring perpetrators of war crimes in Africa to book is questionable and has received criticisms from Africans, particularly, African leaders.

According to Ventures Africa (2015) "if countries are unwilling to arrest Bashir, is it indicative that they approve his misdeeds? Both signatories and non-signatories of the ICC Rome Statute have shown reluctance in arresting Al-Bashir. Besides, the AU's resolve not to hand over African leaders to the ICC, there are perhaps other reasons involved". Ventures Africa went on to state that "the ICC has shown its inefficiency in enforcing its own authority, and therefore is being taken for granted by these nations. The apex court presumes upon its own authority, which seems to anger these nations. The United Nations is not helping either; they do not give the ICC sufficient backing in carrying out its mandate". The failure of the ICC to carry out its mandate without fear or favour is the reason it is being taken for granted. The Court seems to be selective in justice. From the foregoing, the refusal of countries to hand over Al-Bashir to the ICC is not because they support his misdeeds, rather because the court focuses only on Africa.

Conclusion and Recommendations

The ICC is an international institutional arrangement to promote international cooperation in the realization of human rights. The ICC is yet to succeed in the indictment and administration of justice to criminals of crime, genocide crimes against humanity and aggression. Since it came into force on July 1, 2002 to date it has succeeded only in the conviction of a case out of the twenty-three (23) cases out of nine (9) situations before it. For the court to succeed in achieving its purpose, it has to overcome its challenges such as poor funding, unipolarity, insincerity of the UNSC and African perception of the court. The following are helpful suggestions that can erase the challenges before the ICC, or at least reduce the challenges to a barest minimum.

-The UNSC should be fair in referring cases to the ICC Office of the prosecutor. The UNSC has so far referred only cases in Africa to the International criminal court, but ignored the cases that involved advanced countries, particularly, United States of America, Israel and Russia.

-The United State should tame itself on its unilateral actions and try as much as possible to abide by international laws.

-Non-governmental organizations, Multinational corporations (MNCs) or Trans-National corporations (TNCs) are to be encouraged to contribute more to the court with no string attached.

-The United States should ratify the Rome Statute because it will strengthen the performance of the court.

- The ICC should open investigation and prosecute all the cases of human rights violation in every part of the global community as this will go a long way to clear the negative perception of Africans that the ICC is a Western tool created to target Africans.

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