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Africa and the international criminal court: A case of imperialism by another name

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Abstract

The International Criminal Court is one of the institutional mechanisms created to sustain the international legal system. Specifically, the court was established to investigate and prosecute cases of “war crimes”, “crimes against humanity”, etc. This essay critically examines the operations of the court as they affect Africa, and it is argued that Africa’s overwhelming support of the idea of an international court was informed by the continent’s strong belief in the principles of fairness, justice and equity. It is also contended that the court is controlled and manipulated by powerful American and European forces, and consequently, only cases that involve parties that are not friendly with these powerful forces are investigated and prosecuted by the court. The point is also made that so far, the court has focused mainly on Africa because of the continent’s weak and peripheral position in the international system. It is concluded that an international legal institution that concentrates on cases in only one part of the world does not promote the cardinal value of justice for ALL.

Keywords: Africa; Imperialism; War Crime and Crime against Humanity

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1. Introduction

The nature of imperialism is as profound as its history is chequered. From the outset, it is essential to appreciate that imperialism cannot be comprehended as a general phenomenon, but only in relation to the stages of development of societies. This is the basic reason why the past, present and future of Third World countries... and the industrialized countries cannot be fully understood without a proper understanding of the role of imperialism in their history.

- Bade Onimode (1983: 3)

There is no doubt that in the international system where sovereign states interact – militarily, politically, economically, socio-culturally, etc – with one another, it is important to put in place a body of rules and regulations as well as other mechanisms to guide and regulate the behaviour and actions of these states as they interface. It is also necessary to ensure that these regulatory mechanisms which guide the activities of states in their relations with one another are applied to these states equally. This implies that the basic principles of justice, equity and fair play should be upheld.

Moreover, the institutional frameworks or mechanisms established to ensure that states adhere to internationally acceptable standards of behaviour must always be deployed in furtherance of this goal irrespective of which state(s) is/are involved. In other words, the enforcement of the rules and regulations guiding the operations of the international system must not only be fair, but must also be seen to be fair to all. In sum, an international system that has sovereign states as major actors should not be run on the basis of “all animals are equal, but some are more equal than others.”

However, the present international legal order is in an incredibly huge deficit – as far as the aforementioned democratic values are concerned. For instance, in spite of its enormous contributions to the historical and economic development of the world, Africa remains a mere peripheral and subservient actor on the global stage. This huge and ineffably endowed continent – out of which came the only Nelson Mandela the world has produced – is often treated ignominiously by the dominant forces of European and American hegemony in the international system. The international legal order and its institutions and structures are dominated and controlled by Western and Eastern forces, and they are often manipulated to the disadvantage of Africa.

This essay examines the relationship between Africa and the International Criminal Court (ICC), and it is contended that so far, the activities of this “international” adjudicator clearly show that the subjugation of Africa by Northern forces may not end soon, and the kerfuffle of the developed states about rule of law and democracy is a façade. This essay also attempts to reinforce the assertion that Africa is the most humiliated and most dehumanized continent in the world, and its history is a depressing tale of dispossession and impoverishment (Osundare, 1998: 231).

This paper is organized into five sections. Following this introduction is section two in which the concept of imperialism is clarified. In section three, a brief overview of the historical trajectory of the International Criminal Court is presented. In section four, we examine some of the activities of the court, and it is argued

that these activities tend to promote the continuous marginalization of Africa. The fifth section contains the conclusion.

2. Conceptualizing imperialism

The term “imperialism” does not have any universally accepted definition. Indeed, attempting to define it can be a Herculean task. The term is often used but is seldom explained and is even less frequently understood (Toyo, 2001: 41). As Geovanni Arrighi (1978: 35) has acknowledged, it is no easy task to define the concept of imperialism. According to him, the same word is customarily used to designate diverse, and in certain instances, antithetical concepts.

The foregoing views have been reinforced by Palmer and Perkins (2010: 158 and 159) who point out that imperialism can be discussed, denounced, defended, and died for, but it cannot be defined in any generally acceptable way; it means different things to different people. According to them, imperialism is a highly subjective word – that is, writers define it pretty much as they please. Moreover, in their view, imperialism has become more of an epithet than anything else: the Russians use it to stigmatize the policies of the Western states, the anti-Communist powers use it to blacken Soviet policies, and the “uncommitted world” uses it to condemn the policies of both the Communist and non-Communist worlds.

In its stricter usage, imperialism, according to Lenin (1978), is an economic phenomenon. In this sense, imperialism is a stage in the development of the capitalist mode of production. Lenin (1978: 226-227) also stated that imperialism is capitalism in that state of development in which the dominance of monopoly and finance capital has established itself, in which the export of capital has acquired pronounced importance, in which the division of the world among the international trusts has begun, and in which the division of all territories of the globe among the great capitalist powers has been completed.

To Jyrki Kakonen (1988: 42-50), imperialism can be regarded as capitalist expansion that changes both the internal national development of capitalism and the world markets, which ultimately enter a process of capitalization. In his view, we must note that imperialism is both economic and political; neither sphere empties the concept, and neither is subordinate to the other. In Kakonen’s words, imperialism could be seen as the internationalized process of extended reproduction of capital and the capitalist social system, and it can also be seen as a policy which safeguards the conditions for extended reproduction of capital at the national and international level.

In the view of Charles Hodges (cited in Palmer and Perkins, 2010: 160), imperialism is “a projection externally, directly or indirectly, of the alien political, economic or cultural power of one nation into the internal life of another people. It involves the imposition of control – open or covert, direct or indirect – of one people by another”. Hodges also adds that “the object of imperialism is to affect the destinies of the backward people in the interest of the more advanced from the standpoint of world power.”

On her part, Unionmwan Edebiri (1987: 7) surmises that imperialism is, in a nutshell, the exploitation of the resources of one nation or country by another through one form of domination or another. In simple

terms, imperialism can be regarded as the subjugation and exploitation of the poor, weak and backward peoples by the rich, strong and developed nations of the world (Johari, 2005: 634). In this essay, we shall adopt the definitions of imperialism offered by Eskor Toyo and Claude Ake. According to Toyo (2001: 41), generally, imperialism is the exploitation of the people of one country by the ruling class of another country which exercises some hegemony over the exploited to make possible perpetual exploitation. In his own analysis, Ake (1982: 137) states that imperialism is the subordination of one country to another in order to maintain a relationship of unequal exchange. The subordination may be military, economic, political, cultural, or some combination of these. We also agree with the view that imperialism pertains to a relationship in which one area and its people are subordinate to another area and its government. Thus construed, imperialism in essence always involves subordination; it is a power relationship without moral implications of any kind (Palmer and Perkins, 2010: 160).

It is equally important to state that as a phenomenon, imperialism is always changing its tactics and strategies. There is no doubt that at the heart of history is change, motion or dynamics. It is inherent to social phenomena, and is responsible for social progress or regression. In other words, no social phenomenon is static; it is constantly changing into forms that are better or worse moving forwards or backwards (Nnoli, 2011: 279).

3. The international criminal court: A brief historical discourse

Just as the “the character of contemporary international legal system cannot be understood if the historical circumstances that culminated in the emergence of international law are not highlighted” (Obo and Williams, 2014), the operations of the International Criminal Court as they impinge on the interests of Africa cannot be properly contextualized if the institution’s genesis is not established. For an analysis of any social phenomenon to be fruitful, the centrality of history cannot be undermined. Indeed, as Okwudiba Nnoli (2011: 10) has asserted,

the importance of history in social analysis lies in the fact that no social phenomenon is comprehensible and useful unless it is characterized by a union of its past, present and future. The present cannot be understood outside the past and visions of the future. And the future cannot be planned for without understanding how it is emerging from, and related to, the present and the past...

According to *Wikipedia, the Free Encyclopedia*, the establishment of an international tribunal to judge political leaders accused of war crimes was first made during the Paris Peace Conference in 1919 by the Commission of Responsibilities. The issue was addressed again at a conference held in Geneva under the auspices of the League of Nations in 1937, but no practical results followed. The U.N. General Assembly first recognized the need for a permanent international court to deal with atrocities of the kind committed during World War II in 1948, following the Nuremberg and Tokyo tribunals (www.wikipedia.com).

It has been reported that;

*Following years of negotiations, the U.N. General Assembly convened a conference in Rome in June 1998, with the aim of finalizing a treaty. On 17 July 1998, the Rome Statute of the International Criminal Court was adopted by a vote of 120 to 7, with 21 countries abstaining. The seven countries that voted against the treaty were **China**, Iraq, **Israel**, Libya, Qatar, **United States**, and Yemen. The Rome Statute became a binding treaty on 11 April 2002, when the number of countries that had ratified it reached sixty. The Statute legally came into force on 1 July 2002, and the International Criminal Court (ICC) can only prosecute crimes committed after that date. The first bench of eighteen (18) judges was elected by an Assembly of States Parties in February 2003, with Philippe Kirsch of Canada as the president of the Court and Argentina's Luis Moreno-Ocampo as the Court's Chief Prosecutor. The Court issued its first arrest warrants on 8 July 2005, and the first pre-trial hearings were held in 2006 (www.wikipedia.com; Rourke, 2007: 290).*

By the beginning of June 2012, one hundred and twenty-one countries had become State Parties to the Rome Statute, out of which thirty-three were African States, eighteen were Asia-Pacific States, eighteen were from Eastern Europe, twenty-seven were from Latin America and Caribbean States, and twenty-five were from Western Europe and other States (Avocats Sans Frontieres, 2012). This clearly shows that Africa believed (and still believes) in the existence of an international judicial institution – but one that would dispense justice fairly to victims of “crimes against humanity” in all parts of the world in a non-selective manner.

Africa's overwhelming support for the International Criminal Court (ICC) was acknowledged by Ambassador Tiina Intelmann, (cited in Lamony, 2013), President of the Assembly of States Parties to the Rome Statute when she remarked that “my largest constituency is Africa and its state parties. I make every effort to liaise with them and be truly attentive to their concerns”. On her part, the current Chief Prosecutor of the ICC Fatou Bensouda (a Gambian) has asserted that “the office of the prosecutor will go where the victims need us... The world increasingly understands the role of the court and Africa understood it from the start. As Africans we know that impunity is not an academic, abstract notion” (cited in Lamony, 2013).

Indeed, Africa's hopes and enthusiasm about the International Criminal Court were expressed at the 1998 Rome Conference negotiations when the (then) OAU Legal Adviser Tiyanjana Maluwa (cited in Lamony, 2013) gave two justifications for Africa's interest in the ICC: the continent's historical endurance of atrocities such as slavery and colonial wars, and the memory of the 1994 Rwandan genocide, where the international community failed to take preventive action. In Maluwa's words, these experiences “strengthened Africa's resolve to support the idea of an independent, effective, international penal court that would punish and hopefully deter perpetrators of such heinous crimes” (cited in Lamony, 2013).

Africa is also well represented on the ICC's staff. Several Africans hold key positions in the Court, including the Chief Prosecutor, 5 of the Court's judges are Africans including the first Vice-President and Deputy Registrar. Out of a total of 658 permanent ICC staff, 144 are African nationals representing 34 African countries (Lamony, 2013).

It should be emphasized that the International Criminal Court (ICC) was established as a component of the regulatory framework put in place to ensure that individuals and states abide by internationally acceptable standards of behaviour. Specifically, the Rome Statute gives the International Criminal Court jurisdiction over wars of aggression, genocide, crimes against humanity, war crimes, and other “widespread and systematic” crimes committed as part of “state, organization, or group policy” during international and internal wars. National courts remain the first point of justice, and the International Criminal Court is authorized to try cases only when countries fail to do so (Rourke, 2007: 290).

4. The operations of the international criminal court and the domination of Africa: Any correlation?

As earlier alluded to, in order to establish whether – or not – the activities of the International Criminal Court tend to accentuate “the peripheralization of Africa in the global socio-economic, political, and legal schemes of things” (Obo and Williams, 2014), it is necessary to understand the historical forces which midwived the birth of the institution. The story of the emergence of the court clearly shows that Africa – just as in the case of the emergence of international law – was not the dominant actor in the processes of negotiations that culminated in the institution’s emergence. Thus, the African countries that have ratified the Statute of the International Criminal Court are accepting or acknowledging the jurisdiction of an adjudicator that was established mainly by countries of other continents.

It is instructive to state that at the Conference of Rome – where the Treaty of the International Criminal Court was finalized – some powerful countries opposed the formation of a strong international court. John Rourke (2007: 289) has reported that the United States, for example, wanted a much weaker Court. According to him, the crux of U.S. opposition to a strong I.C.C. was the fear that U.S. leaders and military personnel might become targets of politically motivated prosecutions. Rourke quotes a U.S. delegate to the talks as declaring that “the reality is that the United States is a global military power and presence.... We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power.”

The foregoing point has been eloquently articulated by Khalil Timamy (2007: 91-92), who points out that efforts by the U.S. to reduce the International Criminal Court to absolute impotence and functional paralysis is an instance of a type of tactical maneuver by which the forces of organized spoliation tend to smother, if not neutralize, particular institutional arrangements in a bid to offer protection to those directly involved in implementing spoliatory schemes. According to him, in prosecuting projects bordering on organized spoliation, some western powers run the risk of transgressing international laws and infringing global conventions, and it would not be unexpected for their military officers to use methods and undertake campaigns that amount to war crimes. A recent case in point, in the words of Timamy,

involved the use of depleted uranium shells, whose terrible impact occurs on a mass scale. These wreaked mass destruction on the Iraqi people and the Iraqi environment. These are crimes

against humanity, and some believe that some Coalition soldiers legally ought to answer for their activities. The ICC... was created to administer justice against individuals or groups guilty of War Crimes and Crimes Against Humanity. It was for strategic protection that the US opposed this institution's right from the word go, fearful of transgressions likely to be committed by Coalition forces.... Aware that its strategic excesses abroad would nefariously be red in tooth and claw, it embarked, rather unsurprisingly, on a spirited diplomatic offensive to limit the usefulness of the ICC...

It is important to emphasize that this essay is not an exercise in support of tyranny or any form of brutality or impunity. But

"while we are completely averse to the despotic and neo-fascistic proclivities of African rulers, we need to ask: are 'crimes against humanity' committed only by Africans and other lesser mortals? What has been happening in Afghanistan and Iraq since 2001 and 2003 respectively?" (Obo and Williams, 2014).

While expressing support for the ICC and admonishing African countries not to withdraw from it, retired Archbishop Desmond Tutu (2013: 18) contends that

African leaders behind the move to extract the continent from the jurisdiction of the Court are effectively seeking a license to kill, maim and oppress their people without consequences, and that they are saying that African leaders should not allow the interests of the people to get in the way of their personal ambitions. Being held to account, according to him, interferes with their ability to act with impunity to achieve their objectives; and those who get in their way – their victims – should remain faceless and voiceless.

Archbishop Tutu (2013: 18) also states that when thousands of people are murdered and displaced in any country, one would hope, in the first instance that that country's own systems of justice and fairness would kick in to right the wrongs. The venerable cleric and hero of the anti-apartheid struggle also reasons that leaving the ICC "would be a tragedy for Africa" for three reasons: first, without justice, countries can attack their neighbours or minorities in their own countries with impunity; second, without justice, there can be no peace; and third, as Africa finds its voice in world affairs, it should be strengthening justice and the role of law, not undermining them (Tutu, 2013:19).

Another supporter and enthusiast of the International Criminal Court, Stephen Lamony (2013) has attempted to reinforce the argument for the necessity for, and perhaps the inevitability of, the court. According to him,

those who argue that the court is targeting Africans should stop and think for a moment: there are more than 5 million African victims displaced, more than 40,000 African victims killed, hundreds of thousands of African children transformed into killers and rapists, thousands of Africans raped. Should the ICC ignore these victims? Arguably, it's not about focusing on Africa;

it is about working for the victims, and the victims are African. That is why the court is a solution; its impartiality, its independence ensures the legitimacy of its intervention.

However, there is no doubt that the greater tragedy that has befallen the world and humanity is that atrocities of unspeakable proportions are being perpetrated by regimes that are friendly with powerful countries of the West and East without the International Criminal Court raising eyebrows. These regimes are in some countries of Africa and other parts of the world. As Jacqueline Geis and Alex Mundt have asserted,

“although the ICC was established as an impartial arbiter of international justice, both the timing and nature of its indictments issued to date suggest that the intervention of the ICC in situations of ongoing conflict is influenced by broader external factors” (www.newafricanmagazine.com/icc).

According to them,

the broad international consensus in favour of the Rome Statute has begun to fray as the Court pursued justice in some of the world’s most politically charged and complex crises, all of which happened to fall within Africa. At the same time, in their view, other states such as Burma and North Korea have so far eluded potential ICC investigations, most likely for geopolitical reasons and/or deference to regional interests. Geis and Mundt also state that other commentators have alleged that the prosecutor has limited investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers or as a tool of Western foreign policy (www.newafricanmagazine.com/icc).

It is clear that if you have powerful friends in Europe and America, your actions or activities – which ordinarily should constitute “crimes against humanity” – can never come under the radar of the ICC. This explains why, for instance, brutal and cruel tyrants like Bashar Assad and Abdel Fatah Al Sisi – respectively – of Syria and Egypt cannot be named as candidates for trial at the ICC – even though the former, for example, has so far managed to butcher over one hundred thousand citizens of his country. Again, the thousands of people that were slaughtered during the pro-democracy protests in Yemen and Bahrain under President Ali Abdullah Saleh and King Hamad Ibn Isa Al Khalifa respectively were not enough for the ICC to bring these two friends of the West to justice. Moreover, the numerous atrocities that Israel has committed over the years against the Palestinians can hardly be defined as “crimes against humanity”. Thus, we agree with Professor Ramesh Thakur’s remarks that

a troubling issue is how an initiative of international criminal justice meant to protect vulnerable people from brutal national rulers has managed to be subverted into an instrument of power against vulnerable countries. A court meant to embody and pursue universal justice is in practice reduced to imposing selective justice of the West against the rest (www.newafricanmagazine.com/icc).

It is instructive to remember that in 2013, the International Criminal Court commenced the trials of Uhuru Kenyatta and William Ruto, the incumbent President and Deputy President of Kenya, and this was the first time that serving leaders of any country would be so treated. While Kofi Annan, former U.N. Secretary-General implores us to believe that "...it is the culture of impunity and individuals who are on trial at the ICC, not Africa" (BBC, October 8, 2013, 15.20GMT), we are persuaded by the facts to appreciate the anger of Amina Mohammed, the Kenyan Foreign Minister when she declared: "I could challenge you to tell me in what place on earth a serving President has been brought before any court of justice" (BBC, October 9, 2013, 15.15GMT).

From the above, it is difficult to controvert the views of Nicholas Waddell and Phil Clark who argue that

the fact that the ICC has focused so overwhelmingly on African situations prompts questions about why the gaze of international criminal justice falls in some places and on some people and not on others. The court's focus on Africa, in their view, has stirred African sensitivities about sovereignty and self-determination – not least because of the continent's history of colonization and a pattern of decisions made for Africa by outsiders (www.newafricanmagazine.com/icc).

In this situation, the nexus between the operations of the International Criminal Court and the marginalization or domination of Africa can be easily deciphered. In the words of the African Union,

"the abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on political, social and economic development of member states and their ability to conduct international relations..." (www.newafricanmagazine.com/icc).

The foregoing points have been amplified by Professor Mahmood Mamdani, who observes that

the fact of mutual accommodation between the world's only superpower and an international institution struggling to get its bearings is clear if we take into account the four countries where by 2009 the ICC had launched its investigations: Sudan, Central African Republic, Uganda and Democratic Republic of Congo. All ... are places where the U.S. has no objection to the course charted by the ICC investigations.

Mamdani points out that in Uganda, the ICC has charged only the leadership of the rebel group, the Lord's Resistance Army (LRA) but not that of the pro-US government of Yoweri Museveni. In Sudan, the ICC has charged officials of the government, and in DR Congo, the ICC has remained mum about the links between the armies of Uganda and Rwanda – both pro-U.S. – and the ethnic militias that have been at the heart of the slaughter of civilians. Mamdani then convincingly concludes:

The ICC's attempted accommodation with the powers that be has changed the international face of the Court. Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. Even then, its approach is selective: it targets governments

that are adversaries of the US and ignores US allies, effectively conferring impunity on them (www.newafricanmagazine.com/icc).

It is obvious that Africa has not been treated fairly and respectfully by the hegemonic forces that control the International Criminal Court (ICC). What the African continent is experiencing in this court and most of the so-called international organizations could be described as “structured repression, backed by subtly scienticized mechanisms of manipulation, and expressed in the language of emasculated humanism”, and this “is the worst form of enslavement” (Nwankwo, 1990: ix).

5. Conclusion

In the preceding passages, an attempt has been made to examine the activities of the International Criminal Court (ICC) in a global system overwhelmingly dominated by Northern countries, and how these activities have challenged the dignity and sovereignty of Africa. The Court is one of the structures and institutions established to sustain the international legal order, and like other “global” organizations, it is controlled and manipulated by the dominant actors of that legal system. As Bolaji Akinyemi (1993: 42) has observed, a world order is a legitimization of power over justice, and the elements of the principles and institutions which constitute a world order are usually laid down by the victors, partly to regulate relationship among themselves, but mostly to regulate their relationship with the defeated and others. This, in Professor Akinyemi’s view, is not to imply that victors wait until victory is assured before enunciating what kind of a world order they wish to preside over.

The nature of the operations of the ICC and the attitude of the powerful European and American forces which control it are captured in the Swahili saying that: “Watende wao, wakitenda wenzi wao huwa mwao”, that is, “whatever they do, it is ok! But let others do the same, and they are up in arms!” (Cited in Timamy, 2007: 478). Indeed, from the analysis in this essay, it is difficult to disagree with the observation that

in Africa generally, the ICC and its prosecutors have been extraordinarily selective and partisan. They have chosen cases which they knew would not antagonize the US. They have also clearly avoided cases which would embarrass the governments in whose countries the ICC was physically present and active (www.newafricanmagazine.com/icc).

It should be emphasized that Africa has always backed the International Criminal Court (ICC). But the issue is not about the large number of African states who have signed up to the Rome Statute – although, to her credit, this is an indication of the continent’s enormous support of the idea of an impartial and independent institution which can effectively and fairly prosecute violators of human dignity across the globe. The point is that the ICC tends to suffer prosecutorial inertia whenever crimes are committed by either the powerful countries of Europe and America or their cronies. This undermines the ideals of justice for all victims and sanctions for all violators.

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