



UDUS LAW JOURNAL

This Journal may be cited as
UDUS LAW JOURNAL, Vol. 1, No. 1, 2020

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K. G. Muhammad, PhD
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INTERNATIONAL CRIMINAL COURT AND AFRICA: ANOTHER APARTHEID REGIME IN THE MAKING?¹

Oyesola Animashaun*

Abstract

Most of the African states, not unlike the apartheid era tribal-homelands (Bantustans), were created to be dependent. These Bantustan-like 'sovereign' African states were weakened by colonialism, trans-Atlantic slavery, structural adjusted programmes, human trafficking, globalization, and international organizations like the International Criminal Court (ICC), created through the Rome Statute, 1998. The unsuspecting African leaders subscribed to in large numbers. The article addresses the geopolitical imbalance in the indictment, investigation and prosecution at the ICC and argues that the court's main focus seems to be only on Africans. It also interrogates the irony of the referral and deferral powers of the permanent members of the United Nations Security Council, majority of whom are not party to the Rome Statute. The article examines the flaws in the Rome Statute, the cases instituted and similar cases that were ignored by the ICC prosecutor. The result indicates that the independence of the ICC is compromised because it focused mainly on African states, while ignoring similar violations of the Rome Statute by the 'powerful nations' and their allies. It concludes that African countries need strong national and regional mechanisms to promote transparency in governance, and should be circumspect in adopting treaties without weighing the implications.

Keywords: ICC, apartheid, Bantustans, globalization, Africa, treaties.

1. Introduction

The term "apartheid" literally, apartness or separateness in the Afrikaans and Dutch languages, refers to institutionalized racial segregation and separate development for the different races, whereby laws were selectively applied to favour a certain race against the others.² The major attribute of institutionalized racism is that it distributes

¹ This article was inspired by a chapter contribution to the yet to be published book titled 'Governing Universalism or a Variant of Apartheid Particularism? Global Jurisprudential Apartheid as a 21st Century Question'.

*Kwara State University, Malete, Ilorin, Kwara State, Nigeria.

² Encyclopedia Britannica, 'Apartheid- Social Policy' (2019) <<https://www.Britannica.com/topic/apartheid>> accessed 2 September 2020; Thobejane, T.D. 'History of Apartheid Education and the Problems Of Reconstruction in South Africa' [2013](3)(1) *Sociology Study*, 1-12; NL Clark and WH Worger, *South Africa-The Rise and Fall Of Apartheid* (2nd ed, Routledge 2011) 4; B Magubane, 'An introduction: The Political Context' in B. Mugabane (ed.), *the Road to Democracy in South Africa (1960-1970)* (Vol. 1, Zebra Press, 2004) 2-15; M Nowak 'The First Ten Years After Apartheid: An Overview of the South African Economy' in M Nowak and LA Ricci (eds), *Post-*

power, wealth and privileges unequally on a racial basis especially against the blacks, which includes concerted efforts to obliterate the collective memory of the people through the enforcement of various native policies.³ Discrimination against the blacks predated apartheid era, however, apartheid is the most systematic enunciation of the racial discrimination ideology, which was prevalent in Southern Africa.⁴

The African continent has been inflicted with grave injustices on the basis of colour of the skin in the past, with apartheid as the latest in the long list of legalized injustice. Although apartheid officially ended in 1994, its brutality on the psyche and the scars that it left on all aspects of the lives of the black people is still fresh. In addition, the brutality of colonialism and trans-Atlantic slavery, creates a recurring reference point in African history and its current problems. Similarly, institutions such as International Criminal Court ("ICC"), International Monetary Fund ("IMF"), World Trade Organisation ("WTO") North Atlantic Treaty Organization ("NATO") and others are termed neo-colonial bodies, which fabricate programmes and policies detrimental to Africans.⁵ These institutions were created to shift and maintain the

Apartheid South Africa: The First Ten Years (International Monetary Fund, 2005), 2-4; J.L. Gibson, *Overcoming Apartheid: Can Truth Reconcile A Divided Nation?* (HSRC Press 2004) 31.

Mariotti, M. and Fourie, J. 'The Economics of Apartheid: An Introduction [2014] (29)(2) *Economic History of Developing Regions*; 113-114; H. Giliomee, 'The Growth of Afrikaner Identity' in W. Beinart and S. Dubow (eds), *Segregation and Apartheid in Twentieth-Century South Africa* (Routledge 2013), 189-205; L. Lloyd, (2013). *South Africa's Media 20 Years after Apartheid: A Report to the Center for International Media Assistance*. The Center for International Media Assistance. <<http://www.cima.ned.org/wp-content/uploads/2015/02/final4.pdf>> accessed 18 September 2020; Ndletyana, M. 'Changing Place Names in Post-Apartheid South Africa: Accounting for the Unevenness [2012](38)(1) *Social Dynamics*; 87-103; L. Holborn, 'The Long Shadow of Apartheid: Race in South Africa since 1994' (South African Institute of Race Relations 2010), 163; D. Dymally, 'Truth, Reconciliation and the Apartheid Legal Order' (Juta & Co. Limited 1998), 7-8; Reader's Digest *Illustrated History of South Africa* (Reader's Digest 1994) 367-374.

K. Naidoo, B. Stanwix and D. Yu, 'Reflecting on Racial Discrimination in the Post-Apartheid South African Labour Market' (2014) Development Policy Research Unit, the World Bank Publication <<http://www.dpru.uct.ac.za/sites>

<<http://default/files/imagetool/images/36/Publications/PolicyBriefs/DPRU%20PB%2014-39.pdf>> accessed 18 September 2020; S. Dubow, 'The Elaboration of Segregationist Ideology' in W. Beinart and S. Dubow (eds), *Segregation and Apartheid in Twentieth-Century South Africa* (Routledge, 2013), 145-175; J. Milner-Thornton, 'Absent Without Fathers: Coloured Identity in Zambia' in M. Adhikari (eds), *Burdened by Race: Coloured Identities in Southern Africa* (UCT Press, 2009), 185-204; M. Peters, 'Collaboration, Assimilation, and Contestation: Emerging Constructions of Coloured Identity in Post-Apartheid South Africa' in M. Adhikari (eds), *Burdened by Race: Coloured Identities in Southern Africa* (UCT Press, 2009) 104-133; M. Besten, 'We are the Original Inhabitants of the Land: Khoes-San Identity in Post-Apartheid South Africa' in M. Adhikari (eds), *Burdened by Race: Coloured Identities in Southern Africa* (UCT Press, 2009) 134-155; J. Muzondidya, 'Race, Ethnic Identity and Politics of Positioning: The Making of Coloured Identity in Colonial Zimbabwe, 1890-1980' in M. Adhikari (eds), *Burdened by Race: Coloured Identities in Southern Africa* (UCT Press, 2009), 156-184.

R.H. Steinberg, 'Introduction to Part 7' in R.H. Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Koninklijke Brill NV, 2016), 306-308; M.C. Bassiouni and D. Hansen,

balance of power in favour of the West.⁶ The detrimental manifestation of the programmes created by these “neo-colonial bodies” to the African states include structural adjusted programmes, high debt profile, unfavourable trade terms, selective prosecution, human trafficking and brain drain.⁷

The ICC was conceived as an institution to investigate and prosecute international criminal cases and was widely subscribed to by African states with enthusiasm. The African states were among the earliest to ratify the Rome Statute.⁸ To date, Africa represents the largest regional grouping of countries within the ICC’s Assembly of States Parties to the Rome Statute (“ASP”).⁹ African states’ support for the ICC was predicated on many reasons. First, African political elites opined that it is better for the African states to surrender their nationals who are alleged to have committed international crimes to an international tribunal rather than the jurisdiction of another state. This was probably informed by Libya’s refusal to surrender its nationals to face trial in the United Kingdom (“UK”) following the Lockerbie debacle which pitted Libya against three permanent members of the United Nations Security Council (“UNSC”) and its aftermath.¹⁰ Second, because the people of the continent have been victims of large scale violations of human rights over the centuries, as earlier depicted. The genocide at Rwanda in 1994 serves as an impetus for mass subscription to the Rome Statute, probably in order to prevent the recurrence of such

‘The inevitable Practice of the Office of the Prosecutor’ in R.H. Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Koninklijke Brill NV, 2016) 309-325; Clark, N.J. ‘Peace, Justice and the International Criminal Court: Possibilities and Limitations’ [2011](9)(3) *Journal of International Criminal Justice*, 521-545; S. Odero, ‘The Politics Of International Criminal Justice: The ICC’s Arrest Warrant For Al Bashir And The African Union’s Neo-Colonial Conspirator Thesis’ in C. Murungu and J. Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011), 154-159; M. Mamdani, ‘Darfur, ICC and the New Humanitarian Order- How the ICC’s “Responsibility to Protect” is Being Turned into an Assertion of Neocolonial Domination’ *The Nation*, (New York 10 September 2008) <<https://www.thenation.com/article/new-humanitarian-order/>> accessed 18 September 2020.

⁶ T.V. Warikandwa and S.K. Amoo, ‘African Law in Comparative Law: A Case of Undermining African Jurisprudence and Promoting a New World Order Agenda?’ in A Nhemachena, T.V. Warikandwa and SK Amoo (eds), *Social and Legal Theory in the Age of Decoloniality: Towards an African Jurisprudence in the 21st century* (Langaa Research & Publishing Common Initiative Group, 2018), 299-326.

⁷ S. Odero (n.5) 154-155.

⁸ J. Nyawo, ‘Historical Narratives of Mass Atrocities and Injustice in Africa’ in VO Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012) 125-160; S.M. Monageng ‘Africa and the International Criminal Court: Then and Now’ in G Werle, L Fernandez and M Vormbaum (eds), *Africa and International Criminal Court: International Criminal Justice Series* (Volume 1 TMC Asser Press, 2014) 13-20; T Murithi, ‘Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court’ In G Werle, L Fernandez, and M Vormbaum (eds), *Africa and International Criminal Court International Criminal Justice Series* (Volume 1 TMC Asser Press, 2014), 179-194.

⁹ T. Murithi, (n. 8) 179 -180.

¹⁰ J. Nyawo (n. 8) 37.

an incident.¹¹ Third, the role of the civil societies and the Non-Government Organisations ("NGOs") in arm twisting the governments in subscribing to the Rome Statute cannot be discountenanced.¹² Fourth, the involvement and representation of the African states in the conception and gestation of the Rome Statute was another cogent reason for the mass subscription.¹³

The support that the African states had for ICC, however, nosedived when it was evident that all the cases on trial and the focus of ICC were mainly on African political office holders. The lack of support became an open defiance with the arrest warrant against the then President Al-Bashir of Sudan and the indictment of President Uhuru Kenyatta of Kenya and his deputy.¹⁴ The indictment of only Africans and other leaders from the global south has created a group of scholars who are critical of the international legal regime and its ability for fairness, as well as those who sought to imbue human right with an African fingerprint.¹⁵ It is beyond dispute that apartheid was employed against the African leaders. The outcry against the anomaly resulted in efforts to assuage the grievances of the African leaders by the ICC and other stakeholders such as UNSC, as African referrals were halted after

the background of the issues and contentions highlighted above that this article analyses the relationship between African states and the ICC. It espouses the appropriateness of the indictment of the then President Omar Al-Bashir, as an incumbent head of state and the implication of the conflict between customary international law and the Rome Statute. It also interrogates the irony of the referral and deferral powers of the permanent members of the UNSC, majority of whom, are non-party to the Rome Statute. In addition, the article examines the flaws in the Rome Statute, the cases instituted and similar cases that were ignored by the ICC prosecutor.

2 African States and the Burden of History

The memories of subjugation and subordination of Africans by the White Europeans of the West is still vivid.¹⁶ No "continent has suffered more trauma than Africa in

¹¹ Mutua (n. 8) 41.

¹² Mutua (n. 8) 45- 47.

¹³ See Mutua, 'Introduction: Africa and International Criminal Justice: Issues and Contentions' in Mutua (ed), *Africa and The Future of International Criminal Justice* (Eleven International Publishing 2012), 1-12.

¹⁴ See Mutua, 'Africans and the ICC: Hypocrisy, Impunity and Perversion,' in K.M. Clarke and E. de-Volde (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press, 2017), 47-50.

¹⁵ See Mutua (n.14) 50-51.

¹⁶ See Mutua (n.14) 48; Imoedemhe, O.C. 'Unpacking the Tension between the African Union and the ICC: The Way Forward' [2015] (23) (1) *African Journal of International and Comparative Law*, 1-10.

the past 500 years".¹⁷ The modern African states are illegitimate products of colonialism as the European leading powers arbitrarily carved out African territories amongst themselves at the Berlin Conference of 1884-1885.¹⁸ This is bound to have far reaching effect on the continent, as most of the conflicts in which the continent is enmeshed were a carry-over of this episode and some of these artificial states are patently dysfunctional.¹⁹ The devastating effect of colonialism and trans-Atlantic slave on Africa is topical; ironically international law played a significant role in the colonization and devastation of Africa.²⁰ The plunder of the continent by the Arab slave trade was equally damaging.²¹ Similarly, genocide, such as the Herero genocide and the unchecked brutality (typified by the Belgian King Leopold's II administration mistreatment of the natives in Congo) extermination, forced removals, slavery, racial discrimination, cruel, inhuman or degrading treatment, and more on the African populace was the hallmark of the colonial era.²² Mutua opined that after independence "the cauldron of the cold war and a scandalous international economic order combined to ravage the emerging African states".²³ These traumas made Africa to be initially warm and later ambivalent and sometimes hostile to

¹⁷M.W. Mutua (n.14) 48; Monageng, S.M. (2014). 'Africa and the International Criminal Court: Then and Now', in G. Werle and L. Fernandez and M. Vormbaum (eds), *Africa and International Criminal Court: International Criminal*

Justice series (Volume 1 T.M.C. Asser Press, 2014) 13-20.

¹⁸M.W. Mutua (n.14) 49; P.D. Schmitt, 'France, Africa and the ICC: The Neocolonialist Critique and the Crisis of Institutional Legitimacy', in K.M. Clarke and A.S. Knottnerus and E. de-Volde (Eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press, 2017) 127- 151; J Nyawo (n. 8) 147; K. Shillington, 'History of Africa' (3rd ed. Palgrave Macmillan, 2012), 318; C.H. Ofuho, 'The Legitimacy and Sovereignty Dilemma of African States and Governments: Problems of the Colonial Legacy' in B.T. Bakut and S. Dutt (eds), *Africa at the Millennium* (Palgrave Macmillan, 2000) 103-125.

¹⁹J. Nyawo (n. 8) 49; J.A. Aluede, 'Border Relations in Africa and the Impact on Nation-Building: A Study of Nigeria and her Limitrophe Neighbours since the 1960s' [2017] (6) (1), *African Journal of Governance and Development*, 10-25; R. Schuerch, 'The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders-International Criminal Justice Series (volume 13 T.M.C. Asser Press, 2017) 23; Bayeh, E. 'The Legacy of Colonialism in the Contemporary Africa: A Cause for Intrastate and Interstate Conflicts' [2015](3)(2) *International Journal of Innovative and Applied Research*, 23- 29; Sarkin, J. 'The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South' [2004] (1) (1) *International Journal on Human Rights*, 67-125; Mbazira, C. 'Duty to Prosecute International Crimes under International Law' in C. Murungu and J. Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011), 197.

²⁰J. Nyawo (n. 8). 149; Odero, (n. 5) 155.

²¹M.W. Mutua, (n. 14) 48; Nwoko, 2015 p. 11).

²²J. Nyawo (n. 8) 149-1; S.N. Nwoko, S.N. 'Right to Self-Determination of a People: A TWAIIian Analysis of ICJ Decisions in Cameroon v. Nigeria, East Timor, and Western Sahara Cases' (2015 LLM Thesis). <<https://pdfs.semanticscholar.org/0a72/1c3806c7ca7f6b880dfa062c016ab3e61c6b.pdf>> accessed 20 September 2020.

²³J. Sarkin (n. 19) 67-68).

²³M.W. Mutua (n. 14) 48

international law and institutions like ICC.²⁴ From the postulations above, it seems that the aggravated trauma had left an indelible mark on the psyche of the African leaders which made them to behave like the former colonial masters by oppressing their citizens. This also includes subscribing to international institutions and treaties without reservations and the subsequent bemoaning of their fate.

The dominance of the West in the international economic and political space and their refusal to pay reparation for the damages done to Africans is well documented.²⁵ The West also exhibits double standards and are usually indifferent and wickedly unconcerned whenever the issue of revisiting the wrong done to Africans in the past was mentioned. For instance, Germany that refused to pay reparations to the survivors of the Herero's genocide despite persistent demand, voluntarily offered to pay compensation to the Jews.²⁶ Nhemachena, Warikandwa & Amoo²⁷ lamented that the pleas of the Africans who were dispossessed of their lands were ignored. Issues like these made many African scholars and political leaders to start asking questions as to whether the international legal order, especially, ICC is not the institutionalization of another apartheid regime; and take a second look at the Rome Statute.

3. A Critical Analysis of the Rome Statute

The ICC was established as a permanent independent institution to prosecute individuals who have orchestrated and committed specified crimes, such as genocide, aggression, crimes against humanity and war crimes. The Rome Statute, which entered into force on 1 July 2002, is explicit on the role of the Court in exercising a criminal jurisdiction over perpetrators of these crimes.²⁸ African countries were actively involved in the creation of the ICC and played a crucial role in the Rome conference when the Court's Statute was drafted and adopted.²⁹ The Rome Statute allows accessibility to the ICC in three ways, - firstly, ASP could refer a case to the ICC Prosecutor. Secondly, the UNSC could refer a case to the ICC

²⁴ Mutua (n. 14) 50.

²⁵ Nyawo (n. 8) 149-157.

²⁶ Nhemachena and T.V. Warikandwa and S.K. Amoo 'Identity, Originality and Hybridity in Jurisprudence and Social Theory: An Introduction' in A Nhemachena, TV Warikandwa and SK Amoo (eds), *Social and Legal Theory in the Age of Decoloniality: Towards an African Jurisprudence for the 21st century* (Langaa Research & Publishing Common Initiative Group, 2018) 1-71; J. Nyawo (n. 15); Howard-Hassmann, R. E. 'Reparations for the Slave Trade: Rhetoric, Law, History and Political Realities' [2007] (41)(3) *Canadian Journal of African Studies / Revue Canadienne d'Etudes Africaines*, 427-454; Spitzer, R.M. Holocaust: Should Europe Pay Reparations to Africa? [2002] (35) (4) *Vanderbilt Journal of Transnational Law* 1313-1347.

²⁷ Nhemachena and TV Warikandwa and SK Amoo (n. 26) 4-5.

²⁸ Tamm, B.J. and Pkalya D.R. and Maragia, B. 'The International Criminal Court and Africa: Institutionalizing the Anti-ICC Narrative' [2016] (2) (1-2) *African Journal of International Criminal Justice* 3.

²⁹ Nyawo (n. 8), 36-45; S.M. Monageng (n.17) 14.

Prosecutor; and thirdly, the ICC Prosecutor on its own could commence investigation and prosecution.³⁰

The ICC is mandated to investigate and prosecute the crime of genocide, crimes against humanity, war crimes and the crime of aggression.³¹ However, under the Rome Statute, ICC may only exercise jurisdiction over crimes committed on the territory of a state party, or by a national of a state party. The only exception can be made by the UNSC, if it uses its powers under Chapter VII of the United Nations Charter to refer a situation to the Prosecutor of the ICC. Under Article 13(b) and 16 of the Rome Statute, the UNSC has the powers of referral and deferral of cases and has exercised these powers only on African leaders and in African cases involving Libya and Sudan. This is a contentious issue and an observable flaw.

It is contentious because three of the five permanent members of (United States of America ("US"), Russia and China) the Security Council are not party to the Rome Statute. Actually, USA and China are critical of the ICC.³² It is ironical that these states are part of those who have referral and deferral powers not only on states parties to the Rome Statute but on states that are not parties to the Rome Statute like themselves! Unfortunately, these three veto holding powers would not submit their citizens or allies to the jurisdiction of the same court! Similarly, the US has signed a number of bilateral treaties with many states including the most vociferous defender of ICC on the African continent, Botswana, prohibiting the transfer of any US national to the court.³³ Further, the US has taken another elaborate step to shield her citizens from the ICC's reach, by enacting the American Servicemen's Protection Act ('ASPA, 2002').³⁴ ASPA, 2002, protects the US military, elected and appointed officials' immunity from arrest and trial in any international criminal court to which the US is not a party. It also provides that the US may use force to extricate her citizens from the authority of another state, in order to prevent ICC or any international court from exercising jurisdiction over them.³⁵ Notwithstanding all these elaborate armour, the probability of investigation and trial of citizens and allies of US and China is seriously in doubt, even if they were signatories to the Rome Statute by virtue of their veto vote, military and economic might.³⁶

Another contentious issue is the assumption of universal jurisdiction by some states, especially the European states that have domesticated the Rome Statute. German

³⁰ S.M. Monageng (n. 17) 15-16.

³¹ The Rome Statute, Art 5.

³² J Nyawo (n. 8) 86-87; MW Mutua (n.14) 52; Chuter, D. 'The ICC: A Place for Africans and Africans in Their Place?' in V.O. Nmeihelle (ed), *Africa and the Future of International Criminal Justice*, (Eleven International Publishing 2012) 172, 182.

³³ J Nyawo (n. 8) 45.

³⁴ ASPA, 2002, 22 U.S.C. sec 7421-7432.

³⁵ S. Odero (n.5) 158; Akande, D. 'The Jurisdiction of International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' [2003] (1) (3) *Journal of International Criminal Justice*, 618-650; Faulhaber, L.V. 'American Service Members' Protection Act of 2002' [2003] (40) *Harvard Journal on Legislation*, 537.

³⁶ Cannon B.J. and Pkalya D.R. and Maragia, B. (n.28) 12.

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Crimes in

n could comm. for instance, assume jurisdiction on international crimes committed in
er state and without any connection to German citizens.³⁷ A number of
of genocide, crs of African states have been prosecuted and convicted under this Code.³⁸ This
However, under has opened the floodgate of cases against serving and former public officers in
s committed on any.³⁹ These complaints concerned, inter alia, Donald Rumsfeld (US), Henry
only exception canger (US), Ariel Sharon (Israel), Jiang Zemin (China), Zakir Almatov
the United Nalekistan) and others. All these complaints were dismissed, mostly because the
Article 13(b) anetrators were either not present in Germany or on the basis of immunity enjoyed
le referral of cases le accused.⁴⁰ The assumption of universal jurisdiction under international law by
can cases invol state, I opined is misplaced. One would rather recommend that states party to
aw.
Rome Statute in custody of a person(s) accused of committing international
of (United States on a foreign soil and/ or against foreign nationals, should transfer such an
party to the Residual(s) to ICC rather than embarking on domestic trial. This assumption of
ironical that thersal jurisdiction by certain states on international crimes is prone to abuse,
not only on such includes the proliferation of litigations and the disregard for the principle of
Rome Statute lereign equality of states.⁴¹ The African Union's ('AU') report, also noted that the
ld not submit the principle of universal jurisdiction is not applied uniformly. It varies among countries
re US has signed on how the principle is implemented under their national laws.⁴² There is
ociferous defense the potential for a clash between universal jurisdiction and national
ansfer of any lstitutional manuscripts.
step to shield he third is on the issue of immunity of serving heads of state and senior officials
emen's Protection have not waived their immunity by becoming signatories to the Rome Statute.
ted and appointed court of a sovereign state cannot issue summons to another head of state or
al court to which nign officials vested with immunity to appear before her courts, unless it is
e to extricate herect to the consent of the head of state concerned.⁴³ Customary international law,
ent ICC or any ke conventional law is binding on all states and cannot be derogated from, but
twisthstanding there is disagreement on which human rights are protected under customary
citizens and all international law.⁴⁴ The unanimous acceptability of immunity of heads of sovereign
ries to the Rome

1 by some states. The German Code of Crimes against International (Volkerstrafgesetzbuch – VStGB) 2002 Federal Statute. German: Leßberger, 'On Behalf of Africa': Towards the Regionalization of Universal Jurisdiction? in G. L. Fernandez, & M. Vormbaum (Ed.), *Africa and International Criminal Court: International Criminal Justice Series* (Volume 1 T.M.C. Asser Press 2014) 155-156. Leßberger (n. 38) 155-156. Leßberger (n. 38) 166-167).

e for Africans and African Union The Executive Council Thirteenth Ordinary Session, Report of the Commission on
national Crim... use of the principle of universal jurisdiction by some non-African states as recommended by the
ference of Ministers of Justice/Attorneys General (June 2008, para 79 @17) <https://au.int/sites/default/files/decisions/9634council_en
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over Nationals' <[divine_council_thirteenth_ordinary_session.pdf](#)> accessed 20 September 2020.
 rinal Justice, 6 (2008) para 79.
 03] (40) Har... 2008 para 79.
 Article 98(1) of the Rome Statute; K. Obura, 'Prosecuting International Crimes Committed by the
 s Resistant Army in Uganda' in C. Murungu and J. Biegon (eds), *Prosecuting International
 Crimes in Africa* (Pretoria University Law Press, 2011), 24- 26.

state and senior state officials under customary international law is well documented and incontrovertible.⁴⁵ However, an exception has been created under Article 27 of the Rome Statute which removes immunity based on status or official capacity. Schabas and Gaeta opine that when Article 98(1) and Article 27 of the Rome Statute are read together, it suggests that officials of states parties to the Rome Statute have waived their immunity while non-party states have not abandoned their immunity.⁴⁶ This above position is at variance with the decision of ICC Pre-trial Chamber I in *Prosecutor v. Omar Hassan Ahmad Al Bashir case*, ('*Al Bashir case*') where the court stated erroneously in my belief that the position of the accused as the head of state "has no effect on the court's jurisdiction".⁴⁷ The position of the court seems erroneous in my opinion due to the following reasons. First, it is trite that a treaty does not create an obligation or a right for a third state without its consent.⁴⁸ If the reasoning of the court was correct in *Al Bashir case*, could or would, the UNSC strip the immunity of presidents of states like North Korea or Iran before the ICC and order their arrest? Chinese atrocities and genocide in its Uighur and Tibet provinces are well documented.⁴⁹ China is a state not party to the Rome Statute like Sudan. could the UNSC remove Chinese President's immunity, even if China weren't a member of the UNSC? Second, a situation whereby any official with diplomatic immunity, especially, an incumbent head of state could be picked like a common bum and turned over to the ICC, irrespective of being a party to the Rome Statute is likely to create anarchy and a breakdown of the international relations and order. Third, the ability of the UNSC to remove the immunity of sitting heads of state and senior officials may have an adverse impact on the effective performance of their official functions as well as limiting the conduct of foreign relations. This is likely to exacerbate conflict in international relations and jeopardize peaceful process in the affected country. This argument is similar to the one used by the AU and African members who are opposed to the ICC's indictment of sitting heads of state especially when peace processes are being negotiated.⁵⁰

⁴⁵ W. Schabas, 'State Obligations in Implementing Arrest Warrants' in R.H. Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Koninklijke Brill NV, 2016) 119; K. Obura (n. 44) 24-26; Murungu, C. 'Immunity of State Officials And The Prosecution Of International Crimes' in C. Murungu and J. Biegon (ed), *Prosecuting international crimes in Africa* (Pretoria University Law Press, 2011) 36-42; *Democratic Republic of Congo v Belgium*, 2002, (Arrest warrant of 11 April, 2000), Judgement, [2002] ICJ Report 3 at para 58; *Tachiona v Mugabe*, 169 F Supp. 2d 259, 309 (SDNY 2001).

⁴⁶ W. Schabas (n. 45) 120; Gaeta, P. 'Head of State Immunity as a Bar to Arrest' in R.H. Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Koninklijke Brill NV, 2016) 97.

⁴⁷ *Al Bashir case* para. 41.

⁴⁸ Vienna Convention on the Laws of Treaties 1980 Art 34.

⁴⁹ D. Byler, 'Hi-tech war on its Muslim minority' *The Guardian*, (London, April 11 2019) <<https://www.theguardian.com/news/2019/apr/11/china-hi-tech-war-on-muslim-minority-xinjiang-uighurs-surveillance-face-recognition>> accessed 20 September 2020.

⁵⁰ Imoedemhe, O.C. 'Unpacking the Tension between the African Union and the ICC: The Way Forward' [2015] (23) (1) *African Journal of International and Comparative Law* 74.

is well documented

ICC and Africa: An Ambivalent Relationship

or official capacity was an enthusiastic and a devoted supporter of the ICC.⁵¹ According to the Rome Statute "there was a stampede in Africa to ratify the Rome Statute".⁵² The same political elites, who ratified the Rome Statute in great numbers, subsequently became its ardent critics and threatened to withdraw their membership.⁵³ Why and how did the AU and the African political elites become ICC's most vociferous opponents? This question would be answered in this section.

The ICC has three triggering mechanisms for investigation and institution of cases under the Rome Statute. All the three mechanisms were activated in Africa and on African political leaders. But Danyi opined that ICC is not specifically targeting Africans.⁵⁴ There are four situations which were self-referred by states parties- these were Uganda, Democratic Republic of the Congo, Central African Republic and Mali. The second category was the two situations referred to the ICC Prosecutor by the UNSC, which were Darfur (Sudan) and Libya cases. The last category was investigations opened by the Prosecutor *proprio motu* on his own initiative in Kenya and Cote d'Ivoire.⁵⁵ All the above cases are in Africa and this in part turned African leaders, especially Kofi Annan, into the most passionate supporter of ICC to its major antagonist.⁵⁶ It is perplexing that despite serious complaints from the African leaders, almost all cases under investigation are African cases, moreover, all indicted officials are Africans.⁵⁷ The impression that a casual observer reaches immediately from ICC investigations, arrests and prosecution is that, it is only African political leaders who commit international crimes, however, this is far from the truth. This undue and single-minded focus on African situations made the AU, scholars and African political leaders to attack ICC of targeting African elites for selective judgment and warned that this could complicate reconciliation efforts in Africa.⁵⁸ However, ICC has heads of state

1 Dersso 'The ICC's African Problem: A Spotlight on the Politics and Limits of International

1. Steinberg (supra note 1) 119; *Principles of Justice* (Cambridge University Press, 2017) 62; J. Nyawo (n. 8) 36; SM Monageng (n. 8) 119; T. Murithi (n. 8) 179-180.

...-16; T. Murithi
Mutua (n.14) 49.

2 (Africa) (Pretoria) (n. 8) 204-219; Cannon, B.J. and Pkalya D.R. and Maragia, B. (n. 28) 24.

2, 169 F Supp. 2d 1008 (D. Minn. 2002). 'Is International Criminal Court Targeting Africans? Reflections on the Enforcement of International Criminal Law in Africa' in V.O. Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing 2012) 185.

n R.H. Steinberg, *Justice* (Eleven International Monageng (n.17) 15-16).

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ICC: The W. [2019] (66) *Netherlands International Law Review*, 295.
B.J. and Pkalya D.R. and Maragia, B. (n. 28) 7; Imoedemhe, O.C (n. 14) 74; Clark, N.J.

recently opened in Afghanistan and Palestine in 2020.⁵⁹ Others alleged that the Court is ignoring atrocities committed by the great world powers such as the US, Russia, UK, China and their allies; and that the court is used as an agent of neo-colonialism or apartheid.⁶⁰

The first sign of conflict between the AU and ICC occurred after ICC indicted and issued a warrant for the arrest of the then Sudanese President Omar Hassan Ahmad Al-Bashir, the Libya's case and the indictment of Uhuru Kenyatta and his deputy.⁶¹ The refusal of the UNSC to allow AU to mediate in these conflicts made the ICC to be construed as a neo-colonial court by AU and African politicians.⁶² Some scholars even posited that, when ICC -a neocolonial institution- failed in the bid to oust Ghaddafi with his indictment before it, the West resorted to the use of NATO, another neocolonial institution to achieve their aim.⁶³ The forceful removal of Ghaddafi has created untold hardship and the breakdown of law and order in Libya. Libya is worse off after NATO's western induced "liberation" than under Ghaddafi's "dictatorial rule".⁶⁴ The stance of the African leaders and the AU on ICC undue focus on African situations has some merits and certain measures were put in place to assuage the grievance of the AU.⁶⁵ The appointment of Bensouda as the Chief Prosecutor was a move calculated to appease the African members of the ASP.⁶⁶ The court was compelled to try Uhuru Kenyatta through video link, and this "trial by skype" was mocked by critics.⁶⁷

Although the undue focus of ICC on African political leaders seems to amount to apartheid and double standards, but the conduct of the African political leaders is also not beyond reproach.⁶⁸ The African members' party to the Rome Statute are partially responsible for the harm they claim the ICC is inflicting on them at the behest of Western imperialists, because of their failure to create credible and independent judiciaries that could adjudicate gross violations of human rights and

⁵⁹ Human Rights Watch 'Q&A: The International Criminal Court and the United States' (2 September 2020) <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states> accessed 23 September 2020.

⁶⁰ A Nhemachena and TV Warikandwa and SK Amoo (n. 26) 2; N. Dyani (n. 54) 185; African Union 2013, 2.

⁶¹ M.W. Mutua (n. 14) 53-54.

⁶² J Nyawo (n. 8) 126-127; Chuter, D. 'The ICC: A Place for Africans and Africans in their Place?' in V.O. Nmeihelle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012) 179-180).

⁶³ Banyera, E. 'Colonialism, the Theft of History and the Quest for Justice for Africa' in A Nhemachena, and T.V. Warikandwa and S.K Amoo (eds), *Social and Legal Theory in the Age of Decoloniality: Towards an African Jurisprudence in the 21st Century* (Langaa Research & Publishing Common Initiative Group, 2018) 129.

⁶⁴ Banyera, E. (n. 63) 129.

⁶⁵ S.Odero (n. 5) 155-158.

⁶⁶ T. Murithi (n. 8) 186.

⁶⁷ M.W. Mutua (n. 14) 55.

⁶⁸ Cannon, B.J and Pkalya D.R. and Maragia, B. (n. 28) 13-15.

Countries diminish the relevance of an external court like the ICC.⁶⁹ Second, they lacked the usual vigilance and the discipline to properly scrutinize international treaties before signing; and third, they were signing treaties or international agreements against their national interests.⁷⁰ The African heads of party to the Rome Statute were interested in using the ICC as a tool to deal with political opponents, and were astonished when the ICC demanded to investigate their own crimes.⁷¹ It is evident that these African leaders did not find it very foul when marginal political leaders and 'rebellious' elements, like the mad leaders and members of the Uganda's Lord's Resistance Army and others of their ilk, were being indicted and prosecuted by the same ICC.⁷² Similarly, African leaders in the continent bit double standards, not unlike the imperialist west that they are criticizing. For instance, the arrest of pro-Tutsi Rwandan Patriotic Front's Rose Kabuye for alleged involvement in the genocide was condemned but the trial and conviction of pro-Hutu, Jean-Baptiste Ndayishimiye was applauded by the same Rwandan authority.⁷³ In the same way, Judge Tadić, a judge at the ICC, disagree that ICC is being used to haunt African leaders. He based his thesis on two premises. First, he catalogued the positions held by African nationals and concluded that due to the sensitive positions held by these Africans in the ICC, the statement that Africans are targeted is ridiculous.⁷⁴ The fact that Africans are holding sensitive position in ICC has little relationship with the fact that African leaders are special target, after all, apartheid had a large number of black leaders on the police force as well as black collaborators and informers.⁷⁵ While I am not suggesting that the Africans on ICC payroll are 'imperialist collaborators', but the mere fact that they are Africans has no relationship with working for or against African leaders' interest. Second, he stated, citing Article 27 of the Rome Statute that the proceedings before the ICC are fully in conformity with the Rome Statute, and including the cases against sitting heads of state.⁷⁶ Similarly, Trendafilova contended that the ASP to the Rome Statute have waived the immunities of their senior

...on, B.J and Pkalya D.R. and Maragia, B. (n. 28) 15.

Maragias, B.J. and Pkalya D.R. and Maragia, B. (n. 28) 15.

Baroncelli 'The Fight against Impunity in the Democratic Republic of Congo between Justice and Reconciliation. (2014) (248) (4)ISPI<https://www.ispi.it/sites/default/files/publicazioni/analysis_248_2014.pdf> accessed 22 September 2020.

№ 135 (n. 8) 135.

Heinrich, F (n. 38). 155-156.

Marageng, S.M. (n. 17) 19; Batohi, S. 'Africa and the International Criminal Court: A Prosecutor's Perspective' in G. Werle, L. and Fernandez and M. Vormbaum (eds), *Africa and International Criminal Court: International Criminal Justice Series* (Volume 1 T.M.C Asser Press, 2014), 49-56.

3. August 2016) <[https://www.nytimes.com/2016/08/14/world/africa/south-africa-apartheid-](https://www.nytimes.com/2016/08/14/world/africa/south-africa-apartheid-police)

killings.html> accessed 20 September 2020; H. Tyler, 'South Africa's Black Police: Focus of Civilian Hostility' *The Christian Science Monitor* (Boston 9 April 1985)

www.csmonitor.com/1985/0409/oblac.html> accessed 22 September 2020.

Monageng (n. 17) 17.

officials by virtue of Article 27(2) of the Rome Statute.⁷⁷ He stated that the immunity of Al-Bashir was waived because the Sudanese President was sought by the Court as a result of a UNSC referral in the exercise of its powers under Chapter VII of the Charter of the United Nations. Secondly, that the UNSC has 'implicitly lifted the immunities accruing to President Al-Bashir'.⁷⁸ The question to ask at this juncture is how can the UNSC, majority of which, as permanent members, are not states party to the Rome Statute, lift the immunity of the head of a sovereign state, who is not a state party like themselves? Why did the UNSC not issue a warrant to arrest and 'lift the immunity' of the North Korean President for various acts of aggression and gross violation of human rights committed by him? North Korea for instance is known to have violated many bilateral and multilateral treaties.⁷⁹

It is ironic that the West that launched the manhunt against the ex-Sudanese President, Al-Bashir as a sitting president, failed to apologize or pay compensation when the US on August 20, 1998 launched an airstrike against the Al-Shiffa pharmaceutical plant in Sudan. The US claimed that it was a chemical weapons facility operated by the extremists, which was subsequently discovered to be false.⁸⁰ The plant was actually a United Nations sanctioned producer of pharmaceutical products with no link or connection terrorism or extremists.⁸¹ The Sudanese President's calls for the international prosecution of the US officials responsible for the airstrike for war crime, as a result of killing civilians in a legitimate medical facility went unheeded. Had the Statute been in existence in 1998, under Article 12 of the Rome Statute, would the UNSC attempt to charge US citizens with war crimes or crimes against humanity committed in the territory of Sudan and withdraw the immunity of the US President, even if it was not a member of UNSC? The equality of sovereign state under international law is thus nothing but a mirage, with the strong lording issues over the weak.⁸² The unequal and unfavourable treatment

⁷⁷Trendafilova, E. 'Africa and the International Criminal Court: A Judge's Perspective.' in G. Werle and L. Fernandez and M. Vormbaum (eds.), *Africa and International Criminal Court: International Criminal Justice Series* (Volume 1 T.M.C. Asser Press) 21-32.

⁷⁸Trendafilova, E. (n. 75) 30.

⁷⁹ Cho, I.H. 'Aligning Autonomy and Alliance: Variation in South Korea's Policy towards North Korea and the Moon Jae-In Presidency' [2019] (1)(1) *Journal of Peace and War Studies*, 65-88; Baum A.C. (2018). South Korean efforts to counter North Korean aggression.[2018] (1) (1) *United States Air Force Centre for Strategic Deterrence Service Trinity Site Papers Publication* <https://www.airuniversity.af.edu/Portals/10/CSDS/assets/trinity_site_paper11.pdf> accessed 22 September 2020; Klinger, B. (2010). Another feeble response to North Korean aggression. The Heritage Foundation' <<https://www.heritage.org/asia/report/another-feeble-response-north-korean-aggression>> accessed 22 September 2020.

⁸⁰ L. Marc, 'Look at the Place!' The New York Times (New York, 20 October 20 2005) <<https://www.nytimes.com/2005/10/20/world/africa/look-at-the-place-sudan-says-say-sorry-but-us-wont.html?>> accessed 22 September 2020.

⁸¹Scharf, M.P. 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position' [2011] (64)(1) *Law and Contemporary Problems*, 67-118.

⁸² J.L. Dunoff, 'Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations' in J.E. Nijman and W.G. Wouter G. Werner (eds), *Netherlands Yearbook of*

immunity granted on African political leaders made the political leaders and scholars to question the fairness of international law, order and institutions.

5. ICC and Africa –the Validation of Another Apartheid Regime

There is no doubt that Africa has a long history of civil conflicts and egregious human rights abuses.⁸³ In addition, the human rights abuse in the Sudan (Darfur) and some African states are inexcusable, but, Africa did not have the monopoly of such atrocities. Why is it convenient to ignore international crimes and atrocities committed in Iraq, Yemen, Palestine-Israel, Mexico, Sri Lanka, Myanmar, and other sovereign states, until after the reaction of the African leaders? As earlier stated, the crimes committed by the big powers, for instance Russia, US, UK, France and China are usually swept under the carpet. It took the vehement protest from Africa before investigations into atrocities committed elsewhere commenced. In addition, it was in Africa that a warrant was issued by ICC against a sitting head of state. I posit that it would have been better to freeze the assets and impose sanctions on states not party to the Rome Statute, whose leaders are customarily entitled to immunity but are alleged to have committed international crimes. This is likely to bring pressure on such regimes and the political leaders are likely to lose their immunity by loss of the privilege that made them eligible to immunity, as in the case of the embattled ex-Sudanese President Al-Bashir due to a coup d'état. The said Al-Bashir has been ousted in a coup d'état and currently facing criminal charges in Sudan though not related to the ICC's charges.⁸⁴

Regrettably, like the "independent native states" or the "independent African states" created under apartheid, many African states and their leaders are puppets of the neo-colonial interests they are criticizing.⁸⁵ Most African states are economically weak and dependent, (like the "African native states" which depended on apartheid South Africa then), on the receipt of largesse tagged "aids" from the imperial West, Russia or China. The office of ICC Prosecutor did not even deny that it focused exclusively on Africa, but its denial is that the focus was not appropriate.⁸⁶ The arms used to foment trouble in Africa are not manufactured in Africa, but in the imperial West (US and its Western European allies) and the East (Russia, China and their allies). Is it not possible for the ICC to *proprio motu* go after those who violate international arms embargo and the proliferation of deadly weapons?

⁸³ See Mutua (n.14) 102).
⁸⁴ See International Law 2012-Legal Equality and the International Rule of Law: Essays in Honour of P. H. T. M. C. Asser Press, 2013) 99-127; J Paulsson, Denial of Justice in International Law (Cambridge University Press 2010) 15-37.

⁸⁵ See Mutua (n.14) 102).
⁸⁶ 2005, P. H. T. M. C. Asser Press, 2013) 99-127; J Paulsson, Denial of Justice in International Law (Cambridge University Press 2010) 15-37.

2005, P. H. T. M. C. Asser Press, 2013) 99-127; J Paulsson, Denial of Justice in International Law (Cambridge University Press 2010) 15-37.

2005, P. H. T. M. C. Asser Press, 2013) 99-127; J Paulsson, Denial of Justice in International Law (Cambridge University Press 2010) 15-37.

weapons treaty in facilitating genocide and gross abuse of human rights?⁸⁷ Although the issue of arms trade may be tangentially related to the functions of the office of ICC Prosecutor, she should seize the initiative and deal with individual's culpability within the scope of the Rome Statute, while the Arms Trade Treaty deals with state's culpability. The "independent African reserves" created under apartheid regime were designated as homeland to specific tribes, similarly many African states are divided into English, French, Portuguese, Spanish, and Arabic turfs. The leaders and citizens unwittingly view themselves as Anglophone, Francophone, Lusophone and Arabs rather than Africans. This to a large extent allows others to treat these African leaders with impunity.

Lastly, the reaction of the African leaders and scholars may not be unconnected with their history and the way apartheid crept slowly into Southern Africa, until it became a way of life. The dictum of Zulu King Cetshwayo is apt here "First the trader, then missionary and then the red soldiers.....It is as if an assegai has been thrust into our belly".⁸⁸ African leaders must cry out to prevent the thrusting of another assegai into their belly, through another form of apartheid! However the author opined that the power of the west is waning economically thus, a new master-China- is emerging.

6. The Way Forward for Africa

It is incontrovertible that there are many trouble spots in Africa which require interventions. It is also incontestable that Africa is not the only trouble spot in the world. The ancient and recent oppressive history of Africans may not be unconnected to their sensitivity to issue of separate treatment under the law. In order for Africa to combat being victim of apartheid there is need to, first, create credible, independent and viable judiciaries in the respective jurisdiction that could adjudicate gross violations of human rights and diminish the relevance of international courts like the ICC. Second, African political elites should be wary of just signing any and all treaties without adequate consideration of the implication, as other serious states do. Third, there is a need to strengthen the regional and AU judicial mechanisms with the aim of creating courts at regional and continental levels to take care of issues of gross violation of human rights. The unprecedented move to establish the African Criminal Court was not unconnected with the objection of African leaders to the ICC's exclusive focus on Africans and the threat of exercise of universal jurisdiction by third parties against African political leaders.⁸⁹ It should be ensured that these regional and continental courts revive the indigenous judicial systems

⁸⁷S. Kendall and C. da-Silva 'Beyond the ICC: State Responsibility for Arms Trade in Africa' in K.M. Clarke and A.S. Kottnerus and E. de-Volde (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press, 2017) 407-436; C.C.A. Taku (n. 83) 349.

⁸⁸G Nattrass, *A Short History of South Africa* (Jonathan Ball Publishers, 2017) 113.

⁸⁹Manirakiza, P. 'The Case of An African Criminal Court to Prosecute International Crimes Committed in Africa' in V.O. Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, 2012) 375-404.

rights?⁸⁷ Although at promoting justice and peace.⁹⁰ This idea is laudable but with a caveat. s of the office can countries must be willing to pay the requisite contributions to make these dual's culpability viable and must be willing to abide by the courts' decisions. It must be deals with stalled that the refusal of Zimbabwe to abide by the decision of the regional aid regime was in *Mike Campbell (Pvt.) Ltd and Others v Republic of Zimbabwe*,⁹¹ led to the states aredivisary?) demise of the Southern African Development Community Tribunal ders and citizens (SADCT). In addition, AU must address the issue of sit-tight executives and lusophone African Presidents who have stayed in office for longer than ten years, at these African as Kagame of Rwanda and Museveni of Uganda. AU and the African leaders be accountable to its citizens with regards to operating under the rule of law. disconnected with referral and deferral powers of the UNSC should be whittled down and the , until it became Statute should be amended to exclude states not party to it for having rights the trader, the liabilities under the statute. There is also need to give Africa a permanent seat a thrust into a veto power in the UNSC in the light of its perpetual fear of apartheid based on her assegai in past and recent traumatic history.

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Conclusion

This article shows that Africa has probably for the past four decades experienced which require national, regional and continental mechanisms for dealing with gross human rights ble spot in the world in order to make institutions like ICC superfluous.⁹² Although the importance may not be emphasized. However, ICC must be fair and be seen to be fair by applying the e law. In order to emphasize. However, ICC must be fair and be seen to be fair by applying the reate credibility of law equally to other constituents of the global community in order to allay uld adjudicate fear of apartheid alleged against it by African leaders, scholars the AU and other ational court used observers.

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(n. 19) 197; Omorogbe, E.Y. (n. 57) 287-311.