

Chapter 7

The International Criminal Court and Its Targeting of African Leaders

A Case of Legitimising Another Global Apartheid Regime?

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INTRODUCTION

Most African states have been weakened by colonialism, apartheid, trans-Atlantic slavery, Arab slave trade, structural adjustment programmes and human trafficking. Some of these African states are further weakened by double standards perpetrated by international organisations like the International Criminal Court (ICC). This is usually perpetrated through the Rome Statute 1998, which the unsuspecting African leaders subscribed to in large numbers. The chapter addresses the geopolitical imbalance in the indictment, investigation and prosecution at the ICC. The authors argue that the ICC's main focus seems to be only on Africans and they also submit that the indictment of a serving African head of state whose country is not a party to the Rome Statute, contrary to customary international law, is both unfair and unlawful. It also interrogates the contentions in 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 chapter further examines the flaws in the Rome Statute, the cases instituted and similar cases that were ignored by the ICC prosecutor which suggests that there may be some justification for the allegation of global apartheid levied against the body by some authors, politicians and the African Union (AU). There are also indications 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" such as the United States of America (US), Russia and China and their allies. The chapter 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. Furthermore, the ICC must reinvent itself to escape the accusation of global apartheid due to its near-exclusive focus on Africans.

The term “global apartheid” simply refers to minority rule in international decision-making (Köhler 1995, 404). The term is derived from apartheid, the system which was officially used to rule South Africa from 1948 till 1994. Global apartheid describes the political and socio-economic disparities that exist between the rich countries of the Global North and the poor countries of the global South, caused by the deliberate policy of the Global North (Besteman 2019, 26–27; Adebajo 2009, 3). Global apartheid is therefore defined as “a structure of world society . . . a structure of extreme inequality in cultural, racial, political, economic and legal terms, as is South African apartheid” (Köhler 1995, 404). According to Mazrui (2007, 96, 98), global apartheid is driven by “pan-Europeanism” and Western-controlled transnational capitalism, two processes that have intensified since the end of the Cold War. Global apartheid is grounded in Global North–South relationship which is defined to be a political, economic and cultural system in which the Global North overwhelmingly controls power and material resources; global apartheid also comprises of Global North dominance and Global South subordination, which is daily reenacted across a broad array of institutions and social settings (Ansley 1997, 592).

Nour and Connell (2012, 13) argued that Global South serves as another metaphor for underdevelopment and it refers broadly to the regions of Latin America, most of Asia, Africa and Oceania (Nour and Connell 2012, 12–13). In the Global North–South configuration, it is not the geographical location that matters but the level of development and economic system adopted by each country (Müller 2018, 2; Nour and Connell 2012, 12–14). The Global North/South and Global East/West concepts are controversial and subject to criticism because of its inexactitude (Müller 2018, 2–3; Berger 1997, 260–261). In this chapter, Global North refers to North America (except Mexico), Western Europe, Israel, Australia, New Zealand, Russia and East Asia. The Global North is further sub-classified into the West (comprising United States, Canada, and Western Europe) and the East (comprising Russia and China). The other countries not included in the list above are classified as Global South. Thus, all countries on the African continent, which is of special concern in this chapter, are in the Global South.

Mutua (2017, 48) maintained that the African continent was inflicted with grave injustices and trauma such as colonialism, trans-Atlantic slavery and apartheid. All these unpleasant events as well as the cauldron of the cold war and the scandalous international order combined to ravage the emergent African states at and after independence from their erstwhile colonial masters (Mutua 2017, 48). Most African states attained independence between 1950 and 1970 and joined the United Nations (UN) afterwards, however, before

the arrival of the newly independent Africa states, the rules of the UN had already been set by the original signatories to the UN charter (Birmingham 1995, 15; Adebajo 2009, 6; the UN Department of Public Information 2008, 5). These rules were meant to favour the Global North and these inequalities were deeply embedded in later international institutions (Adebajo 2009, 3–15). For instance, the official languages of the UN were Chinese, English, French, Russian and Spanish; and Arabic was later added later by the General Assembly. UN adopts no indigenous African language for conducting its business. Further, Alexander (1996, 40–46) and Huntington (2011, 81) enumerated some important mainstays of global apartheid employed by the Global North to include controlling powers at International Monetary Fund (IMF), World Bank and World Trade Organisation (WTO). Alexander (1996, 46) and Huntington (2011, 81) stated that global apartheid is perfected by the Global North through the following: the introduction and protection of some Western currencies – “hard currency” through the Bank of International Settlement, the use of aid and investment to control the Global South and support for military intervention in countries which defy Western dominance. Institutions such as the ICC, IMF, WTO, North Atlantic Treaty Organisation (NATO) and others are termed neo-colonial bodies because they are used to make Global South amenable to domination by the more affluent states from the Global North (Chipaike and Matarutse 2018, 2). These international institutions were created to shift and maintain the balance of power in favour of the West (Warikandwa and Amoo 2018, 301).

According to Mutasa (2005, 1), global apartheid is “hidden in global economic processes, political institutions and cultural assumptions,” which fabricate programmes and policies detrimental to Africans (Steinberg 2016, 306; Bassiouni and Hansen 2016, 315, 318; Clarke 2016, 331; Odera 2011, 154–155; Mamdani 2008). The detrimental manifestation of the some of the programmes created by these international organisations to the African states include economic policies known as structural adjusted programmes, which led African countries that adopted it to higher debt profile, brain drain and unfavourable trade terms. Other unfavourable manifestation of some of these international organisations’ programmes are selective prosecution and human trafficking (Odera 2011, 154–155).

Dersso (2017, 62–64, 72) and Seymour (2017, 107–108) argue that the ICC is one of the international organisations fostering global apartheid on the Global South. The ICC was conceived as an institution to investigate and prosecute international criminal cases and was widely embraced by Africans states with enthusiasm initially (Mutua 2017, 52; Seymour 2017, 107; Nyawo 2017, 36; Monageng 2014, 14–16; Murithi 2014, 179–180). African states were positively disposed towards ICC and embraced the court with enthusiasm initially (Mutua 2017, 52; Seymour 2017, 107; Nyawo 2017, 36;

Monageng 2014, 14–16; Murithi 2014, 179–180). African states' initial support for the ICC was based on many reasons. First, Nyawo (2017, 38) opined that the Lockerbie bombing case which pitted the West against Libya would not have occurred if there were a court like ICC. He reasoned that it would have been easier for the erstwhile Libyan head of state, Muammar Gadhafi to send the Libyan nationals accused of being involved in the Lockerbie's bombing to an ICC than the jurisdiction of another sovereign state. The insistence of the US and her allies that Libya, transfer her nationals, who were alleged to have committed international crimes to the jurisdiction of the Western courts was seen as a form of global apartheid (Nyawo 2017, 37). Further, the United States (US), United Kingdom (UK) and France rejected Libya's willingness to invite international observers to the trial of the suspects in the Lockerbie's bombing case (Nyawo 2017, 37). Thereafter, the United Nations Security Council (UNSC) imposed a crippling economic sanction on Libya (at the behest of the US and the UK) despite a subsisting application at the International Court of Justice (*Libya Arab Jamahiriya v UK, Order*, provisional measures, ICJ GL No 88, [1992] ICJ Rep 3, ICGJ 75 (ICJ 1992), 14th April 1992). The authors submit that this action was a manifestation of global apartheid, whereby UK and the US use their political and economic clout to control Libya, a sovereign state from the Global South. It is ironical that the West that is enamoured with democracy and the rule of law refused to abide with the dispute resolution mechanism outlined under international law for such cases (article 8, paragraph 2, Montreal Convention). UK and the US insistence that Libya extradite her citizen to either the US or UK when there was no extradition treaty between these countries and Libya was oppressive to the latter (Zubel 1999, 263–267). The fallout from the Lockerbie's case made the Ghanaian representative at the UN, George Lamptey to argue that if there was an international tribunal like the ICC, the Lockerbie debacle which pitted Libya against the West would not have occurred (Nyawo 2017, 38). Thus, the bid to avoid this form of global apartheid by powerful countries from the Global North, the African countries probably felt that the constitution of the ICC would be the solution.

African states attributed the international indifference to the Rwandan genocide in 1994 to global apartheid. Scholars such as Melvern and Williams (2004, 12) and Goldstone (2002, 78) observed that the response of the international community to similar incidents in the Balkans and other areas differs from the Rwandan episode. The interest of the Western countries such as the US, UK and France in Rwanda was initially limited to the evacuation of their nationals; and the indifference of the East too worsened the status quo (Berdal 2005, 118–130; Melvern 2009; Hintjens 1999, 273–274). Thus, Africa states submit that the creation of the ICC would curb the repetition of the Rwandan genocidal episode, and serves as an impetus for mass subscription to the

Rome Statute by these states (Nyawo 2017, 41; Mbizvo 2016, 41). The involvement and participation of the African states in the development of the Rome Statute was another cogent reason for the mass subscription to the Rome Statute (Mbizvo 2016, 41; Nmehielle 2012, 5).

Nyawo (2017, 35) submits that African states were active participants in the formation and drafting of the Rome Statute, in contrast to the other international organisations where the rules had been set before their entry as members of the organisation by the original signatories. The fact that African states were instrumental to the setting of the rules in Rome Statute accounts for the mass appeal of the ICC to African states. Further, the initial support that the African states had for ICC, however, plunged when it was evident that all the cases on trial by the ICC involved only Africans (Dersso 2017, 62–64, 72; Seymour 2017, 107–108). Thus, this selective indictment and prosecution of only African was resented by African political leaders and regarded as global apartheid; moreover, the lack of support by African leaders became an open defiance with the arrest warrant issued against the then president of Sudan Al-Bashir and the indictment of President Uhuru Kenyatta of Kenya and his deputy (Mutua 2017, 49). The indictment and trial of only Africans from the Global South by the ICC, and such other discrimination by other international bodies is termed global apartheid (Nhemachena et al. 2018, 10).

A growing body of Third World Approach to International Law (TWAIL) scholars, like Anghie and Chimni (2003) and Mamdani (2008) have led evidence on how international law and international order was used and continue to be used to justify the suppression of the third world peoples (Mutua 2017, 49; Nwoko 2015, 3–5; Odero 2011, 155; Mamdani 2008). Mamdani (2008, 2) affirmed that “the language of the law is often subverted by powerful states with the effect of establishing a new humanitarian order in which the principle of state sovereignty obtains in the larger parts of the world but is suspended in many countries in Africa” (Odero 2011, 155). Taku (2016, 339, 343–347) submits that it seems as if only African political leaders and African problems were targeted by ICC, which gave rise to an outcry of global apartheid. Mills and Bloomfield (2018, 125–127), argued that the outcry against this specific targeting of African situations resulted in efforts to appease the African leaders by the ICC and other stakeholders such as UNSC, as all referrals were halted after the row.

It is against the background of the issues and contentions highlighted above that this chapter analyses the relationship between Africa states and the ICC. The chapter examines the indictment of the ex-Sudanese President Omar Al-Bashir by ICC, as an incumbent head of state; and the implication of the conflict between customary international law and the Rome Statute. It also interrogates the referral and deferral powers of the permanent members

of the UNSC, majority of whom, are not party to the Rome Statute. Besides, the chapter examines the flaws in the Rome Statute, the cases instituted and similar cases that were ignored by the ICC prosecutor, which gave rise to outcry of global apartheid by African politicians and some scholars. Seymour (2017, 108), stated that till date only Africans have been indicted and tried by ICC. This inappropriate focus on African problems in the exercise prosecutorial discretion by ICC, while overlooking similar situations in other continents gave rise to allegations of global apartheid (Seymour 2017, 117; Taku 2016, 338).

PHASES IN AFRICAN STATES' RELATIONSHIP WITH THE GLOBAL COMMUNITY

The reaction of African leaders to the exclusive indictment and prosecution of Africans by ICC could not be separated from African history, as the subjugation and subordination of Africans by the West is still vivid in people's memory (Mutua 2017, 48; Imoedemhe 2015, 74). No "continent has suffered more trauma than Africa in the past 500 years" (Mutua 2017, 48; Monageng 2014, 13). The devastating effect of colonialism, trans-Atlantic slave trade and Arab slave trade on Africa is topical; ironically, international law played a significant role in the colonisation and subjugation of Africa (Mutua 2017, 48; Nwoko 2015, 11; Nyawo 2012, 149; Odero 2011, 155). Similarly, genocide, such as the Herero's genocide and brutality, and the colonial Belgium's mistreatment of the natives in Congo were not uncommon. Others include apartheid, forced removals, racial discrimination and other inhuman or degrading treatment on the African populace (Nyawo 2012, 149–159; Sarkin 2004, 67–68). These painful experiences are bound to have a far-reaching effect on the continent of Africa as most of the conflicts in which the continent was or is currently enmeshed in, was a carry-over of this episode.

Nyawo (2012, 149–157) argued that the double standard and selective application of the law to Africans is apparent because the reaction of the perpetrators to these traumatic experiences in Africa and similar harrowing experience elsewhere differ (Nyawo 2012, 149–157). The West is usually indifferent and unconcerned whenever the issue of revisiting the wrong done to Africans in the past was mentioned. For instance, Germany refused to pay reparations to the survivors of the Herero's genocide despite persistent demand, but voluntarily offered to pay compensation to the Jews for the holocaust (Nhemachena et al. 2018, 2; Nyawo 2012, 155; Howard-Hassmann 2007, 428–420; Sarkin 2004, 75; Spitzer 2002, 1319).

In addition, most modern African states are products of colonialism where the major European powers negotiated and formalise claims to territories in

Africa at the Berlin Conference of 1884–1885 and international law was used to freeze the territory under the principle of *Uti possidetis juris* (a principle of international law which provides that newly formed sovereign states should retain the internal borders) (Mutua 2017, 49; Schmitt 2017, 128; Nyawo 2012, 147; Shillington 2012, 318; Ofuho 2000). Some of these African states are patently dysfunctional (Mutua 2017, 49; Aluede 2017, 17; Schuerch 2017, 23; Bayeh 2015; Sarkin 2004, 68; Mbazira 2011, 197). The issue of global apartheid mentioned above are further complicated by the dominance of the West in the international economic and political arena. Hence, it is evident that the international legal order and institutions are manipulated against Africans (Harrison 2002, 52–54).

African political leaders who were initially warm, later became ambivalent and eventually hostile to ICC, when they observed that all those indicted and tried before the court were all Africans (Mutua 2017, 50). This gave the erroneous impression to any reasonable observer that the crimes that fall under the jurisdiction of ICC were committed only on the African continent. In the light of the above, it could be questioned whether the ICC is not the legitimisation of a subtle form of global apartheid?

THE ROME STATUTE: LEGAL AND MORAL FLAWS

The Rome Statute, which entered into force on 1 July 2002, and it provides for the role of the ICC in exercising criminal jurisdiction over perpetrators of specified crimes, such as genocide, aggression, crimes against humanity and war crimes (articles 5–8 bis of the UN General Assembly, Rome Statute of the ICC (last amended 2010, July 17, 1998; Brendon et al. 2016, 6).

African countries were actively involved in the establishment of the ICC and played a crucial role at the Rome conference when the ICC's Statute was drafted and adopted (Nyawo 2017, 36–45; Monageng 2014, 14). The Rome Statute allows accessibility to the ICC in three ways, that is, referral by states party to the Rome Statute, by the prosecutor or by the UNSC, and all these three mechanisms of accessing the ICC have been used on Africans only (Monageng 2014, 15–16). This selective investigation, indictment and trial of only Africans by the ICC seem like a form of global apartheid because similar violations elsewhere were ignored by the ICC.

Further, the ICC's mandate to investigate and prosecute under the Rome Statute may only be exercised over crimes committed on the territory of a state party to the Rome Statute (article 5 of the Rome Statute). The only exception can be made by the UNSC, if it uses its powers under Chapter VII of the UN Charter to refer a situation to the prosecutor of the ICC. Under articles 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 such as those of Libya and Sudan. This is a contentious issue. Besides, the referral of cases from the African continent only, is a form of global apartheid because similar infractions by some permanent members of UNSC and their allies are not referred to the ICC. In the same vein, it is important to reiterate that three out of the five (the US, Russia and China) permanent members of the UNSC are not party to the Rome Statute and not subject to the rule they are enforcing.

Ironically, the US, Russia and China are permanent members of the UNSC, 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 themselves or their allies to the jurisdiction of the ICC. Similarly, the US has signed several bilateral treaties with many states including a great supporter of the ICC on the African continent, Botswana, prohibiting the transfer of any US nationals to the court (Nyawo 2017, 45). The US has taken another step to shield her citizens from the ICC's reach, by enacting the American Service-Member Protection Act "ASPA 2002" 22 USC Public Law 107-206, August 2, 2002, as amended through P.L. 110-181). Sections 2007-2008 of the ASPA 2002 protects the US military, elected and appointed officials from arrest and trial in any ICC to which the US is not a party. It also provides that the US may use force to free her citizens from the authority of another state, to prevent ICC or any international court from exercising jurisdiction over them (Section 2008 of ASPA 2002; Odero 2011, 158; Akande 2003, 618-650; Faulhaber 2003, 537). Faulhaber (2003, 536) affirmed that the American Service Members Protection Act "was designed to prevent United States participation in the ICC and to discourage other members of the international community from participating in the Court or assisting it in any way."

Notwithstanding all these, the probability of investigating 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 (Cannon et al. 2016, 12). The United States thus shielded itself and her allies from ICC's reach but was part of those enforcing the Rome statute especially on the Africans.

The issue on the immunity of serving heads of state and senior officials who have not waived their immunity by becoming signatories to the Rome Statute is also contentious. It is trite that the court of a sovereign state cannot issue summons to another head of state or foreign officials vested with immunity to appear before her courts, except with the consent of the state concerned (AU, 2008, paragraph 79, 17; *Tachiona v Mugabe*, 169 F. Supp. 2d 259 (SDNY, 2001). Customary international law, unlike conventional law, is binding on all states and cannot be derogated from, but there is disagreement on the

human rights that are protected under customary international law (article 98(1) of the Rome Statute; Obura 2011, 24–26). The unanimous acceptability of immunity of heads of sovereign state and senior state officials under customary international law is well documented and incontrovertible (Schabas 2016, 119; Obura 2011, 24–26; Murungu 2011, 36–42; Arrest Warrant of April 11, 2000 (*Democratic Republic of Congo v Belgium* [2002] ICJ Rep 3; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, at paragraph 75; *Tachiona v Mugabe*, 2001). However, an exception has been created under article 27 of the Rome Statute which removes immunity based on status or official capacity. This exception, as stated earlier, is only applicable to state officials from weak and relatively powerless countries of the Global South, but if the exception is equally applicable to officials from all states, the author will undoubtedly classify it as good law.

Schabas (2016, 120) and Gaeta (2016, 97) submit that when articles 98(1) and 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. The above position is at variance with the decision of ICC Pre-trial Chamber I in Prosecutor v Omar Hassan Ahmad Al Bashir No: ICC-02/05-01/09OA2 paragraph 41, “*Al Bashir case*”). In this case, the court stated erroneously in my opinion that the position of the accused as the head of state “has no effect on the court’s jurisdiction.” The position of the ICC seems erroneous due to the following reasons. It is an established rule that a treaty does not create any obligation or a right for a third state without its consent (Article 34 United Nations, Vienna Convention on the Law of Treaties, May 23, 1969, United Nations, Treaty Series, volume 1155, 331 Entry into force: January 27, 1980). If the reasoning of the court was correct in *Al Bashir case*, is it probable for the UNSC to 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 but ICC has not deemed it fit to attempt to investigate this crime (Byler 2019, 11; Cronin-Furman 2018, 4). China is a state not party to the Rome Statute like Sudan. Can the UNSC remove Chinese president’s immunity even if China is not a member of the UNSC? Was the Al Bashir’s case not the execution of global apartheid on the weak countries of the African continent?

A situation whereby any official with diplomatic immunity, particularly, an incumbent head of state could be picked up 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. The power granted the UNSC to remove the immunity of sitting heads of state and senior state officials of sovereign states may impact adversely on the effective performance of their official functions and limit the conduct of foreign

relations. This is likely to exacerbate conflict in international relations and jeopardise peaceful process initiated by well-wishers in the affected country. For instance, AU argued that the ICC's indictment of Sudanese head of state and other opponents had hindered the peace processes that were being negotiated by AU (Imoedemhe 2015, 74). The indictment of sitting presidents from the African continent only by ICC seems like a form of global apartheid and selective to an unbiased observer.

ICC AND AFRICA: FROM SUPPORT TO ACCUSATION OF GLOBAL APARTHEID

Africa was an enthusiastic and a devoted supporter of the ICC (Dersso 2017, 62; Nyawo 2017, 36; Monageng 2014, 14–16; Murithi 2014, 179–180). According to Mutua (2018, 49), the support was overwhelming to the extent that “there was a stampede in Africa to ratify the Rome Statute.” The same African political leaders who ratified the Rome Statute in great numbers subsequently became its critics and threatened to withdraw their membership en masse (Nyawo 2017, 204–219; Knottnerus 2017, 152; Cannon et al. 2016, 24). Why and when did the AU and the African political leaders become ICC's most vociferous critics? This question would be answered in this section.

All the ICC's three activating mechanisms for investigation and institution of cases were used on African political leaders alone (Dyani 2012, 185). There were four situations that were self-referred by states parties – these were Uganda, Congo, Central African Republic and Mali. The second category was the two situations referred to the ICC Prosecutor by the UNSC – Darfur (Sudan) and Libya cases. The last category was investigations opened by the prosecutor *proprio motu* or on his initiative, in Kenya and Cote d'Ivoire (Monageng 2014, 15–16). All the above cases are in Africa and this in part turned African leaders and the AU, from passionate support to antagonists of the ICC (Nyawo 2017, 204–219; Okoth 2016, 195). The erroneous conclusion that a reasonable observer reaches from ICC's investigations, indictments and prosecution is that it is only Africa political leaders who commit international crimes. This exclusive focus on African situations made the AU, scholars and African political elites to attack the ICC of specifically targeting African leaders and warned that this could complicate reconciliation efforts in Africa (Brendon Pkalya and Maragia, 2016, 7; Imoedemhe 2015, 74; Clark 2011, 521). Nhemachena et al. (2018, 2) and Dyani (2012, 185) argue that the ICC is ignoring atrocities committed by the great world powers such as the US, Russia, UK, China and their allies. They also argue that the ICC is used to as an agent of neo-colonialism or global apartheid (African Union 2013, 2).

A serious sign of conflict between the AU and ICC occurred after the ICC indicted and issued a warrant for the arrest of the then Sudanese President Ahmad Al-Bashir, the Libya's case and the indictment of Uhuru Kenyatta and his deputy (Mutua 2017, 53–54). AU construed the refusal of the UNSC to allow mediation in these conflicts as unfortunate because AU is of the opinion that it was mediation and not litigation that could ensure lasting peace. The AU views the ICC as a neo-colonial court because of its near exclusive focus on African leaders (Nyawo 2012, 126–127; Chutter 2012, 179–180). It is on record that Al-Bashir had since his indictment by ICC visited China, Nigeria, Saudi Arabia, the United Arab Emirates, Egypt, Ethiopia, Kenya, Qatar, South Africa and other countries, all of which refused to surrender him to the ICC for prosecution (Cluskey 2019). South Africa went further by refusing to obey an interim order of a Gauteng High Court to detain Al-Bashir as an ICC fugitive (*Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & 9 Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP) para 5). The refusal of certain countries to cooperate with ICC on the arrest of Al-Bashir is a protest against exercise of global apartheid and double standards by ICC on Africans (Nyawo 2017, 205). It is surprising that China, a permanent member of the UNSC hosted an ICC fugitive (Al Bashir), showed that even the UNSC is not impenetrable.

The opinion of African political leaders is better mirrored in the chairman of AU, Ethiopian Premier, Desalegn's speech where he likened ICC to an international hound "hunting Africans" (Mutua 2017, 48; Desalegn 2013, 1). When the ICC failed in the bid to oust Libya's former leader Gaddafi with his indictment before it, the West then resorted to the use of NATO to achieve their aim (Benyera 2018, 129). However, Libya is worse off after NATO's induced "liberation" than under Gaddafi's alleged dictatorial rule (Benyera 2018, 129). After the demise of Gaddafi, law and order broke down in Libya, the militia is in charge of a large part of the country; infrastructure is in a state of disrepair and all indices of development are in the negative (Imam et al. 2014, 1155–1166). The allegation of legitimisation of global apartheid through the ICC against the African leaders as highlighted above became a serious matter of concern and certain measures were put in place to appease the African leaders and the AU (Odero 2011, 155–158). Murithi (2014, 186) affirmed that "the appointment of Bensouda as the Chief Prosecutor was a move calculated to appease the African members of the Assembly of States Parties. By appointing an African and former Minister of Justice of Gambia, the Assembly of States Parties is communicating the notion that it does not view the ICC as advancing an anti-African agenda." Similarly, Mutua (2017, 55), stated that the ICC was compelled to try Uhuru Kenyatta through video link and this "trial by skype" was mocked by some commentators such as James Mbaka.

Although the conduct of the African political leaders is not beyond reproach, the undue focus of the ICC on African leaders to the near exclusion of others amounts to global apartheid and double standards. ICC must be impartial and not run like a court specially created to try Africans alone (Cannon et al. 2016, 13–15). The African countries that are party to the Rome Statute are partially responsible for the harm they claim the ICC is inflicting on them. This is due to the failure of most of the African states to create credible and independent judiciaries that could adjudicate crimes under ICC's jurisdiction, thereby diminishing the relevance of the ICC (Cannon et al. 2016, 15). Most of the African leaders lacked the grit and the discipline to properly scrutinise international treaties before signing; thereby signing treaties or international agreements against their national or personal interests (Cannon et al. 2016, 15). However, one must not overlook the vulnerability of most African states that depend on aids from the more affluent countries from the Global North which makes them subscribe to international treaties without reservations, due to external influence from their Global North "benefactors" and the subsequent bemoaning of their fate (Harrison 2002, 52–54).

In addition, some of the African heads of state 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 decided to investigate their crimes as well (Baroncelli 2014, 7–8). Some of these African leaders like Ugandan president, Yoweri Museveni, did not cry foul when marginal political leaders and "rebellious" elements, like the leaders and members of Uganda's Lord's Resistance Army and others were being indicted and prosecuted by the ICC (Nyawo 2012, 135). Similarly, the arrest of pro-Tutsi Rwandan Patriotic Front's Rose Kabuye for alleged genocide was condemned but the trial and conviction of pro-Hutu, Onesphore Rwabukombe was applauded by the same Rwandan authority (Jeßberger 2014, 155–156). However, the allegation that the ICC is being used to perpetrate apartheid against African leaders has been debunked by some authors like Monengeng and Trendafilova. Monengeng, a judge at the ICC, disagrees that ICC is being used to haunt African leaders.

Monengeng stated, citing article 27 of the Rome Statute, that the proceedings before the ICC are fully in conformity with the Rome Statute, including the cases against sitting heads of state (Monengeng 2014, 17). Similarly, another judge at ICC, Trendafilova (2014, 30), contended that the Assembly of States Party to the Rome Statute have waived the immunities of their senior officials under article 27(2) of the Rome Statute. Trendafilova further stated that the immunity of Al-Bashir was waived because the Sudanese president is sought by the ICC as a result of a UNSC referral in the exercise of its powers under Chapter VII of the Charter of the United Nations. Besides, he contended that the UNSC has "implicitly lifted the immunities accruing to President Al-Bashir" (Trendafilova 2014, 30). The question to

ask here is, how can the UNSC, majority of whom, 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 to the Rome Statute 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 multilateral treaties and committed international crimes (Cho 2019, 78; Baum 2018, 1; Klinger 2010, 4). The exclusive focus on the weak nations only is one of the reasons for Africans to maintain that specifically targeting them alone constitutes global apartheid. The Gambia’s former Information Minister, Bojang refers to ICC as “the international Caucasian court for the persecution and humiliation of people of colour, especially Africans” because only Africans had ever been tried at the ICC (Rukooko and Silverman 2019, 89).

It is ironic that the West, a part of the group that launched the manhunt against the ex-Sudanese president, Al-Bashir, as a sitting president, failed to apologise or pay compensation when the US on August 20, 1998, launched an airstrike against the Al-Shiffa pharmaceutical plant in Sudan. The US’s claim that Al-Shiffa plant was a chemical weapons facility operated by the extremists was subsequently discovered to be false by international observers including US top officials (Robinson 2016, 2; Marc 2005, 5; Scharf 2001, 21). The suit filed against the US government in the US Court of Appeal on the El Shifa’s matter was dismissed not on merit but on issues bordering on jurisdiction (*El-Shifa Pharmaceutical Industries Company and Salah El Din Ahmed Mohammed Idris v United States* Case No. 03-5098, Appeals Judgment, August 11, 2004).

The Sudanese president’s calls for the international prosecution of the US officials responsible for the airstrike for war crimes as a result of killing civilians in the medical facility, went unheeded. Had the Rome Statute been in existence in 1998, was the UNSC going to attempt to charge US citizens with war crimes or crimes against humanity under article 12 of the Rome Statute? Was the UNSC going to withdraw the immunity of the US president even if the US was not a member of UNSC?

Similarly, despite evidence of international crime violations by the UK in Iraq, the ICC prosecutor decided that the human rights violation did not meet the threshold for investigation and prosecution (Nyawo 2017, 86). This issue of unequal treatment by ICC made the author to question the notion of equality of sovereign states under international law because of the different yardsticks used for different states under the Rome Statute (Dunoff 2013, 127; Paulsson 2010, 15–37). As enumerated above, persons from a particular geopolitical zone seemed to be earmarked for trial and investigation by ICC while similar infractions by Global North countries are ignored raises some

questions on whether the ICC is not legitimising another global apartheid regime on the Global South, particularly, Africa.

ICC AND AFRICA: THE LEGITIMISATION OF ANOTHER APARTHEID REGIME?

There is no doubt that Africa has a long history of civil conflicts and atrocities (Mutua 2016, 102). Besides, the human rights abuses in Sudan (Darfur) and some African states are inexcusable, but, it is convenient for ICC to ignore international crimes and atrocities committed in Iraq, Yemen, Palestine-Israel, Mexico, Sri Lanka, Myanmar, Georgia and other states. As earlier stated, the crimes committed by Russia, the US, the UK, France and China, such as the alleged genocide in China's Uighur province or UK's conduct in Iraq were not investigated. It took the protest from Africa before investigations into these atrocities were commenced.

It was only in Africa that a warrant was issued by ICC against a sitting head of state. It is submitted 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 against trial and prosecution at the ICC. The assets freeze and imposition of sanctions could bring pressure on such regimes and force them to respect human rights of all persons in their respective countries.

Rukooko and Silverman (2019, 98) maintained that "by trying Uhuru Kenyatta and Laurent Gbagbo and indicting Bashir of Sudan, the ICC has demonstrated that, in international law, presidential impunity is dead." In line with Rukooko and Silverman submission, it would be an interesting phenomenon for the presidential immunity of the sitting president of a country from the Global North to be waived and a warrant issued for the arrest of such persons by the ICC. The ICC's Prosecutor's Office was criticised for its low record of conviction against the indicted African leaders. The quashing of ex-Congolese vice president, Jean-Pierre Bemba's conviction, the discharge of the ex-Ivory Coast president, Laurent Gbagbo, and his co-accused Charles Blé Goudé and the withdrawal of the case against Kenyatta and his deputy has further weakened the credibility of the ICC in Africa (Rukooko and Silverman 2019, 86). It is submitted that the ICC is employing a form of global apartheid by targeting the vulnerable and weak African political leaders. The ICC criticised the prosecutor in *The Prosecutor v Thomas Lubanga Dyilo* (ICC601/04601/06, Pre-Trial Chamber I, decision on confirmation of charges, January 29, 2007). This trial lasted for six years and it was marred by controversies. The ICC chastised the prosecutor for the manner in which the case was investigated and how the charges were drafted.

Taku (2016, 338) stated that regrettably, many African states and their leaders are puppets of the neo-colonial interests they are criticising because most of these states are economically weak and dependent on aids from the West, Russia or China which made them amenable to neo-colonial bondage. The office of the ICC prosecutor did not even deny that it “focused exclusively on Africa,” but it denied that the focus was not inappropriate (Taku 2016, 339).

The arms used to foment trouble in Africa are not manufactured in Africa, but in the Global South countries. It is not clear whether the ICC may proprio motu go after those who violate international arms embargo and the Arms Trade Treaty of 2013, in facilitating genocide and gross human rights abuses in Africa (Kendall and Da-Silva 2017, 407–436; Taku 2016, 349). The issue of arms trade may be related to the functions of the office of the ICC prosecutor and it should seize the initiative and deal with individual culpability within the scope of the Rome Statute while the Arms Trade Treaty deals with state culpability.

THE WAY OUT FOR AFRICA

It is incontrovertible that there are many atrocities committed in brutal conflicts in some African states which may require interventions by the ICC. It is also incontestable that other continents in the world are not devoid of conflicts.

The ancient and recent oppressive history of Africans may not be unconnected to their sensitivity to the issue of separate treatment under the Rome Statute. For Africa to combat global apartheid, there is a need to, first, create credible, independent and viable judiciaries in the respective jurisdiction. The independent judiciary at the national level should effectively adjudicate gross violations of human rights and diminish the relevance of international courts like the ICC. Second, African political leaders should be wary of just signing any treaty without adequate consideration of the implication. The charge of selective justice raised by many African leaders may partly seem puerile because the subscription to the Rome statute was not done under compulsion.

Third, there is a need to strengthen the regional and AU judicial mechanisms to create courts at regional and continental levels to adjudicate on issues of gross violation of human rights. This mechanism would have dealt with cases that fall within ICC’s jurisdiction under the principle of complementarity and render the issue of selectivity and global apartheid irrelevant. 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 Africa (Manirakiza 2012, 380). Manirakiza (2012, 381–382) canvassed for

the revival of the indigenous judicial systems of dispute resolution at both regional and continental courts to promote justice and peace. This idea of establishing regional and continental courts is laudable because it will help fight impunity at the highest level and effectively prosecute the majority of the perpetrators of crimes rather than a handful cases that are prosecuted by the ICC. The idea of establishing regional and continental courts in Africa, however, comes with a caveat. African countries must be willing to pay the requisite financial contributions to make these courts viable and must be willing to abide by the courts' decisions. It must be recalled that the refusal of Zimbabwe to abide with the decision of the regional tribunal in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (November 28, 2008), led to the demise of the Southern African Development Community Tribunal (SADCT).

Fourth, the AU must address the issue of sit-tight executives and ostracise African presidents who have stayed in office for longer than the terms initially allowed by their constitution such as Kagame of Rwanda and Museveni of Uganda. The limitation of terms of office could enable such heads of state to be liable for trial if they commit any crime punishable under the Rome Statute.

Fifth, the referral and deferral powers of the UNSC should be whittled down and the Rome Statute should be amended to exclude states not party to it from having rights and liabilities under the statute. Lastly, there is a need to give Africa a permanent seat with veto power in the UNSC in the light of the global apartheid challenges.

CONCLUSION

This chapter has shown that Africa has experienced economic, social and political problems than any other continent for the past four decades (Mbazira 2011, 197). The chapter underscores the importance of ICC in checking gross abuse of human rights in Africa and elsewhere. However, it is submitted that the biased indictment and trial of only Africans by ICC is giving the ICC a credibility challenge. According to Mutua (2017, 55), the ICC faces a challenge of "legitimacy if all its cases continue to be Africans. The appearance of selective, race-based justice will be difficult to avoid if the ICC does not . . . pursue egregious offenders elsewhere"). It is submitted that for ICC to be free of its current legitimacy challenge of global apartheid against Africans it must be seen to investigate and pursue cases in jurisdictions other than Africa with the same vigour it did on the African political leaders' cases. According to Mutua (2017, 55), the credibility challenge and criticism of ICC practices by scholars, AU and others led to the opening

of preliminary investigations into situations outside Africa, but none has matured to full-fledged cases. The charge by African political leaders and AU that the ICC is being used as a tool of global apartheid to haunt Africans may be persuasive, but it did not exculpate some of the indicted African leaders from complicity and wrongdoing in the alleged crimes. The African political leaders and AU are as involved in the double standards as the ICC, in certain instances, because there were no complaint from these African political leaders when marginal political leaders and rebels like the leadership of the “Ugandan Lord’s Army” were being indicted and prosecuted by the ICC. It appears that African political leaders and the AU submit that their heads of state and the ruling elites should not be prosecuted by the ICC.

The AU and African leaders need to operate under the rule of law, overhaul their relevant laws and judicial system to effectively deal with gross human rights abuses to render institutions like the ICC, irrelevant. The institutionalisation of credible national, regional and continental mechanisms for prosecuting gross human rights abuses by the Global South countries would obliterate the illicit global apartheid activities perpetrated against Africans under ICC’s jurisdiction. Finally, the ICC must fairly and impartially apply the law equally to all the constituents of the global community to combat global apartheid, especially against Africa and its people.

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