How Relevant Is the International Criminal Court to the 21st Century Africa and Beyond?

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Abstract

Although the International Criminal Court (ICC) was examining some non-African situations by 2013, most of the Court's indictees happened to come from African conflict situations. As will be discussed later, this state of affairs was worsened by the arrest warrant on President Omar Al-Bashir while he was then a sitting president. This made the African Union (AU) feel unfairly targeted and, therefore, contemplate withdrawal from the ICC. Some African leaders have also maintained slanderous charges against the ICC describing it in uncharitable identities and questioning its modus operandi. However, given that the Court was established to dispense international justice for the commission of core crimes, the AU's contemplation of withdrawal evokes some pertinent questions regarding the future of justice on the continent should the AU eventually withdraw from membership of the Court. How justifiable is the AU withdrawal contemplation? Is this the best of options? What are the possible alternatives for the AU? How does the AU contemplation of withdrawal represent a conflict of interest? In which ways could the Court be strengthened to dispense the international justice for which it was established? In the wake of the aforementioned questions, this paper seeks to address the issue of how relevant the ICC is to the 21st century Africa and beyond.

Dwelling on critical discourse analysis as a methodology, the paper employs interdisciplinary perspectives featuring reflections on research in human rights, international law, political science and other relevant areas of interest and speaks to such probing concerns. This paper concludes that though the challenges the AU raises against the ICC are reasonably admissible, they are not compelling enough to justify an AU withdrawal since they are not of the magnitude that deprives the Court of its capacity to dispense justice. This means that the Court remains relevant to the 21st century Africa and beyond. The paper ends by proposing a framework within which the AU could contribute towards making the Court more functional.

Keywords:

ICC, international law, African Union, peace, international justice,

Introduction

This paper derives its essential motivation from the African Union's (AU) perception of the International Criminal Court's lack of even-handedness in executing its mandate of pursuing international justice. In this regard, the overall objective of the paper is to interrogate this perception, examine the AU's contemplation of withdrawal from the Rome Statute, and to probe the extent of relevance of the ICC to contemporary Africa. Being featured at a time when the continent is completely decolonized but largely remains a routine victim of governance challenges worsened by geopolitical machinations over six decades of political independence, it is historically significant. It is also particularly important as it comes around the year 2020, which the AU proudly dedicates to the objective of "Silencing the Guns in Africa." The year 2021 also marks an epic year in which the ICC scouts for its third Chief Prosecutor, following the end of mandate of its first African woman Chief Prosecutor, Fatou Bom Bensouda. Most importantly, perhaps, it comes at a critical time of the AU's heightened dilemma over whether to remain with or turn its back to the ICC.

For this paper, it is unfortunate that some operations of the ICC have incurred the displeasure of the AU thus depriving the Court of the enthusiastic support it once enjoyed from Africa's leadership and the AU itself. With a plethora of postulations and explanations being adduced by Africa's leadership for the continent's growing disaffection for the Court, Shilaho (2018), for instance, has contended that the perception that the ICC dispenses lopsided justice emanates from a historical antecedent that realpolitik, self-preservation and geopolitics have marred international criminal justice such that Africa's relationship with the West is steeped in humiliation thus making African rulers suspicious of Western-dominated institutions.

It is argued in other circles that some international norms, notably the responsibility to protect (R2P) doctrine which was unanimously adopted by the United Nations General Assembly (UNGA) at the 2005 World Summit, had the capacity of coercing Africa into opening itself up in a way that would eventually endorse the West to "invade" the continent with impunity. Referencing the North Atlantic Treaty Organization (NATO)-led intervention in Libya in 2011, for example, Nicholas Erameh (2019), contends that though mediation and prevention remain central to the R2P, some instances of its application, notably in Libya and Mali, suggested a concentration on Pillar III, the use of force by intervening states leading to misuse, misapplication and misinterpretation of security resolutions. Thus, in spite of the international community's assurance in the case of Libya, the country is worse off today, given that neither the removal nor the eventual killing of the then President, Colonel Muammar Gaddaffi, restored peace. Instead, "… the country is now largely characterized by social banditry, insurgency, sectionalism and an almost total absence of a central authority." He argues further, "Mali has also shown how deeply flawed external interventions can end, in the sense that insurgency has increased tremendously with great consequences for the people of Mali."

Haunted by reminiscence of such considerations, coupled with the scourge of Africa's painful historical past at the hands of her colonizers, a school of thought upholds the view that some international institutions such as the ICC do not work in the interest of Africa's leadership and the AU. As a cause and consequence of systemic turn of events, Africa's leadership now maintains charges against the Court, questioning its very judicial independence, credibility and fairness. Many African states have described the Court in uncharitable identities including being pro-Western in character; a political instrument for disproportionately targeting African leadership; double standards, selective justice, and granting impunity to some Western leaders (O'Toole, 2017). As Rukooko and Silverman (2019) have it, "For many African states, the latest iteration of Western colonialism is the International Criminal Court. All the Court's prosecutions have involved African conflicts, and the continent's initially strong support for its creation has in recent years notably weakened."

Kenya's President, Uhuru Kenyatta, who endured an ICC indictment, is noted to have averred that the Court was a tool of global power politics rather than the justice it was built to dispense. Ugandan President, Yuweri Museveni, once described this Court as a bunch of useless people, while Rwandan President Paul Kagame once held that the Court was never about justice but politics disguised as international justice (Kuwonu, 2017). In fact, just as Herman Wilhelm Göring and his fellow Nazi defendants vilified the Nuremberg trials in the aftermath of World War II, some Africans hold the ICC in such vilifying disdain and highly discredited for its presumed bias against the continent.

At the same time when the AU advocates a rejection of the Court, other eminent and renowned Africans, notably Desmond Mpilo Tutu, have strongly risen to the proposition that the continent needs to remain under the watchful eyes of the ICC in order to ensure good governance and to avoid horrendous human rights atrocities which some African leaders perpetrate against their own fellow Africans. For Tutu, Africa has suffered the consequences of unaccountable governance for far too long to disown the protection offered by the ICC, and that those who advocate for AU withdrawal from the ICC are only looking for a licence to kill, maim and oppress their own people without consequences. Tutu admits that at a first glance, Africa's claim of bias may look plausible. However, the seeming focus on Africa should not be interpreted as an indictment on the Court's neutrality. Among others, this is because the establishment of independent tribunals to handle cases in former Yugoslavia, Cambodia and others has naturally narrowed the scope of the Court's activities (Tutu, 2013).

The position of Ghana's former President John Dramani Mahama (2015) on this issue is terse, insightful and profound. Though he is critical about some aspects of the ICC's work regarding Africa, and therefore expresses in strong terms that Africa feels targeted, he is quick to admit that the ICC serves a purpose and has relevance which is why Ghana is a member state. It is these two antipodal perspectives that legitimize the primary concern of this paper: to examine the relevance of the ICC to Africa. The paper begins by reviewing the historical antecedence of the ICC and weighing its responsibilities against evolving concerns of perceived bias against Africa. It then attempts an appraisal of the Court by examining the concerns of bias against the Court's mandate and its engagement so far. It invokes the centrality and essence of fairness in

the machinery of justice, the place of international law in international relations and raises the question of conflict of interest.

Background to the International Criminal Court

The need for establishing international tribunals to serve the greater interest of international justice by prosecuting authors and perpetrators of heinous crimes of genocide, crimes against humanity, war crimes and crimes of aggression (core crimes) dates as far back as events of the former Yugoslavia. Later, as a consequence of the horrific Rwandan genocide, a second ad hoc tribunal based in Arusha, Tanzania, was created for prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January and 3 December 1994 (Shelton, 2014). It is instructive at this onset to indicate that "former Yugoslavia," in this paper, refers to territories in South East Europe during a substantial part of the 18th century. Logically and historically, therefore, the establishment of such international tribunals neither originated from nor targeted Africa. Emphasis on this knowledge could contribute to dispelling the characterisation of the ICC as a tool for targeting African leadership.

On 25th May 1993, the United Nations Security Council (UNSC) unanimously adopted Resolution 827 for the establishment of an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the then Yugoslavia. This led to the establishment of the UN's first special tribunal, the International Criminal Tribunal for Yugoslavia, to bring to justice those suspected to have committed atrocities in that territory since 1991. Bosnia and Herzegovina, Cambodia, East Timor, Kosovo and several others share comparable settings.

In the context of Africa, the UNSC adopted Resolution 955 in December 1994 and established the International Criminal Tribunal to try those responsible for the 1994 Rwandan genocide and other violations of international law in the country. In both cases, the underpinning objective was to bring perpetrators of injustice to face justice. With the passage of time, the growing frequency of ad hoc interventions that characterized various states made a compelling case for establishing a permanent criminal tribunal. It is such a deserved vision of dispensing international justice that gave impetus for the UNSC to take encouraging steps in establishing what emerged as the world's first permanent International Criminal Court located in The Hague in 2002.

Thus, on 17 July 1998, 123 states met at the United Nations Diplomatic Conference of Plenipotentiaries in Rome and signed the Statute of the ICC to create the Court. Pursuant to the Rome Statute, and thanks to its careful definition of relevant crimes, as Shelton (2014) notes, coupled with other significant provisions, the Court purposefully limits itself in several important domains that justify it as a Court of last resort, when states are either unable or unwilling to adjudicate on some peculiar cases. To a very large extent, its unique role of complementarity serves, among others, to restrain the Court from arbitrarily engaging in selective justice even though it does have some substantial prerogative to pursue certain cases in which it has interests.

In this regard, the ICC was intended to complement existing national judicial systems and may, therefore, only exercise jurisdiction when certain conditions are manifest. For instance, the ICC is under obligation of establishment if an alleged crime was either committed within the territory of a State Party to the Statute or committed by a national of a State Party to the Statute (Art. 12); undertaking investigation or prosecution only upon referral by a State Party (Arts. 13 & 14); referral by the UN Security Council (Art. 13); or initiating proprio motu investigations subject to the authorization of the Court's Pre-Trial Chamber upon receiving credible information from individuals and organizations on crimes that fall within its jurisdiction (Arts. 13 & 15). The Court could also act upon referral from the UNSC subject to the authorization of a Pre-Trial Chamber of the Court. Where necessary, the Security Council may delay the Court's investigative or prosecutorial actions on cases for a renewable period of one year, if it so requests a resolution adopted under Chapter VI of the Charter (Shelton, 2014).

With such well-outlined parameters, the winds of optimism that catapulted the establishment of the ICC into prominence were so appealing, at least to politically independent African leadership at that time, to the extent that the continent's leadership warmly, willfully and willingly subscribed to its membership at their own instances to serve the broader interest of upholding international justice, including tackling impunity. Africa's membership of the Court increased making it appear even more of an African Court than an international one, so to say. In fact, out of the 123 State Parties to the Statute, as many as 34 out of Africa's then 54 countries ratified the Statute. From numerical and statistical perspectives, therefore, there is a comparatively high probability ratio that Africa's cases emerge at the top of the Court's dealings, and with a higher frequency too. For instance, Senegal, was the first to ratify the Statute while another African country, Burundi, was the first in history to start a withdrawal process and then eventually withdrew a year after lodging official notice to quit.

Additionally, several prominent Africans have served the Court in several important and influential capacities, and it is the view of this paper that these prominent people could not have condoned Africa's perceived bias. Between 2003 and 2015, Akua Kuenyehia of Ghana served as judge to the Court. She also served as the first Vice-President between 2003 and 2009. Today, its Chief Prosecutor, Fatou Bensouda, is an African from The Gambia. In the last decade, the ICC has sought to establish its niche and relevance in addressing global injustice by exercising its mandate. In doing this, most of the Court's indictees happened to come from Africa and this has provoked a bad relationship between African leadership and the Court. It is on record that under its pioneering Chief Prosecutor, Luis Gabriel Moris Ocampo (June 2003 – June 2012), the Court opened investigations into 12[1] situations out of which ten were all in Africa. Additionally, it had indicted 36 persons and issued arrest warrants for as many as 27 individuals, mostly from Africa.

1 Burundi; 2 in the Central African Republic; Cote d'Ivoire; Darfur, Sudan; The DRC; Georgia; Kenya; Libya; Mali; Uganda and Bangladesh/Myanmar.

Some arguments "for" and "against"

Would the above confirm the hypothesis that the Court is discriminatory against Africa? Statistically, at least two of the cases were referred to the Court by the UNSC[2]. As many as four[3] cases, including Mali (2012), were willingly self-referred by African states themselves whereas three[4] resulted from prosecutorial initiatives of the Court. These cases were all African but the underlying circumstances surrounding them may duly suggest a patent tribute to the view that the Court must have acted with good intent within its legitimate mandate and, therefore, presumably without inappropriate motive against Africa. Though the Prosecutor's office by 2013 was conducting preliminary examinations into some non-African situations,[5] the overall scales tilt hypothetically in favor of concerns that Africa is the primary target of the Court. Thus, Courtenay Griffiths, who acted as Lead Counsel for Liberia's ex-President Charles Ghankay Taylor's trial, lamented:

…I now submit that the following propositions are true: (a) The West's appeal to the supposed universal principles of international justice is hypothetical. (b) NATO and the US, in the post-Cold War world, have embarked on a project to establish themselves as the global enforcer of international legal norms. (c) This role as "world policeman" has been adopted to protect what is seen as vital Western interests, particularly in the new scramble for Africa. (d) "Humanitarian intervention" is a fig leaf behind which the US and NATO (aka, "the international community"), mask their true intentions and goals, utilizing, where necessary, the legitimizing function of the UN Security Council (New African, 2012).

As a cause and consequence of systemic turn of events, African leadership including those who willingly referred their own cases to the ICC have levelled and maintained disparaging charges against the Court, which they once held in so high esteem. But as Rukooko and Silverman (2019) contend, it is important to appreciate that there are differing explanations for state referrals such that in the case of Uganda's Lord's Resistance Army (LRA), for instance, Rukooko and Silverman (2019) reference Mueller's proposition that initial support for the Court was strong as long as its investigations centred on non-state actors (such as Uganda's LRA), but when the focus shifted towards former heads of state and even serving presidents, self-preservation became the dominant response.

To what extent has the ICC lived up to its standards or erred?

Founded on high optimism about the future of international justice, it is fair to attempt a performance audit by way of prospects and challenges as they relate to African leadership. One could convincingly submit that the Court has made significant progress but like any other institution, it still has room for fine-tuning. In his keynote speech at the 20th anniversary of the Rome Statute on 17th July 2018, Judge Sang-Hyun, 2nd President of the ICC, noted the following:

2 Darfur, Sudan (March, 2005) and Libya (February, 2011).

3 Democratic Republic of the Congo (April, 2004); Uganda (January, 2004); Central African Republic (December, 2004): Mali (20012).

4 Kenya (March, 2010); Cote d'Ivoire (February, 2013); Burundi (October, 2017).

5 Notably in Afghanistan, Columbia, Georgia, Guinea, Honduras and Korea.

The monumental achievement of the Rome Statute is that it set up an entirely new paradigm of international criminal justice, which has made accountability for atrocity crimes an integral aspect of the rule of law that simply cannot be ignored any more. Now the world knows that perpetrators of the gravest crimes need to be, and can be held, accountable – in the first place by national courts, and failing that, by the ICC (2018).

Though the very African cases before the Court are the capital reasons for the AU's disaffection for the Court, this paper contends that, in spite of the AU's ill feelings about perceived targeting of Africa, the cases before the Court count in support of the ICC executing its legitimate tasks as captioned in the above quote. The AU's perception of African bias in keeping disproportionate focus on African leadership has created disaffection and some aura of credibility crisis from which the ICC needs to extricate itself as far as the AU is concerned. Weighing the numerous states and individuals whose conduct make them potential candidates for the Court, against those in which the Court has shown manifest prosecutorial interest, it appears suggestive, at least to the AU that international justice is not being dispensed by the ICC with the verve and momentum which the AU and some African leaders would have liked to see. It is in such context that this paper reflects critically on whether or not the Court has erred. A terse reflection on the legal responsibilities that bind member states might help appreciate the discussion better.

From the presentation relating to the background of the ICC, perhaps coupled with its nomenclature as an International Criminal Court, it should not be difficult to appreciate the legal and international status of the Court. What also needs to be emphasized relates to the legal obligations that bind the Court's member states. Whereas membership of the Rome Statute is a voluntary and sovereign decision left to the discretion of State Parties, members have a general obligation to cooperate with the Court on matters that relate to its investigations and prosecutions. Thus, "…a State which has referred a situation to the ICC can challenge the decision in the event the Prosecutor decides not to initiate an investigation; a State Party can challenge the admissibility of a case or the jurisdiction of the Court; and a State Party can submit amicus curiae briefs… (The ICC)"

If "What is good for the goose is also good for the gander", then natural justice would have it that the ICC, in its quest to crack the long whip in favour of international justice, does to the rest of the world what it does to Africa and vice-versa. Otherwise, many people might be lured into suggesting that the apparent relative frequency of African cases before the ICC denies the Court of its neutral and international appeal except, perhaps, for its nomenclature. This would contribute to inflicting an unfortunate dent on the overall image and anticipated neutrality of the Court in ensuring an international justice regime. This argument is tenable if it is accepted that one of the hallmarks from which justice is derived is its philosophical theory by which fairness is administered without fear or favor. Such ideals of fairness exist within coordinates and notions of impartiality, disinterestedness, lack of bias and lack of prejudice.

Perhaps such considerations might have contributed to influencing those who question the neutrality and credibility of the Court. For instance, Hoile suggests that the Court's claim to international jurisdiction and judicial independence is institutionally flawed, and the reputation of the Court has been damaged beyond retrieval due to its racism, hypocritical stance and serious

judicial irregularities. For him and those who share his concerns, far from deterring conflict, the ICC has rather derailed delicate peace processes in some parts of Africa and they cite Uganda as a typical example. His Justice Denied: The Reality of the International Criminal Court (2014) documents such concerns.

It is not unfair to suggest that, irrespective of the gravity or frequency of core crimes committed in Africa for whatever reason, there are comparable, if not worse, crimes committed elsewhere. For many African leaders, therefore, the failure of the ICC to pursue such compelling cases across the world with the same alacrity it does in Africa is difficult to comprehend given that the Court is expected to serve as an international umpire. While this is worrying enough, the inability of the Court to convince the world beyond reasonable doubt that it is not deliberately targeting Africa and its leadership seems to make a case for its antagonists.

It also appears that the Court's supposed vested interest in investigating African affairs is further strengthened by its pursuit of Kenya's Uhuru Muigai Kenyatta and William Somoe Ruto even as they contested for the Presidency and Deputy Presidency respectively in their country's elections. That the Court could not be bothered even after the AU had requested for deferment of Omar Al-Bashir's case, as provided for in the Court's own Constitutive Act, further provoked sentiments about the Court's perceived anti-African bias. All these may have contributed to the eventual decision of the AU to declare a stance of non-cooperation with the Court. However, observing from distance, one cannot fail to see that the AU's non-cooperation stance is also stained with elements of conflict of interest, which as I shall argue later, undermines the ethical ethos of the AU in this matter and potentially weakens its case.

An overview of the AU's Declaration of Non-cooperation with the ICC

In May 2009 when the ICC indicted the then Sudanese President, Omar Hassan Al-Bashir, the oil-rich country rejected the basis and circumstances for indictment. Per Article 86 of the Rome Statute, member states of the Statute bore the primary responsibility to arrest and surrender an indicted criminal to the ICC because of their obligation to co-operate with the Court. Contrarily, African member-states that shared Sudan's sentiments side-stepped the ICC provisions of the warrant, and left the hook on President Al-Bashir to travel within and across their air and territorial spaces freely without let or hindrance. On 21-23 July 2010, he attended a meeting of the leaders of the Community of Sahel-Saharan States (CEN-SAD) without arrest. In August of the same year, he was a guest at the celebration of Kenya's new constitution. On 8 May 2011, he successfully travelled to Djibouti for the inauguration of President Ismael Omar Guelleh.

At that meeting, the European Union (EU) and leading human rights organizations called upon Chad, as a member state of the ICC, to arrest him but this was never done (Fordham International Law Journal, 2011). He had since enjoyed succor in the territories of several other African member states, including South Africa, where he attended an AU Summit in 2015 and easily flew out in a private jet despite the ICC arrest warrant served on him. In the words of Amnesty International (2015), "South Africa's government failed to fulfil its international legal obligation. Two open ICC arrest warrants had been laid against him, and a court order from South Africa's High Court

also prohibited him from leaving. South Africa's failure to act saw it join a list of states that failed to arrest and surrender President Al-Bashir to face trial." Obviously, he successfully managed to travel through several African ICC member states with notable ease.

Since July 2009, the AU has lived by its resolve not to co-operate with the ICC regarding his arrest and surrender. Until his detention in 2019, he remained one of the most high-profiled wanted persons of the Court, perhaps even after losing his presidency. The Union had indicated its concern that the President's indictment would have far-reaching consequences on Sudan's peace process which was then underway (African Union, 2009). Particularly, the AU expressed regret that its call for a deferral of proceedings initiated against President Al-Bashir, in accordance with Article 16 of the Rome Statute of the ICC, had neither been heard nor acted upon. On account of the above, among others, the AU raised flags over the posture of the ICC and finally decided that its member states shall not co-operate, pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al-Bashir.

By 2017, Burundi had taken an unprecedented step to becoming the first country to withdraw its membership from the ICC. Though South Africa and The Gambia had also contemplated similar actions earlier, they later rescinded their intentions. The case for Burundi is quite seminal in this discussion not just because it was the first country to do so. The action comes against the backdrop of a security crackdown and major arrests following President Pierre Nkurunziza's controversial third term bid which provoked violent clashes between pro and anti-government groups, the latter claiming the move was unconstitutional. The debilitating situations where incumbent governments in Africa have altered state constitutions to favor their controversial presidential extensions led to violent clashes and deaths abound on the continent (Africa News, 2019). Burundi stood accused of committing crimes against humanity including executions and torture for which the UN Commission of inquiry was urging the ICC to open prosecution. Burundi in turn accused the ICC of deliberately targeting Africa for prosecution (DW, 2017). However, according to Article 127, Burundi's withdrawal does not affect the jurisdiction of the ICC regarding crimes committed while Burundi was a member state.

The AU non-cooperation stance leaves several questions unanswered and, therefore, calls for further interrogation. The attempt to answer some of these questions leads this paper to the old quandary revolving around why and whether or not the pride of place should be given to peace or justice over the other, given that each has its own exigencies at any particular given point in time in politics. Proponents of the idea of peace over justice argue that the pursuit of justice and accountability creates more conflict in an already difficult situation. On the contrary, those who argue for justice and accountability exalt the conviction that durable peace cannot be established on the foundations of injustice. Katerina Mansour and Laura Riches (2017) set a good intervention, in the view of this paper, by observing that the peace versus justice debate is a false dichotomy. Nouwen's (2013) "no peace without justice ideology" plays a corroborating role by upholding an impartial judicial system which in turn offers an opportunity to accused perpetrators of violence to be acquitted or made to atone for their crimes in order that peace might prevail. Thus, impunity supported by injustice oils the wheels of conflicts and violence which eventually threatens peace.

In the light of the above, it is fitting to reflect critically on the question: "To what extent is the AU's stance of non-cooperation a 'forward' or 'backward' or step in the fight against impunity?" In the view of this paper, granting this request could imply mortgaging impunity for immunity which would often leave offenders off the hook, and therefore a backward step in the fight against impunity. Though peace is desired, its pursuit should not be executed at the expense of justice because, whereas dispensing justice has great potential for ensuring peace, the same cannot be said of peace necessarily evolving from injustice and impunity. In the same vein, politics must be used neither to compromise peace nor to concede justice.

It is also important to mention that sometimes, it is not what we do per se that matters most but rather how we do it. Since the establishment of the ICC has comparable historical narrative with the establishment of other international ad hoc judicial systems and international special criminal tribunals such as the Special Court for Sierra Leone (SCSL), the operations of the tribunals have often been generally viewed in shared backgrounds and spaces (Barns, 2011). This has somewhat led to a misrepresented image of the Court. In particular, the trial of former Liberian President Charles Taylor exemplifies this. Following his arrest by Nigerian authorities near the Cameroonian border in March 2006, Charles Taylor made his first appearance in Freetown. Later, UN Security Council Resolution 1688 of June 2006 cleared the way for him to be tried in The Hague on account that his presence in the sub-region impeded stability and peace. Thus on 20 June, he was transferred to The Hague where his trial was conducted by the SCSL in the ICC facility. Thus, the SCSL only borrowed the facilities of the ICC so as to prevent destabilization in the sub-region due to the trial of a former president in a neighbouring country. Unfortunately, the mere fact that he was tried in the ICC facilities in The Hague elicited erroneous impressions that he was tried by the ICC and, therefore, perceived as one of the Court's anti-African bias reference points.

A related case in question is the setting and timing within which former Liberia's President Charles Taylor's indictment and arrest warrant were served on the Ghanaian authorities. Its planned or sheer coincidence with Charles Taylor's peace negotiation trip in Accra did put the Ghanaian authorities on a surprise footing. As Chacha Bhoke notes:

Following approval of the indictment, the Warrant of Arrest against Taylor was issued on 4 June 2003 while he was attending the Liberian peace talks in Ghana. Both the warrant and the indictment were e-mailed, faxed and personally served to the Government of Ghana for the purposes of arresting Taylor at about 8 AM that day. But, the authorities in Ghana turned down the Prosecutor's request, and Taylor returned to Monrovia (2006).

The implication of this coincidence was that Ghanaian authorities in whose territory Charles Taylor was at the time were under primary obligation to co-operate by arresting and surrendering him. Obviously, however, such an execution under that circumstance could have been injurious to the tenets of privileges and immunities to which heads of state attending that meeting were legitimately entitled. Admittedly, by virtue of agreeing to be State Party to the Rome Statute, Ghana was obliged to effect the arrest. However, doing so within its role as host country could have implied betrayal. Granted that the Ghanaian authorities had fore-knowledge, they might have acted differently. It is also essential that irrespective of any other way the Ghanaian authorities

might have acted, it is critical that member states uphold and discharge their obligations to the ICC appropriately. A failure in this direction evokes issues of self-preservation or protectionism, which I discuss later in this paper, and betrayal of loyalty.

Mba Chidi Nmaju (2003) documents the background setting of this issue which I reference in two parts as follows: (1) "Mr Taylor accepted the offer of asylum from Nigeria, resigned and left the country. Arguably, Mr Taylor, who had just been indicted by the Special Court, would not have agreed to resign unless he was assured of some sort of amnesty from prosecution which in turn would have prolonged the crisis. Nigeria, while leading the negotiations, opted to grant him a safe haven from the Court so as to realize the more immediate goal of regional peace and stability" (emphasis mine). This paper is unable to establish the extent to which the objective of this intervention was to achieve the above emphasis or whether the resultant effect was mere coincidence or the result of popular demand for Nigeria to hand him over for trial. This is because some years after taking his asylum, pressure was mounted from within and outside Africa, arguing that Nigeria's provision of asylum to Charles Taylor in an attempt to shield him was inconsistent with international law. There were several outpours of public outcry from interest groups notably, civil society organizations (CSOs) inspired by some non-governmental organizations (NGOs) rejecting this asylum. In a public document dated 11th August 2005, Amnesty International under the banner of Campaign against Impunity submitted:

"Two years after Liberian President Charles Taylor fled for exile in Nigeria, Nigerian President Obasanjo should no longer allow Taylor to escape prosecution for crimes against humanity and war crimes committed during Sierra Leone's civil war (Amnesty International, 2005)."

"…it is imperative that the attendees know they are dealing with an indicted war criminal (American Society of International Law, 2003)."

As Mba (2007) notes further, "It should be appreciated that Nigeria's offer of asylum prevented much bloodshed in Liberia. Furthermore, it was essential to keep Mr. Taylor out of Liberia, and crucial not to prosecute him until such time when the stability of the two states (Liberia and Sierra Leone) was ensured. The objective was to prevent a fresh outbreak of fighting by Mr. Taylor's supporters. In 2006, after the election of a new government in Liberia and after both States had regained some measure of stability, Nigeria extradited Taylor to Liberia where he was arrested by UNMIL and transferred to the Special Court."

Whereas this paper advocates neither for nor against the view that African initiatives such as this must be given pride of place over international norms and standards, it promotes that such fragile circumstances deserve to be accorded very delicate and intricate attention for timing, balance and prioritization of required actions so that "corporate" international diplomacy might reign higher. Relevance of 'timing' and 'priority' in the above quote could help shape the debate of when and how to prioritize peace over justice or vice-versa, but never to trade off one for the other. In any case, the Rome Statute was written clearly and unambiguously. The obligations of member states to arrest and surrender indictees within the mandate of the Court as well as its jurisdiction are part of such obligations. Its signatories were, therefore, not under any delusion when they ratified the

same. It is, therefore, imperative that unless such Rome Statute obligations are formally amended, the AU and its member states are required to actualize their commitments to the Statute.

On the other hand, the decision of some African State Parties to the ICC to refuse executing the Court's arrest warrant on President Omar Al-Bashir should persistently convey a permanent reminder to the ICC that it would always need diplomatic co-operation facilitated by the involvement of member states to ensure enforcement of its arrest warrants. This is obvious given that the ICC has neither inherent enforcement powers nor a standing army or police of its own to execute its arrest warrants. In the context of Africa, therefore, it may not serve the best interests of the ICC, and by extrapolation, international justice if the AU's feeling of being unfairly targeted is not well-addressed. Von Michiel Blommestijn and Cedric Ryngaert (2010) provide encouraging discussions revolving around issues of head of state immunity in relation to the ICC: A dichotomy between immunity from prosecution and immunity from arrest. It serves as a good reference point for considering options towards addressing this apparent challenge of the Court.

What Are the Foundations of These Accusations?

A common adage widely used by the Akan speaking people of Ghana, when literarily translated into English, admonishes: "When you observe that your neighbour's beard is on fire, you better get a bucket of water close by (just in case yours also catches fire, then you can quickly use that water to quench yours)". The correlation here is that Africa's leadership believes that if they condone and or facilitate the arrest and surrender of their own kin to the ICC for whatever reason, tomorrow, it would be their turn to dance to the same unpleasant music. Naturally, therefore, it is in their best interest to do all within their powers to avoid such "traps" by standing firmly in "solidarity" with one another as self-protection or self-preservation. Should such "solidarity" syndrome persist, however, it will rather fortify impunity and this will weaken the Court's pursuit of international justice. Impunity must not be allowed to triumph over justice.

Commemorating the 10th anniversary of the coming into force of the Rome Statute, the New African Magazine published a Special Report on the ICC, in which Nicholas Waddel and Phil Clark (2012) part lamented:

The fact that the ICC has focused so overwhelmingly on African situations prompts questions about why the gaze of international criminal justice falls on some places and not on others. The court's focus on Africa has stirred African sensitivities about sovereignty and self-determination; not least because of the continent's history of colonization and pattern of decisions made for Africa by outsiders.

Such concerns do not appear unfounded. Neither do they evolve from a vacuum. Indeed, it must take some reasons why an international court like the ICC, in spite of the largeness of its founding authority, mandate and its audacious promise to go after the biggest perpetrators of international crimes, should have such a seemingly perpetual exclusive fixation of interest on Africa while comparable grave core crimes are also committed elsewhere in the world on the blind side of such a powerful Court.

Chairperson of the AU Commission had the occasion to accuse the Office of the Prosecutor (OTP) of African bias, questioning why Argentina, Myanmar or Iraq was not incurring the same magnitude of the wrath of the ICC. Why, for instance, was it the case that even though the OTP had received information on alleged crimes in other parts of the world, including Afghanistan, Colombia, Iraq, Palestine and Venezuela, the Court remained comparatively sluggish over them? Here it is imperative to mention that the Court has opened investigations into Afghanistan on alleged crimes against humanity and war crimes committed since 1 May 2003. Innumerable conjectures, propositions and postulations on this issue of perceived bias abound. They revolve principally around the views that some of the most powerful states, notably the United States of America, have been deliberately left off the hook, and, therefore, question whether it is the case that such states are either just too powerful or too strategically positioned in global affairs to be touched by the ICC.

This bothers on the matter of jurisdiction, and it is important to emphasize that though the ICC was set up with the capacity to exercise jurisdiction over international crimes, it is restricted in the sense that it does not have universal jurisdiction. This limitation evolves from Article 12 (1) which provides: "A State which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5". There is a further limitation on the jurisdiction of the Court regarding the territory within which a crime occurs as well as the nationality of the perpetrator. Thus, even though the United States is a signatory to the Rome Treaty, the fact remains that the US has not ratified the Treaty. By implication, therefore, the US cannot be bound by interventions of the ICC. Consequently, the US cannot be bound by the jurisdiction of the Court since is not a member state. By extrapolation, citizens of the US cannot be subjected to the Court's jurisdiction.

Under comparable circumstances, China, Russia, Japan, India, Pakistan, Israel and Turkey are some of the world's powerful states that, because they have not signed the Treaty, cannot be subjected to the jurisdiction of the ICC. In the case of Russia, it supported the establishment of the ICC from inception in 1998 and signed it in 2000 as well as its entry into force later in 2002 but in 2016, it formally withdrew from the Rome Statute and, therefore, cannot be under its jurisdiction (The Guardian, 2016). When such important details are brought into the public domain for better appreciation, it would help shape and re-orient the debate regarding some people's perceptions of bias about the ICC.

AU's non-cooperation: Is there a potential conflict of interest?

The impasse between the AU and the ICC could be summed up in the former's belief of selective prosecution, which when established beyond reasonable doubt, could sadly be one of the Court's Achilles' heels. As discussed earlier, the AU, which represents the continent's governments, has contended that its sitting heads of state should enjoy immunity from ICC prosecution. This paper argues that upholding such a position could offer a questionable protection for perpetrators of crimes punishable under the ICC jurisdiction and, therefore, needs re-examination. As argued in other parts of this paper, there are several instances of African leaders altering state constitutions through referenda, the transparency or otherwise has been responsible for violence. The objective

of such referenda appears to incline towards giving "legitimacy" to an illegitimate desire to prolong their mandates. This has often led to serious unrests, conflicts, violence and sometimes heinous crimes inflicted by incumbents on the opposition and the public: all of which undermine peace. What have the AU and member states done to prosecute such offenders? Should they not be held responsible for their decisions? If not, then why not? If yes, then the ICC is up to undertaking such tasks effectively.

In the view of this paper, the stance of the AU in The Prosecutor vs. Omar Al-Bashir, paradoxically triggers a potential conflict of interest, which might also come back to haunt and hurt Africa's leadership. Whereas the AU may flag its non-cooperation as important for making its case heard and addressed, other members of the international community might see it differently. In the words of Amnesty International (2015), for instance, "...some states and the AU also continued their political efforts to undermine the independence of the ICC, and to ensure immunity from prosecution for its serving heads of state, even when accused of crimes against humanity and other crimes under international law.

Here emerges the contemplation of whether selective prosecution is defensible or even worth relying upon, especially when you are the victim. I contend that in jurisprudence, a defendant who argues against being held criminally liable for breaking the law, the reason being that the criminal justice system discriminated by choosing to prosecute him or her and not some other person(s) who have committed the same or comparable crime, tends to beg the question, if not run away from one's own shadows. Such a position represents a tacit admission to committing a crime yet trying to escape or reject its legal ramifications. It is hereby submitted that this position may only make a beautiful case for logic but could be bound for failure when put to the test and scrutiny of legal processes.

Consider that when the police on duty invoke the discretionary privilege to determine which vehicles to randomly scrutinize at any checkpoint, one can hardly successfully argue one's case out by suggesting that the failure of the police to scrutinize other vehicles means that the police unfairly or discriminatingly targeted him or her, as a result of which one must not be penalized for the crime when it is so established beyond a reasonable doubt. The substantive issue which would eventually prevail is: Yes, the process might have discriminated against you, but the overriding crux of the matter would reside on the legitimacy or otherwise of the charges preferred against you. Once the legitimacy is established, it effectively quashes the discrimination debate. At best, in the opinion of this paper, any counter-view will exist only as a secondary matter.

By extrapolation, painful as it might be, Africa's cry of or the AU's concern of selective prosecution at the hands of the ICC might be legitimate, but suffer severe setbacks because it fails, in the consideration of this paper, to disestablish the suggested guilt if established by a competent court of judicature, granting that the Court diligently applies all standards of fair trial. To this extent, it detracts substantially from the AU's cry of discriminatory or unfair targeting, making it hardly defensible in its truest sense. Though this paper deeply shares Africa's concerns and predicament, it would love to see Africa's leadership rising above the banner of unfair targeting to negating the charges preferred against its leadership. It is also the conviction of this paper that if Africa

could establish substantial prima facie case of bias against Africans in the judicial proceedings of the ICC so far, it would make a more compelling and blistering appeal than being speculative, more so because neither Africa nor the AU appears to have questioned the competence of the Court's prosecutors.

Where then is the conflict of interest?

In advancing the proposition on conflict of interest, I am persuaded that a situation that has the capacity to undermine the loyalty or impartiality of an individual or group's public or self-interest breeds fertile grounds for conflict of interest to flourish. By creating a condition where the AU wishes to serve its self-interest and that of the ICC, both of whose primary interests are now competing for superior recognition, Africa's leadership, in the opinion of this paper, finds itself trapped in a circumstance that makes it an unfortunate victim of conflict of interest. This is because the AU might be striving to serve the ambivalent self-interest of non-prosecution as self-protectionism, and the obligation to honor interests of ICC. Now that the AU, in the interest of self-defense, flags its stance of non-cooperation in defiance of ICC norms and protocols that bind the AU, the situation sets in motion, an African leadership struggling to serve the conflicting interests of both the AU and the ICC concurrently.

This is comparable to Africa eating its own cake and still wanting to have it. If it is defensible that regulating conflict of interest is one of the cardinal aims of political ethics, then it is reasonably admissible that one of the surest ways for Africa's leadership to extricate itself from this quagmire is to commit to serve the interest of only one of the conflicting interest groups: the AU or the ICC. This effectively implies denouncing one of its self-interests, or quitting one of them honorably. Otherwise, I am afraid the AU might lack ethical fortitude to question ICC's operations. Whereas quitting the ICC would effectively keep the AU outside the umbrella of the ICC, such a move would tend to protect the self-interest of such AU leaders and regimes who commit core crimes, or even seek to remain in power at all costs, including by illegitimate mandate extension through referenda that lack credibility. This will obviously not augur well for the peace, democracy and stability of such African countries.

The case of The Prosecutor vs. Omar Hassan Al Bashir typically exemplifies the foregoing assertions on conflict of interest. The accused was President of the Sudan and by default, a member of the AU, which is signatory to the Rome Statute establishing the ICC. The AU indicates that its sitting heads of state should be entitled to immunity from judicial actions of the ICC especially as it revolves around the indictment of fellow AU member, President Omar Al Bashir, a view which the ICC rejects as unmeritorious. This places the AU in an awkward position where one of its cardinal interests is at variance with that of the ICC to which it still owes allegiance by virtue of its membership of the Rome Statute. The refusal of AU member states to co-operate in effecting his arrest clearly demonstrates conflict of interest. This paper acknowledges that since his arrest and detention in the military uprising of April 2020, there have been substantial talks between the ICC Chief prosecutor and Sudan's transitional government leading to the latter agreeing to Omar Al-Bashir standing trial before the ICC. This new development, not withstanding, does not

negate the held conviction of this paper regarding AU and Africa's leadership being enmeshed in conflict of interest. The AU needs to address this concern in order to strengthen its case.

What are the implications for Africa's peace and human rights regime?

It is understood that the AU's declaration of non-cooperation does not automatically mean it supports human rights infractions with impunity which eventually undermines peace and security. Instead, the AU is using its stance of non-cooperation to underscore the need for rejecting impunity beyond Africa. However, since impunity for egregious human rights violations has wide-reaching ramifications, AU's stance must not directly or indirectly be seen or interpreted as favouring impunity on the altar of immunity.

AU's dedication of the year 2016 to human rights remains an encouraging self-attestation to the importance which Africa accords to the uncompromising place of a flourishing human rights regime. As the AU echoes the prime place of human rights in its strategic Agenda 2063 under "Our Aspirations for the Africa We Want", which in part, commits itself to the ideals of an Africa of good governance, democracy, respect for human rights, justice and rule of law, it is important that Africa works comprehensively in order not to leave any protection gap for the victims of core crimes whose only solace could reside in delivery of justice in its truest sense for perpetrators of core crimes. The AU's continuum of non-cooperation with the ICC as well as its threat to quit the ICC could reverse the above ideals and visions.

Challenges for international law and international politics

Sir Arthur Watts (1999) was right in his observation that there seems to be no doubt that across the board, international law is an important part of the structure of our international society. As a result, states accept it as such, and their record in observing it bears comparison to the level of law observance in many countries. This makes the respect for international law a corporate part of today's international affairs and the global governance system. This should not be taken for granted if a stable international order is to prevail, especially including in relatively conflict-prone Africa. In the context of human rights, Makau Wa Mutua's view that since the Second World War, international human rights law has become one of the most pre-eminent doctrines of our time ought to be deeply appreciated because of the consequences which core crimes impose on human rights (1999).

In a similar vein, the preamble of the UN Charter makes it clear enough that one of the most primary objectives of the UN since its establishment is the development of international law. This is not difficult to understand for, in the absence of international law, there could hardly be any system to regulate international relations, especially including in times of aggression against a county. The world in that context could degenerate to one comparable to the state of affairs in George Orwell's legendary Animal Farm, where the dictum of "all animals are equal but some are more equal than others" reigns supreme. It is in this context that international law seeks to define and regulate the legal responsibilities of states in a broad spectrum of issues such as laws relating to human rights, international crimes and several others. The place and role of

international law in the global system, of which Africa is a part, is obviously so well-established that it can no longer be underestimated.

In the context of the Rome Statute, all its signatories are under obligation to respect international laws guiding the conduct of the ICC's legally recognized operations to which its member states are signatories. By common standards of application, therefore, the failure or refusal of a member state to comply with such tenets provides sufficient discomfort to raise legitimate questions. This paper would contend that it amounts to "questionable" conduct for any state (African or not), to maintain its membership and yet refuse to respect its regulatory norms. In the opinion of this paper, one way out is the option of engaging in dialogue and available conflict or dispute resolution mechanisms.

Should such available options fail, then member states who feel uncomfortable within the jurisdiction of the ICC might be better off withdrawing entirely after exhausting all available channels for resolving conflicts. Otherwise, such countries are likely to be seen in the wrong limelight within international circles, and this could negatively impact the courtesies needed to be extended to them in international relations.

In applying John Rawls' "Veil of Ignorance" concept as upheld in the Fairness Principle, Benjamin Franklin once reasoned: "Justice would not be served until those who are unaffected are as outraged as those who are." This is best appreciated in the idea that, when considering whether we should endorse a proposed law or policy, we can ask: "if I did not know whether this would affect me or not, would I still support it?" This is based on the view that those who make big decisions that shape the lives of large numbers of people are almost always those in positions of power. And those in positions of power are almost always members of privileged groups (FS, 2017). Another variant of this holds that certain species of ants, even though they are able to form colonies alone, would often band together to form more productive colonies. However, once the first group of worker ants reaches maturity, the queens often fight to death until one remains.

The analogy here is that, when they first form a colony, the queen ants are behind a Veil of Ignorance since they do not know whether they will be the sole survivors. All they know, on an instinctual level, is that co-operation is beneficial for their species. This symbolizes strength in unity. Like the people behind the Veil of Ignorance, the ants make a decision which, by necessity, is selfless. By implication, the AU stance of non-cooperation should be informed by selflessness rather than self-preservation. In the absence of this, are there other viable alternatives to the ICC? This forms the central thesis of concern in the ensuing paragraphs.

What are Africa's viable alternatives?

There are several significant formidable reference points for believing that, in spite of other grim circumstances, Africa's leadership remains reasonably committed to protecting human rights and rejecting impunity on the continent. This view finds merit in the marked departure from

'indifference' to 'engagement' which reflects one key underlying justification for the transformation of the Organization of African Unity (OAU) to the current AU. In July 2015 in Senegal, the historic trial against former Chadian President, Hissène Habré symbolized a watershed moment in international justice as it was the first time that a court in one African state had tried a former leader of another African state. This demonstrates the capacity of African states to actively broaden the spaces for justice to prevail over injustice, and to engage impunity effectively, all other things being equal. Since its creation under the aegis of the then OAU, the African Charter on Human and People's Rights (ACHPR), also referred to as the Banjul Charter, has remained an important charter of international repute for its multi-faceted uniqueness including the norms it recognizes and the supervisory mechanisms it has. The African Court is certainly worth mentioning here, and the list and several tangible initiatives go without an easy limit.

But to which side of the pendulum should Africa swing? Creating its own Court and withdrawing from the jurisdiction of the Rome Statute or retaining its membership of the ICC yet side stepping some of the Court's tenets? Ghana's former President John Dramani Mahama's position on this issue is significant, diplomatic, insightful and profound. For him, Africa feels targeted, but at the same time, he admits that the ICC serves a purpose, and has relevance (Conflict Zone, 2015).

Other critical questions that need to be asked include whether Africa would be better off without the ICC. Does the failure of the ICC to engage evenly by intervening in cases of core crimes in other geographical territories of the world disestablish the basis for its current investigations in Africa? Does this negate the crimes that have been leveled against the continent's indicted persons? This paper lends itself to the proposition that Africa has a unique opportunity to use its contemporary circumstance as an excellent entry point to challenge the exclusion of Africa's voices from international discourse and to court the principle of non-discrimination in its favour towards altering the status quo.

At the same time, Africa's leadership has enormous opportunity to make the ICC less of an enemy by ensuring a regime that distances itself from the mandated prosecutorial interest of the Court. Thus, if the AU can ensure that Africa's leadership properly manages its political governance and leadership challenges so that the ICC would have no justification for indicting them, it would have taken decisive steps towards keeping the ICC at arm's length.

Many Africans would celebrate the success story of an African version of the ICC provided that Africa can surmount and survive the overall inherent challenges it imposes. On that score, emerging questions could include: What would be the broader scope which Africa's leadership would hope to claim by establishing its own version of the ICC? Is it the selective justice or foreignness of the Court which should warrant such initiative? Would it be a scheme to narrow the limits of international justice to Africa alone while the continent still depends on the international community for other resources? Would it also mean that Africa would not be interested in injustice anywhere else? To what extent would this fulfill the ideals of "African solutions to African problems"? Several genuine challenges stare at this noble idea. Justice delivery is terribly expensive and one wonders how Africa will meet the necessary economic resources, especially in a COVID-19 and post COVID-19 epoch when global economic fortunes would certainly have suffered great losses.

Over six decades into independence, Africa has not convincingly demonstrated financial independence though it has political independence. In the past years, for instance, funding of the AU has traditionally come largely from the "Big Five" (Algeria, Egypt, Libya, Nigeria and South Africa. Worse still, even at the international level where Africa speaks in bold and erudite fashion about the New Partnership for Africa's Development (NEPAD), which this paper considers one of AU's most successful initiatives since the transformation of the defunct OAU, the idea of "partnership" has often been functionally paralyzed. This is because Africa still leans heavily on funding under varying nomenclature from the international community to propel its development and other related projects. Where then does the "partnership" lie when Africa cannot have the leverage of financial equilibrium or economic authoritative voice to speak to the financial needs that underline its partnerships?

In the 21st century, it is not out of place to say that some African leaders are still overtly involved in nepotism and corruption (Devex, 2021). African governments are continuously accused of openly usurping state apparatus, state institutions and the power of incumbency to temper with national constitutions in order to unlawfully perpetuate their stay in office. In turn, democracy continues to be heavily desecrated through lack of electoral integrity though some good progress is being made. Popular African countries whose images are dented in this domain include Burundi, Cameroon, Chad, Republic of Congo, Djibouti, Guinea, Ivory Coast, Rwanda, Togo, and Uganda (ReliefWeb, 2019). Over time, the consequences of such untoward acts provide "appropriate" circumstances that make some of Africa's questionable leaders potential candidates for core crimes which the ICC so bitterly abhors, and over which the Court exercises jurisdiction. Will, and can an "African Criminal Court" effectively and decisively intervene in such situations?

Africa's leadership and political independences have come a long way, but still have a long way to go. While there might be better alternatives to make the ICC more effective and global, the ICC, like other institutions, also has challenges. As Fatou Bensouda herself noted at the historic international conference organized by the Ghana Institute of Management and Public Administration (GIMPA) under the theme: "The International Criminal Court & Africa: A Discussion on Legitimacy, Impunity, Selectivity, Fairness and Accountability" (March 2016), African countries owe it to themselves and posterity, a duty to help nurture the ICC to fight impunity, adding that though the ICC had done much, a lot remains to be done (Daily Graphic, 2016).

Since African leadership submitted itself to the Rome Statute voluntarily, it should, in the view of this paper, consider co-operation and engaging in effective consultation and dialogue for constructive reforms rather than engaging in non-cooperation. The successful walk back to "freedom" of Kenya's Uhuru Kenyatta and William Ruto in 2015 after their ICC indictment should offer glimmers of hope that, all other things being equal, other indicted African leaders can have fair trials in order to clear their names, and emerge triumphant over the ICC. It is important to emphasize, however, that the Kenyatta/William Ruto prosecution suffered poor patronage including due to witness intimidation and the very weakness of the ICC case against them. This notwithstanding, Africa's leadership, so long as it keeps its clean hands, should not panic at the mention of ICC.

Admittedly, ICC's perceived unfair selective prosecution may be real, offensive and a betrayal of the very justice over which it seeks to preside but it appears that Africa's cry of wolf only elicits an illicit shift of emphasis from the status quo. In any case, it might serve as a better option for any indicted person to face the ICC squarely in order to prove one's innocence than to run away from truth and justice. But for this to have meaning, the ICC should step up its pursuit of true justice in the spirit of holistic interpretation of fairness in other territories too.

The much talked about transformation of the OAU into the AU over a decade ago also came on the waves of high anticipation for a brighter future for Africa, for it was equipped with enhanced administrative mechanisms, including notably, greater authority to intervene in the affairs of its member states. Perhaps not much has been achieved in this direction except for sanctioning member states who use coup d'états (unconstitutional paths) to seize political power. Such sanctions, in the opinion of this paper, have not been punitive or deterring enough. This does not encourage the conviction that Africa is ready yet for its own version of the ICC.

The relevance of the ICC to 21st century Africa

That investigations into non-African cases have been opened is suggestive of the fact that the ICC is operating in international spaces and, therefore, dilutes the view that the Court has a fixated eye on Africa. Besides, even though there are varying reasons why some African states referred their cases voluntarily to the ICC, the referrals themselves bear significance to the relevance of the ICC on the continent. That the current leadership of the Sudan, as recently as 2020, agreed to subject deposed President Omar Al-Bashir to the prosecution of the ICC is an important endorsement recognizing the relevance of the Court to Africa. This is especially so, considering that it was his arrest warrant by the ICC that provoked the AU's non-cooperation declaration back in 2009.

At least two high profiled African leaders, Kenya's President Uhuru Kenyatta and former Ivorian President Laurent Gbagbo, have survived prosecution at the ICC. Whereas in the case of the former, there was poor witness interest, in the case of the latter, as observed by a BBC correspondent, "… the ruling demonstrates the judges' independence and impartiality and makes it harder to push the narrative, popular among those who fear the long arm of the ICC, that the court is a biased weapon of neo-colonial justice used purely to convict African leaders." Additionally, as Janet Anderson, a writer for the Justice Tribune, told the BBC, "It's important also to find people not guilty or to find there isn't a case to answer if there isn't one (2019)." By these, the ICC has made itself locally relevant to Africa in the sense that it provides a reputable international platform of opportunity for indicted persons to establish their innocence and be free.

It is also critical to mention that for all the ICC indicted African high profile personalities, no African country has demonstrated the capacity to host their trials in their country. This is suggestive that, if the ICC could not do so, the case in question could have been one dead on arrival. This is indicative that Africa, at least as it stands today, is hardly capable of providing the necessary infrastructure which the ICC provides. This is fairly illustrative that the ICC is still relevant to 21st century Africa. For instance, though there were significant geopolitical reasons for the indictment of former Ivorian President Laurent Gbagbo, his extradition to The Hague in

November 2011 played a key role in restoring relative peace to Côte d'Ivoire after the country was plunged into civil crises that bothered on elections. France, for instance, was supportive of his arrest as could be seen in BBC's reportage of his acquittal: "Mr Gbagbo was captured in 2011 in a presidential palace bunker by UN and French-backed (emphasis mine) forces supporting his rival, Alassane Ouattara (2019)." Without this intervention, Africa could have found it difficult to handle the situation owing to the potential multiple violent effects associated with grave human rights abuses that could have emerged in the country and its impact on the sub-region and the continent at large.

The mere presence of the ICC with its current structures, powers and jurisdiction injects some fear into African leaders who contemplate crimes within the ambit of the Court. It is becoming increasingly appreciated that no matter how long one escapes from the ICC, its long arms of justice will eventually catch up with its victims. The existence of the ICC alone, therefore, serves an important relevance to African leaders and their involvement in core crimes.

This paper suggests that the AU's desire to have its membership withdrawn en mass from the jurisdiction of the ICC is conceived out of bad faith, and the Union should rescind this decision since it has failed to establish irrelevance of the ICC. Many of the African cases brought before the Court were willingly sent there by African leaders themselves. It, therefore, becomes hypocritical for Africa to turn round and cry wolf about the same Court. This rather amplifies the relevance of the Court to Africa. Given that Africa's leadership and the AU itself acknowledge the importance of the ICC, except that it wants to see the Court going after other criminals in the West, is indicative of the Court's relevance to the continent. In the end, the letter and spirit of the Court's establishment as far back as 2002 remains as relevant today as it was then to the 21st century and beyond.

Conclusion

While there are significant challenges associated with operations of the ICC, the AU needs to establish convincingly beyond reasonable doubt that the Court's interventions on the continent are unmeritorious. Africa's displeasure and frustrations at the Court's posturing, though born out of legitimate concerns, do not stand out robust enough to justify withdrawal from the ICC without a strategic alternative. Denouncing the ICC on account of its weaknesses is comparable to the Ghanaian proverbial reasoning that throwing a baby away with the dirty water in a basin only because the baby has soiled itself is a bad judgment: better keep the baby and deal with the dirty water.

In the larger interest of international jurisprudence, especially for victims of core crimes who otherwise are not likely to find the solace of justice anywhere else, the AU is encouraged to give diligent and delicate pride of place to engagement, dialogues and negotiations in place of non-cooperation. Should the AU eventually insist on exiting the Rome Statute, it would serve the interest of Africa and the cause of justice for the AU to establish and ensure that an effective alternative court is made fully functional and operational before quitting the Rome Statute. This would ensure that a "prosecution gap" is not created for perpetrators of core crimes. A failure in

this direction could damage the enhanced authority of the AU, and threaten to plunge Africa into an abyss of dark ages.

The ICC should demonstrate that it is rising above real or perceived unfairness in order to regain the AU's needed trust and co-operation so as to justify its status as an international umpire. There is sufficient proof that both the ICC and the AU need each other as ever before.

It is the view of this paper that Africa's peculiar circumstances do not give it a commanding leverage for operating an effective African version of an ICC that will be capable of surviving the test of time. At the same time, the paper believes that the ICC ought to be more conscious of the fact that, since it would need to depend on African leadership to get its work done in Africa, it should take Africa's concerns on board.

It is finally the submission of this paper that it fails to be persuaded into identifying with the AU's non-cooperation stance. Thus, the International Criminal Court remains as relevant to 21st century Africa and beyond, just as it was at birth. The AU and the ICC should, therefore, stand together to strengthen their individual and collective weaknesses in order to make the ICC a formidable international force to reckon with.

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