Dispensing International Criminal Justice and its Bottlenecks in the Sudan and Kenya Cases

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Abstract

To a layman in law, the on-going ICC cases and the politics around them is a sign of desperation when it concerns the process of criminal justice. Little do we know that every law must have its philosophy and principles that make it deal with the questions of justice in the real time. The challenges facing the International Criminal Court (ICC) today are ordinary and within the expectations of international lawyers, scholars and drafters of the Rome Statute. The creation of the ICC took the world a very long time due to its affinity with national and international politics, and diplomatic relations. At the same time the need to have an effective international criminal judicial system was due and the time to establish the Court was ripe enough. The reason is that many persons continue to lose their lives in what would be considered as abuse of human rights and fundamental freedoms of persons. Those who appreciate and glorify the work of the ICC also question the rationale behind the States that have not acceded to the Rome Statute, yet they commit crimes. At the same time some States feel oppressed and subjected to international criminal audit against their will. Such tensions and doubts are answered in the reflections highlighted in this article.

Introduction

This review paper seeks to discuss in depth some leading factors in the cases involving Sudan and Kenya and the challenges of the provision of Rome Statute, Article 27(1) that says: "This Statute shall apply to all persons without any *distinction* based on official capacity. "In particular, official capacity as a Head of State or Government, a member of a Government or

parliament, an elected representative or a Government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground from reduction of sentence."

On March 4, 2009, the world woke up to the reality that Mr. Omar Hassan Al Bashir was faced with a warrant of arrest issued by the International Criminal Court (UNSC Res. 1593, 2005) at the request of the United Nations Security Council for alleged criminal offences in the Darfur region of Sudan. This was the first time that a serving "Head of State" from the African region was given the order of warrant of arrest by the world court under the Rome Statute for crimes against humanity, war crimes, and genocide. World public opinion was divided on the announcement indicting a sitting President. Two opposing views were recorded: one in favour of the Court ruling; and the other dissenting opinion against it. Surprisingly enough, many African States and members of the African Union viewed the indictment of a sitting Head of State as an act of arrogance by the Court and interpreted the whole judicial process as witch-hunting targeting only African States. As a result some Heads of State and Government have made public expressions of neo-imperialism and re-colonisation of African states.

1. More Questions than Answers

The Rome Statute that established the International Criminal Court has provoked several criticisms across Africa. African Union member States who suspected some mischief in the whole practice have condemned the court and threatened a mass walk-out. Questions related to

complementarity principle and admissibility of cases arose immediately Mr. Omar Al Bashir was indicted.

The order triggered off different emotional reactions that made some African Union members change their attitude towards the ICC and campaigned for mass walk-out. Since then African Union members have generated dissenting opinion criticising the conduct of the ICC and the whole exercise alleging that the jurisdiction of the court is questionable. The generality of criminal cases as handled by the ICC differed considerably. The nature, the surrounding socio-political environment, geopolitical characteristics and the motivation that suggests case by case analysis indicate several contradictions with new turn of events.

The Kenyan situation was triggered by the post-elections violence of 2007/8 which saw many people killed and hundreds of thousands displaced. Crimes against humanity were committed and through the efforts of prominent African personalities mandated by the African Union, Kenya was encouraged to establish a special tribunal to bring to justice the suspects. The failure of the political actors to come up with a local tribunal made it possible for the Prosecutor of the ICC to apply *proprio motu* (Art. 15(1) principle) to begin investigations in Kenya. At the announcement of the suspects indicted by the Pre-Trial Chamber of the ICC, the Kenyan Government and political factions started to change tune. The ICC was no longer the best option and the need to refer or defer the cases was high.

The Government of Kenya, while calling for withdrawal from the Rome Statute, actively took the lead in campaigning for either deferral or referral of her cases from the International Criminal

Court arguing in favour of domestic jurisdiction[1] (African Union Assembly, Ordinary Session, Addis Ababa, 2010). Several diplomatic attempts to secure the consent of the United Nations Security Council collapsed creating more room for challenging the admissibility provision under Article 17 of the Rome Statute (2002). A number of shuttle diplomatic missions and persuasive talks were conducted at different levels with African Heads of State involving top Government authorities in negotiations and brainstorming. The Government of Kenya has never relented in its request for referral since the confirmation of the cases against four Kenyans to face full trial at the ICC. State law offices, Attorney-General Chamber, the Ministry of Justice and Constitutional Affairs, the Cabinet, National Assembly and its relevant committees, all hired law experts and technocrats, engaged in different occasions with intention to ensure that the work of the International Criminal Court in prosecuting Kenyan nationals was neutralised or at least diverted to regional or national courts. With the collapse of the case against Mr. Francis K. Muthaura, Kenyan suspects dropped from four to three. The collapse was blamed on failure to have sufficient number of witnesses to support the Prosecutor's case against Mr. Muthaura. Yet, the Prosecution affirmed that it had strong and valid cases against the three, President Uhuru, his Deputy Ruto and journalist Sang.

Opinions opposing the ICC in both Sudan and Kenya cases by the African region were provoked initially by the case of the Sudanese sitting President and later by Kenyan sitting President. In what seems to be a political motivation, the reality at hand is that like-minded members of the African Union ganged up to reject any attempt by the International Criminal Court to prosecute

[1] DAVID J. BEDERMAN, "International Decisions", in *The American Journal of International Law*, January 2012Issue, American Society of International Law, http://ssrn.com/abstract=2000343

any sitting Head of State in spite of the provisions of the Rome Statute and their international obligations stated by the Vienna Convention on the law of treaties of 1969[2].

As has been said before, the situation in Kenya in 2009 was that both Parliament and the general public preferred ICC to a national mechanism, suggesting that the Government would fully co-operate with the requirements of the International Criminal Court. The visit by then Prosecutor, Mr. Luis Moreno Ocampo, and the Registrar of the Court received positive nod from the Government. By then it was not known by the general public who would be the suspects or the perpetrators of the Post-Elections Violence that the Office of the Prosecutor (OTP) would be interested in prosecuting until the announcements of March 2011 which brought about the turn of events.

First and foremost, it is important to read between the lines the whole case and the environment within which the ICC is operating. Given that the ICC operates in a highly charged political environment implicating States with sovereign powers and territorial integrity, Article 27(1) cannot avoid facing oppositions even from the very States that enthusiastically had signed, ratified and adopted the Rome Statute in 2002. Another perspective of this contradicting opinion

[2] Since then the court has encountered significant challenges especially when the Government of Kenya sought to shield its nationals defying the mandate of the Court in dispensing international justice as prescribed by the Statute. On August 30, 2011, the Appeal Chamber of the ICC rejected Kenya's admissibility challenges under Article 19(2)(b) of the Rome Statute (ICC Doc. ICC-01/09-01/11 (30 May 2011) at # 44).

is anchored on the myth surrounding African leadership especially in the dictatorial regimes or totalitarian governments where people still see myths in their rulers (rulers are seen as small divinities) and put them above the law, or persons in authority use their powers to commit crimes and defend themselves using the State powers in what is known as impunity.

It is important to dispel argument that in African political contexts a "ruler" is seen to be in possession of some mythical powers (Elias, 98: 1956); therefore, it is an anathema even to imagine arresting a serving Head of State, let alone imagining his conviction by an international criminal court. The tendency to see some divine power in African leadership, which seems to be within the range of some customary beliefs, is prominently influencing African public opinion and alluding to the fact that it would be difficult to apply the rule of law and equality principle of justice when it comes to what international justice requires of Heads of State that violate international criminal and international humanitarian law. Uprooting impunity in Africa requires international effort other than local or national efforts. On one hand immunity and privileges that Heads of State enjoy in Africa is customarily believed to involve also charges of criminal offences (crimes of genocide, war crimes and crimes against humanity), and this seems to be the leading factor in the case of Sudan and the feeling of the African Union. On the other hand the Kenyan cases are seen as influenced by the corruption, impunity, nepotism, use of wealth, ethnic politics and the situation of the coalition Government that appear to put road-blocks in the ICC process and the international criminal justice system.

Purportedly charging Mr. Al Bashir while in office would be a humiliation to the Sudanese people and a challenge posed to the statehood from a political perspective. The supremacy of the king's will was maintained by a continual display of his absolute power over the lives, bodies and fortunes of his subjects (Bello, 15: 1980). In the African customary humanitarian law the struggle for power (politics), wealth and influence were the major causes for armed conflicts.

The Sudan and Libya cases are similar in that both leaders came into power through gun, and they differ in that the former's criminal charges were proposed by the international community while the latter was initiated by the same people of Libya then later by a resolution issued by the United Nations Security Council. Legally speaking, the criminal charges against Mr. Al Bashir are provoked by the evident violations of the international criminal law as stated by the Court. The law in this case treats Mr. Al Bashir as a person and not as Head of State unveiling the act of incorporation. This is an important dichotomy and personality distinction that is disturbing under Article 27(2) of the Rome Statute and as such domestic politics and issues cannot overrule the principles of international criminal justice unless the law is bent to favour individual interests.

The Kenyan cases take another turn with the coming into presidency of Mr. Uhuru and Mr. Ruto after winning the March 4, 2013 presidential elections. In what could be interpreted as the court of public opinion acquitting the two from their criminal offences, the Kenyan Government has re-engaged in another campaign for the cases to be deferred or terminated citing insecurity and possible power vacuum. Again the complication of the cases seems to move from individuals to Kenya as a State, or as a people, a sentiment that the current ICC Prosecutor persistently denies.

2. Article 27(1) of the Rome Statute

By the time the Rome Statute was being drafted by international law experts it was clear enough that most of the international crimes involving State organs especially in powerful authoritarian regimes were well taken into consideration. By then it was evident that in several States, including the former Federal State of Yugoslavia, and many other African States, there were already numerous reports of serious criminal offences that would attract the attention of international criminal justice in terms of crimes such as genocide, war crimes, and crimes against humanity involving Governments or persons in authority. Since most of such crimes were related to State power, the genesis of the norm was to come up with a provision that would deter State officials and hold them accountable as individuals for international crimes without any regard to their political status.

Other realities that would have been considered in this case were the general principles of international law such as *jus cogens* and *pacta sunt servanda* that define *Jus humanum* of the 19th Century and due process of law is regarded as human rights. The benchmark in these rules is that human life is an inalienable and inviolable right contained in the universal human rights and fundamental freedoms. These are also the underlying principles in the treaty law including the Rome Statute. The treaty law binds the State parties and non-State members not to act as they wish (Koroma, 2005). There is a strong belief in the trend of international justice that human life is beyond state sovereignty as has been clearly demonstrated in the concept of *jus cogens* norms. Zero tolerance to crimes of genocide and other serious crimes of similar gravity cannot be overruled by any treaty, law (statutes) or custom. Human life is held sacrosanct by the

international human rights law and contemplated in the four Geneva Conventions of August 12, 1949, and the Additional Protocols of 1977 and 2005. This is justified by repeated call for protection of human life and assistance of the sufferings during international and non-international armed conflicts, moving us closer to the concept of human solidarity around which the intervention of the Prosecutor in the case of Sudan and Kenya can be justified.

In the same manner, African customary law upholds the same concepts of protection of human life during conflicts and human solidarity principles which enshrine sacredness of life (Bello, 3: 1980). Reading from the pedigree of historical books, there was no case in which people would allow and render legitimate the shrewdness of the chief or ruler especially when he destroyed his subjects. Mr. Omar Al Bashir would have met similar charges in African traditional courts if these courts were enforcing the law to the letter and spirit. Bennett has observed that "a notion of due process of law permeated indigenous law; deprivation of personal liberty or property was rare; security of the person was assured, and customary legal process was characterised not by unpredictable and harsh encroachment upon the individual by the sovereign, but by meticulous, if cumbersome, procedures for decision making" (2010: 4). In African ethical system many scholars have proved that Africans had value for life and whatever would interfere with it would stand opposed. The allegation that the international criminal justice is targeting African region is a mistake and should be expeditiously corrected. Such nuances in the political circles negate the progress in Africa, undervaluing the African people and its progress.

The case of Sudan is suggesting two important legal concepts in the international case law: a person of superior authority should be held individually responsible for giving an unlawful order (criminal liability) and he should be held responsible for failure to prevent criminal offense to deter the unlawful behavior of his subordinates (criminal responsibility). It is believed that Mr. Al Bashir should have acted, or demonstrated that he acted with due diligence to prevent the alleged crimes from occurring. The failure to do so would equally implicate him in the alleged crimes as an act of omission. It is convincing, therefore, that Al Bashir had all the possibilities within his powers to prevent the crimes from occurring or to demonstrate that he exhausted all options available within his powers to respect and observe international humanitarian law and international criminal law.

The principle of equality as contemplated in the theory of justice (Rawls, 442: 1971), and reflected in Article 27(1) of the Rome Statute, makes it possible for the judges of the ICC to issue a warrant of arrest to any sitting President without fear or favour. By doing so, the principle of State sovereignty stands overruled by the principles of *jus cogens*. The provision of Article 27 states that: "this Statute shall apply *equally* to *all* persons without any distinction based on official capacity". It is necessary, therefore, to analyse the meaning of the italicised words in order to understand their essence as contemplated in the aforesaid norm.

The word "all" appearing in Article 27(1) portrays the principle of collectivity (Malcom, 2005: 38) and the universalism characteristic of the international criminal justice system as stated. Under the customary international law the universality of law suggests that all human beings

have equal obligation to respect and safeguard humanity. This shows also that international criminal law must be seen to apply to all using the principle of human rights stating that all human beings are born free and equal in dignity. Humanity, therefore, is one and it is from the same "oneness" that we can address international justice and apprehend real meaning of the universal jurisdiction as exercised by the world court. That is to say, whoever commits international crime or fails in his or her obligations will respond accordingly to the same international criminal law in disregard to the relativity of law or State immunities. In light of this legal assumption, anybody, despite his or her political position, is subject to the same rules.

3. Lifting the Veil of Immunity & Privileges

States are sovereign and the state officers are accorded immunity and privileges as highlighted in the two Vienna Conventions on Diplomatic Relations of 1961. In the perspective of public international law, State sovereignty, integrity, and independence are fundamental and inviolable. This sentiment of sovereignty of the State, as preached by the international law doctrines such as Oppenheim, argue that a State shall not interfere with the internal affairs of other States and that States will ensure that they maintain their individuality and international intercourse at the same time. Hence, Heads of States enjoy diplomatic immunity and privileges that are provided for in the treaty law and the customary international law.

In this regard States develop a sense of self-protection that is more political than legal, which makes it hard for an international court to indict a sitting Head of State or Government without creating political animosities and diplomatic complications. The cases against Al Bashir,

Augustus Pinochet, Slobodan Milosevic, Laurent Gbagbo, Charles Taylor, and Uhuru Kenyatta, have set some concrete precedents in international case law that should not be ignored. It is apparently clear that the developing international criminal justice, international humanitarian and human rights law shall never condone any international crime despite the position, role or status of perpetrators or suspects. The International Criminal Court has an international jurisdiction over criminal cases as provided for under the Rome Statute and promotes the due process of law.

The veil of State sovereignty, immunity and integrity has been already lifted in the cases against late Col. Muammar Gaddafi (Libya) who was the sitting Head of State when he was indicted, Milosevic, Al Bashir, Charles Taylor, and Gbagbo, among others. These precedents are what contribute to the development of international criminal jurisprudence. In the same manner the veil of State sovereignty has been lifted in the cases against Kenyan State officials charged with crimes against humanity and confirmed for full trial at the ICC. The situation does not change even after the democratic election of Mr. Uhuru as president holding State and Government responsibilities according to the constitution of Kenya.

The former President of Liberia, Charles Taylor, and his Ivory Coast counterpart, Laurent Gbabgo, have been indicted by the ICC. While Mr. Taylor's case has been successfully concluded that of Mr. Gbagbo is still underway. Constitutionalism and the principles of the rule of law are being felt across the board, and yet States shall continue opposing any law that will minimise their sovereignty and reduce the dignity of their statehood.

4. Dilemma Facing the ICC in the Sudan Case

Immediate concern is linked to the political commitment of international peace and security as provided for by the United Nations Charter. The ICC under Article 1 states that it shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern. The same provision states that the Court shall be complementary to national criminal jurisdictions. Under Article 4(2) it is stated that the Court may exercise its functions and powers, as provided in the Statute, on the territory of any State Party and by special agreement on the territory of any other State.

The word "may" is not a coercive term and it suggests that the Court can consider some political arrangements such as need to secure national peace and security whenever it deems necessary (the case of Kenya 2013). This is contemplated in the clause on complementarity of the ICC and the national jurisdictions. The question that follows is: up to what extent can we tolerate such requests based on political grounds? Will this not be tantamount to justice delayed hence justice denied?

Such connotation implies that the Court may be politically compromised in its decisions leading to loss of its impartiality, fairness, and integrity in dispensing efficiently and expeditiously international justice as expected. This political consideration may require a lengthy period of time for the Court to act on wanting criminal cases and operate within reasonable given time without encountering criticisms or creating problems to the international criminal justice process.

5. UN Security Council

The relationship between the Court and the United Nations Security Council is that the two entities are distinct, separate and independent from one another. The ICC was created by the Rome Statute and its fate lies fully with the Parties as prescribed by the treaty law. The Statute is binding on its original and acceding members as its primary subscribers. Yet the same State members of the Rome Statute are also members of the United Nations and vice-versa.

Under Article 2 of the Rome Statute it is stated that the Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of State Parties to it. It is tacitly implicated that this provision shall oblige the ICC to respect its obligations towards the United Nations Security Council request and accede to its resolutions without necessarily becoming its member. Already this has been demonstrated in the case of Libya when the United Nations, through the Security Council, requested the Office of the ICC Prosecutor to intervene and conduct investigations in the case of the late Muammar Gaddafi, his son Saif Al Islam, and Mr. Senussi.

6. Treaty Law and Criminal Liability of Non-Parties

The case of the Sudanese Head of State gets more complicated when one considers the fact that some State Parties to the Rome Statute have defied the Court declined to fulfill their international obligation defined under the principle of *pacta sunt servanda* in the Vienna Convention (1969). Mr. Omar Hassan Ahmad Al Bashir has visited Chad, Nigeria, Ethiopia, Kenya, and Malawi despite the international obligation of such States to enforce the Rome Statute and forthrightly arrest him and hand him over to the ICC authorities.

Political protection by the African Union of its members charged at the ICC is tantamount to contempt of court and may lead to institution of contempt proceedings by the ICC against AU members. African Union is not a party to the Rome Statute and its resolutions are just mere political instruments with no legal value. The continental body can only persuade its members to walk out of the ICC, but even this may not be so easy since some members are still convinced that justice must take its course without any hindrance. The ICC has not managed to indict the defiant States for contempt of court and debate is still there on whether the Court should assert its judicial powers and proceed with the cases or withdraw the controversial cases from its list once and for all. This is a real dilemma that requires time, debate and consultations with *top brass jurists*, members of the ICC, the UN Security Council and subscribers to the Rome Statute. However, the warrant of arrest put on Kenyan journalist Mr. Walter Baraza on October 2, 2013, indicates that Kenya must pass the collaboration test and arrest the suspect wanted by the Court for interfering with witnesses.

Being a signatory to the Rome Statute or not does not shield criminals. Sudan is not a signatory to the Rome Statute but is a *de jure* member of the United Nations thus subjected to the norms of the UN Charter. Even if it appears that the ICC is walking on a tight rope, it cannot fail to respect the request of the United Nations Security Council while maintaining its impartiality, independence, and integrity as contemplated in the Statute.

7. Applicability of Universal Jurisdiction

The universal jurisdiction principle that saw Great Britain arresting Mr. Pinochet (former Head of State of Chile) following the indictment placed on him by Spain and many other civilised nations such as Belgium and France is another new developing challenge within the range of international criminal justice. The States that violated their international obligations arising out of the Vienna Convention have also infringed the principle of universal jurisdiction. The feeling is that States will not be willing to surrender their constitutional rights and adhere fully to their obligations in the international judicial system. International criminal law punishes those who violate it as individuals or groups, not as States. From the cases that we have analysed there is a big difference if the perpetrator is protected by the State. In the case of Sudan and Kenya it is the State protecting the perpetrators and ensuring that they don't face the international justice system outside their jurisdictions. The contrary happens when the perpetrator is not supported by the State and does not enjoy immunities and privileges as in the cases of DRC's Piérre Bemba and Lubanga. In the two cases, the State cooperates with the ICC making the criminal proceedings easier and tenable.

8. Contempt of Court

Failure to arrest the indicted President Omar Al-Bashir by State parties to the Rome Statute is a sign of impunity and can be interpreted as contempt of court. Since the issuing of the warrant of arrest against Mr. Al-Bashir, the indicted perpetrator has continued visiting several States that have failed to arrest him. The accused has visited several African States including the Republic of Chad, Kenya, Uganda, Nigeria, Malawi and Ethiopia. None of these countries made any effort to arrest him Mr. Bashir.

The Government of Kenya is yet to prove its case in obeying or disobeying the warrant of arrest issued against a Kenyan citizen, Mr Walter Barasa, by the ICC in October 2013. The failure to do so might complicate the Kenyatta and Ruto cases, whereas compliance may persuade the Court that Kenya is fully cooperating.

Conclusion

So much has changed in the situations of Sudan and Kenya with a number of turn of events. Since the election of Mr Kenyatta as President and Mr Ruto as his Deputy in the March 4, 2013 General Elections, the Kenyan cases at the ICC have encountered another significant challenge in their history. The Government of Kenya, with the support of some African countries, has argued that such cases implicating the President and his Deputy should either be deferred till they finish their term in office or be terminated altogether with immediate effect. However, the international criminal justice systems appear to uphold the spirit of the Rome Statute, to deal with impunity engulfing States. The drafters of the Statute were quite aware of possible political resistance, use of human shield and State resistance in serious violations of international criminal law.

As Kenya awaits its fate in regards to the ICC cases, debate still rages on whether a sitting Head of State or Government should be arraigned in the world court to face international justice or not. Stakes are high as the highly powered United Nations Security Council is to make its

contemplations on the case and whichever resolution shall be adopted will have its consequences. It is a question of time and a big trial for the world court to come to terms with its operations without failing and at the same time working closer with State Parties. Probably the conception of the relationship of the proposed international court and national justice systems must be revisited by the International Law Commission and to possible consider any necessary amendments to the Rome Statute.

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