AFRICA AND THE ICC: WHICH WAY FORWARD?

By Daniel Ehighalua

THE International Criminal Court (ICC) is the world's first permanent international criminal court. The ICC was established pursuant to the adoption and subsequent ratification by the required legal minimum number of State Parties to the Rome Statute on July 17, 1998. Senegal on February 2, 1999, was the first country to ratify the Rome Statute. The Czech Republic became the 110th country to ratify the Statute in October, 2009. There is a growing momentum globally by the Coalition for the International Criminal Court (CICC) to up the number of ratifying countries through advocacy, education, sensitisation and the medium of civil societies in over 150 countries worldwide. The ICC it appears, has come to stay, despite the sticks and skepticism of some of the world's global powers - the United States of America, India and China.

The attempt by the international community to confront impunity has had a chequered history. The League of Nations in 1937 did articulate a Draft Convention on International Criminal Court before the imbroglio of the Second World War and the demise of the League of Nations. Prior to the coming into force of the ICC, the international community responded to specific conscience shocking situations around the world with the setting up of 'hybrid' courts. The earliest of these tribunals were the Nuremberg and Tokyo Tribunals after the end of the Second World War, to trial Nazi war criminals. These Ehhybrid courts were the precursor to the ICC. However, they were constrained mainly because of the very limited agenda that informed their existence, that is, to deal with specific situations.

More recently, The International Criminal Tribunal for the former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR); the Special Court for Sierra Leone (SCSL) and the Special Tribunal in Lebanon and Cambodia were established to confront the post war/conflict situations in these countries. These tribunals were usually set up and/or driven by the United Nations, or as in the case of Sierra Leone, taken over by the United Nations for a variety of reasons. These were all attempts by the comity of nations to respond to specific egregious violations of international human rights law, international humanitarian law, the laws of war (the 4 Geneva Conventions of 1949 and 1950). These courts were designed to confront the fallout of state impunity and atrocious acts that shocked the conscience of the international community. The Rwanda genocide was one such situation, where it seemed that the world let down the Rwandese people.

The ICC unlike these ad hoc tribunals is a permanent court. It is headquartered in The Hague. Of the 110 countries that have so far ratified the Rome Treaty, 30 are African State Parties. Africa played a leading role in the years preceding the Rome conference where the Statute was adopted. The Dakar and SADC declarations respectively formed the kernel of African's input into the Rome Statute. Consequently, African countries were effectively in the thick of the process and eventual formulation of the Rome Statute. That

active involvement, in a sense, was carried forward by African countries with the re-fashioning of the Organisation of African Unity (OAU) to become the African Union (AU) and the fundamental changes that the transformation of the continental body brought about.

This is clearly evident from the shift in watering down the principle of state sovereignty and that of non-interference in the territorial integrity of member states and the new doctrine of non-indifference as opposed to non-interference in the internal affairs of member-states. The 2000 Constitutive Act of the AU was a major paradigm shift in international law. The implication, therefore, was that African States could no longer hoist the mantra of non-interference as excuse for the continued dehumanisation of its peoples. The African Union commitment was, therefore, to say that impunity and gross human rights violations would be collectively confronted, and if need be, the AU would forcefully intervene in any member-country where human rights violations reaches the threshold as enunciated in Articles 4(h) of the 2000 Constitutive Act. In a sense, this was taking the matter of confronting state impunity to another level.

It has been argued that the AU could have stretched the logic further to fully empower and confer criminal jurisdiction on the African Court on Human and Peoples Rights to deal with violations arising from breaches of the Constitutive Act as envisaged. Thus, some African scholars are now calling for the regionalisation of international criminal law as a way of stemming what is perceived as the 'lopsided justice' of the ICC. The argument is that the plank of that justice is to be weaved around empowering individuals to be able to legally bring personal applications before regional courts, as well as extending the jurisdictions of these courts to include personal criminal responsibility, as well as lifting the veil of state immunity for state officials.

Although this proposition is yet to gain currency, the fact that the ICC is essentially a court of last resort, it is not impossible that in the near future, these and other considerations will start to feature in the ICC jurisprudence. The current ICC Prosecutor (Luis Moreno Ocampo) considers the success of the ICC as the fewer number of situations that the ICC would be called upon to deal with in the future, consequently, giving credence to the principle of complementarity as enunciated in Article 17 of the Rome Statute.

Nigeria ratified the Rome Statute on September 27, 2001. Nigeria operates a dualist system with respect to the doctrine of incorporation of Treaties, thence, though Nigeria has ratified the Rome Statute, it has not yet become part of Nigeria domestic law. Under the Nigerian Constitution, it requires the passage of a local legislation by both Houses of the National Assembly, as well as the assent of the President for the Statute to have municipal force of law within Nigerian courts. It is instructive to note that a Draft Bill was pushed through the two National Houses of Assembly during Obasanjo's tenure as President, but got stalled at the level of the President assenting to the Bill. Given that the life of that legislative Assembly came to an end, a new Bill would now be made to go through the mills de novo.

Domestication of the Rome Statute still largely remains an issue for a large number of the State Parties that have ratified the Rome Statute. For purely domestic procedural and legal reasons, this still remains an issue for most State Parties to the Statute.

The ICC has no 'universal jurisdiction'. The jurisdiction of the court is either invoked or triggered. The ICC's jurisdiction is invoked where a State Party to the Rome Statute makes a 'self-referral' to the court under Article 13 of the Statute. Of the four situations presently before the court, three arose from such 'self-referrals' by Uganda, Central African Republic (CAR) and the Democratic Republic of Congo (DRC). The ICC prosecutor can also trigger a case in exercise of his pro priotu (on his own initiative) powers, that is, by initiating investigation with a view to prosecution. This power has never been exercised by the prosecutor. The prosecutor is currently investigating several situations with a view to commencing prosecution if the State Parties in question fail to take steps. This is currently the situation in Kenya. Finally, the jurisdiction of the court can be triggered by the United Nations Security Council (UNSC) in exercise of its Chapter VII powers, referring a situation to the prosecutor, even if such a country is not a signatory to the Rome Statute. This is the basis of the current situation in the case of Sudan, following the report of the Darfur Commission into crimes of genocide, war crimes and crimes against humanity alleged to have been committed in the Darfur region of Sudan.

There is also a 'reversionary process' of recalling a referral. This is referred to as a 'deferral' under Article 16 of the Statute. It is a process and procedure the AU is interested in applying to engage with the Sudanese situation as a way of managing the current imbroglio between the ICC and the Sudanese President Omar Al Bashir.

The ICC operates on the principle of 'complementarity' or 'subsidiarity'. The court is essentially not a court of 'fourth instance'. This means that recourse to the ICC is secondary and that States are primarily encouraged to put in place national judicial systems for dealing with persons who are alleged to have committed or 'bear the greatest responsibility' for the commission of war crimes, crimes against humanity and genocide. The ICC in a sense, should be a court of last resort where national authorities are 'unable or unwilling genuinely' to prosecute those who commit such heinous crimes. In this regard, national authorities ideally should have a first bite of the cherry and prosecute alleged perpetrators of heinous crimes committed within their territory. It is only when a country fails to put judicial machinery in motion that the prosecutor commences investigation with a view to prosecuting. This is what Colombia is attempting to contend with. It is also what the ICC is expecting Kenya to grapple with following the mayhem, death and destruction that trailed the general election of 2008.

The stalemate eventually led to the formation of a national government with President Mwai Kibaki and Prime Minister Raila Odinga sharing power. It is yet to be seen whether the Kenya government will summon the political will to bring the alleged perpetrators to trial failing which the ICC prosecutor might be compelled to intervene.

The ICC is at a crossroads. The Rome Statute falls for review in 2010. Kampala, the

capital of Uganda, will host the review conference in May. It will be a defining moment for the court. The agenda of the review conference, among others, will attempt to resurrect the definition of the crime of aggression. This was deferred at the negotiation of the Rome Statute as State Parties could not reach a consensus as to what constitutes crime of aggression. The review conference will also review the powers of the prosecutor to initiate prosecution, even though the prosecutor has never exercised this power to bring a situation before the ICC.

For Africa, the review conference it appears, is set to pitch African states and non-state parties to the Rome Statute as to the future of the court vis-□-vis what is being considered in some quarters, as the court unduly 'picking on' African countries.

Broadly, two schools of thoughts have merged or is emerging, regarding what the ICC in relation to Africa has done so far. Prof. Mahmood Mamdani is the foremost advocate of the school of thought that the ICC is another form of neo-colonialism; an imperialistic institution that was foisted on and is targeted mainly at African and poor countries of the South. He contends further that a legalistic approach to the issues of justice, reconciliation post war, conflicts and human rights violations in Africa will not produce the desired result. He concludes that a mix of justice and socio-political engineering the African style, will produce a more stable African society that will engender peace and development.

Prof. Charles Chernor Jalloh on the other hand, although acknowledges the primacy and desirability of the ICC for Africa, is somewhat cautious and advises that Africa's relationship with the court must develop taking into consideration the peculiar nature of the African situation. He opines that if this delicate balance is played out, the ICC could be a 'win win' situation for Africa, given the internecine wars and conflicts, gross abuse of human rights and poor governance currently in Africa.

The ICC's recent warrant for the arrest of President Omar Al-Bashir of Sudan also provides the context and background for the forthcoming review conference. Al-Bashir is now an international pariah. To date, he has not succeeded in visiting any of the State Parties to the Rome Statute. The combination of unfavourable public opinion and the concerted efforts by civil society organisations, prevented this from happening. The Nigerian Coalition on the International Criminal Court (NCICC) launched a major advocacy blitz both in the print and electronic media to forestall the said visit. Thankfully, the Federal Government of Nigeria harkened to wise counsel and this did not happen. Al Bashir has also attempted recently to go to Turkey, although Turkey is not signatory to the Rome Statute, but the Turkish government developed cold feet and called it off. This development has brought to the fore the question of political and legal justice. Prof. Jalloh is of the opinion that if carefully managed, legal justice can effectively be steered away from politics, but the African context must be properly situated and the ICC must now proceed to deal with other similar situation elsewhere in the world to give the work of the court a much broader reach beyond Africa.

It is contended that if this is done, it is capable of getting other lukewarm countries to

buy-in and sign up to the Rome Statute. In this connection, countries like the United States of America, China and India could then be encouraged to get involved with the ICC and ratify the Rome Statute. The United States of America only recently attended the Assembly of States Parties (ASP) meeting that took place from the November 18 to 26, 2009, albeit as an 'Observer'. Keen observers of this development has alluded to the possibility of the State Parties reaching a consensus on the definition of crime of aggression, which they have reckoned the US intends to fully follow through. This is so given that however the definition of crime of aggression is couched, it will for obvious reasons, re-open the whole question of the legality of the actions of the United States in intervening in Afghanistan and Iraq. Could these interventions for any reason(s) be termed aggression on the part of the United States? More worrisome for the United States of America is the fact that the ICC would almost certainly have jurisdiction to deal with any such situation as the period of the Iraqi and Afghanistan war falls within the ICC's cut off date for assuming jurisdiction, that is, events occurring after the July 1, 2002. There is also the question of the dubious legality of the war, and whether on a proper interpretation of the powers of the United Nations, the United States of America and her allies would not be found wanting for prosecuting an illegal war. This is still a moot point. The United Kingdom only recently set up a high powered enquiry to unravel the role of the United Kingdom and public officials involved at the recent time, leading to the full blown outbreak of war.

The Al Bashir arrest warrant has split African countries down the middle. At the recent African Union preparatory meeting on November 3 to 6, 2009 - in advance of the review conference - the AU attempted to juxtapose the question of justice with those of peace, development and security. In the result, it is unclear whether African countries will be speaking with one voice or discordant voices. It would be interesting to see how these issues pan out. What implications it would have for Africa?

The implications for the ICC given that African state parties constitute the largest continental bloc that have ratified the Rome Statute. On a broader level, it will bring to the fore the question of addressing state impunity, conflicts and wars and the larger questions of the violations of human rights and implications for good and democratic governance in Africa.

In conclusion, there remains the real possibility of the ICC being a 'win win' situation for Africa. On the one hand, the legitimate concern of African countries and scholars as to the undue emphasis of the ICC on African countries must be taken seriously. Events occurring in countries like Iraq, Afghanistan, Colombia, Sri Lanka and Nepal deserve the equal attention of the ICC prosecutor. The question of the uneven reaches of justice must be taken seriously to counter the perceived concentration on Africa, even though three of the situations before the ICC were 'self-referrals' by the African countries involved.

On the other hand, we must come to the realisation that wars and conflicts have wrought unimaginable and incalculable damage on African countries, stunting growth and development of the African people. The UN Human Development Index report and all such similar reports score two-thirds of African countries well below the poverty line.

This is due in part to unstable, vicious regimes and unaccountable governments in power in most African countries.

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