

INTERNATIONAL CRIMINAL COURT AND REALPOLITIK: DOES THE COURT SUFFER FROM AN AFRICAN BIAS?

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ABSTRACT

This article focuses on the perceived African bias of the International Criminal Court and the effect that has had on the functioning of the court. The forces of realpolitik guide the political world and the court has to undoubtedly operate in the prevailing political environment and counter these forces when it can in order to fulfil its objectives. The court has often been criticized of having an African bias and targeting the continent unfairly. Many countries have also decided to withdraw. An insight will be provided into the situation of Gambia, Burundi and South Africa. There is a focus on the relationship between the African Union and the International Criminal Court, along with a discussion on the ICC-Africa relationship and the importance of the continent to the court and its future.

Keywords: Realpolitik, Tool for Neo-colonialism, Threat to Withdraw, African Union, Resistance to the court, International Structure

INTRODUCTION

Realpolitik is a manner in which the realist and pragmatist approach to politics is practically applied. It is essentially a theory of how a state should conduct itself in the political sphere and takes into account the prevailing economic and socio-cultural realities of the time. It can be best described as an idea of the implementation of practical governance where one's interests reign supreme, often being placed on a higher pedestal than morals or ideals. A politics of diplomacy based primarily and foremost on realistic objectives that can be achieved in the given circumstance.

The term Realpolitik was first coined by a German writer and politician named Ludwig Van Rochau in his book *Grundsätze der Realpolitik angewendet auf die staatlichen Zustände Deutschlands* (Practical Politics: an Application of its Principles to the Situation of the German States) published in 1853. He tried to study Realpolitik as a force that shapes and governs the political world just as the law of gravity governs the physical world.¹ For Rochau Realpolitik was not a theory but "A mere measuring, and weighing, and calculating, of facts that need to be processed politically."² It was more of a method of working through the various political forces and ideas rather than trying to compete with them for dominance. Realpolitik dealt with the historical product, accepting it as it is, with an eye for its strengths and weaknesses and remained otherwise unconcerned with its origins and the reasons for its particular characteristics.³ It has helped shape foreign policy and the manner in which states align their interests and positions in world affairs. Thus with a view to the working of the International Criminal Court, it has had an important role to play.

If viewed objectively, the history of the development of international criminal law has been dictated by Realpolitik. Almost all international tribunals that have been established, and which through their decisions have contributed to the jurisprudence of international criminal law, have some element of victor's justice and political compromise attached to them.

¹ John Bew, *Real Realpolitik: A History* 2014

² Real Realpolitik: A History SPEAKER: John Bew EVENT DATE: 2014/04/10, available at https://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=6285

³ *Ibid*

The law then is in many ways part of the political process; law is made and agreements are given meaning by the total political process—when governments act and other governments react, when courts (national or international) decide cases, when political bodies debate and pass resolutions and nations act in their light.⁴

Recently there has been a lot of outcry from various sources that the International Criminal Court [ICC] has unfavourably targeted the African continent, focusing all its resources towards the continent and acting as a western tool for neo-colonialism. There have been repeated accusations that the ICC is suffering from an African bias and the credibility of the institution has been called into question time and again. The court has come in for a lot of criticism on this ground since the African bloc has the most member states to the Rome Statute, it has 34 member states the most of any continent. These accusations too are tainted in realpolitik, and while they may be true to some extent, the situation is not as bad as some detractors of the court have painted it to be. It is not true that the ICC is suffering from an African bias or has targeted the continent unjustly while overlooking its western member states.

The accusations arose primarily because of the 11 formal investigations currently underway by the ICC 10 are in Africa, while situations in Gabon, Guinea and Nigeria are also under examination. Furthermore most of the cases on the ICC docket are against African leaders, thus creating an image that the court has decided to exclusively focus its resources towards Africa while deadly conflicts and grave crimes over which the ICC has jurisdiction continue to take place unabated all over the world with the court turning a blind eye towards them. While it may appear so but the ICC is not targeting Africa and there are sound reason and justifications to counter these accusations.

Gambia, Burundi and South Africa have decided to withdraw from the membership of the court and there are larger calls for a mass African withdrawal. It would be wise to take a look at each of these countries specifically and analyze why they have decided to withdraw and understand their Realpolitik considerations as well.

⁴ War Crimes and Realpolitik: International Justice from World War I to the 21st Century, Jackson Nyamuya Maogoto

- Gambia – the country announced in October 2016 that it intended to withdraw from the membership of the court. The accusation was that the court was targeting Africans. Its information minister Sheriff Bojang stated that “The withdrawal is warranted by the fact that the ICC, despite being called International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans. There are many Western countries, at least 30, that have committed heinous war crimes against independent sovereign states and their citizens since the creation of the ICC and not a single Western war criminal has been indicted.”⁵ What is overlooked in this realpolitik infused anti ICC narrative are the interests of Gambia’s state leaders. Since 1994, The Gambia has been under the rule of President Yahya Jammeh, who exercises full control over the military and those critical of government policies have been at the receiving end of state excesses. With its questionable human rights track record, including the crackdown on political opponents, The Gambia sooner than later faced the prospect of emerging as a contender for an ICC investigation.⁶ The main reason of this threat of withdrawal was actually an attempt by the government to cover its track of its dismal human rights record and election related violence. In 2016 19 people including the leader of the United Democratic Party (UDP) Ousainou Darboe were sentenced to three years imprisonment. They were found guilty on six counts relating to participating in unauthorised protests on 16 April 2016 in the outskirts of the capital Banjul. The Economic Community of West African States had in June 2016 had even advised Gambia to refrain from using excessive force against protestors and to launch a political dialogue with opposition parties.⁷

It is easy to see past this anti ICC narrative in Gambia and understand that it was a ploy by its leaders to save themselves from legitimate future prosecution by the court for its

⁵ Gambia and the ICC, Available at <https://www.independent.co.uk/news/world/africa/gambia-international-criminal-court-hague-yahya-jammeh-south-africa-burundi-a7380516.html>

⁶ Why Did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court? Available at <https://thewire.in/world/why-did-south-africa-burundi-and-gambia-decide-to-leave-the-international-criminal-court>

⁷ Available at <https://www.amnesty.org/en/latest/news/2016/07/gambia-prison-sentences-for-opposition-leaders-continues-downward-spiral-for-human-rights/>

criminal activities. Even the present prosecutor of the court Fatou Bensouda is from Gambia and was a foreign Gambian justice minister. Currently the newly elected President, Adama Barrow, reversed the withdrawal decision and Gambia continues to be a member state.⁸

- Burundi – it was the first African state to formally specify its intention to withdraw from the ICC, and is so far the only state to actually withdraw. The government asserted that the ICC was an instrument of powerful countries to punish the weak who do not do their bidding.⁹ A closer look at the situation in Burundi will also reveal its Realpolitik intentions behind the withdrawal. The ICC prosecutor was authorized by the Pre Trial Chamber to open a *proprio motu* investigation in Burundi, this led to various state and government officials coming under investigation for allegedly committing crimes against humanity. The crimes were committed in the 2015 election violence that was triggered when President Nkurunziza ran for a third term in office and won the election, which was boycotted by the opposition.¹⁰ The Pre Trial Chamber found a reasonable basis to believe that State agents and groups implementing State policies, together with members of the "Imbonerakure" launched a widespread and systematic attack against the Burundian civilian population.¹¹ Thus the decision to withdraw is in the self-interest of the Burundi officials who have become the target of the investigation. Since the withdrawal of the country took effect on 27 October 2017, the ICC still has jurisdiction to investigate and prosecute individuals that have allegedly committed the crimes till 26 October 2017. The range of the ICC investigation is from 1 December 2004 to 26 October 2017. The Rome Statute states that withdrawing states are still subject to the ICC's jurisdiction for investigations initiated before the withdrawal date.¹²

⁸ The International Criminal Court's Africa Problem December 1, 2017 Kurt Mills, Available at <https://www.cablemagazine.scot/mills-icc-africa-problem/>

⁹ *Ibid*

¹⁰ Burundi leaves ICC, Available at <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>

¹¹ Available at <https://www.icc-cpi.int/burundi>

¹² Article 127, Rome Statute, 1998

- South Africa – the country was one of ICC’s strongest supporters however in October 2016 the government announced its intention to withdraw from the membership of the court.¹³ The controversy surrounding South Africa generated with the failure of the government to arrest Sudanese president Al Bashir, who had an arrest warrant issued against him and was visiting South Africa for an African Union summit in 2015. It was the responsibility of South Africa as a member state to cooperate with the court and enforce the warrant, however, it decided to not only defy the court but also the orders of its domestic judiciary and refused to enforce the warrant. The government argued that Al Bashir enjoyed immunity because he was a sitting Head of state, challenging the anti-impunity norm of the Rome Statute. Another case of realpolitik, whereby a member state deliberately did not cooperate with the court and instead favoured its ally. In March 2017 South Africa revoked its decision to withdraw from the International Criminal Court, citing in a letter submitted to the United Nations a recent court ruling that declared the withdrawal “unconstitutional and invalid.”¹⁴

Analysing this claim of African Bias we can further gain insights into the investigations that the court is carrying out in Africa and other actions that take place in the continent and their realpolitik interests.

Would statesmen yield before having exhausted every means of resistance, if they knew that in the enemy’s eyes they are criminals and will be treated as such in case of defeat?¹⁵

The African Union recently in a resolution adopted by it showed signs of supporting and propagating a mass withdrawal strategy from the ICC

¹³ *Supra* 6

¹⁴ South Africa Reverses Withdrawal From International Criminal Court, Available at <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>

¹⁵ Aron. Raymond. 2003. Peace and War: A Theory of International Relations.

“*Welcomes and fully supports* the sovereign decisions taken by Burundi, South Africa and The Gambia as pioneer implementers of the Withdrawal Strategy, regarding their notification of withdrawal from the ICC; “¹⁶

However, it has not been as damaging as some of the countries would have wanted it to be since many countries firmly opposed the idea. Nigeria, Senegal, and Cape Verde ultimately entered formal reservations to the decision adopted by heads of state. Liberia entered a reservation to the paragraph that adopts the strategy, and Malawi, Tanzania, Tunisia, and Zambia requested more time to study it.

Outside of AU meetings, Nigeria, Senegal, Burkina Faso, Côte d’Ivoire, Mali, Malawi, Zambia, Tanzania, Ghana, Democratic Republic of Congo, Lesotho, Sierra Leone, and Botswana have clearly spoken out in their capitals, New York, and The Hague to expressly reaffirm their commitment to the ICC.¹⁷

Another argument often advanced by scholars to counter the perceived African bias is that the ICC is not meant to replace national courts, but may step in and investigate and prosecute individuals if the country concerned is unwilling or unable to do so. As such, the number of cases concerning Africa may be more of an indicator of the state of domestic judicial systems there, rather than a fixation on the continent by the Court.¹⁸ Furthermore of the various investigations underway by the court in Africa many have been self-referrals by sovereign governments of the countries, again piercing the argument of African Bias. Investigations in Congo, Uganda, Côte d’Ivoire, Mali, Central African Republic, Gabon were all self-referrals, while the situation in Libya and Sudan were referrals by the Security Council. Congo, Benin and Tanzania voted in favour of the UN Security Council referral of the Darfur situation to the ICC while South Africa, Gabon and Nigeria voted in favour of the UN Security Council referral of the Libya situation to the ICC.

¹⁶ Available at https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec._1_-_19_xxviii_e.pdf

¹⁷ AU's 'ICC Withdrawal Strategy' Less than Meets the Eye Opposition to Withdrawal by States, Available at <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye>

¹⁸ *Understanding the International Criminal Court*, Int’l Crim. Ct. 1, Available at <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

Countering the claims that the court has only focussed on Africa, it has opened investigations Afghanistan, Colombia, Palestine, Philippines, Ukraine, Venezuela, and Iraq has launched a formal investigation in Georgia. With regards to its criticism of inaction in Syria it must be noted that the court has no jurisdiction over Syria since it is not a member and any attempts at a Security Council referral have been vetoed. It is true that most of the cases under investigation by the court are in Africa but it cannot be denied that any one of those African cases does not deserve to be investigated and prosecuted by the court. While it is true that the ICC can be lambasted for inconsistent case selection, there is not a single case before the Court that one could dismiss as being frivolous or vexatious.¹⁹

However it is not that the court is completely free of blame, it has undoubtedly committed some mistakes with the way it has negotiated its relation with Africa. The court does not exist in a vacuum and is undoubtedly affected by global power politics. It should act to rectify its mistakes, of which there have been a few to say the least, in order to maintain its credibility as the future of international criminal justice.

The investigations in Africa have often limited itself to one party to the conflict, focusing mostly on alleged crimes by rebel fighters and leaving the atrocities committed by the state institutions unchecked.

It was true of Côte d'Ivoire in the wake of the post-election crisis and French intervention: charges were brought by the ICC against the defeated candidate, Laurent Gbagbo, his wife Simone and the Minister for Sports and Youth for 'crimes against humanity' during the post-election violence; none were filed against the French-backed opposition, also accused of widespread violence, or the intervention force itself. And in Libya, of course, Ocampo was more concerned with supporting US designs than the civilians under NATO's 'humanitarian' bombs.²⁰

¹⁹ Abdul Tejan-Cole, Is Africa on trial? Available at <http://www.bbc.com/news/world-africa-17513065>

²⁰ Africa in the Dock: On ICC Bias by Tor Krever, Available at <http://criticallegalthinking.com/2016/10/30/africa-in-the-dock-icc-bias/>

It cannot be doubted that international criminal justice is not truly international in nature and often powerful and influential countries have operated outside the law.

The argument of Abdul Cole holds true - it would be folly to deny the fact that the ICC works within an international structure that is far too unequal and within an international hierarchy that no longer reflects the distribution of power in the world. This structure reinforces the reality that powerful states are too often shielded from accountability. The Court's promise was to transcend this by being an impartial institution independent of the realpolitik machinations of institutions like the United Nations Security Council and 'great powers' like the United States. It hasn't been able to do so. That's no secret. No honest advocate of international criminal justice can say that he or she is satisfied with the current reach of international criminal justice.²¹

It is true that despite its 'global mandate', the ICC simply does not have the clout to effectively pursue investigations in the global north as it does in Africa. The forces of Realpolitik have often outclassed it. Yet despite these flaws a mass withdrawal from the Court or opposition to its workings is not the correct strategy, instead African countries should continue to cooperate with the court and fulfill its mandate of enforcing criminal justice and ending impunity for the perpetrators of the worst crimes.

*'As I have said before, Africa wants this court. Africa needs this court. Africa should continue to support this court'*²². - Kofi Annan

²¹ *Supra* 14

²² State impunity is back in fashion – we need the international court more than ever, Available at <https://www.theguardian.com/commentisfree/2016/nov/18/state-impunity-international-criminal-court-african>