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RIGHT TO SELF DETERMINATION: THE TRIAL OF AFRICAN LEADERS IN AFRICA

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Hopefully a day will come

when African Leaders will

be tried in a communal jurisdiction

and not an alien jurisdiction

ABSTRACT: *Sovereignty of a State accentuates the autonomy of a State. It further demands and indeed dictates that a State shall be free from external interference. Unfortunately, Africans leaders have become the object of prosecutorial caricature. This is because of the consistent trial of African leaders in international courts usually situated outside Africa. Often times, this awry practice is justified by the fact that principle of universal jurisdiction permits it. However, it is glaring that several charters and treaties on human rights permit self-determination. Specifically, article 20 of the African charter stipulates that: "All peoples shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen". The said article 20 contains a gamut of factors that must be weaved in to access the self-determination status of a State. Irrespective of existing right to self-determination, over thirty two African leaders have either been indicted or are standing trial in these international courts in derogation of the right to self-determination of the African states. Therefore, this work sets out to argue that it is a violation of the right to self-determination to try African leaders outside Africa. It ought to be trial of African leaders in Africa. Nothing less is acceptable in law.*

KEYWORDS: Right to Self-Determination, Trial of African, Leaders

INTRODUCTION

Among the attributes of independence of a State are the assertion of freedom and absence of external interference in the internal affairs of a State. Concomitantly, each State territory is recognised as constituting both a self-sufficient unit and an independent legal entity, so that the notion naturally followed that, within each State, there must be located some supreme power, the decisive feature of which is its virtually unlimited capacity to make new law.[1] This supreme power is the sovereign. A sovereign is the entity that exercises the sovereignty of a state. The essence of a legal system is the inherent fact, based on various psychological factors, that law is accepted by the community as a whole

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[1] MDA Freeman, *Lloyd's Introduction to Jurisprudence*, (7th edn London: Sweet and Maxwell 2005) 200.

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as binding, and the element of sanction is not an essential, or perhaps even an important, element in the functioning of a system.[2]

Since concept of jurisdiction revolves around the principle of State sovereignty, equality and non interference, domestic jurisdiction as a notion attempts to define the area in which the actions of the organs of government and administration are supreme internally, that is within its own territorial frontiers, it must not intervene in the domestic affairs of another nation.[3] The constitution is the popular sovereignty. However, it must be accentuated that for the constitution to reflect the true grundnorm or the peoples popular sovereignty, it will not only sustain an atmosphere of public peace and tranquillity, but also be aimed towards the achievement of justice for the entire citizenry, irrespective of age, sex, race, sexual orientation, intelligence, physical features, abilities and disabilities, everyone under the veil of ignorance – in the Rawlsian context, by creating a level playing field – the field characterized by William Shakespeare as life is a stage and all the people are like poor players. The irresistible conclusion is that legal independence not anchored on popular sovereignty, is more or less logically vacuous, and may end up in unrealized hopes and dreams manifested by the tendency of failure of statehood now confronting most decolonized states.[4]

It is aimed at this work to examine the trial of African leaders outside Africa. It is herein contended that trial of African leaders outside the African continent is diametrically opposite of the essence of sovereignty and self-determination of African States. The consistent interference and humiliation of African leaders in these international courts portend heavy negative impact on the anti-colonialism stance of the international communities. This work will insist that the African leaders should be tried in Africa in deference to African's right to self-determination and in protection of the sacrosanctity of sovereignty of African states.

Sovereignty

Sovereignty is difficult to adumbrate with exactitude. It is a presupposition and whether the state is sovereign cannot be answered through inquiry into its natural or social reality.[5] Elegido insists that:

> Sovereign state designates an independent state, a state which does not acknowledge any superior. And within any given state the term sovereign designates that authority which has no superior, the ultimate legal authority, whether it is an individual person or a collegiate body.[6]

[2] AL Goodhart, 'An Apology for Jurisprudence', (1967) *Tulane L Rev* 769, 283.
[3] Peace Udeh, 'Immunity of Sovereign States – Historical and Contemporary Perspectives' in *Nigerian Journal of Public Law*, vol. 2, No. 1, 2009, 125 – 137, 125.
[4] Chris U Anyanwu, *Jurisprudence of Sovereignty*, (Lagos: Africom Ltd 2006), 23.
[5] Hans Kelsen, 'Sovereignty of International Law' cited in Chris U Anyanwu, *Jurisprudence of Sovereignty* (Lagos: Africom Ltd 2006), 443.
[6] JM Elegido, *Jurisprudence* (Ibadan: Spectrum Law Publishing 1994), 50 – 51.

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Simplistically, sovereignty is the supreme and final authority above and beyond which no further legal power exists.[7] In a democratic government, sovereignty is vested on the people.

Under international law, sovereignty refers to the right of states as political communities, to self-government. It is the supreme authority exercised by every independent state in the international community.[8] Sovereignty is the power possessed by states which enables them to carry out their official functions, which includes the power to make and enforce laws, for public benefit.[9] The concept of sovereignty denotes the independent existence of a state in itself, without being merely a part of a larger whole, to whose powers it is subject.

For a political community to enjoy the benefits of sovereignty under international law, it must satisfy the requirements of statehood as contained in article 1 of the Montevideo Convention on Rights and Duties of States of 1933, which provides that:

> "The State as a person of international law should possess the following qualifications:
>
> (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States".[10]

The Convention despite being signed by only fourteen States nearly a century ago, has influenced the contemporary notion of statehood, and now reflects general acceptance by States of its customary nature as a basic rule of international law.[11] The constant development of international law has led to the growth of several factors that tend to act as a restraint to sovereignty. In the fields of international human rights law, international environmental law as well as international criminal law, the suspicion that State sovereignty can be an obstacle to their protection has led to the development of 'universal sovereignty' through which the sovereignty of independent States may be usurped by external bodies who exercise jurisdiction over certain matters to the exclusion of these otherwise independent states. In other words, matters which had formerly been considered indispensable exclusive State functions are presently accomplished by virtue of international cooperation in its various instrumental modes and forms (international organisations; multilateral instruments; integrated communities).[12]

Self Determination

The right of nations to self-determination is a cardinal principle in modern international law, and is thus commonly regarded as a *jus cogens*[13] rule. It states that nations based on respect for the principle of equal rights and fair equality of opportunity have the right to freely choose their sovereignty and international political status with no external compulsion or interference. Article 2 of the United Nations Declaration on the Granting of Independence to

[7] BC Nwankwo, *Authority in Government* (Onitsha: Abbot Books Ltd 2002), 23.

[8] BA Garner(ed.), *Black's Law Dictionary* (8th edn., Minnesota: ThomsonmWest 2004), 1446.
[9] Ibid.
[10] (1934) 165 League of Nations Treaty Series, 19.
[11] M Masahiro, "Sovereignty and International Law", available at http://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi)_paper.pdf (accessed 16 June 2018).
[12] H Steinberger, "Sovereignty", in R. Bernhardt, *Encyclopedia of Public International Law, Amsterdam*, vol. IV (2000), 501.
[13] That is compelling law or peremptory norm.

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Colonial Territories and Peoples[14] states that: "All peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development". In a similar vein, article 20 of the African Charter on Human and Peoples Rights provides that:

> All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
>
> 1. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
>
> 2. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

It is against this backdrop, that the selective enforcement of the International Criminal Court (ICC)[15] has been questioned. The fact that the ICC has focused so overwhelmingly on African situations have raised suspicions on why the gaze of the court falls in some places and on some people 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 colonisation and a pattern of decisions made for Africa by outsiders.[16] The ICC has been accused of bias and of carrying out a selective enforcement vendetta against poor weak states, while ignoring crimes committed by wealthier and more powerful nations. To this end, George Monbiot of The Guardian writes:

> The conviction of Charles Taylor, the former president of Liberia, is said to have sent an unequivocal message to current leaders: that great office confers no immunity. In fact it sent two messages: if you run a small, weak nation, you may be subject to the full force of international law; if you run a powerful nation, you have nothing to fear.[17]

Aside the various cases of this victimized prosecution by the ICC, the court which was originally set-up to exercise complementary jurisdiction has in recent times been seen to assume superiority over municipal systems by usurping the criminal justice systems of independent African States, thereby denying them their right to determine how to deal with their own situations relating to crimes against humanity.

[14] United Nations General Assembly Resolution 1514 (XV). Adopted on 14 December 1960.
[15] This court was deliberated on at the Rome Conference of 1998. It was at that conference that the International Criminal Court Statute was adopted by 160 States. However, the court came into effect on July 1, 2002. The court is situate at the Hague in Netherlands.
[16] N Waddell and P Clark, *Introduction in Courting Conflict: Justice, Peace and the ICC in Africa*, (London: Royal African Society 2008), 1.
[17] G Monbiot, 'Imperialism Didn't End' (30 April 2012), *The Guardian (UK)* available at http://www.guardian.co.uk/commentisfree/2012/apr/30/imperialism-didnt-end-international-law (accessed 16 June 2018).

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The ICC denied Ivory Coast the right to try its former first lady, Simone Gbagbo, in the Ivorien courts, insisting that she be transferred to the Hague for prosecution.[18] Unfortunately when it comes to desecrating the sovereign rights of African States, the ICC is not standing alone on the queue, as some nations have taken the trend to a new trajectory. A Spanish High Court judge recently 'agreed' to assume jurisdiction and begin the trial of Boko Haram leader, Abubakar Shekau, on the basis of universal jurisdiction.[19] Even worse, is the attempt by a South African court to instigate the arrest of the President of Sudan, Omar Al-Bashir. All these are pointers to the fact that self-determination of African States has taken a flight. It is in complete limbo as the international Courts descend on African leaders like an enraged hawk.

Jurisdiction over International Crimes

The issue of jurisdiction is fundamental and important. It is the *sine qua non* to an action.[20] Jurisdiction is the power by which a court decides a case or issues decrees. The Supreme Court in *Saraki v FRN*[21] elucidated that: jurisdiction is 'the authority which a court or tribunal has to decide matters presented in a formal way for its decision'. In *Azie v Azie*,[22] Court of Appeal defined jurisdiction as:

> The authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by similar means… A limitation may be… as to the area over which the jurisdiction extends.[23]

Who then has jurisdiction over international crimes? The general growth of internationally law has led to the development of the concepts of international criminal justice. The atrocities that accompanied the second World War led to the development of the present day international criminal justice system as the international community embarked on the first post-conflict justice administration through the setting up of *ad hoc* tribunals in Nuremberg and Tokyo whose prosecutions were however limited to trials against the defeated parties.[24] After the Nuremberg Trials and the Tokyo War Crimes Trials came to a close, the concept of international criminal law largely receded into memory, and not until the eruption of horrific violence in the former Yugoslavia and Rwanda in the 1990's, did international criminal justice re-emerge onto the international scene.[25] The United Nations Security Council subsequently established the 'International Criminal Tribunal for the former Yugoslavia' in 1993 and the International Criminal Tribunal for Rwanda in 1994. The International Law Commission in 1993 commenced preparatory works for the establishment of a permanent

[18] 'Ivory Coast Loses Appeal, Must Handover Gbagbo's Wife to ICC', *Daily Sun*, 28th May, 2015, 16.
[19] 'Spanish Court to Begin Trial of Boko Haram Leader, Abubakar Shekau', *Daily Sun*, 29th May, 2015, 15.
[20] Relevant is *Igbinedion CFR v Edo State Board of Internal Revenue* [2017] 19 WRN 170, 182.
[21] [2017] 1 WRN 1, 56.
[22] [2015] 5 WRN 155.
[23] Ibid, 174 – 175.
[24] MC Bassiouni, *Introduction to International Criminal Law* (New York: Transnational Publishers, 2003) 495.
[25] CA Nielsen, 'History and International Criminal Justice' (2 June 2009), *Danish Institute for International Studies and Human Rights*, < http://www.diis.dk/sw78423.asp> (accessed 16 June 2017).

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international criminal court. The *Rome Statute* establishing the International Criminal Court (ICC) was signed in 1998 at a diplomatic conference at the Italian capital.[26]

The International Criminal Court which is a permanent international institution created by the Rome Statute which came into force in May 2002, for the purpose of investigating and prosecuting persons who are suspected to have committed "the most serious crimes of international concern"[27] namely[28]: genocide[29], crimes against humanity[30], war crimes[31], and the crime of aggression.[32]

The three major international crimes that currently fall within the jurisdiction of the court are well defined in international criminal law and presently carry international legal obligations to investigate, prosecute or extradite persons who are suspected to have been involved in the commission of such crimes.

Ordinarily as a treaty-based institution the ICC is binding only on its state parties, however in 2011 the Security Council of the United Nations in a unanimous decision referred the Libyan situation to the court.[33] The ICC is not established to supplant national criminal justice systems, as it is not a substitute to them, rather its jurisdiction is complementary to theirs.[34] However, it is axiomatic to note that 99% of African countries were not independent as at 1948 when the Universal Declaration of Human Rights was adopted, which questions the input of African Countries if any, regarding the enactments of these International Covenants that is hunting Africa today.

Comparative Insight

The trial of African leaders outside Africa has affected so many States in Africa. The leaders of Kenya, Sudan, Democratic Republic of Congo, Nigeria and so many other African countries have tested the pill of trial outside Africa. Even if International Criminal Court is not western imperialism in disguise, one can express genuine fear that it concentrates a key power in an institution and by so doing eviscerates the sovereignty of states, especially weaker states in Africa.[35] Let us examine the trial of Congo leaders outside Africa.

Democratic Republic of Congo

In Democratic Republic of Congo at least six personalities have been subjected to prosecution at the International Criminal Court. They are: Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui, Bosco Ntaganda, Callixte Mbarushimana, and Sylvestre Mudacumura.

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[26] 'International Criminal Law', *Wikipedia, The Free Internet Encyclopedia*, <http://en.wikipedia.org/wiki/International_criminal_law> (accessed 16 June 2017).
[27] Rome Statute of the International Criminal Court, art. 1.
[28] Ibid, art. 5, (a) to (d).
[29] Ibid, art. 6.
[30] Ibid, art. 7.
[31] Ibid, art. 8.
[32] Ibid, art. 8.
[33] 'UN Security Council refers Libya to ICC' (27 February 2011), *Human Rights Watch*, <http://www.hrw.org/2011/02/27/un-security-council-refers-libya-icc> (accessed 15 June 2018).
[34] Rome Statute, *op. cit.*, art. 1,17(1)(b).
[35] Sylvester Ndubuisi Anya, 'Optimizing the Role of the International Criminal Court in Global Security', (2011 – 2012) 10 Nig. JR, 198 – 221, 221.

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Thomas Lubanga Dyilo was the alleged founder and leader of the Union of Congolese Patriots (UPC) and its military wing, the Patriotic Forces for the Liberation of the Congo (FPLC). He was charged on 10 February 2006 with three counts related to the military use of children from July 2002 to December 2003 in the Ituri region of the DRC.[36] Lubanga's trial began on 26 January 2009 but on 8 July 2010 the Trial Chamber once again stayed the proceedings because of the conduct of the Prosecutor and ordered that he be released. Following a successful appeal by the Prosecutor the order to release Lubanga was reversed and the trial resumed. In 2012, Lubanga was found guilty and is sentenced to a total period of 14 years imprisonment.

The next people affected by this trial of African leaders outside Africa in Congo are Germain Katanga and Mathieu Ngudjolo Chui. Germain Katanga[37] was the commander of the Front for Patriotic Resistance in Ituri (FRPI). Mathieu Ngudjolo Chui was the leader of the Nationalist and Integrationist Front (FNI). Katanga and Chui are charged with nine counts of crimes against humanity and war crimes allegedly committed between January and March 2003 in the Ituri region of the DRC against members of the Hema people. Katanga and Chui were indicted in July 2007.

The Prosecutor applied for warrants for the arrest of Katanga and Chui on 25 June 2007 and the warrants were issued by Pre-Trial Chamber I on 2 July and 6 July, both under seal.[38] Katanga was arrested in the DRC and was surrendered to the Court on 17 October 2007. Chui was arrested on 6 February 2008 and surrendered to the court the following day. The trial of Katanga and Chui began on 24 November 2009 and concluded on 23 May 2012. Chui is acquitted, and Katanga was convicted of murder and pillage over a deadly attack on Bogoro.

Bosco Ntaganda is the former Deputy Chief of the General Staff of the Patriotic Forces for the Liberation of the Congo (FPLC), the military wing of the Union of Congolese Patriots (UPC). On 22 August 2006 he was charged with three counts of war crimes.[39] On 14 July 2012, he was additionally charged with three crimes against humanity and four counts of war crimes.[40] The Prosecutor applied for a warrant for Ntaganda's arrest on 12 January 2006. The warrant was issued on 22 August 2006 under seal and subsequently unsealed on 28 April 2008. After indictment, Ntaganda became a general in the Congolese armed forces but later submitted himself at the US Embassy in Rwanda on 18 March 2013.

Callixte Mbarushimana is a Hutu Rwandan and former United Nations employee (1992–2001) who was alleged to have participated in the Rwandan Genocide of 1994. On 28 September 2010, Mbarushimana was indicted by the International Criminal Court (ICC) in The Hague for crimes against humanity and war crimes committed in the Democratic Republic of the Congo in 2009. He was arrested in France in October 2010 and extradited to the ICC on 25 January 2011. However, he was released on 23 December 2011 as the ICC found there was insufficient evidence for prosecuting him.[41] The prosecutor of the International Criminal Court sought an arrest warrant against Sylvestre Mudacumura,

[36] ICC-01/04-01/06-2: Warrant of Arrest [for Thomas Lubanga Dyilo], International Criminal Court. 2009-02-10.
[37] Also known simply as 'Simba' (the Swahili word for lion).
[38] ICC-01/04-01/07: Case The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, International Criminal Court.
[39] ICC-01/04-02/06-2: Warrant of Arrest [for Bosco Ntaganda], International Criminal Court. 22-08-2006.
[40] ICC-01/04-02/06-36-Red: Decision on the Prosecutor's Application under Article 58, International Criminal Court, 13-07-2012.
[41] 'Callixte Mbarushimana', <http://en.wikipedia.org/wiki/Callixte_Mbarushimana> (accessed 15 June 2017).

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alleging responsibility for crimes against humanity and war crimes committed in 2009-2010 in the Kivus. The warrant was issued on 13 July 2012.[42]

Sudan

In July 2008, the prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, accused Al-Bashir of genocide, crimes against humanity, and war crimes in Darfur. The court issued an arrest warrant for Al-Bashir on 4 March 2009 on counts of war crimes and crimes against humanity, but ruled that there was insufficient evidence to prosecute him for genocide. However, on 12 July 2010, the Court issued a second warrant containing three separate counts. The new warrant, as with the first, were delivered to the Sudanese government, which neither recognise the warrant nor the ICC. Al-Bashir is the first sitting head of state indicted by the ICC. The indictments do not allege that Al-Bashir personally took part in such activities. Instead, he is suspected of being criminally responsible, as an indirect co-perpetrator. Some international experts think it is unlikely that Ocampo has enough evidence. The court's decision is opposed by the African Union, League of Arab States, Non-Aligned Movement, and the governments of Russia and China.

African leaders ordered a probe into the genocide and war crime allegations against Sudanese President Omar Al Bashir before deciding whether to back an ICC trial for him. The Hague-based International Criminal Court (ICC) issued a second arrest warrant against the Sudanese leader insisting that there was evidence to try him for genocide.[43] The Report of the International Commission however, noted that:

> The conclusion that no genocide policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.[44]

In March 2005, the Security Council officially referred the situation in Darfur to the prosecutor of the International Criminal Court, taking into account the Commission's Report but without mentioning any specific crimes.[45] The prosecutor found reasonable grounds to believe that the individuals identified in the United Nations Security Council Resolution 1593 have committed crimes against humanity and war crimes, but did not have sufficient evidence to prosecute them for genocide.[46] In April 2007, the Judges of the International Criminal Court issued warrants against the former Minister of State for the Interior, Ahmad Harun and

[42] ICC-01/04-01/12-1-Red: Decision on the Prosecutor's Application under Article 58, International Criminal Court, 13-07-2012.
[43] 'African Leaders Order Fresh El Bashir Genocide Probe' < http://www.panapress.com/African-leaders-order-fresh-El-Bashir-genocide-probe--12-539060-20-lang1-index.html> (accessed 15 June 2018).
[44] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, January 25, 2005, 4.
[45] Security Council Resolutions, 1593 (20050)
[46] Four Reports of the prosecutor of the International Criminal Court to the Security Council pursuant to UNSC 1593 (2005), office of the prosecutor of the international criminal court 14 December, 2006.

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a militia Janjaweed leader, Ali Kushayb for crimes against humanity and war crimes.[47] On July 14, 2008 prosecutor of the International Criminal Court filed ten charges of war crimes against Sudan's President Omar Al-Bashir, three counts of genocide, five of crimes against humanity and two of murder. On March 4, 2009, the International Criminal Court issued a warrant for Al-Bashir's arrest for crimes against humanity and war crimes, but not genocide.[48] It has to be noted that the warrant of arrest issued against president Omar Al-Bashir has not been executed. The President won the presidential election of Sudan held from 5th to 12th April 2010. However, the unfolding events will be closely monitored to decipher the enforceability of such warrant against serving presidents.

The developments surrounding Mr. Bashir exposed longstanding tensions between the international court and African governments, which have argued that the court unfairly targets African leaders and nations while ignoring crimes elsewhere. The African Union, a body representing the continent's governments, has a history of protecting the rights of its members more than the rights of ordinary Africans. It has aggressively campaigned against the court, and it has told its members that they need not comply with its demands. If Mr. Bashir's case is a test of the African Union's loyalty to one of its own, it is also a test of the International Criminal Court and its relevance on the continent where it has focused its attention since it began functioning in 2002.[49]

Kenya

In March 2010, Pre-Trial Chamber (PTC) II authorized the ICC prosecutor to open an investigation into crimes against humanity allegedly committed in Kenya in relation to violence that followed Kenya's 2007 presidential election, which killed over 1,200 persons and displaced 600,000 persons. This was the first time that the prosecutor used his *"propriu motu"* powers to initiate an investigation without first having received a referral from a state party or the United Nations Security Council (UNSC). Uhuru Kenyatta had been charged with crimes against humanity including murder, rape, persecution and deportation as an "indirect co-perpetrator" in violence that flared after Kenya's 2007 elections, leaving more than 1,000 people dead. Kenyatta was indicted in 2011 but went on to become president in the 2013 election, using his indictment at The Hague-based court as an election issue. His government lobbied hard to have the case against him deferred by the UN Security Council, arguing that the delay was essential because Kenya needed its leader to help fight al-Shabaab terrorists in neighbouring Somalia.

In October 2014, Kenyatta became the first Head of State to appear before the ICC. He temporarily handed over power to his deputy, William Ruto, before flying to The Hague. The international statute that established the ICC removed the principle that serving heads of state or governments should be granted immunity from prosecution under international law. He had previously appeared before being elected president.

Following incessant application for adjournment by the Prosecutor, the ICC rejected the prosecutors' request for a further adjournment, directing instead that they either withdraw

[47] Statement by Mr. Moreno Ocampo, the then Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005), International Criminal, 5 January 2008.
[48] This warrant was the first ever issued by International Criminal Court against a sitting Head of State.
[49] N Onitshi, 'Bid by Omar Al-Bashir of Sudan to Avoid Arrest is Tested in South Africa', *The New York Times* <http://www.nytimes.com/2015/06/15/world/africa/bashir-sudan-international-criminal-court-south-africa.html?_r=0> (accessed 15 June 2017).

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charges or proceed to trial. The court also dismissed a prosecution request for a finding of "non-cooperation" against Kenya. The case was withdrawn. Karen Naimer[50] insists that the decision to drop charges against President Kenyatta is devastating to the thousands of survivors who saw the court as their last hope for holding one of Africa's most powerful leaders accountable.

The collapse of the case is a new blow to the credibility of the court's prosecution office. The office has begun nine full investigations since it was established in 2002, all of them in Africa, and has just seven suspects in custody.

Principle of Universal Jurisdiction

The principle of universal jurisdiction is a principle in international law whereby States claim criminal jurisdiction over persons whose allege crimes were committed outside the boundaries of the prosecuting State regardless of nationality, country of residence or any other relation with prosecuting country. The State usually backs its claim on the grounds that the crime committed is considered a crime against all, which any state is authorized to punish, as it is too serious to tolerate jurisdictional arbitrage.[51] In *Attorney-General of the Government of Israel v. Eichman*[52] the District Court of Jerusalem upheld universal jurisdiction as a source of its jurisdiction to try the accused for crimes against humanity and war crimes committed against the Jewish people during the Nazi regime when the State of Israel did not exist. Conversely, no British, European and or American is being tried today for crimes against inhumanity for colonization, torture, cruel, inhuman and degrading treatment meted to Africans. In the circumstance, Amnesty International is currently instigating the trial of Nigerian Military senior commanders for fighting terrorism, an act capable of demoralizing the Nigerian military at the peak of the war against terrorism in Nigeria and Africa. Consequently, this act can make Nigeria loose the war against terrorism. Where was Amnesty International when book haram killed thousands of innocent Nigerians, Christians and Muslims and abducted some Nigerian girls and boys? The fight for terrorism mandatorily demands or requires the reduction of both the motives and operational capabilities of the terrorist.

The advocates of universal jurisdiction[53] argue that certain crimes pose so serious a threat to the international community as a whole that states have a logical and moral duty to prosecute an individual responsible for it. They insisted that no place should be safe heaven for those who committed genocide, crimes against humanity, extrajudicial executions, war crimes, torture and forced disappearances. Opponents contend that universal jurisdiction is a breach on each State's sovereignty as affirmed by United Nations Charter. According to Kissinger:[54]

> Widespread agreement that human rights violation and crimes against humanity must be prosecuted has hindered active consideration of the proper role

[50] Karen Naimer is the Director of the Program on Sexual Violence in Conflict Zones at Physicians for Human Rights (PHR).
[51] JJ Paust, MC Bassioui et al, *International Criminal Law: Cases and Materials*, (Carolina: Carolina Academic Press, 1996) 95-180.
[52] Dist. CT. Jerusalem, 11 December 1961 (1962) 56 AJIL 805, para. 30.
[53] See Amnesty International, Policy Research, 'Brief Primer on Genocide' available at <http://www.ihl.lhlresearch.org/inex.cnm?fuseaction=page,viewpage&pageid=1638> (accessed 15 June 2017).
[54] K Hissinger, (July/August 2001) 'The Pitfalls of Universal Jurisdiction Foreign Affairs'.

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> of international courts. Universal jurisdiction risks creating universal tyranny – that of judges.[55]

This principle of universal jurisdiction formed the basis upon which the ICC has swooped on African leaders and desecrated the sacrosanctity of the political sovereignty of the African states.

The Need to Try Africans in Africa

The ease with which African leaders are bundled to international courts has given rise to the suspicion that African Countries are coerced to accede to these treaties which are targeted only at African leaders. It will be near impossible for a sitting president of US or a British Prime Minister and or European and American leaders who occasioned or perpetuate failed economic policies that have impoverished African countries to be subjected to the kind of humiliation African leaders are going through in the name of trial. Thus Anya is right when he argues that:

> A situation where the International Criminal Court can indict and possibly prosecute a sitting president of a state marks a radical departure from what international law and relation used to be. More importantly, the location of such power in one global institution portends ill by making it a tool potentially for totalitarianism on a global scale.[56]

This is why even President Omar Al-Bashir is being hunted like a fugitive. Consequently his escape from arrest in South Africa jolted the international community. This was the first time an African court ordered the arrest of an active African leader to be arrested and possible handed over to the International Criminal Court for war crimes. At the same time, political African leaders have implicitly reneged on Rome Statute by collectively pleading for immunity for grave war crimes. It seems that they have effectively withdrawn from implementing the Rome Statute, while in the meantime obstructing their own rule of law.[57] Al-Bashir landed in Johannesburg on 13 June 2015 to attend the opening of the African Union summit and mug for the cameras. Despite the fact that, as a signatory to the convention that created the ICC, South Africa is legally obliged to arrest the Sudanese president and transfer him to the Netherlands. The South African authorities did not. Instead they allowed him to leave the country on the second day of the conference, despite a judicial order calling for him to remain. Al-Bashir's willingness to travel to Johannesburg in spite of two international arrest warrants is an indication that not only has the ICC lost credibility, but that South Africa, once a beacon for justice and human rights on the continent, has bowed to political expediency.[58]

It is incontrovertible that if the International Criminal Court has a judicial division in Africa, it would have been easy for the court to effectively try African leaders in Africa. Regrettably, the Western States have consistently seen Africa as a continent where corruption has excessively corroded its judicial system. Agymang argues that African courts are unsuitable

[55] R Kenneth (September/October 2001) The case for Universal Jurisdiction, Foreign Affairs.
[56] Anya, loc. cit., 221.
[57] 'South Africa: Six Questions on Al Bashir Escaping Arrest in South Africa' <http://allafrica.com/stories/201506160235.html> (accessed 16 June 2017).
[58] A Baker, 'Sudan's President Escapes War Crimes Arrest in South Africa' <http://time.com/3921456/omar-Al-Bashir-war-crimes/> (accessed 16 June 2017).

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for settling disputes because they could be subjected to pressure by African government to conform to the dictates of the executive.[59] Admittedly, it is usually a common place that such pressure exists, but there has not been any evidence of such pressure on Judges serving at the ECOWAS Court.[60] Thus it is most unlikely that if International Criminal Court is situate in Nigeria that they will be subjected to unnecessary pressure.

CONCLUSION

This study has shown that sovereignty of African State have been hijacked by the institution of International Criminal Court which has turned an effective weapon of oppression against African leaders. There is no rationale for taking African leaders as far as Hagues in the Netherlands for purposes of trying them. By doing so, the socio-cultural factors that led to the commission of the crime will not be adequately appreciated by the judges who possibly have never been to Africa. It is therefore, necessary to state that the principle of universal jurisdiction should not be used as a basis to uproot the principle of sovereignty of states and right to self-determination. Why only Africa? Why are leaders of African being turned to fugitives in Africa? There is no way this consistent and persistent persecution of the African leaders can be justified unless the needful is done. The needful is that ICC must open African Judicial Division of the Court in any African State. This will make it possible for African Leaders to be tried in Africa. Doing that will assure African leaders that there right to self-determination is secured. The time to do that is now.

[59] AA Agyemang, 'African Courts, the Settlement of Investment Disputes and Enforcement of Awards', (1989) JAL, vol. 33, No. 1., 43.

[60] The ECOWAS Court of Justice is the judicial organ of the Economic Community of West African States (ECOWAS) and is charged with resolving disputes related to the Community's treaty, protocols and conventions. The ECOWAS Community Court of Justice has competence to hear individual complaints of alleged human rights violations.

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