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THE ICC, AFRICA AND THE TRAVESTY OF INTERNATIONAL CRIMINAL JUSTICE

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That the International Criminal Court (ICC or the Court) has disappointed expectations that it will be a forum where impunity will be reined, and persons responsible for "the most serious crimes of international concern"[1] brought to justice, is a much canvassed issue amongst many commentators that this paper should not be detained by that discussion.[2] What has not been sufficiently canvassed however is what is argued to be the "travesty of international criminal justice".[3] The argument here is that international criminal justice (as currently engaged with by the ICC) is a travesty because it only provides the apparition of justice which, when subjected to the scrutiny of corporal critical dimensions, is revealed for what it is – an illusory vision. By this argument, the sole objective is to dismiss suggestions that all our faith and hopes for putting an end to impunity in the

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[1] See Article 5 Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90 (hereafter Rome Statute) which identifies the content of the "most serious crimes of concern to the international community as a whole" to include: (a) the crime of genocide; (b) crimes against humanity (c) war crimes; and (d) the crime of aggression. Article 5(1) provides that jurisdiction over the crime of aggression will be exercised by the Court once a provision is adopted in accordance with articles 121 and 123 of the Rome Statute, defining the crime and setting out the conditions under which the Court is to exercise its jurisdiction.

[2] See Mahmood Mamdani, "Darfur, ICC and the New Humanitarian Order: How the ICC's "Responsibility to Protect" is being turned into an Assertion of Neo-colonial Domination" online: http://www.pambazuka.org/en/category/comment/50568 retrieved 14 June 2014; see also Obiora Okafor and Uchechukwu Ngwaba, "Between Tunnel Vision and Sliding Scale: Power, Normativity and Justice in the Praxis of the International Criminal Court" (Paper presented by lead author at the international conference on "International Criminal Justice, Reconciliation and Peace in Africa: The ICC and Beyond" Dakar, Senegal, July 2014) (Conference Proceedings forthcoming);

[3] Here the point is that notwithstanding general criticism(s) of the ICC for its perceived targeting of Africa, not sufficient effort has gone into analysing what the current set-up of the Court means for the attainment of the goal of putting an end to impunity in the international system. To be clear, this is not to suggest that such analysis are not to be found in the vast literature spawned as a result of the work of the Court. Rather, the point is that there is a sense in which attacks on the Court tend to focus on its "geo-stationary orbit" over Africa to the exclusion of other parts of the world and not on the question whether the Court is even in a position to deliver on its objective(s) of putting an end to impunity in the international system.

international system (for acts or omissions widely regarded as offending humanity)[4] should be vested in the ICC.

Three key propositions are advanced in substantiating this framing argument. The first is to the effect that the ICC is not in a position to deliver on its promise of putting an end to impunity for crimes of the most serious concern to the international community because by design, it is not meant to achieve that purpose. The second says that the perception that Africa has been dealt a bad hand in the prosecutorial praxis of the ICC, while a major cause for concern, ignores the obvious fact that ultimately, the continent and its leadership are chiefly responsible for its problems as well as their resolution. As a final proposition, while hope(s) for a world rid of impunity, one whose playing field is level for all, remains an illusion not to be seriously entertained, it is within the realm of possibilities for African states to set up a "proper" mechanism for redressing impunity on the continent through the existing African Union (AU) system. If seriously pursued, such mechanism can offer a veritable alternative to the ICC and consequently insulate the continent from the inequalities and asymmetries inherent in the current setup of the ICC – one that "fosters and reproduces a *binary* dichotomy that ruptures the globe into two conceptual communities, the one "heavenly" and the other "hellish".[5]

The key objective of this paper is to systematically interrogate the claim that the ICC-centric paradigm of international criminal justice is a travesty by utilising critical third world approaches to international law (TWAIL) perspective(s) to ascertain the extent to which that claim is substantiated by the propositions in the preceding paragraph. As such the first objective is to unravel the extent to which the current set-up of the Court, that confers enormous power(s) of control and influence over the Court on a few states while at the same time insulating those same states (and their allies) from the processes of the Court, can achieve the objective of putting an end to impunity for international crimes. To what extent (if at all) is Africa responsible for the current predicament facing it (in terms of creating an environment for the ICC's lopsided justice praxis to flourish)? Can African

[4] For the purpose of this paper, and consistent with the meaning of Article 5(1) of the Rome Statute, the crimes within this category are: (a) the crime of genocide; (b) crimes against humanity (c) war crimes; and (d) the crime of aggression.

[5] This perspective is a Twailian critique of international human rights praxis and discourse and is applied in the present context to highlight the double standards of the ICC's prosecutorial praxis. For more about this Twail perspective, see Obiora Okafor, "International Human Rights Fact-finding Praxis in its Living Forms: A Twail Perspective" (2014) 1(1) Transnational Human Rights Review 59 at 67; Makau Mutua, "Savages, Victims and Saviors: The Metaphor of Human Rights" (2001) 42 Harvard Int'l LJ 201; Obiora Okafor and Shedrack Agbakwa, "Re-Imagining International Human Rights Education in Our Time: Beyond Three Consecutive Orthodoxies" (2001) 14 Leiden J Int'l L 563 at 566-573; Upendra Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2006) at 4; Upendra Baxi, " 'A Work in Progress'?: The United Nations' Human Rights Committee" (1995) 35 Indian Journal of International Law 34.

states set up mechanisms, within the existing AU system, that can be effectively deployed to put an end to impunity for international crimes committed on the continent? If so, what form should such mechanisms assume and what should be the nature of the relationship (of the mechanisms) with the ICC? Would such mechanisms be capable of insulating the continent from the perceived injustices of global power matrixes and asymmetries?

As this paper situates itself within the broad framework of TWAIL analytical tradition, it is necessary to briefly outline the content and nature of that approach. The intellectual roots of TWAIL go as far back as the Afro-Asian anti-colonial struggles of the 1940s-1960s, and even before then, to the Latin American de-colonization movements. In its current form, contemporary TWAIL scholars have engaged strongly with other critical schools of international legal scholarship.[6] TWAIL scholars deploy a wide range of "analytic techniques/sensibilities" [7] in their commitment to providing alternative approaches that "assail the creation and perpetuation of international law" in ways which subordinate the third world in the global order.[8] Through this analytical techniques, TWAIL scholars seek, *inter alia*: (i) to write the third world's broadly shared historical experiences of being discriminated against and subjugated, in part, via the instrumentality of international law and institutions (such as the ICC), into processes and outcomes of international thought and action; (ii) to take the equality of third world peoples much more seriously, resulting in the insistence that all thought and action concerning international relations (such as through institutions like the ICC) should proceed on the assumption that third world peoples and leaders deserve no less dignity, security and freedom from punitive international action than do the citizens and leaders of the more powerful states; (iii) to deeply interrogate all claims of universality, including claims that the ICC's key mandate is to put an end to impunity for the most serious crimes of international concern, wherever such crimes are committed in the world; (iv) and to map/document/analyze the ways in which third world resistance has shaped and continue to shape the character, orientation and effectiveness of international institutions (such as the ICC).[9] As utilized in the paper, the term "third world" is understood more as a "chorus of voices"[10] sharing similar

[6] See Obiora Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective" (2005) 43 Osgoode Hall L. J. 171.
[7] See *ibid*. at 176 for a further exegesis of some familiar techniques deployed by this critical scholarship.
[8] See Vijayashri Sripati, "The United Nation's Role in Post-Conflict Constitution-Making Processes: Twail Insights" (2008) 10 International Community Law Review 411 at 416; see also Makau Mutua, "What is TWAIL?" (2004) 94 Am. Soc'y Int'l L. pp. 31, 37.
[9] See Obiora Okafor, *supra* note 5; see also Upendra Baxi, "What May the 'Third World' Expect from International Law?" (2006) Third World Quarterly 713.
[10] See Karin Mickelson, *supra* note 1.

historical experiences and concerns, and "less as a fixed geographical space;"[11] this is not to however suggest that certain "geographies of injustice" do not remain discernible and significant in our time.[12]

The discussion in this paper is organised around the critical and systematic analysis of the three broad propositions earlier advanced in support of the claim that the ICC's paradigm of international criminal justice is a travesty. There are five major sections to this analysis (including this introductory section). Section II addresses the first claim that the ICC cannot deliver on the objective of putting an end to impunity in the international system because by design it is not meant to achieve that purpose. It utilizes Twail techniques to answer the question whether the current set-up of the Court, that confers enormous power(s) of control and influence over the Court on a few states while at the same time insulating those states (and their allies) from the processes of the Court can achieve the objective of putting an end to impunity for international crimes in the international system.

Section III examines the second claim that despite perceptions and allegations of unfair targeting of Africa by the Court, the continent and its leadership remain the chiefly responsible for the continent's problems as well as their resolution. Here again Twail analytical techniques are used to establish to what extent (if at all) the continent should be held accountable for its international criminal justice challenges.

Section IV responds to the claim that African states can set up a "proper" mechanism within the existing AU system, to address impunity on the continent and that such mechanism can (very well) serve as an alternative to the ICC system in the effort to rein impunity on the African continent. It utilises Twail analytical techniques to question whether the recent expansion of the jurisdiction of the African Court of Justice and Human Rights (ACJHR) to include international crimes satisfies the requirement of a "proper" mechanism to curb impunity on the continent.

I. ICC, STRUCTURAL ASYMMETRY AND THE POLITICS OF ENDING IMPUNITY

Framing this section is the claim that the ICC cannot fulfil the key objective for which it was set up by the Rome Statute because its design is flawed. At first blush, this claim contradicts what the Rome Statute stands for. In particular, Article 1 which provides:

[11] See Balakrishnan Rajagopal, "Locating the Third World in Cultural Geography" (1998-99) Third World Legal Studies 1.
[12] See Upendra Baxi, "Operation Enduring Freedom: Toward a New International Law and Order?" in A. Anghie, B. Chimni, K. Mickelson and O. Okafor, eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003) at 46.

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