

Selective Justice and Persecution? The African View of the ICC-UNSC Relationship

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CALLUM ROSS, SEP 16 2018

The relationship between the United Nations Security Council ('UNSC') and the International Criminal Court ('ICC') has remained a topic of critical debate since the Rome Statute of the International Criminal Court ('Rome Statute') entered into force.[1] No continent has been more condemning in its critique of this relationship than Africa, mainly through the continent's centralised organ, the African Union ('AU').

The Rome Statute preamble clarifies that the ICC was created to tackle "the most serious crimes of concern to the international community as a whole".[2] Yet the AU has often proclaimed the ICC unfairly targets Africa, with the former Chairperson of the AU, Jean Ping, claiming that international justice only fights impunity within Africa.[3] This has led to the contention that the ICC delivers selective justice because African governments believe the ICC only wants to pursue African cases.[4]

Furthermore, the AU has labelled the ICC the "International Caucasian Court".[5] Odero suggests the AU believes the ICC's relationship with the UNSC renders the court a "neo-colonial conspiracy", which is an attempt by the great powers to maintain dominance over African states after the fall of colonialism.[6] The importance of colonialism as an underlying factor in this debate cannot be understated, as a former president of the AU highlighted when claiming that Africa believes the ICC is an "attempt by [the West] to recolonise their former colonies".[7] It is this dual argument of selective justice and the supposed neo-colonialist agenda that has led to the AU perception that Africa is persecuted by the ICC.[8]

This piece aims to establish a two-fold argument. Firstly, that the relationship between the UNSC and ICC causes the latter institution to deliver selective justice, which in agreement with Ayeni and Olong, has placed the ICC on a crash course with Africa.[9] This contention will be forwarded through examination of the referral and deferral powers conferred to the UNSC under the Rome Statute and an analysis of the Council's composition.

Secondly, the writer will contend that on face value Africa appears persecuted due to the relationship between the UNSC and ICC. This is because of the selective justice the UNSC forces the ICC to distribute, coupled with the accusations of neo-colonialism that arise from the UNSC's composition and its powers under the Rome Statute. However, upon deeper analysis, it will be submitted that persecution would require an intention to exclusively target African states and neither the UNSC nor ICC possesses this intention. Instead, it will be posited that Africa has a perception of persecution, owing to the UNSC obstructing ICC intervention in non-African situations. Finally, it will be contended that because of the suffering of African states during colonial rule, the UNSC and ICC owe a responsibility to African nations to ensure that their perception of persecution is addressed.

Africa and the ICC – From Advocates to Adversaries

Werle notes that prior to the AU hostility towards the ICC, Africa was a strong advocate for the creation and maintenance of the ICC.[10] During the Rome Statute negotiations, African nations played a prominent part in the creation of the ICC, advocating for "a strong and independent court".[11] Currently, 33 African nations are state parties to the ICC, which makes it the second largest continental group of signatories and, in agreement with Akande

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et al, this conveys the commitment of African nations to prosecuting the most “serious crimes of concern to the international community”.^[12]

The early African support for the ICC is further demonstrated by the 4 self-referrals of African countries, with the Central African Republic self-referring twice.^[13] These self-referrals under Article 14 of the Rome Statute exhibit the belief of African nations that the ICC can provide fair and appropriate justice, as per the promise of the Rome Statute preamble to “guarantee...enforcement of international justice”.^[14] However, it is pertinent that three of the four self-referrals of African nations came before the UNSC referral of Sudan in Resolution 1593.^[15]

The UNSC decision to refer Sudan under Article 13(b) of the Rome Statute was due to a “number of violations of international human rights and humanitarian law” by the Sudanese Government and Janjaweed.^[16] In March 2009 the first warrant for the arrest of Sudan’s president, Al Bashir, was issued by the ICC for “genocide, crimes against humanity and war crimes”.^[17] The AU has repeatedly requested that the UNSC utilise its deferral power under Article 16 of the Rome Statute to assuage the damage to peace in the region that the AU predicts will result from the Al Bashir arrest warrant.^[18] However, the UNSC has barely troubled itself to consider the AU requests, merely “taking note” of the AU concerns in Resolution 1828, but not acting upon them.^[19] This UNSC position ultimately led to the AU decision of non-cooperation with the ICC regarding the arrest of Al Bashir.^[20]

Since this situation, African hostility towards the ICC has escalated. In October 2017, Burundi became the first nation to withdraw from the Rome Statute. The reason for Burundi’s withdrawal was cited as the ICC’s role as a “political instrument and weapon used by the west to enslave” African nations.^[21] In January 2017, the AU concluded a non-binding agreement to collectively withdraw from the Rome Statute because of a lack of fair justice.^[22] These actions encapsulate the two main accusations the AU levels at the relationship between the UNSC and ICC. Firstly, that the ICC delivers selective justice because it only prosecutes Africans. Secondly, that the UNSC pursues a neo-colonialist agenda by solely referring African situations to the court.^[23]

Selective Justice – A Crash Course with Africa?

This section aims to establish that the relationship between the UNSC and ICC forces the latter institution to deliver selective justice, which has caused the hostility between the AU and ICC. Firstly, the referral and deferral powers of the UNSC will be examined. Secondly, the composition of the UNSC and the impact of the veto powers of the permanent members of the Council will be analysed in relation to the power the UNSC asserts over the ICC. Thirdly, the political compromise that resulted from the Rome Statute negotiations will be briefly considered as playing a part in causing the ICC to deliver selective justice.

Referral and Deferral – Powerful Provisions

Articles 13(b) and 16 of the Rome Statute significantly impact the relationship between the UNSC and the ICC. Firstly, Article 13(b) allows the UNSC to refer a situation under Chapter VII of the Charter of the United Nations (‘the Charter’) to the ICC where one or more of the crimes which the ICC has jurisdiction over appear to have been committed.^[24] Chapter VII of the Charter makes the UNSC the primary organ “to maintain or restore international peace and security”.^[25] Therefore, in agreement with Asaala, Article 13(b) essentially gives the UNSC complete power over situations concerning peace and security.^[26] The broad and encompassing language of Article 39 of the Charter means the UNSC has many opportunities to refer situations to the ICC, which makes Article 13(b) a powerful provision.^[27] Secondly, Article 16 allows the UNSC to dictate that the ICC cannot commence with any investigation or prosecution until 12 months after the UNSC has requested this under Chapter VII.^[28] By conferring this power to the UNSC, it is submitted in agreement with Blome and Markard that Article 16 acts as a “one-way street” for the UNSC to maintain its political interests.^[29]

The ongoing Al Bashir situation encapsulates the debate between “peace and justice” to which Blome and Markard refer.^[30] The UNSC’s policy of merely “taking note” of the AU requests to utilise Article 16 demonstrates a lack of respect by the UNSC in the AU’s view.^[31] The AU has repeatedly reiterated its request for deferral of the Al Bashir proceedings.^[32] This is because, according to Akande *et al*, the AU believes that the prosecution of Al Bashir could

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disrupt peace prospects in Sudan.[33] Clearly from its stance on the AU requests for a deferral, the UNSC believes justice to be of utmost importance in Sudan. Therefore, the debate between peace and justice places the ICC on a crash course with the AU.[34]

This leads to the contention that the deferral power conferred to the UNSC under Article 16 causes the ICC to deploy selective justice. The UNSC refusal to defer the Al Bashir proceedings can be contrasted to UNSC use of Article 16. In 2002, the UNSC invoked Article 16 in Resolution 1422, which dictated that the ICC cannot proceed with a case against “current or former officials” from a non-state party to the Rome Statute involved in a UN operation.[35] Asaala contends that this Resolution effectively granted immunity to US citizens involved in UN peacekeeping missions for any acts constituting international crimes.[36] It is submitted that the UNSC decision to invoke Article 16 in Resolution 1422 was to appease the United States, after they threatened to veto all UN Peacekeeping missions.[37] Thus, the UNSC utilising Article 16 in Resolution 1422, compared to its refusal to do so at the request of the AU, appears to substantiate the AU accusation that the ICC employs selective justice in its work. However, it must be highlighted that the choice to invoke Article 16 rests entirely with the UNSC. Therefore, it is submitted that the perceived selective justice in ICC activity occurs because of the relationship between the UNSC and ICC.

Furthermore, the referral power granted to the UNSC under Article 13(b) of the Rome Statute has been used twice, in Resolution 1593 for Sudan and Resolution 1970 for Libya.[38] The AU has criticised the use of the referral mechanism in only African situations, as compared to its lack of use for non-African situations.[39] It is commonly agreed that the Syrian situation warrants a referral for ICC investigation. However, this situation has not been referred to the ICC for investigation. It is contended in agreement with Aloisi that this is because UNSC use of their referral power is governed by political reasoning.[40]

According to Ayeni and Olong, these political motives can be seen in the inability of the UNSC to refer Syria to the ICC.[41] During May 2014, China and Russia vetoed the Syria referral proposal, despite the strong level of support for an ICC referral demonstrated by the 13 other UNSC members voting for the proposal.[42] This substantiates the submission that the ICC employs selective justice because of the UNSC’s inherently political motives, which Clarke and Koulen suggest originate from the UNSC allowing the permanent members to make decisions based on interests which are not fundamental to the aim of eliminating violence.[43]

Therefore, it can be asserted that the ICC employs selective justice in its investigations when comparing the referrals of Sudan and Libya to the lack of referral for Syria. However, it is submitted that this selective justice arises because of the relationship between the UNSC and ICC, due to the power of referral conferred to the UNSC under the Rome Statute. Therefore, the UNSC can be seen at the heart of the AU frustrations towards the ICC.

The UNSC Composition and Political Perspective

As previously highlighted, the main role of the UNSC is to “maintain or restore international peace and security”.[44] The UNSC comprises of 15 members, 5 of whom are permanent members, and 10 who occupy rotating seats in two-year terms.[45] Article 27 of the Charter states that resolutions must be voted for by 9 members to be passed. However, a resolution must not be subject to a veto by one of the five permanent members of the UNSC, otherwise it will fail. It is commonly acknowledged that the UNSC is an intrinsically political organisation which ultimately lets political considerations influence its decision-making.[46] This contention is epitomised by the appeasement of the US in the UNSC adoption of Resolution 1422, as well as the failure to use Article 13(b) to refer the crisis in Syria to the ICC. Therefore, the AU perceives that the veto powers granted to the permanent members, coupled with the political perspective of the UNSC, have combined to impact upon the ICC’s ability to deliver “transparent and fair” justice.[47]

The veto power afforded to the US, UK, Russia, France and China as the five permanent members of the UNSC provides these states with a powerful tool which dramatically influences the justice the ICC can administer. Ultimately, the ICC cannot investigate or prosecute a situation in a non-state party without a UNSC referral under Article 13(b), unless the party accepts the jurisdiction of the court. This is a rare occurrence, with only one of the eleven current situations before the ICC involving a state who has accepted the jurisdiction of the court.[48]

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Therefore, the permanent members of the UNSC and their veto power is central to the justice the ICC can deliver.

Coupled with the veto powers of the permanent members, the UNSC's intrinsic political character means that political motivations ultimately influence the justice the ICC can deliver.^[49] Therefore, it is uncontroversial to agree with Verduzco and Mistry's contention that the ICC can be viewed as a tool which furthers the political ambitions of the UNSC's permanent members.^[50] On this basis, it is contended that the ICC employs selective justice because of its relationship with the UNSC.

Political Compromise in the Rome Statute

According to Aloisi, the ICC functions in a world of "power politics".^[51] This was no different during the negotiations which led to the Rome Statute. During these negotiations, Jallow and Bensouda assert that African nations committed considerable resources to concluding the Rome Statute.^[52] This engagement in the negotiations reflected the collective African view that the ICC needed to be "independent, permanent, impartial".^[53] However, the permanent members of the UNSC wanted a much more active role for the Council in ICC activity.^[54] The Rome Statute therefore reflects a middle ground between these two views, which Aloisi describes as a compromise between two different judicial models at opposing ends of the "spectrum between political independence and political subordination".^[55]

These negotiations demonstrate that Article 13(b) and 16 of the Rome Statute, which confer power to the UNSC, were clearly the result of political compromise. Clarke and Koulen have submitted that this compromise has led to the controversy between the ICC and Africa.^[56] Therefore, it is submitted in agreement with Laughland that the Rome Statute negotiations evidently display the "politicised justice" of international criminal law which has caused the selective justice that the ICC delivers.^[57]

The African Issue – Persecution or Perception?

This section analyses the AU perception of persecution and the responsibility of the ICC and UNSC to address it. Firstly, it will be argued that, on face value, Africa appears to be persecuted by the ICC because of the selective justice the UNSC forces the court to deliver and the perceived neo-colonial agenda the UNSC pursues. However, the second subsection will demonstrate that upon deeper analysis, the relationship between the UNSC and ICC does not persecute Africa. The traditional understanding of persecution requires an intention to exclusively and deliberately target a set of people. It will be submitted that neither the ICC nor UNSC possesses this intention. Although, it will be submitted that despite this, the AU perceives the relationship between the UNSC and ICC to cause persecution of Africa. This perception of persecution is based on the AU belief that there is differing treatment of African and non-African situations by the ICC and UNSC. Finally, the third subsection will conclude that the fear of neo-colonialism, although disproved above, is driving the African perception of persecution. On this basis, it is submitted that the ICC and UNSC owe a responsibility to formerly colonised nations to ensure that they do not feel unfairly targeted.

Prima Facie Persecution

On face value, it is submitted that the AU's claim that Africa is persecuted by the ICC is understandable. There are various reasons behind this contention. Firstly, it has been acknowledged throughout academic literature that ICC activity appears to centre around Africa.^[58] With ten of the eleven situations currently under investigation by the ICC being African, and all forty-two indicted defendants of the ICC being from Africa, this contention appears uncontroversial.^[59] Therefore, on face value the ICC appears to focus almost exclusively on Africa.

It has been contended previously that the Al Bashir situation has demonstrated the UNSC lack of respect for AU views. This has caused the AU perception that the ICC "misuse[s]...indictments against African[s]".^[60] Since the first arrest warrant for Al Bashir in 2009, this situation has repeatedly been cited by the AU as an example of what it perceives to be deliberate persecution of Africans by the ICC.^[61] Again, on face value there appears to be merit in the view that the UNSC is not listening to African opinion, as evidenced by the UNSC merely "taking note" of the AU's position and not making any substantive changes based upon it.^[62] In agreement with Labuda, the lack of UNSC

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respect for AU opinion is further supported by the fact that it took the UNSC over five years to even consider the AU's repeated requests for deferral of the proceedings against Uhuru Kenyatta and William Ruto.[63] These two examples further the contention that there is *prima facie* persecution of Africa.

The contrast between ICC involvement in African situations and lack of involvement in non-African situations displays what the AU considers a neo-colonial agenda. Russia and China, two of the permanent members of the UNSC, have ensured the failure of the Council to refer Syria to the ICC by using their veto powers to protect their own political interests. The ICC's Office of the Prosecutor ('OTP') states that in the selection of cases for prosecution, "Gravity is the predominant case selection criteria".[64] The gravity of the Syrian situation provides a compelling argument for why it should be referred to the ICC.[65] Therefore, it is contended in agreement with Jalloh and Bantekas that the failure of the permanent members of the UNSC to allow the referral of Syria to the ICC has undermined the gravitational assessment that was previously used to justify the UNSC referrals of Sudan and Libya.[66] However, as Schuerch submits, the UNSC is under no obligation to abide by the gravitational assessment of the OTP, meaning that the permanent members of the UNSC can utilise their power under Articles 13(b) and 16 of the Rome Statute freely.[67] This assertion lends weight to the suggestion that the UNSC pursues a neo-colonial agenda through its powers under the Rome Statute. This supports Jalloh and Bantekas suggestion that the lack of referral of Syria makes it clear to African states that a nation's relationship with great powers, or its lack of relationships, plays a crucial part in UNSC referral of a situation to the ICC.[68]

Therefore, it is submitted that, on face value, it appears the UNSC uses its powers under the Rome Statute to persecute Africa through the ICC. This is due to the selective justice the UNSC forces the ICC to deliver, coupled with the fact that similar crimes committed outside of Africa are not punished, which conflicts with the principle of equality between states.[69] This inequality is at the heart of the AU belief that the UNSC pursues a neo-colonial agenda via the use of ICC intervention in African situations.

Delving Deeper – The African Perception of Persecution

Despite the understandable conclusion of there being *prima facie* persecution of Africa, it is submitted that upon deeper analysis, Africa is not deliberately persecuted by the ICC and UNSC, because neither institution possesses an intention to persecute. Rather, it is the permanent members of the UNSC using their veto powers to inhibit ICC intervention outside of Africa that has led to the AU perception of persecution.

The "vetting process" and burden of proof required to ensure a successful prosecution demonstrates that ICC intervention in Africa is fair and legitimate.[70] ICC investigations and prosecutions are guided by "sound, fair and transparent principles", which require "sufficient evidence to establish...the accused committed the offence".[71] Therefore, as Cole submits, this stringent judicial analysis means it is highly unlikely that a case built on weak evidence would advance to trial.[72] Cole goes further, submitting that even if a case goes to trial, the burden of proof remains on the prosecution to prove guilt beyond reasonable doubt.[73] These high standards ensure that any case, African or otherwise, is dealt with fairly and legitimately by the court. In fact, the ICC has previously dropped charges against African defendants due to a lack of evidence in the cases of *Prosecutor v. Callixte Mbarushimana*[74] and *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* [75]. This substantiates the contention that the ICC deals with African situations fairly and legitimately and that the institution does not have the requisite intent to purposefully persecute Africa. Essentially, the ICC deals with African situations the same as it would any non-African situation, meaning the court does not have an intention to exclusively target Africa. This leads to the conclusion that it is the permanent members of the UNSC, as opposed to the ICC, that are at fault for the AU perception of persecution.

When comparing the UNSC referrals of Sudan and Libya with the lack of referral of Syria, the UNSC's political outlook can be seen to cause the AU perception of persecution. The lack of referral of Syria under Article 13(b) is the result of the UNSC and the political dominance of the permanent members armed with their veto powers.^[76] These obstacles have prevented the referral of Syria, but are not contentious in the referral of African situations, as demonstrated by the Sudan and Libya referrals. Therefore, the "power politics" of the UNSC do not obstruct the ICC investigating African situations, because African states have a lack of political alliances with permanent members of the UNSC, meaning African nations are not shielded from the ICC through use of veto powers.[77] Thus, from the AU

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perspective, this argument fuels the perception that the UNSC is persecuting Africa, because the permanent members of the Council are forcing the ICC to focus upon Africa by inhibiting ICC involvement elsewhere. However, this argument actually highlights the fact that the UNSC does not intentionally persecute African nations. The cause of the apparent ICC focus upon Africa results from the aim of the permanent members to utilise their veto powers to protect political interests, as opposed to an intention to force the ICC to exclusively focus on Africa.

Finally, it is submitted that the Council does not pursue a neo-colonial agenda through its powers under the Rome Statute, despite the African perception that it does. This is because the veto power provided to the permanent members only affords the opportunity to stop a referral or deferral, not the opportunity to positively force one to occur. Therefore, in agreement with Schuerch, the permanent members of the UNSC are not using their position to force the system on less powerful nations, rather, the great powers seek to stop this system from causing negative results for themselves.[78] This argument suggests that the neo-colonial theory does not apply to the UNSC's use of their referral and deferral powers and leads to the contention that the UNSC does not pursue a neo-colonial agenda against African states, simply that African nations lack strong political ties with powerful nations.[79] However, this lack of political relations still causes the AU to perceive that Africa is persecuted by the ICC, because it provides the underlying reason why African situations and non-African situations are treated differently by the UNSC.

Therefore, it is submitted that the AU perceives persecution of Africa because the permanent members of the UNSC allow the ICC to act promptly and decidedly in African situations in marked contrast to non-African situations. Despite dismissing the neo-colonial theory, it has been contended that the UNSC's intrinsic "political dimension" causes the ICC to fuel the AU perception that Africa is persecuted.[80] Therefore, it is asserted that the African perception of persecution is inevitable because of the relationship between the UNSC and ICC, even though it has been shown that this relationship does not cause actual persecution, due to the lack of intention of either institution to deliberately target Africa.

The UNSC and ICC Responsibility to Allay the Perception of Persecution

The AU perception of persecution has arisen from the belief that the UNSC forces the ICC to deliver selective justice and pursue a neo-colonial agenda. Although this paper has submitted that the neo-colonialism theory does not exist, the AU clearly still believes that it does. These issues have fuelled the AU claim of a "perception of double standard[s]" in international justice.[81] On this basis, it is submitted that to alleviate the AU perception of persecution, the ICC and UNSC must ensure the court deals sensitively with African situations.

By seeking to protect themselves and their allies, the permanent members of the UNSC have caused the AU's perception of persecution.[82] Building on this, Du Plessis submits that if the ICC continues to ignore Syria, then the AU will continue to view the lack of referral as a failure of the equality of states principle.[83] The Syrian situation encapsulates the African perception of persecution, because the failure to refer Syria is grounded entirely in politics. This has hindered the ICC's ability to alleviate African fears over double standards in international criminal justice.[84] Therefore, it is submitted that to allay the AU perception, the ICC and UNSC need to work collaboratively to deal with African situations before the court sensitively, because of the suffering that African nations have experienced at the hands of Western powers during colonialism.[85] Only such positive measures can counter the AU's perception of persecution.

Furthermore, the UNSC's previous failures in not fairly considering AU requests to defer prosecutions in Sudan and Kenya has caused further widening of the rift between Africa and the ICC.[86] Labuda believes that the failure of the UNSC to consider the AU's requests fairly has served to drive the perception of persecution, because it conveys to the AU that the ICC is too busy helping powerful nations to listen to smaller states.[87] This has contributed significantly to the AU perception of persecution, and the only way to alleviate this is for the ICC and UNSC to display to Africa that it supports the principle of equality of states and does not allow the political interests of powerful states to impede international justice. If not, African nations will understandably continue to be reminded of the deep scars that colonialism left on the continent, which will result in the ICC and UNSC enduring heightened hostility from Africa.

Conclusion

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This piece aimed to establish a two-fold argument. Firstly, it has been demonstrated that the relationship between the UNSC and ICC causes the court to deliver selective justice. To substantiate this, it has been shown that the use of Article 13(b) in African situations contrasts with its lack of use for non-African situations. Furthermore, the UNSC has utilised Article 16 to appease the United States, but will not do the same for the AU. Also, the UNSC's political outlook and the veto powers afforded to the permanent members have been shown to impact significantly on the justice the ICC can deliver. All of this has substantiated the contention that the relationship the UNSC has with the ICC forces the court to deliver selective justice.

Secondly, it has been posited that, on face value, there is persecution of Africa resulting from the UNSC and ICC's relationship. However, it has been demonstrated with deeper analysis that the ICC and UNSC lack the intention to persecute Africa. However, the writer contended that although there is not actual persecution of Africa, the relationship the ICC has with the UNSC causes the AU perception of persecution. This perception of persecution occurs because of the UNSC's differing treatment of African and non-African situations. The UNSC obstructing ICC involvement in situations outside of Africa has caused the continent to become the almost exclusive focus of the court.

In conclusion to the question posed, it is submitted that the relationship the UNSC has with the ICC is the crux of the AU resentment directed towards the ICC. The UNSC forces the court to deliver selective justice, a concept that the AU has worried about since before the ICC's creation.[88] Despite disproving that the relationship of the UNSC and ICC causes persecution of Africa, it has been shown that this relationship still causes an African perception of persecution. On this basis, it is submitted that owing to the historically ingrained and negative experience of colonialism, the ICC and UNSC have a responsibility to allay the African perception of persecution. This responsibility is not based simply on the need to provide the fairness that international criminal justice demands. It is also based on the need to demonstrate an appearance of fairness that the African continent desires, because of its historically negative experiences with powerful nations.

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