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The Decaying Pillars of International Adjudication and Arbitration: A View from Africa

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Abstract

The alarming rapidity in which the current global system is witnessing the resorting to war in order to resolve difference is worrisome thus the paper setting out to examine what is wrong with international adjudication and arbitration. The current international system which had its root in the treaty of Westphalia (1648) that marked the beginning and creation of the state system had continually been in search of "Peace under law". The search for "Peace under law", in same vein had gone through the League of Nations, World War I & II and to the United Nations system, yet peace had continue to elude humanity and the current international system due to the faulty foundations for the search for peace. The foundation was lopsided and one sided thus the challenge it is currently facing. The faulty foundation for the search for "peace under law" has necessitated the examination of the foundation(s) especially from the lens of the African continent. The examinations lead the paper to the conclusions and recommendations canvass herein.

Keywords: *International System, Arbitration and Adjudication, International Disputes, International Law, Colonialism, Power, Economics.*

1. Introduction

From the treaty of Westphalia (1648) till date, the recurring decimal all through the period was the desire for the reduction of the incidences deaths related to wars, hunger, poverty and terrorism. The quest for these reductions of deaths and for peace under law had led the current international system going through several phases – the League of Nations system, through the world wars to the current United Nations system. From the League of Nations, to the United Nations system, the foundation for international arbitration and adjudication had essentially been based on Eurocentric values, structural division of the global economy, international law and politics, power, and system bias. In most cases, at the operational level society in the international system, the inter play of these factors had influenced the direction and thrust of international adjudication and arbitration. The interplay of these factors had made the foundation of international arbitration and adjudication a "one sided" venture and imposed on other parties and actors in the international system. In Africa, it has inadvertently given an official seal to all the wrongs of colonialism in the continent, thus further exacerbating conflicts in the continent. The problems of searching for peace under law forced Mbeki (2000) to remember the words of Robert copper who noted inter alia;

> *How should we deal with pre modern chaos, as manifested in various areas of the world? What form should intervention take? The most logical way to deal with the chaos, and is unacceptable to postmodern states and as it happens to some modern state too. It is precisely because of the death of imperialism that we are seeing the emergence of pre – modern worlds … all conditions for imperialism have dried up. And yet the weak still need the strong and the strong still need an orderly world. A world in which the efficient and well governed export*

> *stability and liberty, and which is open for investment and growth… what is needed then is a new kind of imperialism, one acceptable to the world of human rights and cosmopolitan value.*

The import of the assertion of Robert copper quoted by Mbeki (2000) on this paper is the fact that the new imperialism had caused the "strong" to continue the pursuit of their economic, social and political wellbeing at the detriment of morality and Justice. This action of states with power had necessitated the description of the current international system, as a legitimization of power over justice, thus the high incidences of wars and conflicts. The high incidences of wars and conflicts caused Boutros - Ghali to describe the 20th and early 21st century as a culture of death. All the description and toga given to the current international system gave Brecke (2002) quoted in Gleditsch the impetus to real out statistics on the frequency of global wars. Brecke (2000), had noted thus that between the periods 1400-2000, there was a total 2,566 wars and these figures dipped in the period immediately after the thirty year war, only to peak in the 1960s. In Brecke (2002) words, while trying to be explicit noted thus;

> *But has risen sharply in three centuries since peaking in the 1960s… most of these conflicts have occurred in the global south of the 38 under way in 2002, the vast majority began years and even decade earlier. The global landscape is dominated by armed conflicts arising from civil wars within states.*

The claims and assertion of Brecke (2002) was not explicit enough, but it did give a leeway to Mutunga (2002) to give flanks and to extend the frontiers of Brecke (2002) logic with more explicit details with Africa's contribution to the overall statistics of wars. Mutunga (2002) has posited that;

> *In Sudan almost two million people have lost their lives since the early 1980s, and the country has been in conflict since 1956, with only a brief period of peace that followed the 19992 peace accord. The conflict is often describe to be between the largely Islamic and largely Arab oriented government in the North and the Sudanese People Liberation Army (SPLM) in the South who are mostly black African and Christians… the decade long civil war has claimed hundreds of the thousands of lives, while there were 800,000 refugees and over 1 million internally displaced persons.*

For Rwanda, the world did watch with disgust as the war between Tutsi and Hutu claimed over one million lives, while in neighboring Burundi, the story remained the same, as the internal conflict resulted in the loss of thousands of lives and over had a million refugees (Dienye, 2012). The position of Mutunga in adding the African dimension to the general statistics of war and conflicts did was to bring the African continent to the forth especially in the complex web of global politics and power that had greatly undermine Africa's abilities in resolving her conflicts and wars, hence her reliance on international adjudication and arbitration.

But the crux of the matter is that, while the African continent was not insulated from the general happening(s) in the international system, most of the continent's conflicts and wars have European power(s) underpinnings to it. The European Power Underpinnings to these conflicts and wars had impacted negatively on Africa ability in resolving her conflicts and wars. Africa's jurisprudence and methodology to conflicts and war(s) resolution was made inferior and considered inadequate in face of the current realities of the current international system: thus the elevation of European jurisprudence and monolithic approach to international adjudication and arbitration. Simply put, the foundation of the current international arbitration and adjudication is European and was imposed on non-European cultures that were incorporated into the current international system. Again the import of

these several conflicts and wars had given impetus to the international arbitration and adjudication. The desire of humanity for "Peace under law" is what was encapsulated in the treaty of San Francisco which gave birth to the current United Nation system, which in turn put the ICJ at the apex of the current international legal (system) framework. From this viewpoint, Shaw (1997) noted thus;

> *Developed as a result of the atmosphere engendered by the Hague conference of 1897 and 1907. The establishment of permanent court of arbitration, although neither permanent nor, in fact a court, marked an important step forward in the consolidation of an international system. However, no lasting concrete steps were taken until after the conclusion of the First World War. The covenant of the League of Nations called for the formulation of Proposals for the Creation of International Justice (PCIJ) was created. It stimulated efforts to develop international arbitral mechanisms.*

The "Permanent court of International Justice" was superseded after the Second World War by the international court of Justice (ICJ) described in "Article 92" of the UN as the principal judicial organ. In other words, the PCIJ and the ICJ are on the same pedestal, thus the ICJ being the same in statute and jurisdiction. Corroborating "Article 92", Article 36" of the court, did assert that the court (International Court of Justice) has the competence to decide the following cases (i) which were entrusted by states parties: and all matters especially provided for in the charter of the United Nations or treaty and convention in force (ii) States could also confer jurisdiction through treaty (iii) states parties to the statute, without special agreement, confer compulsory jurisdiction. The court could also give advisory opinion on the request of the general assembly (Cobanu, 2000, Karney, 2000, Gross, 2000, Kerley, 2000). The ICJ is composed of 15 judges, as the process of selection of judges is interesting, as the process involves both legal and political elements.

From the historical experiences and background of the current international system, non - European cultures were not incorporated into the system as equals. These non - European cultures were subjected to the tenets of colonialism which albinitio was to steal and exploit these cultures. From the period of colonialism till date, every instrument(s) in the arsenal of the colonial masters had been deployed to enforce and maintain the strangle hold of the colonial masters on the current international system. The foundation of the current international adjudication and arbitration was also done or laid in line with the tenants of colonialism, thus the environment in which both the United Nations and ICJ had been operating is the same as those during the colonial times thus necessitating the questioning of the (conduct) performances of ICJ. The interplay of the index of the foundation of the current international adjudication and arbitration had given impetus to the construing the international legal framework being biased thus the African view.

Africa and the Decaying Pillars of International Adjudication and Arbitration

Why should the African continent question the current international legal framework? International arbitration and adjudication is currently facing strong opposition and challenges from the non-European cultures including Africa, as these non-European cultures overtime had witnessed bias. These biases stemmed from the structural division of the global economy, the doctrine of realism, selective enforcement of the judgments of the ICJ, systemic bias and the monolithic approach to international adjudication and arbitration. The rise in terrorist activities and deaths from armed conflicts across the globe has further call into questioning the foundation of international arbitration and adjudication.

As the treaty of San Francisco gave energy and birth to the UN, the UN in same breath did put the ICJ at the apex of international adjudication and arbitration. The making of the ICJ as

the principal judicial organ of UN means by "Ipso Facto" all countries that are signatories to the UN charter are parties to the international court of justice statute (ICJ) and by extension to the current international legal framework. But the crux of the matter and the issue confronting the International Court of Justice (ICJ) and the current international framework was on which legal foundation their assigned role going to be situated.

From the standpoint of the history of the current international system, it has obvious that the ICJ and it operation was fashioned and based on European principles and parameter (Bessis, 2003, Kennedy, 1987). It is in this vein that, Bessis (2003) argued thus that, the dynamics of international politics was deliberately altered by a race and culture (Europeans), especially, in the sixteenth century in their favour. Consequently, every other development witnessed in the international system from the sixteenth century till date; be it social, economic and political, was to sustain the alteration which is to reinforce and strengthen European statute in the international system. Bessis (2005) had noted inter alia;

> *Modern Europe which really began to see itself as such only in the course of the sixteenth century, first invented itself around a series of myths, each based upon a reflection of course all civilization have been built on founding myths. But, unlike in the great systemic cosmogonies, it was at the moment when Europe laid claim to reason that developed its own founding myths. It was then that a selective reading of their history began to change for people in the West, and that the East began to change and to disappear from the modes of European though that became dominant-over succeeding centuries… infact, since Petrach and others gave it an initial form in the fourteenth century, the founding myth of an exclusive Greco-Roman source has functioned as an implacable machine for expulsion of oriental or no Christian sources from European civilization.*

Bessis (2003) in extending the frontier of her logic and argument had argued and noted that the idea to erased the Babylonian, Chaldean, Egyptian and Indian influences on Greece and on the Pre Socrates society was deliberate and part of the grandiose plan of the alteration. This deliberate act which commenced in the fourteenth century had been followed through to the twenty-first century, thus the founding pillars of international adjudication and arbitration being premised on European parameters. This fact is what the International Court Justice, that is currently at the apex of international arbitration acknowledged in its statute and Article 38 that the Court would adjudicate in disputes brought before it based on the principles of international law known the "civilize nations". In order words, article 38 of the court presupposes that there are nations in the current international systems that are not conversant or oblivious of International law. These states and nations according to Ayoob (2013) are those where efforts at state making and state building efforts commenced late. But the crux of the matter at the operational level of state in the current international system, is the fact that that the entire issue surrounding international law had reconfigured into the debate between the positivist and the naturalist as to whether international law should be considered "a real or quasi law" (Dienye, 2012) Whatever the controversy might be between these school of thoughts, international law remains at the heart of international adjudication and arbitration and issues involved herein. International law developed essentially as a product of Christian civilization which began gradually to develop from the second half of middle ages. While international law remains the kernel of the great debate, these great debates had not nullified the fact that the current international system and the current international legal framework are basically European. European values and culture became the sole determinant of the direction and conduct of the international system. The import of this fact on the paper is that there was the elevation of European culture and value(s) above every other culture, which meant and translated into the adoption of monolithic approach to issues of international arbitration and

adjudication. By the polymorphous nature of international adjudication and arbitration, the attempt in making it monolithic had always brought friction with other cultures, thus the questioning of the pillars of international arbitration and adjudication.

The African viewpoint(s) to the questioning of the founding pillars of international adjudication and arbitration are intricately woven to its history in the current international system. Firstly, the African position stemmed from the fact that she was incorporated into the current international system through imperialism and colonialism. The sole purpose of the colonial project in Africa was to tie the continent to "apron string" of European economies. It is in this vein that Aja (1998) noted thus;

> *The countries in the South have common characteristics, most were victims of European imperialism… dependence syndrome is a cardinal feature of the South. The South is generally dependent in trade, finance, technology military and even social consciousness and scholarship of development.*

From the argument of Aja (1998) imperialism and colonialism was not essentially for the effective incorporation of the continent into the global system rather it was for the reduction of the continent to the pedestal of servant, supplier of labour and raw materials. In order words, imperialism and colonialism created an unequal production model-between dominant European economics and those of the African. Colonialism meant to the Africans and the African continent the loss of both political and economic freedom. The import of this fact to the paper was that African became a recipient of History, as she was sideline in the emerging international legal framework and in the current under system. Simply put, from the period of colonialism till date in African there had been systemic bias against the continent. The systemic bias was a carryover effect from colonialism. The systemic bias had accounted for the inability of the continent to securing a permanent seat in the security council of the United Nations. The systemic bias had been transferred into institutions assisting the United Nations in achieving its global objective of "maintaining global peace" like ICJ and the ICC. The consequence(s) of these biases against the continent is the application of European parameters in the adjudication of African cases at the ICJ. This application of European methodology and jurisprudence is what had manifested in the statute institute and articles 38 of ICJ that notes the court will adjudicate in matters brought before it based on principles of international law known to "civilize nations".

African was incorporated into current international system with the mantra-getting the "black continent civilized". This singular fact presupposes that the African continent has a method of adjudicating and resolving conflicts which the colonial masters considered inadequate, thus the need for the adoption of European parameters in resolving cases at the global level. The consequence of the adoption is the relegation of all non-European parameters to the background. Furthermore, the adoption of European parameters had meant or translated into any none European aspiring for a seat in the international court must be trained in European jurisprudence. For example only nine Africans from five countries have had the opportunity of sitting on the bench of the International Court of Justice (ICJ) and all of them are trained and vast in European jurisprudence.

While the monolithic approach to international adjudication and arbitration had shut out non-European cultures and elevated European culture had translated into the domination of the court by the Europeans. For example, the court, while admitting in evidence "the bias protection treaties" used in the colonialism of Nigeria in the case between her and Cameroon, refused to entertain all historical arguments advanced by Nigeria, thus causing judge Koroma to note thus;

> *Historical consolidation established by evidence remains a valid basis of territorial title… what the court described in the judgments as established modes. If this were so, there would have been no place in international jurisprudence for prescriptions, recognition, estoppels or preclusion or acquiescence. In other words, proven long usage coupled with a complex of interest and relations which in themselves have… be effect of affecting a territory, and when supported by evidence of acquiescence constitutes a legal basis of territorial title such as basis to territorial title has been recognized in the jurisprudence of the court. Accordingly, what was required in the case has proof of the claim, and it is for the court to examine the evidence if it is substantial evidence to justify the claim of historical consolidation and affectivities linking that Bakkasi, Peninsula and the settlement around Lake Chad with Nigeria and with the necessary evidence of acquiescence. It should have been for the court to examine such evidence to determine whether if established the title and not to concentrate on the label under which the evidence was presented.*

From the principle of effective authority and occupation, Judge Koroma (2000) felt the court had done a great miscarriage of Justice with this exclamation that the 'majority went wrong', as great Britain could therefore not have transferred any territorial rights to Germany or to Cameroon (Dienye, 2016). Thus the conclusion reached by the court (ICJ) in this case was not in line with the development of its own jurisprudence and in particular with regard to the case of the frontiers dispute (Burkina-Faso-Mali). Whatsoever the debate might be and position of Judge Koroma (2000) on the conclusion of the court (ICJ) in the Maritime Disputes between Nigeria and Cameroon, the salient fact to note is that the court based its judgments(s), as they usually do on treaties. Treaties played a pivotal role in the incorporation of Africa into the current international system, and most of these treaties were one sided, bias and were imposed on Africans during colonialism. For the court, as in the case between Nigeria and Cameroon over Bakassi, to base their judgments on bias and one sided treaties meant transferring the innate bias into their judgments thus making the judgments of court bias and hypocritical (Dienye, 2000). The court by its verdict did inadvertently call into question the pillars of international adjudication and arbitration by giving official seal to colonialism in the African continent.

2. Conclusion/ Recommendations

While the current international legal framework which has International adjudication and arbitration, as an index had recorded some millstone in the "maintenance of global peace" or "peace under law" but the crux of the matter is that the foundation of this current international legal framework that is based on European values, doctrine of realism, structural division of global economy, and controlling of global institutions in favour of the Europeans is facing stiff opposition from non-European cultures. For example the Migrant Crisis rocking Europe is calling into questioning the principle of Human rights, power, and international politics. It is in this vein that Hoile (2012) quoting Robin cook, the former British foreign minister, who had noted, while summing his views on the ICC and by extension the current international legal framework "if I may say so , this is not a court set up to bring to book ministers of United kingdom or President of the United states". The views of the former British foreign minister explicitly captured the feelings of non-European cultures in the current international system.

While the Europeans had not hidden the fact that the current international system is polymorphous but the Europeans have discarded this nature and adopted a monolithic approach to issues emanating from a polymorphous system. This is what that had accounted for the increasing incidences of conflicts and wars which in turn given energy to international arbitration and adjudication. The increase in the incidences of wars and conflicts points to the

decaying foundation of the current international legal framework thus right the African continent in demanding and pushing for the democratization of the international system.

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