
INTERNATIONAL CRIMINAL COURT AND CHALLENGES OF CULTURE AND POWER DYNAMICS IN PROSECUTING INTERNATIONAL CRIMES IN AFRICA: THE WAY FORWARD

Maria Chigozie Onuegbulam, Associate Professor of Public Law, Faculty of Law, Enugu
State University of Science and Technology, (Enugu, Nigeria)*

Maria Omozele Edeko, Lecturer, Department of Public Law, Faculty of Law, Benson
Idahosa University, (Benin City, Nigeria)**¹

ABSTRACT

While International Criminal Law aims at universality, cultural differences and power dynamics can significantly impact its implementation, potentially leading to bias, misunderstanding, and undermining the legitimacy of the Court's justice system. Power influences cultural norms, values, and peoples' identity, but culture shapes how power is distributed and exercised in a society. This article aims at examining the impact of culture and power dynamics on International Criminal Court's (ICC) activities in Africa. The objective is to explore the inter-connectedness between culture, power dynamics and ICC's warrants in African justice issues. The scope is limited to Africa. The approach is doctrinal.

Keywords: International Criminal Court, International Crime, Prosecution, Culture and Power Dynamics, Africa.

¹ *Maria Chigozie Onuegbulam, Associate Professor of Public Law, Faculty of Law, Enugu State University of Science and Technology, (Enugu, Nigeria).

**Maria Omozele Edeko, Lecturer, Department of Public Law, Faculty of Law, Benson Idahosa University, (Benin City, Nigeria).

1. Introduction

International criminal law, culture and power dynamics are intertwined in complex ways. While International Criminal Law aims at universality, it is important to understand that cultural differences and power dynamics can significantly impact its implementation, potentially leading to bias, misunderstanding, marginalisation and undermining the legitimacy of the International Criminal Court's justice system. Irrespective of type, conflict evolves and progresses often due to differences in shared pattern of behaviours, beliefs, values, and traditions. These attributes shape how human beings and groups perceive, understand, appreciate and interact with the world around them. All these revolve around the complex concept called culture. Thus, culture not only plays a prominent role in molding and shaping human lives, identities, in determining conflicts, it equally plays a complex and often contested role in conflict resolution and in the prosecution of perpetrators of international crimes. Understanding these dynamics is crucial for a progressive strategy for international crime prosecution and sustainable conflict resolution in Africa. It involves navigating between universal principles and diverse cultural norms, particularly as it relates to executing warrants, assessing culpability and addressing cultural property destruction. Though culture is complex, but some African culture and cultural heritage have transforming nature and influencing capacity that has affected and can still affect the activities of the International Criminal Court in African. Culture is a constantly evolving phenomenon and it remains an essential aspect of human society, that influences human beings and the world around him even in crime prosecution. To achieve the success the court desires in Africa, there is need to explore the inter-connectedness between culture, power dynamics and international crime prosecution and their influence in African justice issues.

Culture is a dynamic and integral aspect of any society which encompasses both material and non-material aspects such as values and beliefs. It is an intrinsic part of whatever we do, how we think and reason, and who we are. It is inherent and deep-seated in man. Culture is not a thing that we can decide not to bring with us. It is there. Regardless of whether we are aware of it or not, culture is always with us. Hence, it has a strong controlling force that critically influences man in his beings. In pursuit of sustainable conflict resolution, recognition must be given to the culture of parties involved especially if the court wants to succeed and if resolution aims at achieving true, positive peace. The approach will have to include such other factors as knowledge of the local context and culture. However, if the goal is to achieve

negative peace, mere conflict management and ordinarily absence of violence, a universal method might as well be suitable since peace is not just the absence of violence, but the presence of social solidarity. Power dynamics on the other hand simply means the ways in which power is distributed, exercised and experienced within relationships, groups or systems. It is the interactions and influences between individuals or entities with different levels of power. Power dynamics influences how people communicate, shape how decisions are made, how resources are allocated and how conflicts are resolved. In this way, members of the society once again begin to recognise each other as fellow human beings and therefore, begin to share a concern in the common welfare and well-being of each other. Aside being the mother continent and the first inhabited region on earth,² Africa is one continent that is blessed with rich human heritage and cultural diversity that unifies and influences them all round. Africa's rich history and diverse culture varies not only from one country to another but also within regions and countries. The culture of each ethnic group holds together the authentic social fabric of traditional practices and rites, art, music, and oral literature through which identities are built. Culturally sensitive approaches to international crime prosecution and conflict resolution are essential for building trust, facilitating mutual understanding, and achieving lasting agreements. By leveraging intercultural experiences and integrating diverse cultural viewpoints, international criminal court warrants, crime prosecution and conflict resolution processes can be more effective, sustainable, and mutually satisfactory. Indeed, one of the fruitful fundamental approaches to sustainable conflict resolution is understanding the cultural backgrounds of parties that possibly influenced their actions, and then, appreciating their cultural beliefs thereby managing the root cause of the conflict for an effective application. The research introduces how culture and power dynamics impact the role of the International criminal court in prosecuting international crimes in Africa and the way forward.

2. Culture as a Concept

The word 'culture' derives from the latin word '*culturare*' '*colere*' which means to tend to the earth and grow, or cultivation and nurture.³ It is a modern concept based on a term first used in classical antiquity by Cicero: "*cultura animi*." It appeared first in its current sense in Europe in the 18th and 19th centuries, to connote a process of cultivation or improvement, as

² AU-UN NEWSROOM; Permanent observer Mission of the African Union to the United Nations, May 25, 2021.

³ Catherine Soanes, Angus Stevenson,(eds) (2011) Concise Oxford English Dictionary, 12th ed Rev (Oxford University Press, 2011) at 394.

in agriculture or horticulture.⁴ It grew in the 19th century to refer to the betterment or refinement of the individual, especially through education to the fulfillment of national aspirations or ideals. It was then that some scientists used the term 'culture' to refer to a universal human capacity. In the 20th century, culture emerged as a central concept in anthropology encompassing the range of human phenomena that cannot be attributed to genetic inheritance.⁵ Some anthropological studies are of the view that culture has two meanings.⁶ Firstly, it evolved human capacity to classify and represent experiences with symbols, and to act imaginatively and creatively; and secondly, the distinct ways that people living in different parts of the world act creatively, represent and classify their experiences.⁷ Culture has been variously defined by different scholars and discipline. Often times, it is described as the characteristic features of everyday existence shared by people in a particular place or at a particular time encompassing the customary beliefs, social forms and material traits of a racial, religious or social group. According to Taylor culture is that complex whole which includes knowledge, belief, art, morals, law, customs or any other capabilities and habits acquired by man as a member of a society.⁸ For Bello, culture is the totality of the way of life evolved by a people in their attempts to meet the challenges of living in their environment, which gives order and meaning to their social, political, economic, aesthetic and religious norms thus distinguishing a people from their neighbours.⁹ Aziza asserts that Culture is the totality of the pattern of behaviour of a particular group of people including everything that makes them distinct from any other group of people -their greeting habits, dressing, social norms and taboos, food, songs and dance patterns, rites of passages from birth, through marriage to death, traditional occupations, religious as well as philosophical beliefs.¹⁰ From the definitions presented by Taylor, Bello, and Aziza it is obvious that culture entails everything about man, man and his whole environment whether social, political , religious etc.

⁴ Supra.

⁵ LibreTexts libraries are Powered by NICE CXone Expert https://socialsci.libretexts.org/Bookshelves/Sociology/Introduction_to_Sociology/Sociology, accessed 20 June 2024.

⁶ Eg American anthropology. See: LibreTexts libraries, Supra.

⁷ Julie Fraser and Brianne McGonigle Leyh: *Intersections of Law and Culture at the International Criminal Court*(Edward Elgar Publishing 2020)

⁸ Edward B Taylor,(1871)(1958) *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Language, Art and Custom*. 2nd edn. London: John Murray. He is reputed as the scholar who first coined and defined culture.

⁹ S Bello (1991), *Culture and Decision Making in Nigeria*. Lagos: National Council for Arts and Culture.

¹⁰ RC Aziza (2001) *The Relationship between Language use and Survival of Culture: the case of Umobo youth*". *Nigerian Language Studies*. No 4. at 31.

Legally speaking, the complex and diversified nature of culture pose some challenges in having a universally accepted definition. Considering cultural sensitivity, laws and policies must balance the need to protect cultural rights with the need to respect cultural diversity and avoid cultural homogenization. Nonetheless, in various legal context, culture is often understood as shared values, customs and traditions. That is to say a groups collective identity, including their belief, practices and way of life. It is also regarded as an intangible heritage encompassing traditions, language, music and art. Thus, in the field of human rights law, culture is often linked to the right to freedom of expression, association and identity. Under intellectual property law, culture can be relevant in protecting traditional knowledge, cultural expressions and intellectual property rights of indigenous communities. Criminal law rather seeks to ensure fair and informed decision-making while respecting cultural diversity. Some jurisdictions allow cultural background as a defense or mitigating factor in criminal cases, considering cultural context in determining culpability or sentencing.¹¹ Courts strive to avoid cultural bias in decision-making, ensuring fair treatment of defendants from diverse cultural backgrounds. Thus, in cases that require cultural expertise, experts may be invited to provide insight into cultural practices so as to help the court and parties understand cultural nuances relevant to cases. Furthermore, law enforcement agents and courts aim at being culturally sensitive, respecting cultural differences while upholding the law. This will be appreciated more as research progresses.

The United Nations Educational, Scientific and Cultural Organization(UNESCO) defines culture as “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, that encompasses, not only art and literature but lifestyles, ways of living together, value systems, traditions and beliefs. Culture has been described as having seven unique elements that are consistent with its characteristics namely social organisation or society, custom and tradition, language, arts and literature, religion, government and economic systems. Thus, culture is discussed in the context of a particular society, their customs and tradition, language, what they are thought of as a group, social life, religion, government, type of plant they grow, particular substance or crop, animals they breed etc. In fact, the term culture seems to be one of the most disputed concepts. It encompasses a large and diverse set of intangible aspects of social life.

¹¹ State v Mohammed (1969), 1 NMLR at 296. The Court considering an element of provocation as a defense in this case, took into account the fact that the dagger used by the accused , a Kanuri, was worn by his tribe as an ornament.

For the sociologist, culture consists of the values, beliefs, system of language, communication, and practices that people share in common which can be used to define them collectively. The Sociologist believes that culture plays a crucial role in social life because it shapes social relationships, maintains and challenges social order. It determines how people make sense of the world around them, their place in it. It shapes mans' everyday actions and experiences in the society. According to the sociologist culture comprises of both non-material and material things. The non-material things include the values and beliefs, language, communication, and practices that are shared in common by a group of people. Invariably, culture is made up of our knowledge, common sense, assumptions, and expectations, the words we use, how we speak them and write them, the symbols we use to express meaning, ideas, and concepts. It is what we do and how we behave and act. Often times it informs how we walk, sit, carry our bodies, and interact with others; how we behave depending on the place, time, and audience; and how we express identities of race, class, gender, and sexuality, among others. It includes the collective practices we participate in, food we eat, what we wear and how we wear it. Culture is often based on a particular region or specific location. Over the course of history, humans all over the world have created many cultures, which have shaped what people think, feel, wish, value, and how they behave. Culture is a very broad and complex concept that includes many aspects of human existence and daily life and it is reflected in both physical elements of a group or society, such as fare/cuisines, fashion, music, dance, literature, or architecture, and also in the non-physical elements such as customs, traditions, beliefs, and values. A key characteristic of culture is that people are not born with it, but they are born into it. Thus, culture is learned starting at birth, and the learning continues throughout an individual's life time. Culture is passed down from one generation to the next through socialization. Socialization is another important factor in human development that has connection with culture. It is the process of learning to adapt one's thinking, behavior, skills, and attitudes to fit into a society. It is an important means of passing ideas and things on between people as they develop from childhood into adulthood. Culture itself is not static and not fixated. It is dynamic, it changes and evolves over time, so that new beliefs, values, customs, traditions, and practices continually replace older ones. Nonetheless, the process of cultural change is faster for societies that are open to outside influences, such societies engage in cultural exchange activities with other cultures. Interestingly, culture gives people a sense of belonging and fitting into the world and shapes the way they understand the world around them while helping them to find stability in their lives, even when they are living in a rapidly changing world. Importantly, culture is not the same across any one society. There are subcultures within a larger culture, each is unique with

its own distinct beliefs, values, and practices. For example, within a country like Nigeria, there are many unique regional cultures, ethnic cultures, and age-related cultures. Mores so, people of the same state may have various cultures and cultural values and believes that shape their lives and reasoning.

3. Culture from African Perspective

African cultures are rich, diverse and dynamic and shaped by history, geography, and community. They continue to evolve and thrive, influencing global culture and identity. From an African perspective, culture is deeply rooted in community, tradition, and identity. It is often collective, emphasizing community values, share experiences, and interconnectedness. African cultures place significant importance on traditional practices, such as customs, rituals and ceremonies which are often tied to spirituality and ancestry. Oral traditions and storytelling are vital in African cultures passing down history, wisdom and cultural values through generations. For Africans, respect for elders is a core value and cultural. Elders are often revered for their wisdom, experience and role in preserving cultural heritage. According to research, of all the continents, Africa has the longest history of human habitation and from record, humans originated from Africa and began to migrate to other parts of the world around 400,000 years ago. The United Nations Educational, Scientific and Cultural Organization (UNESCO), has it that Africa, the mother continent and the first inhabited region on earth, is characterized by vast lands and one of the largest populations on the planet with rich human heritage and cultural diversity. Africa has a broad history including that of her civilizations starting from the first artists that left impressions on her rock shelters to the scholars who built great universities in the Sahara. Africa is rich with treasure of unique iconic natural places such as the confluence of River Niger and River Benue making a magnificent site from Mount Patti, the Serengeti, the Table Mountain, the Victoria Falls, the origin of the history of mankind from the fossil hominid sites of Olduvai Gorge, the Sterkfontein to the pyramids of ancient Egypt. The high walls of her blockhouses and castles from the colonial era significantly but painfully recite sad stories of her slavery and the long history of Africans' struggle for independence and liberation. Africa's rich history and diverse culture varies from one country to another and also within regions. Africa is a home of numerous cultural diversities with over 2000 languages and countless traditions, each with its unique characteristics. For example, Nigeria alone has more than 300 tribes, and each of these tribes has its own peculiar culture. The culture of each ethnic group holds together the authentic social fabric of traditional practices and rites, art, music, and

oral literature through which identities are built.

Africa has imported and exported its culture for centuries. For example, East African trading ports were a crucial link between East and West as early as the seventh century leading to complex urban centers along the eastern coast, often connected by the movement of raw materials and goods from landlocked parts of the continent. Africa has varied cultural heritage and each is unique in its own way and particular to the people that specially embrace it as theirs. However, there are underlying similarities shared by many African societies which, when contrasted with other foreign cultures, reveal a wide gap of difference. African culture is embedded in rich and strong social, moral, religious and even economic values that support sustainable conflict resolution and impact on her economic growth, social development, and relation with the environment. For example, respect for family and relationship is one of the most cherished cultural values in Africa. Nonetheless, African culture is not characterised with one description. The traditions of these cultures evolved in very different environments.

Africa has cultural practices that are used as viable tools in conflict resolution in Africa. For example, the Ubuntu practice of South Africa emphasizes interconnectedness and community harmony. The Umunna practice among the Igbos of Nigeria highlights the importance of community and collective responsibility. While the Maat of ancient Egypt represent truth, justice and morality. Cultural approaches to conflict resolution in Nigeria for example are deeply rooted in traditional practices, communal values, and indigenous governance systems. These mechanisms leverage cultural norms to restore harmony and resolve disputes. Most of the prominent cultural tools include traditional leadership and customary laws, Communal Reconciliation Practices, Interfaith Cultural Dialogues, and Oral Traditions and Proverbs.

i. Traditional Leadership and Customary Laws

Traditional leaders, such as chiefs, emirs, and obas, play a central role in conflict resolution using customary laws tailored to specific ethnic groups. For example, among the Igbos and Yoruba, the Igwe/Eze and the Oba respectively mediates disputes through communal dialogue, emphasizing reconciliation and restitution. In the North, the Hausa-Fulani rely on emirs to arbitrate conflicts, often using Islamic principles of justice and forgiveness. These methods are effective due to their cultural legitimacy and community trust.

ii. Communal Reconciliation Practices

Cultural practices, such as oath-taking, communal feasts, and restorative rituals, are used to rebuild and re-affirm relationships. In Igbo communities, the Igba Ndu (reconciliation ceremony) involves symbolic acts like sharing kola nuts to signify peace. Similarly, among the Tiv, elders facilitate dialogue to resolve farmer-herder disputes, negotiating grazing routes to prevent future clashes.

iii. Inter-faith Cultural Dialogues

Nigeria's religious diversity necessitates inter-faith approaches that draw on cultural values. The Inter-faith Mediation Centre in Kaduna, led by, integrates Christian and Islamic teachings with cultural practices to foster dialogue between conflicting religious communities. This approach leverages shared cultural values, such as respect for elders, to bridge divides.

Role of Oral Traditions and Proverbs: Oral traditions, including proverbs and storytelling, are used to impart moral lessons and encourage peaceful coexistence. For instance, Yoruba proverbs like “Bi a ba fi ori gba, a fi ori fun” (reconcile with the same spirit you were offended) promote forgiveness and dialogue. These cultural tools reinforce communal bonds and deter conflict escalation.

3. The Concept of Power Dynamics

Power dynamics refer to the ways that formal authority is distributed and how that affects people's behavior. Culture can be seen as a reflection and shaper of power dynamics in various ways. Cultural norms, often influenced by dominant groups, can reinforce existing power structures and inequalities. For example, a culture that highly values individualism might have different power dynamics than a collectivist culture. Also, a culture that values the practice of Female Genital Mutilation as a rite of passage to womanhood or married life will find it very difficult to recognise Female Genital Mutilation as a human right violation especially before the dominant group. So also, with a culture that practices child marriage. Cultural practices, values, and ideas circulate and can both reflect and challenge power dynamics. Power dynamics are often reflected in social hierarchies, where certain groups hold more influence and resources than others and Power dynamics influence how individuals interact, communicate, and make decisions in various social settings. The challenge lies on how to balance cultural rights with human rights to ensure that cultural practices do not infringe on human rights and

dignity. There is also the need to be culturally sensitive in justice issues, and adapt the justice systems to accommodate cultural differences while upholding the rule of law.

4. Conflict as a Concept

Conflict is the disagreement or disruption caused by differing opinions, thoughts, wants or ideas. It can be good or bad depending on the type of conflict and the attitude towards the conflict. It is an active disagreement between two people with opposing opinions or principle. It is variously classified for better understanding and study depending on the parties involved, situations and events. It could be man against man, or man versus nature conflict. It could also happen in the work place, the homes or among nations. There could be conflict over interests, power, values and needs. These conflicts could be intrapersonal, inter-personal, intra-group, or inter-group conflicts. On the other hand, it could be national conflict, international conflict, inter organizational conflict, workplace conflict, social or cultural conflict. However, we are interested in the four broad types to be discussed below.

i. Intra-Personal Conflict

Intra-personal conflict is the type of conflict wherein the struggle is internal as man versus self and it occurs within an individual. It is a psychological type of conflict involving the individual's thoughts, values, principles and emotions without affecting another individual directly. For example, there could be intrapersonal conflict with regards to the use of time, choice of partner, religious vocation, moral questions, goals and aspirations. A lawyer may also experience a conflict of value when he represents a client, he knows to be guilty of the charge brought against him. A career staff/woman who aims to upgrade her certificate may experience an intrapersonal conflict when she is offered a higher position that requires her transfer to a new location entirely. It might also be a role conflict where a worker might have to choose between dinner with a client or dinner with her family. There could be another role conflict for a person heading a team and as well as a secretary of another team of staff meeting at the same time. One can be attracted to two appealing alternatives- two good job offers or repelled by two equally unpleasant alternative i.e. approach/approach conflict or avoidance/ avoidance approach.

ii. Inter-Personal Conflict

This is an external type of conflict between two individuals. It occurs typically due to

personality or individual differences which result to incompatible choices and opinions, differences in goals, values and styles between two or more people who are required to interact or work together. Because interpersonal conflict is between individuals, the conflict can get very personal resulting in value conflicts, role conflicts or conflict of interest etc. Values are ideal we strive for, norms we think we are entitled to realise. Value conflicts arise when parties in conflict have opposing values that influence their preferences for action including the beliefs, they have about how they think it is correct to act. This can be very challenging as long as these values are of fundamental importance to those who have them although they may not be that important. What matters here most is charity/consideration of the other person in getting it right. There is need to uncover the values that are at stake for the conflicting parties. It could be individual or collective. This is because when parties have incompatible goals that they strive to fulfill, there will be conflict of interest. Conflict of interest is slightly different from value conflict in the sense that the parties in interest conflict have a more strategic intention of achieving a goal that is beneficial to them. The tension in interest conflict can be high, especially when the parties believe that they have very good reasons for endorsing their own interest.

iii. Intra- Group Conflict

This is a conflict within a group or team where members disagree over goals or procedures. It occurs among individual within a group because there are incompatibilities and misunderstanding among these individuals in the group. For example, there could arise intra-group conflict among Board of Directors of a company who want to take a risk to launch a set of products on behalf of their organisation to move it forward in spite of dissenting opinions among several members. It may occur as they argue the pros and cons of taking such risk.

iv. Inter-Group Conflict

This is conflict between two groups within the same organisation or outside the same organisation. e.g. conflict between two clubs, class, family versus family. Within this group of conflict one can experience horizontal conflict or vertical conflict. Horizontal conflict with others that are at the same peer level with you and vertical conflict with a manager or a subordinate depending on your status/position. Creating good conflict is a tough job and it is not often done right. In reality organisations that do not encourage or accommodate dissenting opinion can easily go into extinction in today's competitive world. Contemporary companies

and organisations who aim at excellence go out of their way to call for meeting and create atmosphere and forums where dissention can occur and reward people who are courageous enough to provide alternative point of view. They even allow employees a period of time to rate and criticize management. Inter-group conflict takes place among different groups and often involves disagreement over goals, values or resources. It could be different departments, employee unions or management in a company or competing companies that supply to the same customer. Departments may conflict over budget allocations. Unions and Management may disagree over work rules and suppliers may conflict with each other on the quality of parts and products.

5. Application of Culture in African Justice System

Courts may consider cultural context in cases involving honour-based violence or cultural practices that conflict with modern law. More so, cultural traditions may be relevant in cases involving ritualistic practices, cultural titles and cultural ceremonies. In the family, it is common knowledge that a man's family normally consists of the man, his wife or wives and the children born to him by such wife or wives. In Igbo tradition there are recognized traditional ways of giving legitimacy to a child. Hence, no one assigns paternity of a child to a man who is not responsible for the pregnancy against his wish outside adoption or upon his death especially when he did not accept paternity before his death. Thus, in *Chinweze & Anor. v. Masi & Anor.*,¹² the court acknowledged that whatever the system of marriage the undisputed fact is that the appellants were born after the death of Peter Chinweze. They were therefore not his natural sons for it is contrary to the course of nature for a dead man to produce children. They were not his adopted or "acknowledged" children and thus legitimized.¹³

In *Messrs Michael Eze, Michael Ugwu, Joseph Eze and Alexander Eze (for themselves and on behalf of Umuanke Eze of Akpuoga Nike) v Agnes Nnamani*,¹⁴ the parties at the Customary Court of Appeal of Enugu State, appealed against the judgment of the Customary Court Mbuluanwuri sitting at Ugwuomu Nike, delivered on 05/09/2013 in Suit No. CC/MBJ/2/2010. The plaintiffs (appellants in the Customary Court of Appeal (CCA) in a representative capacity sued the defendant (respondent in the CCA) at the said Customary Court, Mbuluanwuri praying for: (a) A declaration that they are entitled to the customary right of occupancy over the two

¹² SC, *Chinweze & Anor. v Masi & Anor.*, (1989) LPELR-851(SC).

¹³ WACA, *Alake v. Pratt* 15 at 20; WACA, *Bamgbose v Daniel* 14 at 116.

¹⁴ CCAE/31/2014. The judgment was delivered on Tuesday, 17/11/2015.

pieces of land situate at Ngene Obibi along Abakaliki Express Road, Akpuoga and that situate at Obodo Akpuoga Nike as beneficial owners. (b) Perpetual injunction restraining the defendant, her agents, servants, privies or whosoever acting on her behalf from having anything with the said piece of land without their prior consent and authority as beneficial owners.

Okorie Nwaneke Nweze was the owner of the three parcels of land in dispute before his death. He was also an indigene of the said Akpuoga community and the father of the defendant. Okorie Nwaneke Nweze died intestate without a surviving male child. Although the plaintiffs (now appellants) and the defendant (now respondent) are cousins, the respondent, a surviving daughter of the said Okorie Nwaneke Nweze is married and living with her husband in her matrimonial home. The appellants' claim was predicated on their performance of the funeral rites of late Okorie Nwaneke Nweze as his closest kinsmen under the native law and custom of Akpuoga Nike. The respondent contended on the other hand that she was qualified to inherit her late father's estate first, because she took care of him till death; and the appellants stood aloof all the while her father suffered in sickness and only descended on his property when he died simply because he had no male survivor; second, because her late father gave the estate to her in appreciation of her love and care; and third, because, she performed the funeral rites of her late father without any financial contribution from the appellants. She sees the custom being relied on by the appellants as anachronistic, antithetical to natural justice, equity and good conscience and deserving to be trampled underfoot. At the conclusion of evidence from the parties and their witnesses, the Customary Court entered judgment in favour of the defendant. Dissatisfied with the judgment, the plaintiffs appealed to the Customary Court of Appeal of Enugu State praying the Court to set aside the said judgment and to enter judgment for the appellants.

After a careful consideration of the appeal in the light of the grounds of appeal, the unanimous issues for determination and the arguments deployed for and against the judgment of the Customary Court below, the court distilled two issues, for determination, but one of which issues which is of great moment to this discourse is: (1) Whether the respondent is entitled to inherit the estate of her father under the custom of Akpuoga Nike in the circumstance of this case and if answered in the negative, whether her non-entitlement is repugnant to natural justice, equity and good conscience. Unanimously allowing the appeal, the Court per Hon Justice G. C. Nnamani relied on relevant portions of the evidence adduced by the parties before the Customary Court below, particularly the evidence of the PW4, the Traditional Ruler of

Akpuoga Nike Community, who testified that: in such circumstance where a man dies without a male issue but he has a female child who has been trained up and married, it is the kinsmen of the man that will come together to bury the man and conduct his funeral and see to his properties... A woman's inheritance is no more in her father's house but where she is married to. The court found as undisputed facts that the appellants are the kinsmen of late Okorie Nwaaneke Nweze who died without a male child and that the respondent, daughter of the said late Okorie Nwaaneke Nweze, is married and living with her husband. Both parties were claiming to have carried out the funeral rites of the deceased to the exclusion of the other. The controversy now raises the question as to who between the appellants and the respondent should perform the funeral rites of the deceased with a view to inheriting his estate under the native custom of Akpuoga Nike. Should it be the respondent, who though is the daughter of the deceased is, nevertheless, married and living with her husband, or the appellants, who though are kinsmen of the deceased, are not his biological children? The Court also found that there is abundant evidence that the funeral rites of a man who dies having no surviving male child but daughters who are all married, are performed by his kinsmen and observed that the application of this custom in Igbo land is so rife that judicial notice of it can be taken. While noting that the fact of marriage introduces a disabling element into the claim of the respondent, The Court drew from his concurring judgment in *Columbus Chukwu & Anor v Kelvin Obasi & Anor*¹⁵ as follows:

...Does a woman continue to retain domestic legal capacity in her maiden home after she had become lawfully married to her husband and his family? Exactly what is the meaning, connotation and implication of marriage? Marriage entails legal severance of the married woman from her maiden roots and fusion with her husband and his people in a legal bond that is only broken upon divorce (and we dare add, or death). Payment of the bride price and handover of the bride to the groom and his people create this legal bond and fusion.

Thus, the court held that the obligation to perform the funeral rites of the deceased and consequently inherit his estate was that of the appellants and not the respondent who by virtue

¹⁵ CCAE/128/2010, delivered on 29th March, 2011.

of marriage now belongs to another family.

The second issue raised for determination was “whether the non-entitlement of the respondent to inherit her deceased father’s estate is repugnant to natural justice, equity and good conscience. The Court distinguished with distinction, the instant case from the decision of the Supreme Court in *Mrs Lois Chituru Ukeje & Anor v Miss Gladys Ada Ukeje*.¹⁶ The facts in the Ukeje case indicate that in December, 1961, LO Ukeje died intestate leaving real property in Lagos State. The appellants are his wife and her son, Enyinnaya Lazarus Ukeje both of whom obtained Letters of Administration for and over the deceased’s Estate. The plaintiff/respondent is the daughter of the deceased. She brought the suit at the High Court seeking a declaration that as the daughter of the deceased she is entitled to a share of his estate. The trial judge found for the plaintiff and declared the original Letters of Administration granted to the defendants null and void. The Court also granted an injunction restraining the defendants from administering the estate and ordered that new Letters of Administration be created and the defendants hand over the administration of the estate to the Administrator General of Public Trustees pending the issuance of new Letters of Administration. Dissatisfied with the judgment, the defendants/appellants appealed to the Court of Appeal (Lagos Division) which was dismissed for lack of merit. The appellants further appealed to the Supreme Court. The appeal was also dismissed and the concurrent judgments of the two lower courts were upheld. The apex court declared *ex cathedra* that:

No matter the circumstances of the birth of a child, such a child is entitled to an inheritance from her late father’s estate. Consequently, the Igbo customary law, which disentitled a female child from partaking in the sharing of her deceased father’s estate, is in breach of section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution.

Nnamani, J, who presided over *Michael Eze, & Ors v Agnes Nnamani*¹⁷ took the view that

¹⁶ (2014) 11 NWLR (pt 1418) 384.

¹⁷ *Supra*.

while in *Ukeje v Ukeje*¹⁸ the bone of contention was whether the respondent is a daughter of late LO Ukeje and whether she was entitled to inherit his estate, in the instant case, the controversy is whether the respondent, a biological daughter of late Okorie Nwaneke Nweze, who is married and living with her husband can inherit her father's estate in violation of the custom of Akpuoga Nike which entitles the kinsmen of a deceased indigene who has no male child surviving him and whose surviving daughters are married, to perform his funeral rites and subsequently inherit his estate. In the *Ukeje*, the courts relying on the respondent's birth Certificate; Form of Undertaking and Guarantee signed by the deceased acknowledging paternity of the respondent and family photographs showing the respondent and her deceased father as well as the respondent's mother and her deceased father, found that LO Ukeje (deceased) was the father of the respondent. In the instant *Eze v Nnamani*¹⁹ case it is not in contention that the respondent is the daughter of late Okorie Nwaneke Nweze. The seeming challenge in the instant case and perhaps a point of departure from the *Ukeje* is that the respondent in *Eze v Nnamani*²⁰ is married and her marriage is still subsisting. In the *Ukeje* case, the respondent who was married to a German national was already divorced and she indeed, tendered the judgment in her divorce proceedings (Exhibit J). Thus, she was 'once again an *Ukeje* and a fortiori qualified to co-inherit her late father's estate, irrespective of her circumstance of birth. On the contrary, with her marriage still subsisting, the respondent in the *Eze v Nnamani*²¹ case does not fit into the narrow compass of *Ukeje v Ukeje*.²² According to Nnamani, J, a different consideration would have applied if the respondent was a spinster or divorced and is back into her maiden home. Her case does not fit into the bigger apartment of sub-sections (1) and (2) of section 42 of the Constitution.

Considering the issue of repugnancy, natural justice, equity and good conscience, the court held that the concept of natural justice, equity and good conscience is based on rights and does not operate in vacuo. The respondent has no right to perform her late father's funeral rites. Such right resides with her late father's kinsmen. The absence of the respondent's legal right banishes the idea of repugnancy from the said native law and custom of Akpuoga Nike. Accordingly, the non-entitlement of the respondent to inherit her late father's estate is not repugnant to natural justice, equity and good conscience. Obviously, we condemn discrimination on the basis of

¹⁸ Supra.

¹⁹ Supra.

²⁰ Supra.

²¹ Supra.

²² Supra.

gender, but we must appreciate as Agbo²³ rightly elucidated which view I associate with that, assignment of gender roles a priori, based on native people's ontology cannot be said to approximate to discrimination. This is simply because such a priori pattern of communal living is based on native customs and norms accepted by the people and roles of both the male and female gender are not only complementary, but are vitally important in the propagation of any traditional society. No one chooses whether he or she wants to be born male or female. The Court of Appeal in *Mojekwu v Mojekwu*²⁴ by Niki Tobi, JCA (as he then was) in a tone of finality held:

...in my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world (seemingly) disagrees with this divine truth. I believe that God, the Creator of human beings, is also the final authority on who should be male or female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront to the Almighty God himself...

However, it is my humble submission that the culture in *Eze v Nnamani*²⁵ that placed on the deceased's kinsmen the right and responsibility to perform the funeral rites of the deceased who had no surviving male child and consequently thereafter, inherit his property, should have also imposed a correlative duty on the said kinsmen to take care of the man in his ailing and last days up to his death. So that they can in all fairness inherit whatever property he had. Since by the same custom, the married daughter of the deceased is severed by marriage from inheriting her father's property, then why should the same custom not sever such a daughter from inheriting the 'trouble' of taking care of her aged and ailing father including, but not limited to medical expenses. Nonetheless, it will be wisdom on the side of daughters who are in the same predicament as in the instant case to get the consent of the father to sell most of his properties and use the proceeds to offset his medical expenses and upkeep.

Also, African proverbs and wise sayings have a rich repository of wisdom. The proverbs warn

²³ Chijioke Uzoma Agbo, Gender Roles under Igbo Customary Law: A Review of the Decision in *Micheal Eze & Ors v Agnes Nnamani*, *ESUT Public Law Journal* Vol. 5 No. 1, 2024.

²⁴ (1997) 7 NWLR (pt 512) 283. See also *Chinweze v Masi* (1989) 1 NWLR (Pt.97)254.

²⁵ *Supra*.

against evil conduct and they are major sources of African wisdom and a valuable part of African heritage. African culture has a moral code that forbids doing harm to a relative, a kinsman, an in-law, a foreigner and a stranger, except when such a person is involved in an immoral act; and if that is the case, it is advisable to stay away from such an individual rather than stain your hand with blood. At death, their corpses would not be dignified with a noble burial in a coffin and grave.²⁶ Mothers of twins then, were not welcome but were regarded as the harbinger of evil, hence unacceptable.

6. Cultural Psychology and Conflict Resolution

Cultural psychology is a branch of psychology that studies how people with different cultural background can think, feel, and behave like each other or unlike each other.²⁷ It compares the behavior, thought processes, emotional processes, and experiences of people from different cultural backgrounds.²⁸ It seeks to understand how forces of society and culture influence individuals' thoughts, feelings and behaviour and its main principle is that mind and culture are inseparable, people are shaped by their culture and their culture is shaped by them.²⁹ According to cross-cultural psychology, the emotions we feel, as well as how we regulate them and express them, are related to our cultural background.³⁰ In some cultures, for example, it may be considered appropriate to express one's emotions openly, while in other cultures it may be considered appropriate to keep emotions hidden. By studying such cultural differences, cross-cultural psychologists can gain a better understanding of differences in human behavior based on differing cultural backgrounds. Because of globalization, it is important to know and understand other people's cultural background and psychology so that people can understand how to behave appropriately in places with cultures different from theirs. To thrive in a globalized world, we must understand each other's cultures. When people from different cultures share the same living environment, workplace, school, classroom, or the likes, it is natural to see differences in customs, values, and beliefs. These cultural differences can often lead to misunderstandings and conflicts if not handled with respect, appreciation, and open-mindedness. In general, cross-cultural psychology aims to identify universal psychological

²⁶ Gabriel E. Idang, *African culture and values Phronimon*, vol (16) Pretoria n.2 (2015).

²⁷ Supra.

²⁸ JW Berry (1997), *Immigration, Acculturation, and Adaptation*. *Appl. Psychol.* at 46:5–34. Doi: 10.1111/j.1464-0597.1997.tb01087.x

²⁹ Libre Texts Libraries, Supra.

³⁰ Butler, E. A., Lee, T. L., and Gross, J. J. (2007) Emotion regulation and culture: Are the social consequences of emotion suppression culture-specific? *Emotion*. 7:30–48. Doi: 10.1037/1528-3542.7.1.30.

processes that are shared by people from all cultures, as well as to identify cultural variations in psychological processes. When people respect cultural differences and value cultural diversity, they are empowered to communicate and interact with one another successfully and to build positive relationships with individuals from other cultural backgrounds.

Conflict may arise from inter personal relationship, therefore in any process of conflict resolution, it is important for the involved parties including negotiators to understand the prevailing culture, its psychology and symbols. Misunderstanding cultural differences may lead to stereotyping, development of negative projection hence, generating more conflicts. Moreover, it is paramount for the parties involved in a conflict resolution process to possess adequate interactive experiences that will enable them mutual relationships. This is because violating cultural expectations in the process of resolving conflicts increases the intensity of conflict.³¹ A good understanding of parties cultural background, psychology and symbols could pave way to a sustainable conflict resolution and lasting peace just as a poor understanding of parties culture, cultural psychology and symbols may hinder conflict resolution and peace building. Some of the conflicts that are evident in the modern society such as the Indian-Pakistan and the Palestinian-Israeli conflicts may not only be about independence and territorial boundaries. There could be deep traits of cultural issues like representation, acknowledgement and symbols. Culture plays a critical role in the bargaining and negotiation processes in conflict resolution.³² Hence, the high rate of ethnic and religious conflicts being experienced in the 21st century has made culture to be considered as one of the key dimensions in conflict management and resolution.

7. Influence of Acculturation

There is again the need to accommodate acculturation process in individuals or groups and understand that apart from one's original culture, people can easily acculturate. When people from one culture move to a different place and learn about a new culture and their actions and thoughts become more like the new culture, it is acculturation. It is often the social and psychological process that immigrants and other cultural minorities face when they attempt to find balance between their own culture and the culture of their new society, by adapting to new

³¹ A Tidwell, (2001), *Conflict Resolved; a Critical Assessment of Conflict Resolution*, Continuum, London 2001.

³² Bercovitch, J & Jackson, R (2009), *Conflict Resolution in the Twenty First Century: Principles, Methods and Approaches*, (University of Michigan Press,2009).

social norms, values, customs, rules, and expectations. According to John Berry, acculturation can take place in four different ways namely by integration, assimilation, segregation and marginalization.³³ Acculturation by integration happens when one learns new things from the host culture but keeps parts of his or her native culture. The person has found a way to mix both cultures together. An example of integration could be when students from different backgrounds and cultures work and play together in the same classroom, participating in activities as a diverse group. For acculturation by assimilation, the individual completely adopts all traditions, norms and behaviors of the host culture and probably interacts only with people from the host culture. A real-life example of assimilation would be a family moving to a new country, where they learn the language, customs, and traditions of their new home. However, they give up all important aspects of their own culture such as language, traditions, or food for the new culture. Acculturation by segregation rather takes place when an individual maintains and keeps his or her native culture and refuses to adapt to the host culture and only interacts with people from her native culture. A real-life example of segregation would be a neighborhood or community where individuals of the same ethnicity predominantly live together, resulting in limited interactions with people from other backgrounds. This could be unhealthy for good relationship. Finally, there is acculturation by marginalization which happens when the individual in her host area does not feel like he or she belongs to either culture and does not want to be associated with either his or her native or the host culture. A real-life example of marginalization would be an individual who experiences rejection or exclusion due to their disabilities or religion. It is like being stuck in the middle, not belonging to either group. This can be tough for anyone, especially refugees and for kids. For example, coming from a liberal religious culture one moves away to live with extremists. Imagine, if someone was told they were not religious enough in their own culture, and then in the new place they moved into, people began to say that they were too religious. This can make them feel like they don't fit in anywhere. It could be challenging and could cause a lot of stress and related physical and mental health issues.

8. African Culture and Sustainable Conflicts Resolution in Africa

Knowledge is power. A good knowledge and awareness of the extent of influence our cultural background has on us is always a credit to good interpersonal relationship, better understanding of the world around us and sustainable conflicts management. It is a key factor to sustainable

³³ Supra.

conflicts resolution in African and even in international criminal law. It will reduce misunderstanding and enhance a better understanding of the people we deal with, why they do what they do and in the way they do it. In some cultures, the people are free, relational, lively and outgoing but a more conserved, reserved culture may see it as being arrogant and aggressive. Understand that people must not see things from your own focal lens. Culture shapes individuals' attitudes towards conflict, their preferred modes of communication, their notions of authority and hierarchy, and their traditional conflict resolution practices. For sustainable conflict resolution and lasting peace, cultural factors cannot be ignored. Thus, by incorporating intercultural and diverse experiences in conflict resolution, a wider range of perspectives, values, and communication styles will be accessed. This can lead to a more comprehensive understanding of the root causes of each conflict situation and the motivations behind the actions of the parties involved, thereby facilitating a more empathetic and holistic approach to conflict resolution. Different cultures often have distinct ways of communicating and expressing emotions. It is not peace conscious to assume that others have the same cultural beliefs and attitudes that we do or that cultural differences are based only on race or ethnicity. No. There may be significant differences in belief systems and communication styles, between urban and rural folks. There are cultures and communities whose identity is based on geography, occupation, professional status, avocation, and wealth. A peace builder appreciates other people's cultural background knowing and ensuring that conflict resolution processes are inclusive, respectful, and responsive to the needs and preferences of all parties involved. For example, for collaborative problem solving and interest-based negotiations to be successful, it is not necessary that everyone involved behaves in a like manner, rather it is important, to respect and try to understand other people's points of view. Bearing in mind that to understand and respect other people's view does not imply agreement.

9. African Cultural Philosophy and International Criminal Law in Conflict Resolution as the Way Forward.

The relationship between Africa and international criminal law, specifically the International Criminal Court (ICC), is complex and marked by both cooperation, bias and criticism. While some African states initially embraced the ICC as a viable means to address impunity, others have voiced concerns about perceived bias and interference in their domestic affairs which has led to calls for withdrawal and the exploration of alternative regional mechanisms for justice.

Many African nations including South Africa, were among the first African country to ratify the Rome Statute, the treaty that established the ICC.³⁴ Senegal for example was the first country in the world to ratify the Rome Statute, demonstrating early support for the ICC by African countries.³⁵ Pursuant to this initial African support, Several African situations were referred to the ICC by African States themselves or by the UN Security Council, indicating a willingness to utilize the court's jurisdiction. However, a significant point of contention arose when Some Africans and their leaders alerted the people on the disproportionate number of cases involving African individuals and situations brought before the ICC. There is the feeling among African leaders and governments that the ICC's focus on their countries undermines their sovereignty and independence. Consequently, Some African nations initiated and/or threatened withdrawal from the ICC, citing these concerns. South Africa for example announced plans to withdraw from the ICC in 2016, and submitted its instrument of withdrawal to the UN Secretary-General. The withdrawal was triggered by a dispute over South Africa's failure to arrest Al- Bashir of Sudan³⁶. However, the withdrawal decision was later revoked after the court declared it unconstitutional. ³⁷ Burundi has also initiated withdrawal proceedings, further highlighting the tensions. African nations are exploring alternative mechanisms for addressing international crimes, including domestic trials and the possibility of an African regional court. The quest for African regional court stems from the desire to enhance human right protection, promote justice and address perceived imbalances in the international legal system but most importantly by a desire for African solution to African problems. The Malabo Protocol, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) is an attempt by African states to create a regional court with jurisdiction over international crimes. The Malabo Protocol includes jurisdiction over core international crimes like genocide, crimes against humanity, war crimes, and the crime of aggression. Some argue that a regional court could potentially complement the ICC by focusing on crimes that may not receive sufficient attention

³⁴ Africa has 34 signatories to the Rome Statute.

³⁵ Senegal signed the Rome Statute on 18 July 1998 and deposited its instrument of ratification of the Statute on 2 February 1999. International Criminal Court, <https://asp.icc.cpi.int>. and <https://press.un.org> accessed 21 June 2025.

³⁶ Maria Chigozie Onuegbulam, Progressive Interpretation of the Doctrine of Sovereignty, Sovereign Immunity and Immunity Clauses in Line with Article 27 of the Rome Statute. International Journal of Business and Law Research (IJBLR) VOL.12 Issue 1, at 276-290.

<https://journals.unijos.edu.ng/ojs/index.php/jilj/article/view/133#:~:text=This%20study%20aims%20at%20a%20progressive%20interpretation%20of,enforcement%20of%20Article%2027%20of%20the%20Rome%20Statue>.

³⁷ South Africa Revokes ICC Withdrawal after Court Ruling, <https://www.bbc.com>, June 21, 2025.

at the international level.

It is submitted that one of the reasons for Africans quest for African solution to African problems is to emphasise on cultural relevance. African solutions can be tailored down to the unique cultural, historical and contextual realities of the African continent. Africans are in the best position to understand the complexities and nuances of their own problems and possible effective and lasting solutions. Furthermore, Africans taking charge of their own problems can foster a sense of ownership and autonomy, reducing reliance on foreign and external solutions. Besides African-led solutions can be more sustainable in the long term, as they are grounded in local capacities and resources. This approach can empower African institutions, leaders, and communities to drive their own development and problem-solving process. The benefits of the agenda of applying African solution to African problems are numerous. First, solutions tailored to African contexts can be more effective in addressing challenges especially if they are diligently applied. Secondly, it will promote African agency in the sense that it will encourage African leadership and initiative in problem-solving. In this way it will discourage over dependence in foreign aid and solutions. Most importantly, it will foster regional cooperation. African solutions can facilitate regional cooperation and collaboration, in the sense the African continent has known its strength and weak points and appreciates regional cooperation and collaboration. It is an agenda worth pursuing for the better development of African continent and countries. Like any worthy venture, some challenges are bound to be encountered but must be faced to achieve the sustainable aim. There could be challenges of capacity building. There is need to strengthen African institutions and leadership,³⁸ human and infrastructural capacities to develop and implement effective solution. There is also need for resource mobilization because there is need to access necessary resources, including funding, technology and expertise. This should be a steady agenda of the African Union Summit. However, while Africa seeks African solution to African problems there is also need for global collaboration but not at the expense of African continent. African ownership has to be balanced with the need for global collaboration and knowledge sharing since no one knows it all and no man is an Ireland. Applying African solutions to African problems can go a long way to make Africans take charge of their own development, leveraging their unique perspectives and

³⁸ Due to bad leadership most African countries are compelled to resort to a regime of military junta. Niger Republic, Gabon, Congo Brazzaville. In Togo, Senegal, Cameroon, cote di voire and Equatorial Guinea citizens are burning with anger over sovereign impunity yet AU remains moot over bad leadership and still wants to be seen as relevant in the mist of all these.

strengths to address challenges and drive progress.

The relationship between Africa and the ICC has a significant impact on the court's legitimacy and effectiveness. It is a multifaceted relationship with a history of both cooperation and conflict and it is affecting the Capacity of the court in conflict resolution in Africa.³⁹ Regions and institution have always formed and developed close ties, bonds and alliances in pursuit of their common interest. They are often bound by laws that can best be perceived as “Regional Customary International Laws.” In recent times, the weights of these regional or institutional bodies are so influential in international criminal law that they cannot just be taken for granted or simply overlooked.⁴⁰ Currently, the weight of the African Union (AU) has been one of the challenges International Criminal Court has been facing and must deal with if the court must succeed in Africa.⁴¹ The AU has developed such regional or institutional bond that has robbed the ICC of the cooperation of its African State parties for the arrest and prosecution of indicted sitting presidents. It has for more than 10 years frustrated the ICC’s hope of arresting and prosecuting Omar Al Bashir before he was dethroned.⁴² While the ICC has played a role in addressing impunity for serious crimes in Africa, concerns about bias and sovereignty have led to calls for alternative mechanisms and withdrawal from the court. The development of the Malabo Protocol and the potential for a regional court offer a path towards a more African-centered approach to international criminal justice, but the success of these efforts will depend on addressing the fundamental issues of legitimacy, power imbalance, and the need for genuine dialogue. Some critics argue that the ICC reflects and reinforces existing power imbalances in international law. Open dialogue and reform efforts are crucial for addressing the concerns raised by African nations and ensuring that international criminal justice mechanisms are perceived as fair and impartial. Culture is one of the most important features of all human societies, and potentially an aspect of all social relationships. African culture is one of those cultures.

³⁹ Maria Chigozie Onuegbulam, (2024) “Expanding the Scope of Complementarity as a Principle in International Criminal Law” *International Journal of Business and Law Research (IJBLR)* VOL.12 Issue 2 at 139-150,

<https://www.seahippublication.org/journal/business-finance-and-law/ijblr-vol-12-issue-2/>.

⁴⁰ The African Union and the European Union for example.

⁴¹ Maria Chigozie Onuegbulam, PhD (2024) “A Progressive Interpretation of the Doctrine of Sovereignty: An Elixir to the enforcement of Article 27 of the Rome Statue”. *International Journal of Business and Law Research (IJBLR)* VOL.12 Issue 1, at 276-290

⁴² ICC, Mr Omar Hassan Al Bashir ICC-02/05-01/09 Trial Chamber

The Influence of Regional/Institutional Bonds as Customary International Law Standard

Regions and institution have always formed and developed close ties, bonds and alliances in pursuit of their common interest. They are often bound by laws that can best be perceived as “Regional Customary International Laws.” In recent times, the weights of these regional or institutional bodies are so influential in international criminal law that they cannot just be taken for granted or simply overlooked. Currently, the weight of the African Union has been one of the challenges International Criminal Court has been facing even in actualizing the arrest and prosecution of the indicted Former President of Sudan – Omar Al Bashir before he was dethroned. The influence of the African Union can be said to have for close to ten years neutralised ICC’s hopes of prosecuting President Al Bashir for war crimes, crimes against humanity and genocide in Darfur. Initially both the international community and indeed African States were fascinated about the birth of the International Criminal Court, so much so that almost three quarter of the whole African States ratified the Rome Statute. The ICC was seen as the pursuit of a new vision of international law predicated on the respect for human rights with the concern for the plight of humanity which is a common goal. The ICC seemed to be a new and emerging international law characterised by a move away from a state-centric model of traditional international law solely based on the preservation of sovereignty, to one more concerned with humanity bringing moral value to order. Hence, the ICC is understood as advocating for ‘responsible sovereignty.’ It is a notion that sovereignty entails obligations and duties to one’s own citizens and to other sovereign States. Nonetheless, the vision continued to be questioned as imperialistic, colonialist and even racist. The ICC has rather been seen by some regional bodies as representing a tool through which Western powers can further demean the already demeaned victims of past colonialism.

As a result of these recent beclouded perception about the ICC, the ICC is losing the confidence of several State Parties including some African States. Consequently, for a while now, the African Union appears to have been developing unequivocal regional anti-ICC standards of its own. It may be argued that the AU’s attitude is simply a response to this new form of imperialism i.e, one in which the ICC is seen as a Western imperial master exercising imperial power over African subjects. It could be said that central to the story of the AU and ICC collision course is the United Nations Security Council. This is because it was the Council that initiated the process that led to the issuing of an arrest warrant against Al Bashir. More so, the Council holds the power to defer the proceedings against Al Bashir under article 16 of the

Rome Statute.

In 2005, the Security Council acting under Chapter VII of the UN Charter and pursuant to Article 13(b) of the Rome Statute referred the situation in the Darfur region of Sudan to the ICC. The prosecutor, on 14 July 2008 presented evidence against Al Bashir to the ICC Pre-Trial Chamber and requested that an arrest warrant be issued against the Sudanese President for charges of genocide, crimes against humanity, and war crimes. The Pre-Trial Chamber on 4 March 2009 handed down its judgment and therein agreed to issue an arrest warrant against Al Bashir for crimes against humanity and war crimes 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 of genocide. Mindful of this power, and in response to the Prosecutor's application for an arrest warrant against Bashir, the AU Peace and Security Council (PSC) issued a communiqué on 21 July 2008 on the prosecutor's application. While, in terms of status, this communiqué was the least potent representation of the evolving AU's position, it is significant in the sense that it provides the contours of the AU's rejection of Bashir's arrest warrant. The communiqué began by reiterating the PSC's commitment to combating impunity and promoting democracy, the rule of law and good governance and condemning the gross violations of human rights in Darfur. The communiqué further expressed the view that in order to achieve long-lasting peace, it is important to uphold principles of accountability and bring to justice the perpetrators of gross human rights violations in Darfur. Ironically, and most worrisome is that, intertwined throughout these AU's calls for an end to impunity, the promotion of justice and accountability are however strong objections to the prosecutor's application for an arrest warrant. The communiqué declared that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace. Furthermore, it expressed concern at the fact of indictments against African leaders. The PSC then called on the Security Council in accordance with Article 16 of the Rome Statute of the ICC, to defer the process of initiating the prosecution of Al Bashir by the ICC. The communiqué took into account the need to ensure that the ongoing peace efforts are not jeopardized, and that considering the current circumstances, that a prosecution may not be in the interest of victims and justice.

The AU Heads of State and Government met in Addis Ababa in February 2009. As at then the ICC had not delivered its decision on the prosecutor's request, neither had the Security Council

reacted to, nor acted on the PSC's request. The Summit decision of February 2009, mainly endorsed the PSC communiqué and reiterated the call for an Article 16 deferral by the Security Council. The February 2009 decision also cautioned that the indictment would undermine the delicate peace process underway in The Sudan. It expressed the AU's 'unflinching commitment to combating impunity.' In addition, the Summit also took an unprecedented step requesting the AU Commission to convene as early as possible, a meeting of African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC). One of the aims of the meeting is to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.

The African Union Summit of July 2009 relying on Article 98 of the Rome Statute on immunities for arrest and surrender concluded that AU member Parties should not co-operate with the court for the arrest and surrender of President Omar Al Bashir. Further to the above recommendations, The AU Extraordinary Summit on the Africa–ICC relationship held by the highest decision making organ of the AU, on 12 October 2013 came up with another or rather more detailed and committing decision to wit:

- (i) That no international court or tribunal has the capacity to commence or to continue charges against any serving AU head of state or government or anybody acting or entitled to act in such capacity during their term of office.
- (ii) That the trials by the ICC against President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their terms in office.
- (iii) To fast track the establishment of the criminal jurisdiction of the African Court on Human and Peoples' Rights and to table for discussion at the Assembly of State Parties of the ICC, amendments to the ICC on immunity of heads of state and government among other matters.

It is very easy to conclude that the AU's objection to the execution of the arrest warrant against Al Bashir is based on the fear that such action would threaten the peace process underway in The Sudan. However, an obvious underlying reason for the objection is the desire to protect their "sovereignty" and the notion that the ICC, as a western institution, should not exercise

jurisdiction over African leaders. In the AU's decision, there are hints of the attitude that African leaders ought not to be tried under non-African systems. Speaking in the aftermath of the July 2009 decision, the Prime Minister of Rwanda, Bernard Makuza, said that though the African leaders were not promoting impunity, they were sending a message that 'Westerners who don't understand anything about Africa should stop trying to import their solutions.'

Furthermore, there was an attempt to move the AU members to withdraw from their treaty obligations under the Rome Statute though it was a failed attempt. It is not clear that there is any legal basis for the AU to require its members to withdraw from their treaty obligations that were entered into voluntarily and on an individual country basis without consulting the AU. History has not revealed that any of the African State Parties to the ICC Statute consulted or got the permission of the AU before ratifying the Statute. The question then is, what is the propriety of AU's resolution urging members to withdraw their membership of the Rome Statute? Obviously, by so demanding AU is acting *ultra vires* its powers. That notwithstanding, the AU's decisions are influencing its members. In pursuit of the AU resolution on African States not cooperating with the ICC with regards to the arrest of Al Bashir, in defiance to the submissions of the South Africa Litigation Centre (SALC), South Africa failed to apprehend Al Bashir and hand him over to the ICC. The Southern Africa Litigation Centre (SALC) reiterated South Africa's obligation under international and domestic law, to arrest President Bashir' and to follow the Implementation Act Article 9 procedure for dealing with any fugitive from the ICC who arrives in South Africa. The government of South Africa against all hopes failed to uphold its own laws and facilitated Al Bashir's travel back to Sudan on 15 June 2015. The Southern Africa Litigation Centre (SALC) submitted among other things that, because South Africa is a State Party to the Rome Statute that established the ICC, it had an obligation to assist the ICC in its effort to prosecute the alleged offences against a fugitive. Furthermore, SALC submitted that South Africa's commitment to the ICC objectives were clear, in that the State had domesticated the ICC Statute by adopting the Implementation of the Rome Statute of the ICC Act No 27 in 2002, and that the Implementation Act requires that South Africa cooperates with the ICC. This cooperation with ICC includes arresting and detaining fugitives from the ICC to ensure that individuals who have been indicted by the ICC are transported to the Netherlands to stand trial. Yet, South Africa paid deaf ears to SALC.

There is no doubt that presently the AU as an institution, in a formidable bond, has allied against ICC arrest or Western penetration into their sovereignty in the name of prosecution. AU

Members and its leadership are committed to protect their sovereignty and extricate themselves from Western hegemony. To that effect, none of the African States will cooperate with the ICC in arresting any sitting president of any of the African countries whether Al Bashir or any other until probably he leaves office. The AU is one among many other Regional bodies who are watching the AU-ICC power tussle and which end is still remote. The AU-ICC saga raises a supremacy conflict between regional law obligation and international law obligation and the question of which one prevails when there is a conflict between the two.

10. Conclusion and Recommendations

Certainly, the impact of culture, cultural practices and narratives and the impact of power structure on social relationships and conflict resolution is quite enormous. Culture influences and shapes social relationship and power structure much as the same power structure shapes and influences cultural practices and narratives. A good knowledge, understanding and application of these facts in conflict resolution is very fundamental and necessary for sustainable conflict resolution in Africa and international criminal law. Obviously, culture and power dynamics are intricately linked. While culture shapes power structures, influences relationships and informs social norms, power dynamics in turn impacts cultural expression, preservation and evolution. We have variously seen in this research how cultural knowledge, practices and symbols can be used to exert power and influence in most Igbo cases discussed above and how they have been instrumental for conflict resolution. The truth is that cultural norms often reinforce social hierarchies, with dominant groups shaping cultural narratives. Marginalized groups may use cultural expression as a form of resistance or subversion. That is exactly what is playing out between Africa and International Criminal Court in most of the African States cases before the Court. Giving Africa an opportunity to apply African solutions to African problems could be a better answer. When people respect cultural differences and value cultural diversity, they are empowered to communicate and interact with one another successfully and to build positive relationships with individuals from other cultural backgrounds. Historical examples and scientific research show that understanding and respecting each other's cultures is a key condition for a peaceful, prospering society that contains people with diverse cultural backgrounds.