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Introduction

The issue of economic growth and development in Africa is as much revered as it is maligned and as such is never far away from the headlines. However, economic corruption remains undoubtedly at large. The Economic and Financial Crimes Commission (EFCC)-tasked with tackling corruption and fraud in Nigeria- has been effective in curbing this plight in the most populated country in the continent. The Commission is empowered to enforce the provisions of laws and regulations relating to economic and financial crimes.1 Its responsibility entail investigating all financial crimes including ‘advance fee fraud, money laundering, counterfeiting, illegal charge transfers, future market fraud, fraudulent encashment of negotiable instruments, contract scams etc.’ pursuant to its establishment act.2 With a mandate to carry out these investigations by law, it is reported that the commission has recovered over 6.5billion dollars in 7 years,3 a remarkable feat which has received little less recognition outside Nigeria. In addition, it is also currently working with

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1 Economic and Financial Crimes Commission, ‘Operations’ [http://www.efccnigeria.org/operations.html] accessed 18 September 2012. The Law enforcement agency was set up in 2003 in response to pressure from the Financial Action Task force on Money Laundry which named Nigeria as one of 23 countries non-corporative in the International community’s effort to fight money laundry. Since then, the commission has broaden its scope to curb the menace of corruption that constitute the cog in the wheel of progress in Nigeria

2 Economic and Financial Crimes Commission (Establishment) Act 2004, Section 6 (b)

the Federal Ministry of Education to introduce anti-corruption curriculum at all levels of education in Nigeria which will go a long way in educating young citizens about the implications of financial crimes. 4

These successes beg the question of why efforts have not been made by the International community to create an African model which will prosecute financial crimes from political and bureaucratic figures. The following will discuss economic corruption in African, the importance of creating a commission that will address this plight, its proposed mandate and structure and the potential legal barriers to its functionality.

Economic Corruption in Africa

Economic corruption remains a significant burden of financial growth and development in Africa. The issue is deeply rooted in all tiers of African governmental set ups, right from local to federal. Since the 1960s, when most African states attained Independence, the continent has consistently been the worst affected region of economic corruption in the world. According to the Transparency International corruption perception index, the average 2011 score for Africa was a very low 2.93. 5 Africa remains in the ‘rampant corruption’ category with a score below 3.0. 6 Botswana, representing less than 1.0% of African population, is the only African country to have reached a score above 6.0. 7 Many African authors have tried to

4 Ibid


6 Ibid

7 Ibid
comprehend the root cause of this problem. John Mukum Mbaku has opines that in many African countries, civil service employees view public service as an opportunity for enrichment.\(^8\) This concept has also been explained by Joseph Nye who argues that corruption involves ‘behaviour which deviates from the normal duties of a public role because of private-regarding (family, close clique), pecuniary or status gain; or violates rules against the exercise of certain types of private-regarding influence’.\(^9\) From both analyses, one can infer that economic corruption is deeply rooted in African family set up and thus has a correlation with predominant cultures in Africa.

While these problems have been discussed in numerous International conventions, such as United Nations General Meeting, no deliberate action has been taken to tackle them. In order to curtail it on a continental scale, the problem ought to be addressed by delegating a commission with the sole intent of investigating and prosecuting economic crimes in Africa.

**International law**

Due to the sparse nature of International law, the most effective way of tackling International crimes is by creating organisations rather than formulating laws. Ian Brownlie, while observing the efficacy of International Law, stated ‘when the law is seen to be


“ineffective”, the cause is not the “law” but the absence of organization, political will, sufficient personnel or funding, and so forth.’

Moving on, tribunals are often made up to tackle International crimes. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an elderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as power could be centralized or vested in one of them but not the others. Due to this narrow concept of jurisdiction in International law, every tribunal (unless otherwise provided) is a self-contained system.

Proposed Mandate and structure for the African Model

Though the Commission has its own law, a key reason to its success can be attributed to its mandate over a posse of other laws such as Money Laundering Act 2011, the Advance Fee Fraud and Other Related Offences Act 2006, the Failed Banks (Recovery of Debt) and Financial Malpractices in Banks Acts and the Miscellaneous Offences Act. Because these statutory laws are not prevalent in International law, the most pragmatic way for an African model to function will be as an ad hoc court backed by the UN with its own specific constitution and various other sources of International in accordance with the guideline highlighted by Article 38 of ICJ Statute.

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10 Ian Brownlie, ‘The reality and efficacy of International Law’ (1982) BYIL 52 (1) 1, 8

11 Tadic case (Appeal) (Decision on the defence motion for interlocutory appeal on Jurisdiction) [1995] ICTY Para 11

12 Economic and Financial Crimes Commission (Establishment) Act 2004
Therefore, the laws that the proposed African model will have a mandate on should be synonymous to the International Criminal Court (ICC) and this commission should have a task (granted by the United Nations) to investigate and sanction those who breach economic laws. Its primary mandate will be an establishment act drafted by experts who have a deep knowledge of economic corruption in Africa and just like the ICC; it will require a certain amount of member states to sign up before it can impose its laws. Although the Nigerian commission is responsible for the determination of financial loss by government; private individuals and organisations, the proposed African model can only prosecute individuals in public sector such as bureaucrats and politicians due to the nature of International Jurisdiction.

The commission’s primary law should then be supplemented by customary International Law which results from the gradual development of international instrument and national case law into general rules. Just like the International Criminal Tribunal for Rwanda; the International Criminal Tribunal for former Yugoslavia and Special Court of Sierra-Leone, the economic treaties that have received international backing and therefore become law could be a mean of secondary source of law for the commission as this is a common practice of Ad Hoc courts. Amongst these will be the Charter of Economic Rights and Duties of States (CERDS) 1974. This charter, adopted by the UN General Assembly to establish the norms of

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13 Economic and Financial Crimes Commission (Establishment) Act 2004, Section 6 (i)

14 Prosecutor v Tadic Case (Interlocutory Appeal) [1997] 105 IRL 453 (ICTY Appeals Chambers)

15 Check Prosecutor v Sam Hinga Norman (Child Recruitment) [2004] 14-AR72 (E) (SCSL) where the ad hoc court opined that ‘since 185 states were parties to the Geneva Conventions prior to 1996... it follows that the provisions are widely recognised as Customary International law
international economic relations, codify the economic rights and duties of states which represent customary rules of International law.\textsuperscript{16}

Also important is the principle of presumption of legality discussed in Lotus Case. The principle in this case, which has been widely referred to in International law, emphasised that there ought to be proof that a law is banned or else it is legal.\textsuperscript{17} Although this hasn’t been employed in an economic context, an African commission formed to tackle economic corruption can be a starting point of such exercise.

Moving on, while the concept of setting up a continental Economic Crimes Commission is a plausible one, various challenges will be faced. The two most important areas of consideration will be discussed followed by contemporary issues.

**Enforcement**

Enforcement is always a key challenge faced by International Ad Hoc Courts set up to fight impunity. In order to allow enforcement of the proposed commission’s law, lessons need to be taken from the problems faced by other courts set up to fight impunity. There are two areas which need to be put into consideration.

The first is admissibility. The EFCC has encountered numerous cases whereby top government officials employ lawyers who argue that prosecution of such persons will be

\textsuperscript{16} S.P. Subedi ‘Section A: Evolution and principles of international economic law’ (ULP page 24, 2007)


\textsuperscript{17} Lotus Case (France v Turkey) [1927] (PCIJ) Ser A No. 10
against their interest. This in effect causes the commission to abandon the cases. Even though International criminal court is a court of last resort, the court has jurisdiction in a case investigated by a state ‘if a state is unwilling and unable genuinely to carry on investigation and prosecution’.\textsuperscript{18} This argument will be whether prosecution will serve the interest of justice or be a detriment on the interest of the general public as they are being governed by these statesmen. The International Criminal Court Appeal Chamber in the Katanga (2008) case supported the interest of justice argument in its interpretation of article 17 (1) (a) by stating failure to exercise jurisdiction in a case where the state is unwilling to prosecute will mean that a potential large number of cases would not be prosecuted by domestic jurisdiction or by the International criminal court.\textsuperscript{19} That said, prosecuting crimes of International law has not always served the interest of justice. In Liberia, instead of being prosecuted, Charles Taylor was promised amnesty in exchange for disarmament. This is an area that the United Nations will need to thoroughly determine when drafting the statute of the proposed tribunal.

Secondly, there will be a big question on immunity. If persons in office capacity are immune from International prosecution, the fundamental aim of the proposed commission will be badly weakened. Over the last few years, there has been a debate on whether the International Criminal Court and other Ad Hoc courts should be permitted to prosecute persons in government office of criminal acts. Although Article 27 of the Rome statute

\textsuperscript{18} Rome Statute of the International Criminal Court 1998 art 17 (1) (a). The court only prosecutes when there is a sham trial or delays which obstruct the court’s jurisdiction

\textsuperscript{19} Prosecutor v Germain Katanga and Mathieu Ngudjolo [2008] ICC-01/04-01/07 0A 8 (ICC PTC1). The appeals chamber also opined that this will result in impunity persisting unchecked and thousands of victims will be denied justice
categorically state that the laws of the court will apply to persons in official capacity, this hasn’t been conclusive in International case law. In the International Court of Justice Case-Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) - the court held ‘throughout the duration of his office, the minister... enjoys full immunity from criminal jurisdiction’. In addition to this, Economic crimes are not generally perceived as serious as war crimes, crimes against humanity and genocide. This issue of immunity is a possible problem that can be faced by this proposed Economic commission which will have to be resolved to facilitate the commission’s effectiveness.

**Attitude to Economic Corruption in International law**

As mentioned earlier, economic corruption has not developed into a crime which is prosecuted by International courts. Although the sources of International economic law are the same as those of International law generally outlined in Article 38 of the Statute of the International court of Justice, economic corruption hasn’t grabbed the attention of International Community in the same scale as War crimes or Crime against humanity since its inception.

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20 Rome Statute of the International Criminal Court 1998 art. 27. Also check Nina H. B Jorgenson, the responsibility of States for International Crimes. (OUP, Oxford 2000) pg 154-155 where the author suggested that the tribunal (ICTY) set a new precedent by indicting an existing head of state, namely Slobodan Milesevic... for crimes against humanity and customs of war

21 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Yerodia Case) 2002 ICJ 3

22 Statute of the International Court of Justice 1945, Article 38. They are International conventions, International customs, General principles of law recognised by Civilised Nations and Judicial decisions
Over the years, the United Nations have generally endorsed commissions that prosecute crimes of the most serious nature. The crimes that are prosecuted by International bodies tend to fall under such ambit. This is mainly because of International law’s attitude to economic corruption.

As Ian Brownie said ‘International law is essentially a law between states and these remain true in spite of the appearance of various international organizations and the significance of human rights standards. There is no world state.’ 23 This statement was re-affirmed some 20 years after when the Statute of the first International tribunal to prosecute International crimes (International Criminal Court) set out to prosecute only ‘the most serious crimes of concern to the International community as a whole’ 24.

Though it is a plausible idea to bring those who misappropriate government’s economic funds into justice, the misappropriation of government funds is currently not deemed serious enough to be prosecuted by an International tribunal. Another question that will have to be asked is if International law is advanced enough to bring such crime—which is still very well viewed as Minor-to justice. That said, the decision due to be taken by the International Criminal Court after 1 January 2017- to determine if the Court will exercise

23 Ibid. 1, 3

24 Rome Statute of the International Criminal Court 1998, Article 5. The court can only investigate and prosecute the core International crimes (genocide, crimes against humanity, war crimes and the crime of aggression). This high threshold can also be seen in the statute of the 2 ad hoc courts, set up to bring to trial all the criminals responsible in the crimes committed in Rwanda and Yugoslavia, to only try those that commit crimes of the most serious nature.
jurisdiction over crime of aggression - is likely to pave the way for the inclusion of economic crimes in the list of International crimes.

The United Nations

Moving on, another issue that will have to be addressed if there is to be an African commission designated to prosecute economic crimes is the role that will be played by the United Nations. It is important that such commission should have International backing from an Organisation such as the United Nations. However, such backing ought not to have a negative impact on the autonomy of the commission. For such commission to be efficient, its independence is of outmost importance. A good illustration of this can be seen in the tension between the African Union and International Criminal Court over United Nations’ lack of use of Article 16\(^\text{25}\) in the deferral of Omar Al Bashir’s indictment.

There is a clear African scepticism of the United Nation’s functionality, especially the role played by an ‘undemocratic’ Security Council with 5 permanent member state. Its involvement is widely considered to be too political. As observed by William Schabas, many Africans consider this a ‘cynical exercise of authority by great powers’.\(^\text{26}\) Another commentary on the issue opines that ‘For many Africans, the ICC involvement in Sudan has come to reflect the skewed nature of power distribution within the United Nations Security Council and global politics’.\(^\text{27}\) It further went on to state ‘this unresolved issue also has wider

\(^{25}\) Rome Statute of the International Criminal Court 1998, Article 16. This provision requires the ICC refrain from commencing or proceeding with an investigation or prosecution, for a period of 12months, if the UNSC so requests in a resolution adopted under chapter VII of the UN charter


significance given that the matters underlying the tension - how ICC prosecutions may be reconciled with peace-making initiatives and the role and power of the Council (Security Council) in ICC business - will likely arise in future situations from around the world’. 28 This shows how the role of the United Nations in the proposed commissions’ functionality will determine its credibility.

Conclusion

To conclude, the issue of economic corruption has become an endemic plight which ought to be given a serious assessment by the International community. This assessment should bear in mind that albeit the various challenges listed above, the functionality of the proposed African model-in terms of its mandate and structure-is possible. Nonetheless, the workability and success of EFCC should serve as an encouragement. Also, as it can be said that the constant changes in International law anticipate the inclusion of economic crime in its list of core crimes. Until then, the United Nations should take a decisive action in discussing not the ethereal aspects of this plight but its entirety.

28 Ibid