

The success of the Economic and Financial Crimes Commission in curbing corruption and misappropriation of government funds in Nigeria: an African Role Model?

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Introduction

The Economic and Financial Crimes Commission (EFCC), a commission tasked with tackling corruption and fraud in Nigeria, has success in its battle against economic corruption in Nigeria. The Commission is empowered to prevent, investigate, prosecute and penalise economic and financial crimes and is charged with the responsibility of enforcing the provisions of other laws and regulations relating to economic and financial crimes.¹ The commission is responsible for the investigation of 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 6.5 billion dollars in 7 years,³ a remarkable feat which is second to none. In addition, the organisation is currently working with the Federal

¹Economic 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-cooperative 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)

³ Economic Confidential, 'EFCC Recovers \$6.5 billion, N1 trillion Assets seized-Farida' (Economic Confidential, April 2010) <<http://economicconfidential.net/new/interviews/260-efcc-recovers-6bn-forfeits-assets-worth-n1trillion>> accessed 20 September 2012

Ministry of Education to introduce anti-corruption curriculum at all levels of education in Nigeria.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 political and bureaucratic corruption. 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 still 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 government. The continent remains the worse affected area 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 comprehend the root cause of the problem. John

MukumMbaku states that in many African countries, civil service employees view public

⁴ Ibid

⁵ African Economic Outlook, 'Corruption' (African Economic Outlook, May 2012) <<http://www.africaneconomicoutlook.org/en/outlook/governance/corruption/>> accessed 20 September 2012. The corruption perception index ranks countries according to perception of corruption in the public sector on a scale of 10 (very clean) to 0 (very corrupt). Africa remain in the 'rampant corruption' category with a score below 3.0

⁶ Ibid

⁷ Ibid

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

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 economic corruption 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.'¹⁰

⁸John Mukum Mbaku 'Bureaucratic Corruption in Africa: The Futility of Cleanups' (Cato Journal Vol 16 No 1, Summer 1996) <<http://www.cato.org/pubs/journal/cj16n1-6.html>> accessed 15 October 2012

⁹J.S. Nye 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) American Political Science Review 61 (2): 417-27

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

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.¹¹ 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 law¹², 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.

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

¹¹Tadic 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

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,¹³ 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.¹⁴ 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.¹⁵ 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 international economic relations, codify the economic rights and duties of states which represent customary rules of International law.¹⁶

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

¹⁶ S.P. Subedi 'Section A: Evolution and principles of international economic law' (ULP page 24, 2007)

<http://www.londoninternational.ac.uk/sites/default/files/international_economic_law.pdf> accessed 16 October 2012.

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.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.

Attitude to Economic Corruption in International law

Although the sources of International economic law are the same as those of International law generally outlined in Article 38¹⁸ 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.

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.

¹⁷ Lotus Case (France v Turkey) [1927] (PCIJ) Ser A No. 10

¹⁸ 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

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.'¹⁹ 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'²⁰.

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 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

¹⁹ Ibid. 1, 3

²⁰ 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

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 16²¹ 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'.²² 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'.²³ It further went on to state 'this unresolved issue also has wider 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'.²⁴ This

²¹Rome 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 12 months, if the UNSC so requests in a resolution adopted under chapter VII of the UN charter

²²William Schabas, *The International Criminal Court: A commentary on the Rome Statute* (2010) OUP 333

²³D. Akande, C. Jalloh and M. Du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 African Journal of Legal Studies 5

²⁴ Ibid

shows how the role of the United Nations in the proposed commissions' functionality will determine its credibility.

The Arab Spring

The events that led to the Arab Spring showed, inter alia, that economic corruption is a real problem in Africa. The aftermath of the revolution showed that this plight will not be subjugated by such revolt. Although the protests demonstrated a resurgence of democracy predominantly in Middle Eastern and North African (and partly sub-Saharan region such as Northern parts of Nigeria) region would suggest a uniformity in African approach to governance, the harsh reality remain that a vast majority of these African states are still far away from permanent democracy. A report, *After the Arab Spring: Power shift in the Middle East*, published by London School of Economics looked for genuine evidence of power shifts in the region but found no evidence of a genuine revolution.²⁵ Although George Lawson, in his piece for the report, opined that 'the meaning and character of revolution has changed becoming increasingly represented around political representation rather than reordering of society',²⁶ the overall assessment of the authors found little evidence to suggest that the fundamentals of social, economic and political organisation in the Arab were successfully contested by the protests.

²⁵ Nicholas Kitchen, Toby Dodge, George Lawson... *'After the Arab Spring: Power shift in the Middle East'* (May 2012) LSE Ideas

²⁶ George Lawson, *'The Arab Uprising: Revolution or protest?'* (May 2012) LSE Ideas 16

Democratisation and corruption play a key role in determining development in a Nation. The events take place in the Arab spring is particularly significant because they reflect the plight of economic corruption on Africa. Also, it shows that a revolution led by the People will not make a dramatic change to this plight. Lack of Economic freedom is generally regarded as an infringement on Human Rights by International community. The 1986 resolution of the UN General Assembly which reinforced and strengthened one of the central elements of the New International Economic Order read as follows:²⁷

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.²⁸

The creation of an African commission, which will curb bureaucratic and political corruption, will go a long way in restoring Human Rights in form of economic freedom to every human person in developing countries in Africa.

²⁷S.P. Subedi 'Section A: Evolution and principles of international economic law' (ULP page 26, 2007) <http://www.londoninternational.ac.uk/sites/default/files/international_economic_law.pdf> accessed 16 October 2012.

<http://www.londoninternational.ac.uk/sites/default/files/international_economic_law.pdf> accessed 16 October 2012.

²⁸ Ibid

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 the EFCC should serve as an encouragement. Also, as it can be said that International law is still in its embryonic stage, its development anticipates 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 the entirety of it.