

Independence of the Judiciary and Security of Investments- Opportunities & Challenges

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Introduction

Africa is endowed with abundant largely unexploited natural resources and raw materials yet the continent is afflicted by poverty, diseases and violent conflicts in the midst of plenty. Unfortunately, these resources when exploited are often not done so for the benefit of the people of Africa.

The availability and abundance of these resources present Africa with great investment opportunities. The paucity of a credible continental legal and economic framework defining Africa's investment needs has led to scramble for Africa's resources by the leading nations of the world, from West to the East. This scramble has in turn generated an economic cold that affects all sectors of Africa's economic, political and social life.

Investing in Africa under the prevailing economic, judicial and political condition breeds significant challenges and invites critical questions requiring answers. Significant among these is the question whether a credible independent judicial mechanism exists within Africa that regulates investment contracts in Africa that benefits Africa. Do African countries possess independent judiciaries capable of guaranteeing the security of investments in the continent through fair trial processes? Who negotiates the terms of the investments? Are the terms of negotiated investments favorable to Africa? Do investment contracts in Africa contain transfer of technology clauses aimed at transforming African economies from markets of cheap raw materials to markets for processed finished products? Is Africa endowed with an enabling legal environment for negotiating, drafting, interpreting and adjudicating investment conflicts? What are the opportunities and challenges that investors face in Africa? How can these challenges be surmounted? The answers to these questions and more are the subject of this paper.

The Universal Foundations of the Independence of the Judiciary

Among the founding objectives of the United Nations enshrined in the preamble of UN Charter were a reaffirmation of the “ the faith in fundamental human rights, in the dignity of nations large and small, and the establishment of conditions under which justice and respect for the obligations arising from treaties and sources of international law can be maintained, to promote social and better standards of life in freedom; and to employ international machinery for the promotion of the economic and social advancement of all peoples”.¹

These universal conditions for the administration of justice significantly inspired and informed the founding of the United Nations in 1945. Justice for all was therefore, conceived and proclaimed a critical instrument for the promotion and protection of peace, and “the economic and social advancement of all peoples”.

In furtherance of this objective, the UN multilateral human rights treaty regime adopted provisions that guarantee the independence and impartiality of the Judiciary and recommended that they be enshrined in the laws of state parties to the respective conventions.² To safeguard, protect and promote the independence of the judiciary within the international and national justice systems, the United Nations adopted the “Basic Principles on the Independence of the Judiciary”.³

The preamble of these basic principles emphasizes that the organization and administration of justice in every country, member state of the United Nations must be inspired by the principles. It states that efforts must be undertaken to translate these principles fully into reality. And that

¹ Preamble, *Charter of the United Nations*, 24 October 1945.

² Articles 8 and 10, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948. Article 14, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

³ Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

the rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with the principles, because “judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens”.

There is therefore no gainsaying that the United Nations Charter foundation of universal tenets of Justice as the underlying principles for the attainment of world peace, security, economic well-being and prosperity of nations big and small, is well settled in customary international law. It is on this basis that these principles are enshrined in the Constitutions of member states.

It cannot reasonably be disputed that at the founding of the United Nations in 1945, Africa was not a subject of international law. Africa and peoples of Africa decent were not contemplated by the founding fathers of the United Nations when they made the justice, economic, human rights and security pledges as the salvific tenets of a new world order and civilization. The so-called big and small nations that came under the protections afforded in the UN Charter did not include Africa and peoples of African descent. They were then invariably considered as chattel, European possessions, colonies by any other name but nations or states. Emerging from the humiliation of its World War defeat and occupation by Germany, France led a genocidal campaign in its French Africa possessions orchestrating the extermination of millions of pro-independence nationalists and armless civilians in French Cameroun and Algeria.⁴

Without the protections afforded by the United Nations Charter Africa was deprived on the economic sovereignty over its vast natural resources. Africa could also not exercise judicial independence over commerce, industry and investments in the continent. There was therefore no investment charter for the benefits of African European colonies or possessions. Investments benefitted the colonial masters and their national economies. Africans were valued as slave labour and nothing more.

Decrying this situation in 1949 Dr Nnamdi Azikiwe in an Address delivered at the Plenary Session of the British Peace Congress powerfully submitted “There is gold in Nigeria. Coal,

⁴ The French campaign in French Cameroun commenced in 1948, the same year the UN Declaration on Human Rights was proclaimed against the Union des Population du Cameroun UPC founded by Um Nyobe Mpodol and continued this campaign directly or by proxy until 1971 when the last nationalist leader of the UPC Ernest Ouandie was assassinated.

lignite, tin, columbite, tantalite, lead, diamonite, thorium, (uranium-133), and tungsten in Nigeria, rubber, cocoa, groundnuts, benniseeds, coton, palm oil, and palm kernels. Timber of different kinds is found in many areas of this Africa fairyland. Yet in spite of these natural resources which indicate potential wealth, the great majority of Nigerians live in want”.⁵ Concluding, Dr Azikiwe submitted inter alia, “therefore, we are compelled to denounce imperialism as a crime against humanity, because it destroys human dignity and is a constant cause of wars”.

Invoking the human carnage and devastation of the just ended World War 2 in which Africans were drafted to combat not as free people fighting for the interests of Africa and African Peoples, but as mere tools or instruments of warfare deployed to protect the economic and security interests of their colonial masters Dr Azikiwe made the following proclamation amongst others: “We shall no longer be dragooned to act as cannon fodder in the military juggernaut of hypocrites who dangle before our people misleading slogans in order to involve humanity in carnage and destruction”.

The urgent cry of alarm and alert proclaimed by Zik of Africa in the threshold of the founding of the United Nations with lofty principles underpinning justice, and economic empowerment as the salvation credo for a peaceful, prosperous world but which ignored the situation of Africa and black peoples the world over as painted by the Owelle endures to this day.

Due to the enduring effects of these injustices against Africa, I am impelled to submit that the supposed tenets of universal justice, that includes the independence of the judiciary are elusive in Africa making the security of investments in the continent attainable but elusive.

Identifying the Investment and Justice Needs for Africa

My submission that the goals for fair, credible and independent justice for Africa face serious though surmountable obstacles may be better be articulated through the following address credited to His Excellency President Jakaya Kwikete to the United Nations in New York in 2008.

⁵ From an address delivered at the Second Annual Conference of the Congress of Peoples Against Imperialism on “Colonies and War” Poplar, London, on October 9, 1949 quoted in Wilfred Cartey and Martin Kilson: The Africa Reader: Independent Africa Rabdom House New York 1970 pp 74 and 75.

Addressing the United Nations as Chairman of the African Union, President Kikwete reminded the world body that Africa rejected war, HIV Aids and Poverty as templates on which to anchor a just world security and economic order.

He warned that highlighting the adoption of the UN political declaration on African development needs must not obfuscate the fact that poverty and the need to establish economic growth to overcome it was the continent's greatest challenge. He pointed out that some so-called Millennium Development Goals were inadequate in addressing the serious shortfall in resources to meet African development needs. President Kikwete stated that "In trade, Africa's prospects remained bleak as the Doha Round was stalled. New negative trends included climate change and soaring fuel and food prices".⁶

In the face of this bleak picture of the African condition, there is an urgent need for investments in Africa aimed at attenuating poverty, Africa energy self-sufficiency and production industries for the processing and transformation of raw materials into finished products. There is an urgent need for the establishment of efficient healthcare, food security, science and technology and communication industries in Africa by Africans. Foreign investors are invited to invest in Africa but the investments must be aimed at and relevant to the attainment of Africa economic and investment goals.

To attain this goal Africa needs stable, credible, efficient and effective legal frameworks capable of attracting foreign and national investments. Do the existing legal institutions in Africa provide adequate security for foreign and national investments aimed at promoting growth and the economic prosperity of the continent and its people? I hesitate at this point in time to answer this question in the positive. This is not for the lack of capital building capacity by African investors, economic operators, capable independent judiciary or competent professional lawyers capable of managing the continent's investment portfolio. The ghost of Africa's colonial past is still struggling to control the soul of the continent at all levels of constitutional governance rendering profitable investments that benefit Africa and its people a difficult.

⁶ President Jakaya Kikwete, AU Chairman Address to the United Nations in New York 23 September 2008.

The Constitutional Guarantee of the Independence of the Judiciary

When most of Africa gained independence in the early 1960's, the newly independent countries became member states of the United Nations. By their membership of the UN, they pledged allegiance to the United Nations Charter and thereafter ratified or adhered to many conventions in the UN Economic and Human Rights regime.

The constitutions of almost all independent African countries have provisions on separation of powers with the judiciary being an independent arm of government. The constitutions of these African countries guarantee the independence of the judiciary. Despite of the provision of article 26 of the African Charter on Human and Peoples' Rights guaranteeing through constitutional protections the independence of the judiciary, the effective independence of the judiciary as a constitutional arm of government remains illusory in many situations. The enabling legislation in any countries contradicts the intendment of the constitutional guarantees of independence, thus compromising its independence.⁷

A case in point is a decision by the African Commission on Human and Peoples' Rights in the Southern Cameroons Case in which the African Commission decided that Cameroon lacked independence of the judiciary despite a constitutional provision guaranteeing the independence of the judiciary and separation of powers⁸. In that decision, the African Commission found that the lack of independence of the Cameroon judiciary violated article 26 of the Africa Charter. Cameroon admitted before the African Commission that it did not have an independent judicial service commission and that the President of the Republic was the Chairman of the Higher Judicial Council while the Minister of Justice the Vice President of the Council. The said council has a mandate for the administration and guaranteeing the independence of the judiciary. The African Commission found that by subjugating the judiciary to the executive arm of government,

⁷ Article 26 of the African Charter states that "State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter".

⁸ Communication No. 266/2003, 27 May 2009, African Commission for Human Rights, Ngwang Gumne v Cameroon para. 132.

Cameroon was in violation of its treaty obligations, in particular article 26 of the African Charter.

A Melting Pot of Competing Conflicting Investment Interests

An anxious look at foreign and national investment policies in Africa, against available investments opportunities and the investment needs of the continent there is justification in characterizing Africa as a melting pot of competing conflicting investment interests. Foreign investment in Africa has a checkered history and a tortious purpose. Like a chameleon, it assumes different colours while remaining in substance, the same.

Prior to independence, foreign trade policies of African European colonies were imposed rather than negotiated. African economies were rudimentary and mainly aimed at producing and supplying raw materials for the European industrial and commercial markets. The huge mineral deposits and agricultural potential which Dr Azikiwe talked about in his 1949 address referred to earlier in this paper, although belonging to Nigeria and Nigerians as a matter of colonial and imperial policy in reality belonged to Her Majesty the Queen of England's Government.

The colonial institutions at independence contained imposed military, monetary, economic, educational, social and cultural cooperation treaties that subjugated the economic sovereignty of the colonies to the erstwhile colonial powers. In France considered and still considers its Africa vassal possessions in particular, pre and post-independence cooperation agreements imposed by France subjugated economic, monetary and defense sovereignty to the control of France⁹.

⁹ Cooperations Agreement signed between Ahmadou Ahidjo and France dated December 12, 1959. Cameroon attained independence on January 1, 1960 .The cooperation agreement in its articles 1-6 reserve the authority to 1) determine Cameroon's economic, political, and socio-cultural orientations to France.2) France shall manufacture currency for Cameroon called the CFA.3) France shall guide the determination of educational programs at all levels.4) The French national treasury shall have a portfolio named operations account to cover 100% of Cameroon's foreign exchange. After a series of revisions, the percentage stands at 50% today. 5) France shall have strategic priority in the exploitation of Cameroon's raw materials.6) On 10th November 1961, shortly Cameroon annexed and colonized the Southern Cameroons in the evening of September 30, 1961, President Ahidjo signed a military cooperation agreement with France in which the French army may be invited by the Cameroon President or the French Ambassador in Cameroon to send French troops to suppress an internal rebellion or insurrection or any threats to the regime in place. The Southern Cameroon had voted in a UN sponsored plebiscite to attain independence by joining the independent Republic of Cameroon upon terms to be worked out prior to independence. The independence was attained leading the way for the termination of the trusteeship over the Southern Cameroons

The subsistence of these treaties and colonial policies in Independent African countries made the exercise of sovereignty over constitutional institutions among them independent judiciaries illusory. This state of affairs led Osagyefo Dr Kwame Nkrumah to conclude that “any form of economic union negotiated singly between the fully industrialized states of Europe and the newly emergent countries of Africa is bound to retard the industrialization, and therefore the prosperity and general economic and cultural development, of these countries. For it will mean that those African states which may be inveighed into joining this union will continue to serve as protected markets for the manufactured goods of their industrialized partners, and sources of cheap raw materials”.¹⁰ The existence of these colonial and neo-colonial economic treaties have held Africa in what Dr Nnamdi Azikiwe characterized as “a perennial source of war”¹¹.

In seeking to safeguard and enforce these subsisting colonial and neo-colonial imposed preferential economic and investment treaties, the erstwhile colonial powers and the economic blocs in which they belong have resorted to using coercive methods to impose unfavourable terms of trade and investment terms that auction away African mineral resources and raw materials at prices and conditions intended to recolonize supposed independent states. These includes, economic sabotage, political instability, coups, military intervention and the manipulation of international institutions to discredit, subvert and isolate governments and peoples who dare turn their backs on colonial and neo-colonial puppetry.

In attempts to render the resource endowed countries of Africa ungovernable, alternative sources of power control are funded among the civil society, national and international Non-Governmental Organizations, the Military and the political class. With the use of weapons and funds supplied to these organizations, violent political activism triumphs over laudable civil society activism whose primary purpose ought to have been protecting and promoting the social, economic, political and civic rights of the citizenry.

but the sovereignty to negotiate a union treaty was subverted by the annexation and military occupation of the territory.

¹⁰ Osagyefo Dr Kwame Nkrumah: Neocolonialism in Africa in Africa Must Unite, (New York, 1964 cited in The Africa Reader: Independent Africa edited by Wilfred Cartey and Martin Kilson Random House New York, 1970 p. 220.

¹¹ The African Reader, p. 60.

The sources of instability arising from political and socio-economic factors are easily traced to the desire to control the natural resources and raw materials of African countries. The militarization of the political and economic life of the continent aimed at destabilizing many resource endowed African countries can be traced to this factor. Examples abound, but suffice to cite the failed recent violent regime change attempts in Burundi, Central Africa Republic, South Sudan, Angola and Libya.

According to Adekeye Adebajo and Kaye Whiteman, “the EU willingness to find ways of being militarily involved in Africa has been encouraged by France (seeking ways to justify its own continued military presence in Africa).¹² The problem with the ambitious mission of the EU to support peace and security initiatives as outlined in the EU Common Position on the Prevention, Management and Resolution of Violent Conflicts in Africa is that in conceptual terms, the EU initiative seems good. But it conflates and conceals the colonial and neo-colonial treaties entered into by individual erstwhile colonial powers like France and Belgium in significant regards.

These colonial treaties and policies fuel and sustain the instability that the EU aims to prevent or redress. The erstwhile colonial powers harbouring economic and political ambitions to control and micromanage the economic and political life of their former African colonies targeted by the EU initiative are not faithful participants in the EU initiative. There is overwhelming evidence establishing that they are the sources of instability in Africa. These former colonial powers have consistently used their EU members to attempt to railroad the EU initiative to attain their neo-colonial agenda.

The mitigated result of the EU initiative in Central Africa Republic even with the presence in the territory of French troops who have maintained a military base there since independence is an alarming example of this policy of duplicity on the part of France. Mineral resources Burundi has consistently accused Belgium which recently accepted responsibility and apologized for the assassination of Patrice Lumumba plunging the Democratic Republic of Congo into a blood bath that endures till date, for supporting a rebellion within its national territory aimed at effecting a regime change and controlling its natural resources.

¹² Adekeye Adebajo and Kaye Whiteman: *The EU and Africa: From EuroAfrique to Afro-Europa*, 2012, Hurst and Company, London, p.17.

The failed belligerent EU policy towards Burundi demonstrated by an overwhelming objection of an EU resolution submitted to the 33rd Session of the Joint EU-ACP Parliamentary Conference on 19 June 2017 arises from this policy. For the EU initiative to attain its objective, the EU must call on its member states to rescind with immediate all colonial and neo-colonial treaties or so-called cooperation agreements that undermine the sovereignty of African states and constitute a “perennial source of war”, violence, instability, impunity and criminality. These perennial sources of war have subverted the rule of law and sound constitutional governance.

Africa does not manufacture weapons but the investment in arms through legal and illegal channels fuels internecine armed conflict on the continent. For this to occur, the mineral resources and raw material of African countries are carted away to support materialistic and capitalist cartels in foreign in other continents. These colonial and neo-colonial treaties are not subject to legal challenges before the judiciary of the African countries concerned depriving the citizens of those countries the opportunity to test their validity and legality before independent judges. This keeps significant areas of the African investment and commercial sectors out of independent judicial scrutiny. The Neocolonial economic cartels have also concluded treaties keeping the judicial scrutiny before national courts, key public and private investment sectors in the defense industry, the oil industry, the energy industry and some strategic mineral contracts. With this, corruption is institutionalized at the expense of the people’s sovereignty over their resources, their economic well-being and prosperity.

Owning African Investment Dilemma and Its Judicial Quagmire

For Africa to attract valuable national and international investments that meets African prosperity needs, they must aim at attaining economic sovereignty over its natural resources. Africa must put in place valuable judicial institutions that are competent, independent and reliable.

Investment contracts are quite often negotiated by non-professional bureaucrats and politicians without the assistance of lawyers and professionals in the varying sectors of the economy in which the investment is taking place. This often results in unfavorable terms in the investment

contracts with adjudication clauses that defer the interpretation of the contracts and conflict resolutions to foreign arbitration and adjudication bodies outside the continent. African lawyers and the judiciary are often not even contemplated as key actors in the negotiation of investment contracts and the adjudication of investment disputes in case of conflict. This leaves investments in Key sectors of African economies in the hands of expatriates and foreign agents whose agenda is to stultify the much desired growth of Africa economies.

It has hardly been contemplated nor desired that a transfer of technology clause if inserted into foreign investment contracts could lead to the rapid transformation of Africa from a continent of perpetual slave labour to a continent that processes and transforms its raw materials for the national and universal markets. Africa must own its problems and accept to conceive and apply some dose of painful remedy to this complex life threatening ailment.

Since President Kikwete raised the alarm that placed the required focus on “poverty and the need to establish economic growth to overcome the continent’s challenges” citing Africa’s prospects as remaining bleak with the Doha Round stalling’, and new negative trends that included climate change and soaring fuel and food prices”, Africa has made frantic judicial and continental level efforts towards addressing these problems. The AU has made some adjustments in its focus towards seeking solutions to the continent’s security, economic, health, technological research, energy, mineral exploitation, communication, inter-African and Pan African justice needs. The efforts deployed so far though commendable are still insufficient or not commensurate to the magnitude of the problems.

The AU significantly made giant steps towards establishing an African Criminal Court to try crimes committed in Africa, relieving the continent of the humiliating focus of the international criminal court which gives the perception that Africans may be inherently criminal. The Malabo Protocol granting the African Court on Human and Peoples’ Rights have more than any international court in history criminalized crimes which from Nuremburg and Tokyo World War Tribunals no other international court has criminalized.

The Protocol targets a wide variety of crimes perpetrated on the continent including economic crimes.¹³ The criminalization of the crimes of illicit exploitation of resources, trafficking in hazardous wastes, terrorism, money laundering, unconstitutional change of government, piracy and the crime of aggression have at long last awaken the enduring effects of the hitherto unpunished historic crimes of slavery, imperialism, colonialism and neo-colonialism from which colonial cooperation agreements and treaties drew legitimacy for eternal banishment from the continent of Africa. In other words, criminalizing these crimes at long last will target and slay the beast of colonial crimes and its offspring allowing room for Africa to develop and prosper in peace.

The African Union needs to conceive and proclaim an African Investment and economic Charter for the continent. The AU needs to summon as a matter of urgency, an Africa business forum in which governments and business operators in Africa will set in motion a mechanism and frame work for investment in Africa. The African Union lacks a clearing house for informing African investors and entrepreneurs the business potential of each African country. The Proposed investment and business Charter should aim at the AU working on harmonization business and investment law in Africa to enable African and foreign investors to invest in the continent. Presently, colonial and neo-colonial treaties favour foreign investors, particularly those from former colonial powers.

There is no reason why investment contracts in specific areas or sectors of the African economies should not prioritize national and African investors making foreign investors come in as partners only. Africa has to start training its own road investor contractors. African banks have to start providing loans to support African investments in key areas of the African economy.

African lawyers must mobilize to intervene and settle African conflicts of a political and economic nature. There is no reason why the AU cannot establish a Pan African institution for

¹³ Malabo Protocol Granting Criminal Jurisdiction to the African Court on Human and Peoples' Rights (Adopted in Malabo Equatorial Guinea in June 2014) Articles 28 D, 28 E, 28 F, 28 F, 28 I, 28,Ibis, 28 J, 28 J, 28 L, 28 L Bis, 28 M. In addition to the crimes punishable under the Statute of Ad Hoc Tribunals and the ICC, the Malabo Protocol criminalizes and punishes the crimes unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in hazardous wastes, and illicit exploitation of resources.

the settlement of investments disputes on the continent. There is no reason why the AU with the support of the African Bar Association cannot establish a Pan African Board of Arbitration to which different arbitration bodies in the continent will be affiliated. Such an arbitration board will keep a roster of arbitrators from which arbitrators will be to meet the arbitration needs of investors in Africa.

There is no reason why the AU cannot make article 26 of the African Charter more functional by establishing a more robust mechanism within the AU aimed at encouraging and protecting the independence of the judiciary in member states. In this regard, for a member of the judiciary of a state party to be eligible for appointment to a high judicial organ within the AU institutional framework or within an international judicial or quasi-judicial institution requiring AU support, the constitutional and institutional arrangement in the state party must guarantee independence of the judiciary. A failure to set standards in this regard, led to two Judges from the Cameroon Judiciary which the African Commission on Human found in the Ngwang Gumne v Cameroon (The Southern Cameroons Case) not to be independent to be elected to the African Commission on Human and Peoples Rights and to the African Court on Human and Peoples' Rights making a total mockery of its decision indicting the Cameroon judiciary for not being independent.

Conclusion

The Assembly of African leaders, lawyers, businessmen, professionals from all walks of life, the press and millions alive and unborn will look at this occasion with pride. With pride because African lawyers under the banner of the African Bar Association have risen to the occasion and the challenge to summon all of us here to make an informed pledge to lay down an enduring framework of investment, economic sovereignty and prosperity for Africa.

There is general agreement that investing in Africa will provide a much desired panacea for the dire economic situation facing our continent. The security of these investments needs be guaranteed by competent professional lawyers and an independent judiciary. Africa has significant investment opportunities, competent professional lawyers and independent judges. However, the ability of these key actors to manage Africa's investment portfolio in ways that benefit Africa and the investors is hampered by powerful extraneous actors and factors.

There is a compelling need for all judicial actors in Africa and the judiciary to organize, assert and prove their expertise, proficiency and relevance in playing the role of key actors in managing the investment portfolio of Africa with unblemished expertise and uncontested independence. This conference on investment in Africa is critical and timely. The next conference on the independence of the judiciary and the rule of law complement must be organized to complement the results of this conference.

I respectfully submit that the proceedings of this conference and all the very rich conference papers presented here be delivered to the Chairperson of the African Union Commission, the UN Economic Commission for Africa, all African leaders and universities in Africa to help refocus the desired attention on investments in Africa.

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