POWER PLAY IN INTERNATIONAL INSTITUTIONS: AN AFRICAN CRITIQUE OF THE INTERNATIONAL CRIMINAL COURT

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Abstract

A long standing accusation against the International Criminal Court (ICC) has been its alleged selectivity in targeting African countries. Overwhelming number of cases pertaining to Africa in the ICC prima facie lends support to such an allegation. The recent withdrawal of Burundi from the ICC has again brought to the fore the issue of anti-African bias of the Hague-based institution. The article is an attempt to understand how the dynamics of existing power hierarchies in the international order influence the operation of international institutions such as the ICC. In this context, it becomes imperative to scrutinize the allegation of anti-African bias by critically engaging with the underlying power play operating surreptitiously beneath the surface.

I. Introduction

Norm entrepreneurs (viz. individuals and Non-governmental Organizations) have played a crucial role in permeation of human rights principles in the United Nations as well as the international society. [1] As human rights norms gained wide and near universal acceptability, and individual criminal responsibility being already embedded in humanitarian law and also forming the basis for prosecutions under Tokyo and Nuremberg Tribunals, a need was felt for a permanent, independent and impartial forum to adjudicate genocide, war crimes and crimes against humanity. The International Law Commission (ILC) was asked to study the possibility of the establishment of such a court and a report was produced. And it was only in 1994 that the

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[1] See generally, Cass R. Sunstein, "Social Norms and Social Roles" 96 *CLR* 903-968 (1996).

ILC adopted a draft statute of the International Criminal Court (hereinafter ICC). Therefore unlike previous tribunals with similar subject matter, ICC was an outcome of an international treaty and not of a binding United Nations Security Council Resolution. Broadly speaking, the story of the formation of the ICC is often told as the triumph of principles over politics.[2] But principles rarely stand a chance when politics is the reality the world has to contend with. Although the recent withdrawal of the African state of Burundi from the ICC is the first of its kind in the brief history of the Hague base institution, the grievances and allegations against it are germane to its inception.

II. Burundi's withdrawal

The immediate reason, however, for Burundi's withdrawal from the ICC is the scathing United Nations Commission of Inquiry Report which has concluded in unambiguous terms that extrajudicial executions, arbitrary arrests and detentions, enforced disappearances, acts of torture and cruel, inhuman or degrading treatment and sexual violence have persisted in Burundi from April 2015 to the time when the present report was drafted.[3] The Commission has made a listing of the types of crimes which have been committed in Burundi and these may be called crimes against humanity under the Rome Statute. These include the many cases of arbitrary detentions in National Intelligence Service and police cells and unofficial places of detention which may constitute "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" under the Rome Statute; the actions of members of the security forces, sometimes assisted by Imbonerakure (the youth wing of Burundi's ruling party), which the Commission has categorized as acts of torture and cruel, inhuman or degrading treatment constituting "torture" under the Rome Statute insofar as they were systematically intended to inflict "severe physical or mental pain or suffering upon one or more persons" while such persons were "in the custody or under the control of the perpetrator; cases of rape committed by police officers and/or Imbonerakure in the course of arrests of opponents or reprisals against female members of the families of opponents constitute "rape" under the Rome Statute; and lastly the various violations committed by agents of the State or Imbonerakure

[2] Christopher Rudolph, "Nested Interests and the Institutional Design of the International Criminal Court" in Christopher Rudolph, *Power and Principle: The Politics of International Criminal Courts* 58 (Cornell University Press, 2017).

[3] Report of the Commission of Inquiry on Human Rights in Burundi - A/HRC/36/54 (2017). *Available at:* https://www.ohchr.org/en/hrbodies/hrc/coiburundi/pages/coiburundireporthrc36.aspx (last visited on January 05, 2019).against members of opposition parties —particularly members of the *Forces nationales de*

libération and the *Mouvement pour la solidarité et la démocratie* — or their relatives may also constitute crimes of "persecution" under the Rome Statute.[4]

The Commission has also made a record of several human rights violations in the state of Burundi based on the numerous testimonies it received during the course of its inquiry for which the Burundian state can be rendered liable. These violations include excessive use of deadly force by the defence and security forces during the demonstrations between April and June 2015; reports of extrajudicial executions of members of the security forces, particularly members of the former Burundian Armed Forces ("ex-FAB"); recovery of lifeless and sometimes decapitated bodies in several provinces et al.[5]

As regards the crime of genocide, the Commission could not arrive at concrete conclusions. Although, within the context of certain violations such as arrests, torture and sexual violence, the Commission was able to show that Tutsis were targeted by insults of an ethnic nature, it is not in a position to establish the existence of a political will to destroy that ethnic group "in whole or in part", as required by the definition of genocide given in article 6 of the Rome Statute.[6]

The Commission has also expressed concern regarding the shrinking of democratic space since 2015. And it further lamented that the diminishing independence of judiciary has given rise to a situation of aggravation of impunity in the Burundian state.

Following this scathing United Nations report wherein the Inquiry Commission has urged for criminal investigation which is likely to implicate Burundian leaders, Burundi has become the first nation of the world to leave the ICC and this withdrawal from Rome Statute took effect on October 27, 2017. The Burundian presidential office spokesman Willy Nyamitwe described this move as a great victory for the country because it has defended its sovereignty and national pride and accused the Hague based institution for being a political instrument in the hands of the West to enslave other states.[7]

III. ICC's African Bias

[4] ***Supra*** note 3 at 15.
[5] ***Id.*** at 8.
[6] ***Id.*** at 16.
[7] "Burundi Becomes First Nation to Leave International Criminal Court", ***The Guardian,*** Oct. 28, 2017, ***available at***: https://www.theguardian.com/law/2017/oct/28/ (last visited on January 4, 2019).

"Caucasian Court", "colonial court" are some of the infamous epithets which have been used for describing the ICC by the African establishment which accuses the former of selective prosecution. This African antagonism against the court is not entirely baseless as all of the cases that the ICC is currently investigating and prosecuting have to do with crimes allegedly committed in countries in Africa and questions have been raised as to whether this is an example of the selectivity of international criminal law. [8]

Global South has often complained of the power imbalance embedded in the United Nations as represented by the Security Council and this imbalance is reflected in the ICC as well. Powerful states have often utilized institutions to lock in the advantages that existing power hierarchies afford them which has inevitably resulted in further entrenchment of their powers within new institutional order.[9] United Nations Security Council is a conspicuous example of these dynamics in practice, as both a product of great power interests and a means by which their relative dominance in international politics is reaffirmed and maintained.[10]

The attitude of the Permanent members (P5) of Security Council in the Preparatory Committee meetings (1996-98), Rome Conference (1998) which eventually led to the establishment of the ICC and the Kampala Review Conference (2010) bear some testimony to this complaint. A careful analysis of deliberations that were made in these meetings demonstrates how skewed power relations informed the creation of the ICC as well.

A close review of archival records from the Preparatory Committee deliberations makes clear the strong and unanimous support P5 members had for an ICC nested largely within the authority of the UNSC.[11] For the Security Council, interest in creating a permanent court was more pragmatic than principled, the need for a permanent international penal court was not the product of a sense that existing tribunals were somehow deficient in the justice they meted. Instead, the motivation to pursue a new court was primarily based on a desire to reduce institutional costs and to increase efficiency.[12] Deliberations pertaining to the prospective role of the Security Council in the ICC focused on the Council's regulation over the initiation of legal proceedings. France, for instance,

[8] Max du Plessis, Tiyanjana Maluwa ***et. al.***, "African and the International Criminal Court" ***International Law*** (2013), ***available at***: https://www.chathamhouse.org (last visited on January 5, 2019).
[9] See generally, G. John Ikenberry, ***After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*** (Princeton University Press, 2000).
[10] ***Supra*** note 2 at 63.
[11] ***Supra*** note 2 at 74.
[12] ***Ibid.***

argued that the Security Council should screen all state complaints to see if they involve a situation of threat to or breach of international peace and security.[13] That would have essentially meant that the perceived international penal court would have served as a mere extension of the Security Council. However, the Security Council's preferences of such kind for the proposed international penal institution did not find favour with a number of nations especially constituting the global south. The Indonesian delegation was skeptical of a role for the Security Council and it was noted that since, in many instances, Security Council deliberations had been political, the court should not be affected by its considerations; similarly, the Mexican delegation saw no reason to involve the Security Council in the work of the international criminal court as it believed that the court should be based on the principle of universality.[14] The most scathing criticism of the Security council for its ability to tilt the balance in the favour of the P5 came from Libya during the Preparatory Committee meetings wherein the Libyan delegation noted that the Security Council had been used as a sword in the hand of hegemonic great powers and the great powers should not be allowed to extend their votes to the international criminal court.[15]

Despite such oppositions, the Security Council was successful in establishing a pre-eminent role in relation to determining whether the crime of aggression has been committed. At the Kampala Conference held in 2010 mandated by Rome Statute's Article 123 to inter-alia consider any amendments to the Statute, the Permanent Members remained adamant and outspoken in their preference for council control over aggression.[16] The amendment on the crime of aggression was to come into force upon the fulfillment of two conditions viz. ratification by at least 30 countries and that on a date after 1 January 2017, the Assembly of States Parties has voted in favour of allowing the Court to exercise jurisdiction.[17] So far 35 countries have either accepted or ratified the Kampala amendments on the crime of aggression to the Rome statute.[18] The Assembly of State Parties activated the ICC's jurisdiction over the crime of aggression under which politicians and military leaders can be held individually responsible for invasions and other

[13] Christopher Keith Hall, "The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court." 91(1) *AJIL* 182 (1997).
[14] Christopher Keith Hall, "The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court" 92(1) *AJIL* 124-33 (1998).
[15] *Ibid.*
[16] *Supra* note 2 at 85.
[17] "Resolution RC/Res.6: The Crime of Aggression",
available at: http://www.icc cpi.int/iccdocs/asp_docs/Resolutions (last visited on November 19, 2018).
[18] United Nations Treaty Collection, *available at:* https://treaties.un.org (last visited November 19, 2018).

major attacks.[19] It is pertinent to note here that this new offence can't be invoked retroactively thereby precluding any prosecution of the crimes committed in 2003 Iraq invasion.

The sway of the Security Council over the determination of the crime of aggression can hardly be missed. As per the amendments the Security Council's referral is necessary before the Prosecutor can open an investigation against the national of any state and if the Security Council doesn't act within six months, the Prosecutor can begin with the investigations provided that a Pre-Trial Chamber approves the move. Even so the Security Council keeps its right to defer investigations for a period of one year.[20] Given this level of interference by the Security Council it becomes difficult to counter the criticisms leveled against the Hague-based institution for propagating systemic power imbalances and for being infamously neo-colonial.

IV. India and the ICC

At Rome Conference, the Indian delegation expressed its reservations largely on the issues of role of UNSC in the ICC, and jurisdiction. The Indian establishment stated that a preeminent role for the Security Council in design of the court, "constitutes a violation of sovereign equality, as well as equality before the law, because it contains an assumption that the five veto-wielding States do not by definition commit the crimes covered by the ICC Statute, or in case they so commit, they are above the law and thus possess de jure impunity from prosecution, while individuals in all other States are presumed to be prone to committing such international crimes And an independent and impartial court could only have been erected in the absence of Security Council's interference".[21] The Indian state's concern also revolved around the inherent jurisdiction of the ICC; the office of an independent prosecutor; and the inclusion of internal armed conflict as a crime that the ICC can try.[22] India opposed the jurisdiction of the ICC over internal conflicts, and wanted war crimes to not include acts committed in the context of an armed conflict not of an international character.[23] India also did not favour the inclusion of

[19] Owen Bowcott, "ICC Crime of Aggression Comes into Effect Without Key Signatories", *The Guardian*, Jul. 17, 2018, *available at*: https://www.theguardian.com/law/2018/jul/17/icc-crimeof-aggression-comes-into-effect-without-key-signatories-uk-law-war (last visited on November 30, 2018).
[20] ***Supra*** note 17.
[21] "India Blasts Special Treatment for Security Council," *Terraviva,* Jun. 17, 1998, *available at:* http://www.ips.org/icc/tv170604 .htm, (last visited on November 19, 2018).
[22] Usha Ramanathan, "India and the ICC", 18(7) *Frontline* (2001),
available at: https://www.frontline.in/static/html/fl1807/18070670.htm (last visited on December 13, 2018).
[23] ***Supra*** note 14.

"enforced disappearance of persons" as an act that can constitute a crime against humanity.[24] Further, as regards the issue of jurisdiction of the ICC, India was in favour of optional jurisdiction model wherein the court would exercise its jurisdiction only if the state parties have consented thereto, much like the optional clause in the statute of International Court of Justice, although India agreed to inherent jurisdiction of the ICC in crimes involving genocide.[25] The Indian establishment also appeared to be ill at ease with the power conferred upon the Prosecutor under the Rome Statute. The office of the Prosecutor was conceived to be an independent office and the prosecutor was conferred with powers to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court (Rome Statute, Article 15.1). And since the Indian state had been dealing with militancy and insurgency in Kashmir, Punjab and the North East, it becomes quite evident as to why it had been wary of the inherent jurisdiction of the international court over the crimes covered on the territory of the state parties. This is despite the fact that the principle of complementarity lies at the heart of the statute of ICC[26] according to which the states have primacy over crimes committed in their respective jurisdictions and it is only in the event of them not acting that the role of ICC comes into play.

V. Step Forward

With the proliferation of international institutions as well as their increasing inter-dependency, it becomes important to probe the interplay of power, states and such institutions. Has ICC really failed in trusting in and upholding African Sovereignty? The question needs to be re-visited and re-examined in the light of broader structural inequalities that inform international relations. It is pertinent to note that most of the cases pertaining to Africa in the ICC were sent to the court by the concerned States and by way of Security Council referrals. It is true that African continent has experienced many civil wars in the recent past but it is equally true that the same ICC has declined to open investigations of crimes against humanity in Venezuela and another concerning alleged British war crimes in Iraq. Further with three out of five permanent members of Security Council not being state parties to the Rome statute and still being able to refer cases to the international criminal court speaks volumes about the power dynamics that exist in the international order. It was felt that the Rome Statute would effect changes indirectly what could

[24] *Ibid.*
[25] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol II, 322 (2002), *available at*: www.legal.un.org (last visited on December 12, 2018).
[26] See generally, J.I. Charney, "International Criminal Law and the Role of Domestic Prosecutions", 95 *AJIL* (2001).

not be done directly, namely reform of the United Nations and amendment of the Charter.[27] But prevalent power dynamics played a role in the establishment of the international court. However, recognizing that politics is always an ingredient in making of law would be the first important step in addressing the alleged bias inherent in ICC. Although the withdrawal of Burundi will not decimate ICC's legitimacy, but if it wants to maintain its appeal as an independent and impartial permanent international criminal tribunal it will have to address and correct the existing power imbalances. One step would be if the United States, China, India and the likes ratify the statute.

[27] William A. Schabas, "United States Hostility to the International Criminal Court: It's All about the Security Council" 15(4) ***EJIL*** 15 720 (2004).