The ICC-African Relationship: More Complex Than a Simplistic Dichotomy

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ABSTRTACT - To date, all thirty of the International Criminal Court's (ICC) official cases are against African nationals, calling into question its legitimacy as a neutral and unbiased international legal body. The ICC-African relationship is often framed in an excessively simplistic dichotomy, portraying the ICC as either a Western neo-imperial colonial tool or a legal, institutional champion of global human rights. Nevertheless, each perspective obfuscates the complexity of the ICC's framework. By examining the Rome Statute and the ICC's official cases to garner a legal and historical perspective, this paper seeks to demonstrate the selectivity bias of the ICC's legal framework against nationals from developing countries, in particular, African states. The principle of complementarity and the United Nations Security Council's (UNSC) referral power embedded in the Court's legal framework allows African nations to be disproportionately preliminarily examined, investigated, and prosecuted, while it enables warranted cases against nationals from developed states to circumvent such targeting. Therefore, the primary issue lies not in cases the ICC has opened, but in the cases, it has not.

Following countless calls and attempts to establish a permanent international criminal court after the end of World War Two, the International Law Commission (ILC) finally produced a draft statute for an international court in 1984. Four years later, on July 19, 1988, 120 states signed the Rome Statute, an international treaty that established the International Criminal Court (ICC) (Ellis 2002, 217). Mandated to investigate and prosecute individuals accused of genocide, war crimes, crimes against humanity, and crimes of aggression, the acceptance of the ICC's jurisdiction represented an international shift towards upholding and defending human rights (Hopgood 2013, 4). Since it entered into force on July 1, 2002, the ICC's legitimacy as an independent and unbiased international criminal court has been brought into question, as all official cases to this date have prosecuted, or are in the process of prosecuting, nationals of African countries (International Criminal Court 2020e). This glaring issue of selectivity bias is problematic, as it disproportionately targets individuals from Africa, reinforcing the widespread colonial perspective that views African states as primitive and Western states as exemplars of development (Ofuho 2000, 106). Addressing this selectivity bias, various states, academics, and news outlets frame the ICC-African relationship in this excessively simplistic dichotomy, regarding the ICC as a Western neo-imperial colonial tool, or as a legal champion of global human rights (Kersten 2015). Neither view is completely justified, as each obfuscates the complexity of the relationship by purporting extremes. Instead, the legal framework of the Court, i.e., the formal decision-making process, should be of primary focus in investigating the ICC's alleged bias. This paper will argue that the inherent legal framework of the ICC exhibits selectivity bias against nationals from developing countries, in particular, African states, as all thirty official ICC cases, implicating forty individuals, are defendants from Africa, despite the fact that individuals from more powerful and developed states warrant such court proceedings. The principle of complementarity and the United Nations Security Council's (UNSC) referral power embedded in the ICC's legal framework allows individuals in African nations to be disproportionately preliminarily examined, investigated, and then tried, while enabling powerful and developed states that commit crimes justifying such prosecution, to circumvent targeting. Therefore, the primary issue lies not in cases the ICC has opened, but in the cases it has not.

This paper will begin by providing a brief overview of the ICC to contextualize the preceding argument. Following this, it argues that the principle of complementarity allows individuals from African states to be disproportionately investigated and enables individuals from developed states to evade such scrutiny. Next, this paper will reject the counterargument that despite all official ICC cases targeting African nationals, all were nevertheless justified, making the ICC unbiased. Lastly, this paper will demonstrate how the UNSC's referral power and the geopolitics at play in the anarchic international system allow individuals from powerful and developed states to evade necessary ICC investigations.

Overview

After World War Two, the victorious powers established war tribunals in Nuremberg and Tokyo to deliver justice for the horrors that had transpired over the previous six years. Fifty years later, the first ad hoc international criminal tribunals were established to prosecute war criminals in Rwanda and the former Yugoslavia. These tribunals were all case-specific and temporary (Ellis 2002, 220). Inspired by the efficacy of these tribunals to administer justice, the international community sought to institute a permanent international court to bring justice to those found guilty of genocide, war crimes, crimes against humanity, and crimes of aggression and to deter individuals from committing such heinous crimes. As a result, the ICC, along with two other separate bodies, the Assembly of State Parties and the Trust Fund for Victims, were established by the Rome Statute on July 17, 1988, and entered into force on July 1, 2002 (International Criminal Court 2020a).

The ICC is an independent body composed of four organs, the Presidency, Chambers, Office of the Prosecutor (OTP), and Registry, and 123 state parties, excluding major powers such as the United States (US), China, and Russia (Dicker 2012). The Court's decision-making process to investigate or prosecute individuals is highly influenced by the principle of complementarity, the Court's jurisdiction, and Realpolitik. First, the ICC was created to complement national courts, not to supplant their authority; therefore, the ICC acts only when a national court is unable or unwilling to carry out a prosecution. If, however, a state's legal system collapses or if a government itself is the perpetrator, the ICC can exercise jurisdiction (Chadwick and Thieme 2016, 346). Second, the Court may exercise jurisdiction in a situation in which grievous crimes were committed by a national on the territory of a state that has accepted the jurisdiction of the Court, permitted the crime in question was committed after July 1, 2002, or after the state ratified the Rome Statute. Additionally, the Court may also exercise jurisdiction if the UNSC directly refers the case to the ICC Prosecutor (International Criminal Court 2020c). Lastly, the ICC is an international, independent body that is highly influenced by the anarchic state of the international system. The Court does not hold omnipotent power but is rather often quite limited by its legal framework that directly relies upon jurisdiction and in its absence, UNSC referral. Therefore, the Court's ability to investigate and prosecute state nationals is undoubtedly restrained by *Realpolitik*.

The Principle of Complementarity: African States

The ICC's legal process allows it to prosecute individuals from developing states, typically in Africa, which are disproportionately susceptible to investigation and prosecution. This is primarily due to the Court's principle of complementarity, which designates it as 'the Court of last resort' (Human Rights Watch 2021).

Dictated in Article 17 of the Rome Statute, a case is admissible if, "the state with jurisdiction over it is "unwilling" or "unable" genuinely to carry out the investigation or prosecution" for genocide, war crimes, crimes against humanity, and crimes of aggression (International Criminal Court 1988, 10). This article allows individuals from developing states to be disproportionately investigated by the Court, for it is often easier to 'prove' that developing states are 'unable' or 'unwilling' to prosecute nationals (10).

To prove a state is unwilling to investigate or prosecute, under Article 17.2 of the Rome Statute, only one of the following criteria needs to be met:

> *a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and/or c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. (10)*

Additionally, to determine inability, the state must be unable to obtain the accused or the necessary evidence and testimony or otherwise be unable to carry out its proceedings (International Criminal Court 1988, 10). Therefore, in the words of the former chief prosecutor for the ad hoc UN tribunals, Louise Arbour, "the Court can work against poor, underdeveloped countries because the Prosecutor can easily claim that a justice system in an underdeveloped country is ineffective and therefore "unable" to proceed, for reasons relating to poverty" (Schabus 2001, 68).

As described, both definitions of 'unwilling' and 'unable' are extremely vague and therefore easily manipulated to fit the conditions of developing states. The terms 'underdeveloped' and 'developing' are often synonymous with poverty and corruption, both of which are easily employed as 'proof' that a state is unwilling and unable by

the Court (Franceschet 2004). Typically, states are classified as developed or developing according to income-based measures such as per capita gross domestic product (GDP) or gross national income (GNI). According to the World Bank, countries with less than USD $1,035 GNI per capita are classified as low-income countries and those between $1,036 and $4,085 are branded as lower-middle-income countries (World Bank 2020). Applying this metric to available statistics from 2019, it can be asserted that all residing countries of the Court's thirty official cases fall into either of these two categories (International Monetary Fund 2019). Poverty, in the form of income inequality, is often connected to government corruption (Gupta, Davoodi, and Alonso-Terme 2002, 23). As asserted by Gupta, Davoodi, and Alonso-Terme (2002), an increase of one standard deviation in corruption increases the Gini coefficient of income inequality by about eleven points and income growth of the poor by about five percentage points per year (23). When the government is corrupt, it often limits the national budget to address poverty reduction and the promotion of economic growth through the development of a high-skilled labour market. Moreover, corrupt government officials unfairly award government contracts and favour actors that benefit them politically or monetarily, manipulating how and who controls government institutions. Therefore, the unfortunate reality of Africa's state of poverty and corruption allows for the Court to implicitly determine African states as unwilling to investigate and prosecute, for it is difficult to guarantee that they would be able to conduct a timely, impartial, and independent trial in such conditions. 'Inability' is also quite easy to demonstrate, for it is unlikely that a poor and corrupt state is able to allocate enough funds towards locating and obtaining the accused while compiling the necessary evidence for the proceedings (Franceschet 2004, 36-38). As a result, the characteristics of developing states, in particular African states, render them easily attributable to the requirements of 'unwilling' and 'unable,' allowing the Court jurisdiction to proceed with their investigation.

The Principle of Complementarity: Developed States

While it is relatively easy to label developing states as 'unable' or 'unwilling' according to the criteria stipulated in the Statute, it is much more difficult to demonstrate that developed states that have signed on to the Rome Statute are 'unable' or 'unwilling', for they are often affluent and democratic. Therefore, developed countries are often able to evade ICC investigation because they can afford to locate and obtain the accused, fund the investigation, as well as 'guarantee' an independent, impartial, timely trial at home (Vinjamuri 2016). As Canadian Ambassador Paul Heinbecker (2003) stated, "The ICC was not designed for the United States, Canada, European states or other developed countries because these are well-functioning democracies with strong judiciaries; the ICC is instead designed specifically for the weak states of the world." This procedural advantage of affluent developed countries is visible in the proceedings of the 2006 investigation into the United Kingdom's (UK) military officers' actions during the Iraq conflict and occupation from 2003 to 2008. The UK military officers were accused of unlawful murder, torture, and other forms of ill-treatment that are considered war crimes under international humanitarian law (Davies, Gareth, and Nicholls 2019). As a developed, affluent, and democratic country, the UK was able to effectively demonstrate a willingness and an ability to investigate and prosecute the accused. As stated in the executive summary of the ICC's Final Report on the situation in Iraq/UK, "having exhausted reasonable lines of enquiry arising from the information available, the Office has determined that the only appropriate decision is to close the preliminary examination without seeking authorisation to initiate an investigation" (International Criminal Court 2020d, 4). Nevertheless, an ICC investigation would have been warranted, if not for the UK's privilege to establish its own independent judicial body to investigate the alleged crimes, preventing the ICC jurisdiction to continue their investigation by opening an official case (Davies, Gareth, and Nicholls 2019). Not only did the ICC previously assert that there exists credible evidence that British troops committed war crimes in Iraq, but an investigation by BBC Panorama and the Sunday Times also discovered damning evidence of war crimes from the personal statements of the Iraq Historic Allegations Team (IHAT), which was composed of British soldiers and army staff (BBC News 2019). The closure of the case against the UK military officials serves as a clear example of the ability of the ICC's legal framework to advantage developed states and disadvantage developing countries.

Following the conclusion of the ICC's preliminary examination on February 9, 2006, the UK proceeded with an independent investigation by the IHAT set up by the Labour government in 2010 to investigate credible claims of abuses in Iraq and secure criminal prosecutions where appropriate (Shackle 2018). Over the following years, IHAT referred a few cases to the independent Service Prosecuting Authority (SPA) for prosecution; nevertheless, the SPA declined to prosecute in each instance because the cases failed to meet the evidential test or the public and service interest component of the 'full code test' (International Criminal Court 2020d, 6). By February 2017, the UK government had shut down IHAT, as its investigations had developed into a national scandal over their failure to secure a single prosecution, despite the ICC asserting "there is a reasonable basis to believe that, in the incidents which form the basis of the Office's findings, the Iraqi detainees concerned were subjected to torture, cruel treatment or outrages against personal dignity, and in some cases willful killing" (6).

To this day, the UK has yet to be held legally accountable for its military's war crimes, demonstrating the ability for affluent developed countries to not only circumvent ICC investigation but then evade prosecution and accountability domestically. Wealth in and of itself should not render a state immune from ICC prosecution. It is evident that the principle of complementarity allows the definitions of 'unable' and 'unwilling' to advantage developed, often democratic states, simply because the state's wealth meets a standard that indicates an ability to administer justice. As a result, developed countries can evade Court investigation, while African states are rendered easy targets for ICC investigation. This disproportionate outcome as a result of the principle of complementarity demonstrates that the ICC's legal framework is predisposed towards selectivity bias against developing states. It is important to add that almost ten years later, the ICC did re-open the preliminary examination of the war crimes of UK officers in the Iraqi conflict due to new evidence, though the Prosecutor has not yet moved forward with indictments (International Criminal Court 2020f).

Were all ICC African Cases Justifiable?

Currently, there are twenty-two cases under ICC investigation, fifteen of which are tied to an African state (International Criminal Court 2020e). Before 2016, all Court preliminary investigations and opened cases were against African nationals, totaling eight cases. Four were referred by state parties (Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali) and two were referred by the UNSC (Sudan and Libya). The remaining two preliminary investigations were opened by the ICC itself through the Court's independent Prosecutor (Kenya and Côte d'Ivoire) (Fernadez et al. 2014, 1-10). This pattern garnered widespread scrutiny as to whether or not the ICC was engaging in selective justice (Kimani 2009). However, not everyone accepted that perspective, choosing instead to defend the ICC from such accusations. A common argument in defense of the Court's tendency to target African nationals reasons that the majority of African cases were referred by either a State-Party or the UNSC and thereby were out of the ICC's control, while only two (Kenya and Côte d'Ivoire) out of the eight investigations were launched by the ICC's Prosecutor and were justified (Kersten 2015).

Kenya is the first case in which the Prosecutor opened an investigation proprio motu. On March 31, 2010, Pre-Trial Chamber II granted the Prosecutor's request to open an investigation

regarding the crimes against humanity committed during post-election violence in Kenya from 2007-2008, producing two main cases, originally with six suspects (International Criminal Court 2009). Although this investigation was controversial, as the Court sought to prosecute the Head of State, it was warranted as Article 27 stipulates that the "official capacity as a Head of State or Government [...]shall in no case exempt a person from criminal responsibility under this Statute" (International Criminal Court 1988). In the case of Côte d'Ivoire, the government accepted the Court's jurisdiction in 2003 and reaffirmed the country's acceptance in 2011 when an investigation was launched in October of 2011 (Du Plessis, Maluwa, and O'Reilly 2013, 13). The prosecutor opened a preliminary investigation into alleged crimes against humanity committed during the 2010-2011 post-electoral violence. According to reports by the Human Rights Watch (2011), the violence erupted after Presidential election results between opponents Laurent Gbagbo and Alassane Ouattara were disputed. Therefore, not only has there been an extremely low number of cases in African states launched by the ICC without a referral, but all such cases were justified in accordance with the Rome Statute or accepted by the state itself. Such evidence shows the ICC to be effectively fulfilling its role as an international Court and not acting as a biased, selective instrument.

The argument in defense of the ICC's selectivity fails to recognize that the accusation of its bias does not necessarily pertain to the cases the Court has investigated and prosecuted, but rather the situations it has not. As a senior Rwandan official argued, "There is not a single case at the ICC that does not deserve to be there. But there are many cases that belong there, that aren't there" (Bosco 2013). The ICC's proprio motu investigations should reflect genocide, crimes against humanity, war crimes, and crimes of aggression occurring around the world, yet African nationals make up the majority of the Court's prosecutions, while other countries, such as the UK, evade such prosecution. The ICC's legal framework fails to prosecute warranted cases of nationals from developed states, succeeding in disproportionately opening cases in developing countries, demonstrating the Court's selectivity bias.

UNSC Referral Power

The principle of complementarity and the United Nations Security Council's (UNSC) referral power embedded in the ICC's legal framework allows individuals in African nations to be disproportionately preliminarily examined, investigated, and then tried. The ICC's two-tiered standard of accountability gives the UNSC the power to extend the Court's jurisdiction beyond the ratifying states and directly enables hegemonic powers and their allies to evade prosecution while granting them the power to bring developing states before the Court. First, the Prosecutor can only launch a proprio motu investigation if the state in question has signed and ratified the Rome Statute (International Criminal Court 2020c). The most powerful and developed states that are responsible for the establishment of global order, namely the US, China, and Russia, are not party to the ICC and the Court can only expand its reach through UNSC referral, allocating the ICC jurisdiction over states that have not accepted the Court's jurisdiction (Financial Times 2016). In the cases where the UNSC exercised its referral power, namely, Sudan and Libya, it has only given the Court more room to operate inside Africa, while declining to do the same in Afghanistan and Syria (Tosa 2017, 55). This lack of official investigation is largely due to the requirement of approval from the Council's Permanent Five Members (P5) that consist of prominent geopolitical powers: the US, China, Russia, France, and the UK (Dicker 2012). Great power politics play a key role here as these P5 members hold veto power over UNSC action. China, Russia, and the US are likely to veto any proposal to investigate themselves and their allies: North Korea, Syria, and Afghanistan, respectively (Bosco 2013). Therefore, the Court is largely limited to investigating state parties that fall outside the scope and protection of these powerful state actors. This subordination of the Court to the interests of the geopolitics of the UNSC, and more specifically the P5, exempts many powerful states and their allies from warranted investigations and prosecution due to the two-tiered standard of accountability. The legal structure of the ICC yet again advantages the powerful and developed countries, allowing for the disproportional investigation and prosecution of individuals from developing African states.

The Restraints of *Realpolitik*

As the ICC is an independent international body, it is highly influenced by the anarchic nature of the international system. The structure of the ICC has rendered it difficult to investigate and prosecute powerful states under the restraint of Realpolitik (Chazal 2016). Utilizing the traditional top-down approach, powerful Western states appear to leverage economic incentives in exchange for immunity (Kersten 2019). For example, in 2002, the Bush administration announced that it would veto all future UNSC resolutions concerning peacekeeping and collective security operations until the Council adopted a resolution that would exclude their members of operations from the jurisdiction of the Court (Prestowitz 2008). The US succeeded in pressuring the UNSC to unanimously adopt a resolution granting the members of operation from states not party to the Rome Statute immunity from ICC investigation (United Nations Security Council 2002).

Furthermore, in 2019, the ICC announced that it would potentially launch preliminary examinations into alleged crimes against humanity and war crimes committed in Afghanistan since May 1, 2003 (International Criminal Court 2020b). A preliminary examination would include the examination of conduct by US personnel, with a possible investigation into Palestine that would incorporate the conduct of Israeli officials with whom the US has close security, economic, and diplomatic ties (Human Rights Watch 2019). Greatly opposed to this potentially harmful investigation to the state and its allies, the US Secretary of State Mike Pompeo announced a visa ban on all ICC personnel involved in the Court's potential investigation of US citizens. This policy also extended to those who pursued allied personnel, including Israelis, without the allies' consent (Pompeo 2019). In addition to the visa bans, US National Security Adviser John Bolton threatened prosecutions and financial sanctions against ICC staff and any state or company found assisting in ICC investigations of US nationals or its allies (Evenson 2018).

Despite asserting that the Court would not be bullied into submission, the Pre-Trial Chamber II rejected the Prosecutor's 2017 request for authorisation of an investigation on April 12, 2019. This ruling was made because the commencement of an investigation "would not be in the interests of justice" (International Criminal Court 2020b). The capacity of the US to influence ICC investigations emphasizes the latter's structural inability to operate outside of the pulls and pressures of international politics. The proceedings demonstrated the ability of powerful geopolitical actors, such as the US, to utilize their position to influence other states' cooperation and directly threaten the institutions themselves into submission. This capacity of powerful states to evade ICC investigation allows developing states, often African countries, to be disproportionately prosecuted in comparison, as they do not possess the same soft and hard power capabilities to make credible threats.

Conclusion

The ICC's principle of complementarity enables the Prosecutor to easily demonstrate 'inability' or 'unwillingness' in developing states, allowing individuals from developing countries to be disproportionately investigated in comparison to developed states and for all thirty official ICC cases to prosecute nationals from African states. Despite all African ICC proprio motu investigations and prosecutions being justifiable, the Court's structure remains biased, for it has overtly failed to investigate and then prosecute warranted cases against nationals from affluent, developed states. Furthermore, the ICC's legal structure allocates considerable jurisdictional power to the UNSC, allowing the Court's purpose to be subordinate to great power interests. Within the anarchic international system (Realpolitik), the cases the

Court opens are highly tailored to great power geopolitical interests, as seen with the US and UK, further narrowing the ICC's scope for investigation and prosecution. Therefore, the ICC is neither of the extremes of the overly simplistic dichotomy, rather its legal structure is selectively biased, as it allows nationals of developing states, predominately African countries, to be disproportionately investigated and prosecuted for their crimes while enabling powerful and developed states to utilize the legal structure to circumvent such investigation. Although it is evident that the ICC's legal structure is not without error, the Court's fundamental purpose to enforce international justice and to deter further acts of genocide, war crimes, crimes against humanity, and crimes of aggression, remains of immense importance.

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