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Positive Complementarity in Africa, a Dream or Reality? An Analytical Study of the Consequences of the ICC Process in Kenya

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Abstract: **The complementarity principle serves as one of the key pillars justifying the establishment of the International Criminal Court. The principle presupposes that the primary responsibility of the court is to ensure competent national jurisdictions that can adequately prosecute international crimes. While the Court has been widely involved in the continent its complementary effects have been marginal. Most countries continue to have domestics systems that would fall short of the threshold set out by the Rome statute. The article assesses the challenges faced by the principle of complementarity and the effectiveness of the court on the continent. The study argues that the principle of complementarity has not lead to adequate strengthening of domestic legislations and justice systems on the continent. Self-referrals by several African states presuppose that the principle has had a marginal effect in deterring and preventing the commission of international crimes. The article also points out the dangers of politicizing the ICC process. This has the potential to disrupt the process of ending the culture of impunity. The article concludes by restating the need to apply the complementarity principle in good faith as intended by the founding fathers of the Rome statute.**

Keywords: **ICC, complementarity, International Criminal law, Africa.**

1. INTRODUCTION

The principle of complementarity served as a foundational principle during the establishment of the International Criminal Court (hereby referred to as the court or the ICC). However, the ambiguity and complexity of the principle has led to diverse opinions on what the principle entails especially in the African context (Muriithi, 2015). Pursuant to Article 17 of the Rome statute the court will exercise its jurisdictions only where the state shows unwillingness or inability to investigate and prosecute international crimes (International Criminal Court, 1998). Consequently, the ICC is a court of last resort that is meant to reinforce national jurisdiction and not trump them. It ensures that the sovereignty of member states is not infringed upon. The future of international criminal justice in Africa seems, however, to be threatened. Article 17 was designed to act as a global catalyst for national prosecutions. In essence, the court's impact and role is beyond the prosecution of international crimes.

The doctrine of positive complementarity is meant to reinforce fragile domestic institutions and encourage burden sharing in international criminal justice between state actors and international organizations. The identity and ultimate intention of the Rome statute was to act as a deterrent for states and individuals actors (Lee, 2011). It is also meant to encourage national legislation for international crimes and genuine national prosecutions to end impunity against the most serious of crimes. Positive complementarity is a departure from traditional interpretations of the court's role of playing a residual role or that of a watchdog. However, the work of the court in Africa has not achieved this desired effect. Paradoxically, the complementarity principle has encouraged states to forego their exercise of national jurisdiction.

Voluntary referrals by Uganda, the Democratic Republic of Congo and the Central African Republic signaled the fact that the self-referral mechanism is utilized by ruling regimes to gain ground against political adversaries. The court has been accused of being a colonial project where outsiders make decisions for Africans. The African political elite in Sudan and

Kenya have ridden the crest of this wave to consolidate domestic and regional political support and discredit the ICC process in Africa. To counter this challenge it is imperative for the courts to present its aims and methods clearly and consistently. The article seeks to investigate the consequences of the ICC process on the continent with particular reference to Kenya. This article seeks to investigate whether the intended consequences of the complementary principle have been realized on the continent.

2. METHODOLOGY

This article will investigate the claim laid down by proponents of the complementarity principle that international intervention is likely to lead states to pursue domestic prosecution of international crimes. To fulfill its purpose, the article will assess the effects of the ICC prosecutions in Kenya. Kenya was selected as the ICC process was initiated by the office of the prosecutor. Self-referrals already imply that the state cedes to external intervention for different reasons. Self-referrals therefore also mean that the state in question has admitted failure to prosecute such crimes. Referrals by the UNSC on the other hand may imply political maneuvering by the global elite due to their lack of consistency in practice .The ICC process in Kenya also greatly politicized. The Kenyan case also instituted a regional criticism of the court at the African Union. The article will investigate whether the court's influence has led to any considerable steps by African countries to strengthen their domestic jurisdiction such as enacting legislation dealing with international crimes. It will also explore the potential negative and unintended consequences of the ICC process on the continent. The article is informed by an analytical study of secondary literature. It will also draw from relevant ICC legal docs and the opinion of jurists. The article will also utilize a case analysis to find out the ramifications of the ICC process in Kenya.

3. THEORETICAL FRAMEWORK

While explaining the effectiveness of the court on the continent several theoretical arguments may be utilized. The rationalist approach adopted by realists explores the cooperative and transaction costs between the state and court which may constrain the action of the court (Fehl, 2004). Constructive approach however focuses on the perception of the problem especially the legitimacy of the court. Neo-realist argues that international organization is likely to be ineffective due to their inability to alter the anarchic nature of the international system.

Mearsheimer (1994) argues that international institutions are a reflection of distribution of power in the international system and only has marginal roles compared to the influence of state actors. This might help to explain why Africa has been referred to as ICC's favorite customer. Neo-liberals on the other hand state that international organizations are effective at shaping state behavior through promotion of incentives and implementation of dis-incentives. Keohane and Martin (1995) opine that institutions are a reflection of cooperation which is within state interest. The constructivist approaches focus on structural and agency factors as well as the processes that determine interest of the states. Institutions are reflections of state interests to pursue linkage strategies. Wendt argues that institutions are as a result of processes not structure (Wendt, 1992).

The behavior of institutions can then be determined by examining the identities of state actors and their interests. The main role of institution is to uphold their values and ideologies pass the mover to state and therefore determine state behavior. The court is an international body that can effectively carry out its mandate only when it is able to manage expectations and to balance the interests of the states concerned. The court has been criticized for its dependence on the cooperation of states. Furthermore influential and powerful states are likely to impose constraints on international organizations to serve their interests.

Complementarity Principle:

The principle of complementarity is neither contained nor defined by the articles of the Rome statute. Rather it is contained in the preamble as one of the guiding principles of the court. The idea is further elucidated by article 17 of the court. It states that a case is not admissible if it is under national jurisdiction unless the state is unable or unwilling to prosecute. This means the court is meant to complement national jurisdictions as opposed to circumventing them (Muriithi, 2015). The former prosecutor of the court Louis Moreno Ocampo further developed the concept when he coined the term *'positive complementarity'* in his 2009 prosecutorial strategy. He asserted that the effectiveness of the court should be based on the lack of trials due to functioning national systems (The article will use this test to test the effectiveness of the court on the continent). Therefore the notion was stretched beyond it being a mere admissibility test

(Marshall, 2010). The principles designed to respect territorial sovereignty by promoting the primary duty of states to criminalize and persecute international crimes. The primary responsibility of the court then is to nurture competent national systems. It is also intended to fill the impunity gap. This is because it comes in as a court of last resort when states are not adequately positioned to deal with perpetrators of international crimes.

The principle of complementarity is based on the belief that the court is capable of influencing state behavior. One way states appreciate the principle in practice is by implementing national legislation and genuinely investigating international crimes when they occur (Lee, 2011). The principle of complementarity is also characterized by a certain tension between the competitive and cooperative nature of the doctrine (Marshall, 2010). On one hand, the state and the court are meant to share the burden to end impunity for serious crimes. On the other hand, the court is designed as part of universal jurisdiction that steps in when domestic jurisdiction is judged to incompetent and unable to prosecute international crimes. The courts intervention imposes reputation costs on the state concerned. Lee argues that in order to prevent external intervention by the court the state to accept the political and financial consequences of a prosecution (Lee, 2011). The principle of complementarity has the potential then to have a large impact on national jurisdictions and to contribute to the overall goal of ending impunity and promoting peace and security.

The Kenya Case:

The ICC investigation into international crimes in Kenya was the first *propriomotu* investigation in the history of the court. The other cases have been as a result of state referrals and referrals by the United Nations Security Council. The process came after domestic and international pressure that called on accountability for crimes committed during the elections of December 2007 (Sriram & Brown, 2012). Following the prosecutors requests on summons for six Kenyans the president at the time announced that Kenya would establish a local tribunal. However the leadership was unable to marshal enough support for such a tribunal in parliament.

The Waki Commission which was commissioned after the 2007-2008 post-election violence in Kenya contained a recommendation calling upon the Government of Kenya to pass a Bill that would deal with international crimes. The Commission also recommended the formation of a special tribunal to adjudicate on crimes against humanity committed during the violence (Muriithi, 2015). The Kenyan Parliament passed the International Crimes Act on 11 December 2008 in an effort to domesticate the Rome statute. However the failure of Kenyan to constitute the tribunal laid the foundation for the ICC to intervene in Kenya. However, the ICC process becomes highly politicized in Kenya in the lead up to the 2013 election. Two of the accused Mr. Kenyatta and Mr. Ruto combined to run for the country's top seats as President and Deputy respectively. In the run up to the election the two individuals claimed that the ICC process was a foreign agenda meant to undermine democracy in the country by indirectly choosing its leader. Muriithi (2015) argues that after winning the Presidency Kenyatta and Ruto applied a wide array of strategies to frustrate the ICC process. Diplomatically they favored to pan-Africanize the ICC cases. Kenya appealed to the AU in its criticism of the ICC.

The African union criticized the court as a threat to sovereignty peace and stability in the continent. The legitimacy of the court was called into question as the body described the court as a colonial institution masquerading under the guise of international justice. During the 12thsessionsof the assembly of states parties to Rome statute the Kenyan Attorney general Githu Muigai argued that immunities of head of states recognized under domestic jurisdictions should be extended to the international level (Muriithi, 2015). This is in direct contradiction to Article 1 of the Rome statute. Muigai argued that such recognition of immunity was meant to ensure domestic peace and stability. Article one of the Rome statute however is designed to have a preventive and deterrent role. The basis of this being that the most serious crimes constitute a threat to domestic and international peace and security.

The ICC process in Kenya hastened the calls for broad reforms in the judicial sector that would strengthen the rule of law in the country. The process culminated in the promulgation of a new constitution in December 2010. The symbolic act was served as a precursor for extensive reforms in the judicial and security sector .However it can be argued that the country's judicial framework has not reached such a standard to deter future intervention of the court. Some commentators have pointed to the relative peace that characterized the 2012 elections as evidence of a deterrent effect of the ICC process (Sriram & Brown, 2012). However others have argued that the failure of the ICC to bring into books perpetrators of violence in 2007-2008 is likely to deter similar actions in the future. In Kenya the ICC process was focused mainly on criminal prosecutions with little engagement on how to strengthen domestic systems of justice. The Kenyan case also worsened the relationship between the AU and the ICC. When states feel targeted they less likely to

collaborate with the international court in ending impunity for international crimes. However despite its shortcomings the Kenyan context demonstrates the ability of the political elite to politicize the ICC process. The prosecutorial fundamentalism adapted by the court in the Kenyan cases meant that the court was unable to achieve its goals through positive complementarity by having long-lasting impacts on the Kenyan judicial system.

4. IMPLICATIONS

Conventional wisdom dictates that well intentioned actions sometimes lead to undesirable outcomes. The threat of external intervention based on the standard set out under Article 17 was meant to serve as a deterrent and an incentive for national governments to develop domestic jurisdictions and pursue the prosecutions themselves. While the court has raised the prospects of adherence to the rule of law on the continent it has not delivered adequately. There are a plethora of challenges to the principle in the African context. Marshall argues that the independence and the effectiveness of the court is curtailed by states and international organizations on which it is dependent upon (Marshall, 2010). Secondly international crimes have a high evidentiary demand that might a standard that might proof too difficult for domestics courts in the continent. More often than not the perpetrators of international crimes in Africa wield massive economic and political influence. Furthermore as the Kenyan case implies there is a real danger of the states manipulating and frustrating the ICC process. It can also be argued that ICC has failed to act as a deterrent in a place like Congo where it first intervened. The intervention has done little to decrease or deter potential perpetrators of international crimes.

The impact of the court on national proceedings in the African context has been marginal. States have failed to strengthen their judicial framework to deal with international crimes (Muriithi, 2015). Where such crimes have been committed African states have failed to take the responsibility to prosecute such crimes. The threat of criminal prosecutions could also have a paradoxical effect by acting as a hurdle to the peaceful settlement of the conflict (Lee, 2011). Most African countries are characterized by the lack of adequate judicial action to genuinely conduct trials where international crimes are committed. National opinion may also be divided on whether the current legal structures in most African countries are competent enough to prosecute serious crimes especially in cases where the political elite is suspected of being involved. Consequently, positive complementarity in the African context must begin with effective institutional reforms in political and judicial sectors

The work of the ICC on the African continent has been criticized further on two grounds; selective prosecutions and whittling away of state sovereignty. As a result, some countries like South-Africa, Burundi, and Gambia have threatened to withdraw from the ICC. At the moment nine out of ten of the situations under investigation are from Africa. The court has stirred African sensitivities on self-determination and sovereignty that might lead to a domino effect of *en masse* withdrawal (Lee, 2011). The steps that African states take to strengthen their domestic jurisdiction and legislations to deal with international crimes will determine the future of international justice on the continent. The threats to withdrawal by African states point to a potential weakness in the ICC system that needs to be investigated. The courts role of fulfilling its complementarity role is likely to be constrained by the selfish behavior of states seeking to pursue self-interest. The legitimacy of the court and its neutrality has been called into question by scholars and states alike. Its geographical bias (all the cases presently before the court are of African origin) points to the inherent weakness of the court in particular and the UN system in general. It also provides a loophole that is utilized by critics who like to impede the development of international justice. The court is however relatively young and should seek to arrest this weaknesses.

The ICC process more often than not carries reputational cost for the state and the individuals indicted. This may have a deterrent effect. Some scholars have however argued that there is inherent weakness in the ICC'S deterrent capabilities (Lee, 2011). Whether the ICC is guilty of selective prosecution or not is beyond the scope of this article however it is important to investigate the potential weaknesses in the ICC system. However it is clear that the efforts of the court to complement and cooperation have been marred by suspicion and distrust between state parties and the court. Whether or not the ICC process will act as a deterrent to the commission of future crimes is yet to be seen. However it is undeniable that the ICC process has acted as a catalyst for countries to establish domestic legislation on international crimes (Muriithi, 2015). The domestic jurisdiction in most African countries however remains weak and is unlikely to deter the courts intervention in the future. The sheer number of the African cases in the court means that its effectiveness for prevention of international crimes has been marginal. The court has also had unintended negative consequences on the continent. Some scholars have argued that the indictments of certain individuals accused of international crimes has acted as a barrier to peace processes in Uganda and the Sudan (Sriram & Brown, 2012).

5. CONCLUSION

The principle of complementarity is based on the belief that the court is capable of influencing state behavior. One way states appreciate the principle in practice is by implementing national legislation and genuinely investigating international crimes when they occur. However, the impact of the court on national proceedings in the African context has been marginal. States have failed to strengthen their judicial framework to deal with international crimes. Where such crimes have been committed African states have failed to take the responsibility to prosecute such crimes. While some countries like Kenya and Uganda have enacted international criminal act sin efforts to domesticate the Rome statute. However voluntary referrals by some African states point out to the lack of political will of African states to play a complementary role with the court. It also implies that the threat of external intervention is unlikely to act as global catalyst for African states to establish strong domestic judicial reform. The threat of criminal prosecutions could also have a paradoxical effect by acting as a hurdle to the peaceful settlement of the conflict. The LRA for example during the Juba peace talks insisted that the ICC process is halted as part of the final settlement to the conflict.

Most African countries are characterized by the lack of adequate judicial action to genuinely conduct trials where international crimes are committed. In Kenya for example, the government showed an unwillingness to conduct investigations on crimes committed in 2007-2008. National opinion may also be divided on whether the current legal structures in most African countries are competent enough to prosecute serious crimes especially in cases where the political elite is suspected of being involved. Consequently, positive complementarity in the African context must begin with effective institutional reforms in political and judicial sectors.

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