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Polemics on the Utility of Domestic Courts to Prosecute International Crimes

Abubakar Bukar Kagu
Faculty of Law, Yobe State University, Nigeria
Saadatu Matori
Faculty of Law, Yobe State University, Nigeria
Ashigar Abubakar
Faculty of Law, University of Maiduguri, Nigeria

Abstract:
The role and ability of domestic courts to try international crimes has led to debates among scholars and practitioners. While international law and particularly the Rome Statute that established the International Criminal Court exist on the premise of ensuring a robust international judicial system to deal with heinous crimes against humanity, its role is imbedded to the extent that it is complimentary to what domestic courts can or cannot do. Yet, there is contention on whether that domestic courts can be trusted with the complex task of effectively dealing with crimes that constitute grave violations that include geocide and crimes against humanity.
This paper argues that the best way to confront these crimes is to support robust domestic legal systems that will have the capacity to investigate and prosecute these crimes It is by this commitment that the both domestic and international legal regime with enhance its legitimacy and be able to check the excesses of offenders without necessarily compromising on other fundamental principles of international law and the legitimate democratic quest for accountability, rule of law and social order across the world.

Keyword*: Domestic, ICC, international, jurisdiction, law*

1. Introduction

Although the idea of having a court that will try international crimes has been discussed for some time, it was in 1947 that the U.N. General Assembly requested that the International Law Commission (ILC) to begin to codify the principles of international law that emerged from the Nuremberg Tribunal (Ellis, 2002). This process continued through 1950s, and in 1994, the ILC produced a comprehensive draft that was later to become the Statute to guide the role and jurisdiction of the International Criminal Court (ICC) (Lee, 2001). The draft was adopted as the Rome Statute in 1998 which established the ICC saddled with the role of investigating and prosecuting individuals accused of committing gross violations of international humanitarian law that include genocide, crimes against humanity, war crimes and the crime of aggression (Holmes, 1999; Ellis, 2002). For the purpose of the statute, Genocide is any act committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. Crime against humanity on the other hand is that widespread or systematic attack directed against any civilian population. The statute also defines war crimes is anything that amounts to a grave breach of the Geneva Conventions of August 12, 949, which includes willful killing or causing of great suffering, unlawful deportation or confinement, taking hostage, torture, inhuman treatment that involves extensive and unjustified destruction and appropriation of property, as well as hostility on prisoners of war or depriving them the rights of fair trial (Charney, 2001; Ellis, 2002; Sedman, 2010).The establishment of the ICC brought in a new regime of criminal adjudication onto the world stage where an international court is now given a jurisdiction to investigate and prosecute crimes committed in different parts of the world.

This development in international legal regime generated polemics among scholars and commentators on whether the crimes mentioned in the Rome Statute should be tried by domestic courts or that such crimes be left to international jurisdiction (Doherty and Timothy, 1999; Sadat and Carden, 2000). Proponents of international prosecution are of the opinion that lack the capacity and the will to rigorously prosecute grave international crimes. As proponents argue for a strong international court regime, others are of the opinion that the most effective means of dealing with these crimes of international concern is to have robust domestic legal systems across the countries of the world (Charney, 2001). This way, the domain of the 'complementarity' principle features as a genuine support for national courts and further entrenches the principle of sovereignty. Likewise, resort to international courts will become less and rare to be evoked only when it becomes extremely necessary with clear evidence that a crime will go unpunished do to the unwillingness or inability of domestic courts to try such cases. As Jann pointed out, the standard of measuring 'unwillingness' is to determine and assess the State's subjective motive of intent and purpose behind the proceedings (Kleffner, 2003) In

gauging 'inability', the standard is that of an objective assessment of how a total or substantial of a national judicial system hinders the possibility to obtain the accused or the necessary evidence for a trial (ibid).

2. Possibilities and Challenges for Domestic Courts

The proper role of domestic courts in cases that involve breaches of international crimes are seriously debated. While some scholars are of the view that domestic prosecution should be favoured (Alvareaz, 1999).Others dispute this proposition and regard international courts as the best avenue for the trial of such crimes (Bickley, 2000).The proponents of prosecution by international tribunals contend that domestic courts cannot be trusted with the complex task of effectively dealing with crimes that constitute the breach of international laws. The legal power of domestic courts to preside over cases that involve the violation of international law is firmly rooted in the international legal regime. Hence, the Rome Statute does not make disparity between party states that are signatories to the convention and those countries that are not, especially in respect to its principle of complementarity (Newton, 2001).Incidentally, for every one act that is referred to the ICC, there is one or more sovereign states that could legally investigate and prosecute such cases (ibid).

Since the success of the international criminal tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), which was seen by most observers to have been carried out in a more genuine way,there has been substantial increase in domestic prosecution of international crimes, instigated mainly by the work of the ICTY and the ICTR, as well as the establishment of the ICC. However, the issue of crimes committed in or by states that are not signatories to the Rome statute is another complex area in international law. The reason is that, the concept of sovereignty is sacrosanct in international conventions, a breach of which is always criticised. Hence, countries like Iraq, India, china, Iran and the US who are not signatories to the statute have to try their cases domestically, absent Security Council referral. Nevertheless, Security Council referral is indeed another subject of debate in international relations because, some of the members of the Security Council are themselves not signatories to the Rome statute. The argument among the proponents of the ICC is that, it has a better way of dealing with international more than domestic courts (Knop, 1999).

What is however evident is the fact that states hardly refer matters to international courts where they are convinced that such matters can be properly handled by domestic courts, or where the states is of the genuine opinion that the cases are best resolved if subjected to some form of customary dispute resolution mechanisms (Schneider, 2006). For example, when it is clear that the custom of the communities affected have these kinds of well entrenched culture of dispute resolution, and such propositions are seen as the best way to bring peace and restitution to victims, and also to maintain social order and social relations. The historical trend of international criminal justice has shown thatin some circumstances, states find it in their interest to allow a prosecution by an international court especially where the matter is too delicate to be handled by domestic courts (Charney, 2001).While in other cases, it may become obvious that the state lacks the capacity or ability to try these cases. It therefore becomes a matter of priority and sometimes of necessity that such cases are prosecuted in an international court. Many proponents of international criminal courts suggest that and active international court would constitute a major step forward for the world political order and will serve in supressing international crimes and breaches of international laws. They argue for example that the ICC can serve as a catalyst as well as a monitoring and supporting institution. They maintain further that the establishment of the International Criminal Court is premised on these lofty objectives which will in the long run eliminate impunity.Through these advances, governments have become used to the idea that international criminal law comprise a real and operative body of law, which in turn has facilitated domestic prosecutions of persons accused of crimes (ibid). It has also created an international legal framework for the development of international criminal justice.

Despite these arguments for International trial, it is important to state that there are consequences insisting on international prosecution as against domestic courts. (Nicholson, 2017) Examples can be drawn from various scenarios. For example, in places where there are deep social divisions on basis of ethnicity or religion is ripe is that even a genuine investigation or prosecution by international court may be read along ethnic or religious lines and may result in further conflict.

Paradoxically, even with domestic courts prosecuting international crimes, accused personsmay be part of the larger social or political affiliation that it becomes almost impossible to put them on trial.In other occasions, they are regarded are heroes by a section of the community that any attempt to put them on trial within the territorial boundaries of their country is likely result in another phase of conflict that will further put the people and the political system at risk. It is therefore sensible to refer these kinds of cases to a distant court which will fairly and judiciously deal with the situation. Examples of these are the cases of Milosevic, Karadzic, and Charles Taylor etc. Another problem is where domestic courts may insist on trying cases when it is almost obvious that the accused person may not get justice as a result of several factors including the sentiment of vengeance or revenge on former political rivals.

In respect to the idea of self-referral, scholars argue that the system or process may sometimes become skewed to fit into the political agenda of those in power (Schabas, 2007). Similarly, the concept of self-referral can be used discriminately and unfairly against political opponents (Paola, 2004; Hassanein, 2017). This may produce situations in which "former enemies directly reported one another, often resulting in political maneuvering and dangerous infighting" (William, 2005). The ICC itself has not been exonerated from accusation of being political and unfair in the exercise of its role by its "act of distinguishing between enemies and friends," with the former meant to provide support and legitimacy and the later to be fought (Sarah and Wouter, 2011).

Another important aspect of this debate is the that no ddiscussion on international law is possible without recognizing the primacyof the principle of State sovereignty as a fundamental concept in international law> Hence, it is in the best interest of both the State and the International regime to have robust domestic courts capable of adequately prosecuting international crimes. There certain benefits that will occur when domestic courts are encouraged and

supported to deal with international crimes, as much discouraging them comes with intended and unintended consequences. When domestic courts resolve to adequately and fairly investigate and prosecute the crimes under the ICC Statute, the criminal justice system of such States will be motivated to review and update their legislations to adhere to principles of due process and international standards of procedure and also incorporate all the crimes under international law (Ellis, 2002).

3. Effect of the Complementarity Principle

Principally, the concept of complementarity is seen as procedural as well as a substantive safeguard against any proposition that will allow for unwarranted transcending into the arena of national institutions. It also ensures that the rules, judgements and jurisdictions of domestic courts are not l or at least seen to be replaced. Other than the Tokyo and the Nuremberg war trials, the idea of domestic courts prosecuting international crimes has been very rare. Thus, prosecution for such crimes are seen as "historical anomaly" (Charney, 2001). Principally, the Geneva conventions which set the phase for the modern international humanitarian law, including a set of war crime in fact required states to extradite or prosecute war criminals domestically (Wise, 1998).Moreover, the establishment of the ICC and its guiding principles equally propose that, cases should not be prosecuted by the ICC unless and until a domestic court is unable or unwilling to preside over the case for obvious reasons; or where the Security Council specifically refer the case to the international criminal court (El Zeidy, 2001). The main aim of the Rome statute is not to override the powers of domestic courts. In essence, it notifies domestic courts of their powers and jurisdiction to prosecute cases in their courts.Hence, the ICC will only assume such jurisdiction where domestic courts are unwilling or unable to effectively handle any such case which is in breach of international law (Arsaniani, 1999). It is also important to assert here that because of the principles enshrined in the establishment of the ICC, it cannot assume jurisdiction or retry matters where a domestic court has conclusively issued a verdict. This is because, the legal paradigm of the ICC is clear to the extent that matters can only be subjected to its jurisdiction where the domestic court is unable or genuinely unwilling to prosecute. But where domestic courts are capable and wiling, then it is assumed that the ICC will encourage a fair prosecution of such cases (Ellis, 2002). It evident that states will naturally place precedence on domestic jurisdictions over international jurisdiction where they have the ability and capability of undertaking domestic war crime trials (Marquardt, 1995). These states will hold to maintaining control over domestic prosecutions unless and until it is in their interest to refer the matters to international tribunals. It is almost impossible that a state, in which its legal system functions, would not investigate matters of crimes that fall under the international criminal court (ibid).

In rare circumstance, where for example, a state is known to have a weak justice system, and it happens not to be signatories to the statute, the ICCmay assume jurisdiction, particularly with regard to such violations that constitute crimes against humanity. Most states that ratify the statute tend to try their cases domestically. Likewise, states with high human right records and a fair justice system also tend to prosecute crimes domestically, therefore, the need to refer the cases to the ICC seldom arises in these jurisdictions. Notwithstanding the historical rarity of such commitments by domestic courts to try their own, the establishment of the ICTY and the ICTR has been a major catalyst to this culture of reluctance by providing the foundation for the future of war crimes trial across the world (Meron, 2006). The international community thereafter witnessed a rise in willingness by nations to bring similar cases to trial. It is clear that the establishment of the ICC has also reinvigorated the resolve of nations around the world to try international crimes in domestic courts. The paradox however is that in countries where the justice system is seeing as fair, the courts may give verdicts that the victims may hardly see, observe and be contented with. An example of this is the trial of British soldiers for war crimes in Iraq. In this sense, the concept of retribution and transparency is defeated. There by making justice not seen to be done, at least by the victims of such crimes.

Although some scholars argue that complementarity "is merely a provision in a legal document by itself has not catalyzed into anything substantive (Sarah, 2014), it is worthy to admit that the idea brings some utility to States willing to strengthen the principle that prohibits and also enforce sentence on the most serious crimes of international concern while allowing sovereignty of states to remain unaffected even if the case is to be tried at the International Court (Kleffner, 2003). This was seen after the establishment of the ICTY and the ICTR when opinions begin to change from the perception that the prosecutions of international crimes merely a victors' vengeance to one that is optimistic about the future of prosecution of international crimes in domestic courts. This trend has continued over the years in South Africa, France, Spain, etc. (Bruce, 1995). Interesting to this development is that even in some of world's must less developed democracies, examples have emerged of indictment of international crimes by domestic courts. For instance, the case of the former president of Chad (Hicks, 2018). Hence, it is safe to argue that "the ICTY and the ICTR have legitimated the prosecution of international crimes to the international community and have elaborated on the pertinent law through their statutes, rules, and judgments," creating a kind of new jurisprudence in the area of the prosecution of international crimes (Klefner, 2003).

4. Conclusion

Essentially, there is the need for the international regime to pursue and motivate a system that increases the possibility of domestic courts to try crimes under international law. By promoting the idea of nations to carry out these trials, the standards of domestic legal system will develop in line with international values of procedural justice. It will also lead to more legitimacy of the complementarity principle in ways that nation's states will not be concerned about the power of the international court to usurped their sovereignty. The success of the international legal regime is by far dependent on the level of legitimacy it attracts from individual states. Therefore, the future of international criminal court lies not only in its ability to try cases within its jurisdiction, it is also important that the global community remains

confident of the activities and the willingness to grant nation states the support needed to try cases within their domestic borders. In this regard, the ICC must not be seen as an institution that targets to usurp the powers of domestic courts. Rather, it should consider the sovereignty of nations and the need to support them in the trial of cases. Albeit, where this nation become more interested in referring cases to the ICC for some genuine reasons, then the ICC should assume jurisdiction. This indeed should exclude the problematic and controversial trend of referral by the Security Council, as some members of the council are not signatories to the Rome statute, hence lacking the moral justification to refer others. Where such nations reserve the powers to refer cases to a court they themselves seemingly undermine, it gives the room for other countries or accused persons to construe, with cogent grounds, that they are being politically victimised.There are a number of benefits allowing for more domestic trials as that will motivate review of legislations in ways that incorporate international standards of legal procedure and also integrate all the crimes under international law into domestic legislation.

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