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The Hidden Costs of Strategic Communications for the International Criminal Court

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ABSTRACT

In little more than a decade, the International Criminal Court (ICC) has more than 11,500 requests for its Prosecutor to conduct atrocity investigations around the globe. To date, no such communication has resulted in an official investigation. Nevertheless, the act of publicizing these investigation requests has proven to be an effective attention-getting tool that can achieve valuable alternative goals. This fact explains the increasing popularity of "strategic communications"—highly publicized investigation requests aimed not at securing any ICC-related activity, but at obtaining some non-Court related advantage. This Article, which is the first to identify this trend, explains why the international legal community has accepted the instrumental use of the ICC's communication process with little reflection. It demonstrates why this tolerance is unwise by identifying the potential costs of strategic communications. It then establishes the significance of these concerns by illustrating the specific costs created by the most widely publicized communication to date: The call for the ICC Prosecutor to investigate Pope Benedict XVI for crimes against humanity of sexual violence.

The goal of this Article is to encourage the international legal community to revisit its unexamined acceptance of strategic communications. This can lead to a debate that, at a minimum, should prompt Court supporters—specifically civil society members—to think carefully before engaging in conduct that creates dangerous consequences for the ICC.

TABLE OF CONTENTS

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INTRODUCTION

In September 2011, a widely disseminated press release appeared with the headline "Clergy Sex Victims File an International Criminal Court Complaint: Case Charges Vatican Officials with 'Crimes against Humanity.'"[1] Predictably, the release generated a flurry of media attention, including news coverage with equally eye-catching titles, such as "Child abuse victims sue Pope for crimes against humanity"[2]

1. Press Release, Survivors Network for those Abused by Priests, Clergy Sex Victims File International Criminal Court Complaint Case Charges Vatican Officials with 'Crimes against Humanity' (Sept. 13, 2011), http://www.documentcloud.org/documents/249581\snap-hague-filing-press-release-english.pdf [hereinafter First September 2011 Press Release].

2. *Child Abuse Victims Sue Pope for Crimes Against Humanity*, DAILY NATION (Sept. 13, 2011), http://www.nation.co.ke/News/world/Child+abuse+victims+sue+Pope+for+crimes+against+humanity++/-/1068/1235856/-/1277ncn/-/index.html. For other examples, see generally *Pope Sued for Alleged Crimes Against Humanity*, VOICE OF AMERICA (Sept. 12, 2011), http://www.voanews.com/content/pope-sued-for-alleged-crimes-against-humanity-129731318/170867.html; Karen McVeigh, *Pope Benedict Resigns: Sex Abuse Survivors Hope Move Eases Prosecution*, GUARDIAN (Feb. 11, 2013), http://www.guardian.co.uk/world/2014/feb/11/pope-resignss-sex- abuse-survivors.

and "Case Against Pope Filed Before International Criminal Court."[3] In reality, however, there never was such a case. Rather, the International Criminal Court Prosecutor had simply been asked to consider the possibility of opening an investigation into the matter through a mechanism that is incredibly popular, available to anyone, and profoundly unlikely to result in an International Criminal Court prosecution. Indeed, provocative headlines notwithstanding, retired Pope Benedict XVI is not now, nor has he ever been, charged with crimes against humanity in any court.

Nevertheless, by creating the impression of an ICC case, the Vatican-targeted campaign succeeded in attracting significant media attention and enhancing worldwide awareness of the horrific betrayal of the Catholic Church's most vulnerable members. As a result, the effort appears to be a masterful exercise in what this Article dubs "strategic communications"—highly publicized investigation requests aimed not at securing any ICC-related activity, but at obtaining some non-Court related advantage. What is more, the effort appears to have inspired a broader and generally overlooked trend towards publicizing ICC investigation requests. The appeal of the technique is obvious; much good can come from directing international attention to the many unthinkable atrocities taking place around the globe. But are strategic communications good for the International Criminal Court? This Article addresses this important question. In so doing, it demonstrates why Court supporters—specifically civil society members—ought to think carefully before using investigation requests as attention-getting tools.

I. BACKGROUND

In the short life of the International Criminal Court, the ICC's Office of the Prosecutor (OTP) has received more than 11,500 requests to conduct atrocity investigations around the globe.[4] Requests are accepted pursuant to Article 15 of the Court's Statute,[5] and OTP's policy—subject to very limited exceptions—is to keep both the requests and subsequent analyses private. Ostensibly, this approach is designed to "protect the confidentiality of senders, the confidentiality of information submitted and the integrity of analysis or investigation."[6] At the same time, however, nothing prevents those making the requests (information providers) from publicizing the "communications"[7] they send to the Court. In fact, it has become increasingly

3. *Case Against Pope Filed Before International Criminal Court*, MS. MAG. (Sept. 14, 2011), http://msmagazine.com/news/uswirestory.asp?id=13220.

4. THE OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2015 para. 18 (2015), https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf (stating that between July 1, 2002, the date when the Statute establishing the International Criminal Court (ICC) entered into force, and October 31, 2015, the Office of the Prosecutor received 11,519 communications).

5. Rome Statute of the International Criminal Court art. 15, July 17, 1988, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

6. THE OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, UPDATE ON COMMUNICATIONS RECEIVED BY THE OFFICE OF THE PROSECUTOR OF THE ICC (2006), http://www.icc cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BBB899B9C5BCD2/277421/OTP_Update_on_Communications_10_February_2006.pdf [hereinafter UPDATE ON COMMUNICATIONS].

7. *See* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 320 (2010) ("The Office of the Prosecutor has adopted the term 'communications' to

popular for lawyers and human rights groups to disseminate press releases and hold press briefings in conjunction with their requests for ICC investigations.[8] To date, there has been little commentary on this practice, irrespective of whether a request constitutes "a serious legal bid" or instead appears to be "based on a desire for publicity rather than any expectation of prosecution."[9]

This reception aligns with the increasing use (and acceptance) of strategic human rights litigation, a practice that uses "courts as forums for protest"[10] by initiating cases with important aims "beyond winning."[11] Indeed, well-publicized communications are

describe information provided on the basis of article 15.").

8. *E.g.*, Angelos Anastasiou, *MEP Seeks ICC Action Against Turkey*, CYPRUS MAIL (July 12, 2014), http://cyprus-mail.com/2014/07/12/mep-seeks-icc-action-against-turkey/ (quoting from a press release issued by Cypriots Against Turkish War Crimes regarding the "complaint" they planned to file against Turkey); *Complaint Filed at International Criminal Court over NATO Allies' Complicity in US Drone Strikes*, REPRIEVE (Feb. 19, 2014), http://www.reprieve.org.uk/press/2014_02_19_complaint_international_court_drones/; Press Release, Ctr. for Constitutional Rights, NGOs Submit Evidence to ICC on Crimes Against Humanity and Impunity in Honduras, Call on Court to Take Up Case (Nov. 15, 2012), http://ccrjustice.org/newsroom/press-releases/ngos-submit-evidence-icc-crimes-against-humanity-and-impunity-honduras,-call-court-take-case; Press Release, European Ctr. for Constitutional and Human Rights, The International Criminal Court Must Investigate UK Military Abuses Against Iraqi Detainees from 2003 to 2008 as War Crimes (Jan. 10, 2014), http://www.ecchr.eu/tl_files/Dokumente/Universelle%20Justiz/UK-ICC,%20Press%20Release,%202014-01-10.pdf; Press Release, Int'l Fed'n for Human Rights Glob. Diligence LLP, Richard Rogers of Global Diligence LLP Files an Article 15 Communication at the International Criminal Court (Oct. 7, 2014), http://www.globaldiligence.com/global-diligence-file-article-15-communication-international-criminal-court/; Press Release, Martin Secrett, 9 Bedford Row Int'l, 9 Bedford Row International Submits Article 15 Communication to the ICC Prosecutor in Respect of Bangladesh (Feb. 4, 2014), http://9bri.com/press-release-9-bedford-row-international-submits-article-15-communication-to-the-icc-prosecutor-in-respect-of-bangladesh/.

9. Toby Cadman, *Why I'm Taking the Bangladesh Prime Minister to the International Criminal Court*, HUFFINGTON POST (Mar. 24, 2014), http://www.huffingtonpost.co.uk/toby-cadman/bangladesh_b_5017421.html (describing the Bangladesh filing as one of the former). Admittedly, this latter description is more expansive than the definition adopted above for strategic communications. For example, one might convincingly argue that the Article 15 communication addressing the conduct of UK officers in Iraq was filed without the expectation of an ICC prosecution. Assuming arguendo that this is so, however, provides no indication that the aim of the communication was to secure a non-ICC-related advantage. Rather, the communication prompted a preliminary examination at the ICC which has incentivized greater steps towards accountability at the national level. *See* David Bosco, *A Court on the Rocks? Responding to the Rough Justice Reviews*, JAMES G. STEWART (Mar. 10, 2015), http://jamesgstewart.com/a-court-on-the-rocks-responding-to-the-rough-justice-reviews/ ("The OTP reopened a preliminary examination of British conduct in Iraq, and in so doing it forced the UK authorities to examine much more thoroughly its national accountability procedures."). In other words, the UK-Iraq filing promoted the ICC objective of positive complementarity. *See, e.g.*, THE OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, PROSECUTORIAL STRATEGY 2009–2012, para. 16 (2010), https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf (describing "positive complementarity" as "a proactive policy of cooperation aimed at promoting national proceedings" such that intervention by the Office of the Prosecutor is exceptional). For a recent example of the policy in practice, see Saliou Samb, *Guinea's Ex-Junta Leader Indicted Over Stadium Massacre*, REUTERS (July 9, 2015), http://af.reuters.com/article/topNews/idAFKCN0PJ0M220150709 (describing a domestic indictment issued in the wake of the ICC Prosecutor's visit to the country).

10. Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 479 (2004) [hereinafter Lobel, *Courts as Forums*]. *See also* Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 976–77 (2009) (describing strategic litigation as "a fairly new concept in continental Europe" and as a means to achieve a myriad of extra-judicial outcomes, while also considering its limitations and opportunities).

11. JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 193 (2003) (discussing a complaint brought to "publicize illegal conduct by the U.S. and El Salvadoran governments").

poised to achieve valuable goals virtually identical to those of their litigation counterparts,[12] such as educating the international community about gross human rights violations[13] and mobilizing public opinion against harmful government policies.[14] This instrumental use of the ICC may even seem fitting, as the Court is itself a product of the international human rights movement.[15] At the same time, however, strategic litigation and strategic communications are not entirely analogous. Rather, as some critics have begun to recognize, strategic communications create certain risks for a less established institution like the ICC.[16]

Because non-governmental organizations (NGOs) are frequently behind (or supportive of) Article 15 communications,[17] this Article first explains the unique relationship between civil society and the Court. In so doing, it establishes why members of this group are likely to have a vested interest in the long-term success of the ICC. This Article then identifies some of the possible costs associated with highly publicized investigation requests and illustrates why strategic communications in particular have the potential to undermine that interest. Finally, it evaluates the specific costs created by what is likely the most widely publicized communication to date: The call for the ICC Prosecutor to investigate and prosecute Pope Benedict XVI and senior-level Vatican officials "for rape and other forms of sexual violence as crimes against humanity."[18] In examining this request, this Article illustrates how the communication gives false credence to certain pre-operational criticisms of the Court made popular in the United States, including arguments that the Court's provision on crimes against humanity is overly broad and that unfounded ICC charges can easily be brought at the behest of NGOs. It then demonstrates how the recent rejection of the communication[19] contributes to some of the post-operational criticisms of the Court,

12. *See* Lobel, *Courts as Forums*, *supra* note 10, at 560 ("[M]ovement attorneys should realize that litigation and publicity should go together hand in hand as part of an overall strategy that will result in eventual success, even if that success is temporarily delayed by defeats in the courts.").

13. *See* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1393–94 (1995) ("[A]n important part of the lawsuit was educating the public about the atrocities occurring in El Salvador.").

14. *See* Lobel, *Courts as Forums*, *supra* note 10, at 557 (discussing litigation that was used "as part of a broader political movement against the administration's antiterrorism policies").

15. SCHABAS, *supra* note 7, at 397.

16. *See, e.g.*, Lauren Crothers, *Hun Sen Accused of Genocide in ICC Complaint*, CAMBODIA DAILY (Mar. 21, 2014), https://www.cambodiadaily.com/archives/hun-sen accused of genocide in icc complaint 54669/ (quoting the Executive Director of the Cambodian Defenders' Project's assessment of a request made by human rights groups for the ICC Prosecutor to investigate the current Cambodian Prime Minister and others, stating that "I think that we must use the ICC very carefully, otherwise it will lose value and lose the confidence in the court"); Michael G. Karnavas, Just How Relevant is the ICC: A Viable Court of Last Resort – or – A Politicized Court of Low Expectations? 30–31 (Feb. 26, 2014) (unpublished manuscript), http://michaelgkarnavas.net/files/ICC_BrownLecture_26Feb14.pdf (expressing concern over the use of the communication process by one political party as a "pretext to score politically against" another).

17. *See, e.g.*, SCHABAS, *supra* note 7, at 320 (noting that "individuals and non-governmental organizations" are the "primary sources" of Article 15 communications).

18. Letter from Pamela C. Spees & Katherine Gallagher, Senior Staff Attorneys, Ctr. for Constitutional Rights, to Luis Moreno Ocampo, Prosecutor, Int'l Criminal Court (May 19, 2011), https://ccrjustice.org/sites/default/files/assets/Survivors%20Network%20Art%20%2015%20Communication%20to%20ICC%20OTP%20(3).pdf [hereinafter Communication Letter].

19. Letter from M.P. Dillon, Head of the Info. & Evidence Unit, Office of the Prosecutor, in reference to OTP-CR 159/11 (May 31, 2013), http://d3n8a8pro7vhmx.cloudfront.net/snap/pages/795/attachments/original/1372188351/ICC_letter_from_Prosecution.pdf?1372188351 [hereinafter Rejection Letter]

such as its perceived anti-Africa bias, tendency to exempt the politically powerful, and failure to adequately pursue crimes of sexual violence. Positing that these damaging consequences for the Court are unintentional, this piece illustrates why global civil society actors interested in the ICC's long-term success should carefully evaluate the potential for harm before engaging in the practice of strategic communications.

II. CIVIL SOCIETY AND THE ICC

Defined empirically to include those persons and organizations that have vocalized their opinions about the Court, the term "global civil society" captures an incredibly broad swath of actors with unquestionably divergent interests.[20] Narrowing this field to those members most likely to avail themselves of the strategic communication option—victims' organizations, international and local human rights groups, and the lawyers who represent them—still results in a collection of players whose goals and interests are exceedingly varied. Nevertheless, because these actors played a key role in the creation of the Court,[21] it stands to reason that many in this pool have a vested interest in the ICC's long-term success or, at the very least, a disinclination to act in a way that endangers the support necessary for its survival.

Indeed, if anything, the relationship between global civil society and the ICC is one of ever-increasing engagement, a trajectory that began even prior to the Court's formation. An important barometer in this regard lies in the growing number of NGOs that have partnered to form the Coalition for the International Criminal Court (CICC). Starting with merely twenty-five member organizations in 1995,[22] the CICC grew to have more than 300 members actively preparing for the establishment of the Court.[23] By the time that the ICC Statute was negotiated in Rome in the summer of 1998, this number had nearly tripled.[24] Membership then stretched to over 1000 organizations after the Statute was signed, a number that has essentially doubled since the Court became operational.[25]

As these numbers have grown, so has the connection between civil society and the Court. After the "coordinated lobbying" that preceded the meeting in Rome, the CICC proved indispensable to the successful negotiations of the ICC Statute,[26] as

(responding to the May 2011 letter from Pamela Spees and determining that "there is not a basis at this time to proceed with further analysis").

20. Glasius adopts this definition, capturing a diverse group of actors such as tribal and religious leaders, researchers, aid workers, and journalists. Marlies Glasius, *What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations*, 31 HUM. RTS. Q. 496, 497 (2009) [hereinafter Glasius, *What Is Global Justice*].

21. *See generally* MARLIES GLASIUS, THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT (2006) [hereinafter GLASIUS, GLOBAL CIVIL SOCIETY].

22. *Our History*, COAL. FOR INT'L CRIM. COURT, http://www.iccnow.org/?mod=cicchistory (last visited Feb. 28, 2016).

23. Christopher Keith Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of the International Criminal Court*, 92 AM. J. INT'L L. 331, 339 (1998) (noting the "increasing effectiveness of the coordinated lobbying" of the Coalition for the International Criminal Court's (CICC's) then 316 members).

24. *See* GLASIUS, GLOBAL CIVIL SOCIETY, *supra* note 21, at 27 (noting that more than a quarter of the over 800 organizations sent in-person representatives for the Statute's negotiations in Rome).

25. *Our History*, *supra* note 22.

26. Leila Nadya Sadat, *The International Criminal Court* 4–5 (Wash. Univ. in St. Louis Sch. of Law Legal Studies Research Paper Series, Paper No. 14-05-02, 2014) (describing the CICC as "powerful" and its

NGOs "played a crucial role in shaping the content of emerging norms."[27] In fact, the CICC's contributions to the Court's creation were specifically acknowledged by the Chair of the Statute's drafting committee as "important and useful,"[28] and included generating ideas, advising delegates, and influencing political leaders.[29] Among the NGO-generated ideas was the concept—ultimately adopted—that the Court should have an independent prosecutor with the power to begin investigations on the office's own initiative (*proprio motu*), rather than limiting the Court's docket to referrals from the UN Security Council and Member States.[30]

As a testament to the critical role played by the CICC in the Court's formation, the ICC's Assembly of States Parties (ASP) later passed a resolution that expressly recognized the Coalition's important contributions to the establishment of the Court.[31] By that time, the NGOs of the CICC had concentrated their efforts towards a universal ratification campaign designed to promote worldwide acceptance of the Court.[32] When the campaign surpassed its goal of obtaining sixty ratifications by July 2002,[33] then-UN Secretary-General Kofi Annan expressly "thank[ed] the many non-governmental organizations whose tireless efforts contributed to this success."[34]

Notably, the ties that bind civil society and the Court have remained equally strong throughout the ICC's operation. In keeping with the precedent set at Rome, civil society has consistently participated in the subsequent meetings of the ICC's ASP.[35] In so doing, it has continued to highlight issues of concern and engage in important advocacy measures, including pressuring States Parties to nominate better-qualified judicial candidates.[36] Civil society has also played an active role in contributing to the Court's ongoing work, such as by serving as amici curiae in its

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input as one of five factors without which "[t]he negotiations would undoubtedly have failed").

27. MICHAEL J. STRUETT, THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY 157 (2008).

28. M. CHERIF BASSIOUNI, 3 INTERNATIONAL CRIMINAL LAW: INTERNATIONAL ENFORCEMENT 132 (3d ed. 2008).

29. *Id.*

30. *See* STRUETT, *supra* note 27, at 111 (noting that the NGOs sagely credited the States that advanced this proposal with having come up with the idea); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 177 (4th ed. 2011) (describing the *proprio motu* prosecutor as one of the "battle cries" of the NGOs).

31. Int'l Criminal Court Assembly of States Parties [ASP], *Recognition of the Coordinating and Facilitating Role of the NGO Coalition for the International Criminal Court*, at 1, ICC-ASP/2/Res.8 (Sept. 11, 2003), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP2-Res-08-ENG.pdf.

32. Mariacarmen Colitti, *The Experience of No Peace Without Justice*, *in* CIVIL SOCIETY, INTERNATIONAL COURTS, AND COMPLIANCE BODIES 107, 108 (Tullio Treves et al. eds., 2005).

33. Ved P. Nanda, *The Contribution of Non-Governmental Organizations in Strengthening and Shaping International Human Rights Law: The Successful Drives to Ban Landmines and to Create an International Criminal Court*, 19 WILLAMETTE J. INT'L L. & DISP. RESOL. 256, 282–83 (2011).

34. . Press Release, Secretary-General, Transcript of Press Conference with President Carlo Ciampi of Italy and Secretary-General Kofi Annan in Rome and New York by Videoconference, U.N. Press Release SG/SM/8194 (Apr. 11, 2002).

35. . *See, e.g.*, Gabriela Augustínyová & Aiste Dumbryte, *The Indispensable Role of Non Governmental Organizations in the Creation and Functioning of the International Criminal Court*, 5 CZECH Y.B. INT'L L. 39, 51 (noting the active role played by NGOs at ASP meetings).

36. . *Id.*

proceedings[37] and supplementing the ICC's outreach efforts.[38] The Court has even benefitted from gender training for its staff courtesy of the Women's Initiative for Gender Justice,[39] an organization the current Prosecutor expressly thanked while acknowledging the "crucial role civil society plays" in assisting the Court in addressing crimes of sexual violence.[40] Members of civil society even feature prominently in the latest, most comprehensive book on ICC practice[41] and are at the forefront of the effort to hold States Parties to their obligation to honor and execute ICC arrest warrants.[42]

III. LEGITIMACY AND ITS CHALLENGES

Given these and other significant contributions to the creation, development and operation of the ICC, it is little wonder that NGOs have come to be viewed as "indispensable" to the institution[43] and that the organizations involved have come to feel that they have "a stake in the legitimacy of the Court."[44] Having influenced important aspects of the ICC Statute, it makes sense for civil society to have a strong interest in assuring the Court's normative legitimacy,[45] particularly its institutional integrity.[46] In addition, the prospect of obtaining a meaningful return on the significant

37. . *E.g.*, Prosecutor v. Katanga, ICC-01/04-01/07, Redress Trust Observations Pursuant to Article 75 of the Statute (May 15, 2015); Prosecutor v Dyilo, ICC-01/04-01/06, Observations of the Women's Initiatives for Gender Justice on Reparations (May 10, 2012); Prosecutor v. Gbagbo, ICC-02/11-01/11, Redress Trust Observations to Pre-Trial Chamber I of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence (Mar. 16, 2012); Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence (Apr. 20, 2009).

38. . Glasius, *What Is Global Justice*, *supra* note 20, at 511 (noting that the ICC's outreach is insufficient and that civil society actors have helped to educate local populations about the Court).

39. . Patricia Viseur Sellers, *Gender Strategy is Not a Luxury for International Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 301, 321 (2009).

40. . Fatou Bensouda, Prosecutor-elect of the Int'l Criminal Court, Gender Justice and the ICC: Progress and Reflections, Statement Before the International Conference: 10 Years Review of the ICC. Justice for All? The International Criminal Court 5 (Feb. 14, 2012) [hereinafter Statement of Fatou Bensouda]. Further linking the two, the Executive Director of the Women's Initiative for Gender Justice now serves, in a *pro bono* capacity, as the ICC Prosecutor's Special Gender Advisor. Press Release, Int'l Criminal Court, ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor, ICC Press Release ICC–OTP-20120821-PR833 (Aug. 21, 2012), https://www.icc-cpi.int/Pages/item.aspx?name=pr833&ln=en.

41. . *See generally* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn ed., 2015) (featuring nine chapters authored by individuals working for eight different NGOs, contributions almost equal in number to those of ICC practitioners).

42. . Indeed, it was a South African NGO—Southern Africa Litigation Centre—that sought to ensure the country's arrest of Omar al-Bashir, a move backed by more than 100 civil society organizations worldwide. *Civil Society Declaration on Sudanese President Omar al-Bashir's Visit to South Africa Without Arrest*, HUM. RTS. WATCH (July 1, 2015), https://www.hrw.org/news/2015/07/01/civil-society-declaration-sudanese-president-omar-al-bashirs-visit-south-africa.

43. Augustínyová & Dumbryte, *supra* note 35, at 57.

44. Linda M. Keller, *Comparing the "Interests of Justice": What the International Criminal Court Can Learn from New York Law*, 12 WASH. U. GLOBAL STUD. L. REV. 1, 10, 19 (2013) (designating civil society actors as "self-perceived stakeholders").

45. As Bodansky explains, determining normative legitimacy requires one to ask "whether there are good reasons why [an institution] should have the right to make the decisions it does." Daniel Bodansky, *Legitimacy*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 704, 709 (Daniel Bodansky et al. eds., 2007).

46. *See, e.g.*, Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*,

investments made in the Court is dependent upon the ICC's perceived or sociological legitimacy. For, as Buchanan and Keohane note, "multilateral institutions will only thrive if they are viewed as legitimate by democratic publics."[47]

Yet whether the Court can attain (and ultimately sustain) this indispensable type of legitimacy remains an open question. From the outset, court supporters noted that this task would likely be more difficult because, as a "creation of global civil society," the ICC would "need[] to work much harder than national courts to gain legitimacy."[48] Since becoming operational, however, the Court seems perhaps even further away from achieving this goal.[49] Its failed attempts to bring heads of state to account[50] have created serious perception problems for the institution in an era when "every front page case seems like a litmus test of what the ICC might accomplish."[51] The Court has also been plagued by its record to date, which includes only three completed trials and three convictions in more than a dozen years,[52] prompting observers to question the

20 ETHICS & INT'L AFF. 405, 422–24 (2006) (explaining the significance of institutional integrity and its effects on institutional legitimacy).

47. *Id.* at 407.

48. Glasius, *What is Global Justice*, *supra* note 20, at 497.

49. By any account, the ICC got off to a rocky start. As Kaye observed in 2011: "[The ICC's first trial was nearly dismissed twice. Its highest-profile suspects—Sudanese President Omar al-Bashir and Joseph Kony, the leader of the Lord's Resistance Army (LRA), the rebel group that has terrorized northern Uganda and neighboring areas—have thumbed their noses at the court and are evading arrest. And with all six of the ICC's investigations involving abuses in Africa, its reputation as a truly international tribunal is in question." David Kaye, *Who's Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set It Straight*, 90 FOREIGN AFF. 118, 118–19 (2011).

50. An ICC arrest warrant against Sudan's president, Omar al-Bashir, remains unexecuted after seven years, prompting ICC Pre-Trial Chamber II to request help from the United Nations Security Council (UNSC). Press Release, Int'l Criminal Court, Pre-Trial Chamber II Informs the United Nations Security Council About Sudan's Non-Cooperation in the Arrest and Surrender of Omar Al Bashir, ICC Press Release ICC-CPI-20150309-PR1094 (Mar. 9, 2015) (declaring that "if there is no follow up action on the part of the UNSC, any referral by the Council to the ICC under Chapter VII of the UN Charter would never achieve its ultimate goal, namely, to put an end to impunity"). Meanwhile, insufficient access to evidence caused the Office of the Prosecutor (OTP) to withdraw its charges against Kenya's current leader. Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision on the Withdrawal of Charges Against Mr Kenyatta, paras. 4, 10 (Mar. 13, 2013).

51. Karen J. Alter, *The Trials and Tribulations of Prosecuting Heads of States: Kenyatta and the ICC*, WASH. POST (Dec. 19, 2014), https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/19/the-trials-and-tribulations-of-prosecuting-heads-of-states-kenyatta-and-the-icc/ (noting that "powerful actors have many tools to undermine prosecution").

52. *See, e.g.*, Tricstino Mariniello, *'One, No One and One Hundred Thousand': Reflections on the Multiple Identities of the ICC*, *in* THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY 1, 6 (Triestino Mariniello ed., 2015) (describing the difficulties that have plagued the ICC in successfully prosecuting cases to completion). *See also Jean-Pierre Bemba: DR Congo ex-warlord guilty of war crimes*, BBC NEWS (Mar. 21, 2016) (discussing the March 2016 verdict against Bemba, noting that he was "only the third person to be convicted since the court's founding in 2002" and discussing why there have been so few convictions at the Court).

Court's competency,[53] evoking criticism from established supporters,[54] and providing long-standing ICC opponents with new arguments against the institution.[55]

Notably, the future shows no immediate signs of relief for the ICC in the court of public opinion. Rather, despite the existing concern that the Court "faces an unsustainable workload given its resources,"[56] significant and sometimes unrealistic expectations for the institution continue to flourish. Indeed, despite an already crowded docket and a history of inadequate support from the United Nations Security Council (UNSC) for the matters referred by it to the Court,[57] there are current calls for the UNSC to add the Islamic State[58] and the situation in North Korea[59] to the ICC's existing caseload. In addition, there is a growing demand for the OTP to bring charges

53. "[T]he ICC, in its current form, is by no means a well-run judicial institution." Karnavas, *supra* note 16, at 20; *see also* Editorial, *The International Criminal Court on Shaky Ground*, WASH. POST (Dec. 28, 2014), https://www.washingtonpost.com/opinions/the-international-criminal-court-on-shaky-ground/2014/12/28/8d11a3d6-815c-11e4-81fd-8c4814dfa9d7_story.html (describing the Court as "foundering," discussing "the ICC's chances of gaining international credibility," and concluding that its record "suggests the court lacks the clout" to pursue important cases); Somini Sengupta, *Is the War Crimes Court Still Relevant?*, N.Y. TIMES (Jan. 10, 2015), http://www.nytimes.com/2015/01/11/sunday-review/is-the-war-crimes-court-still-relevant.html? (observing that the Court has recently been "dismissed as ineffective, or even irrelevant" and "has convicted a tiny fraction of those it has charged").

54. *See, e.g.*, Aryeh Neier, *The ICC Still Has a Chance*, JAMES G. STEWART (Feb. 25, 2015), http://jamesgstewart.com/the-icc-still-has-a-chance/ (acknowledging that "it is necessary to raise questions about the ICC's failure to achieve more").

55. "When the International Criminal Court was being formed, I was among those who criticized it .... [I anticipated] a U.S.-style independent prosecutor ranging around the world looking for trouble.... [I]t turns out by now that the bigger problem is that the Court is accomplishing too little." David Davenport, Opinion, *International Criminal Court: 12 Years, $1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014, 2:57 PM), http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#6bfd122c6440 (arguing that the money funding the Court would be better spent strengthening national and regional systems).

56. Patrick Smith, *Justice: Slow Progress for African Cases at the ICC*, AFR. REP. (July 5, 2013, 3:53 PM), http://www.theafricareport.com/North-Africa/justice-slow-progress-for-african-cases-at-the-icc.html (attributing this perspective to Phil Clark and noting that "[n]one of the court's main financiers seems eager to increase contributions to its budget").

57. The UNSC's failure to provide adequate support following the Darfur referral recently prompted the ICC Prosecutor to hibernate the investigation, informing the UNSC that "[w]hat is needed is a dramatic shift in this Council's approach to arresting Darfur suspects." Press Release, Security Council, Amid Growing Brutality in Darfur, International Criminal Court Prosecutor Urges Security Council to Rethink Tactics for Arresting War Crime Suspects, U.N. Press Release SC/11696 (Dec. 12, 2014); *see also* Mark Kersten, *The ICC May Not Bring Justice to Syria*, WASH. POST (May 12, 2014), https://www.washingtonpost.com/news/monkey cage/wp/2014/05/12/the-icc-may-not-bring-justice-to-syria/ (noting that the UNSC referrals of the situations in Darfur and Libya left the Court bearing the entire financial burden of the subsequent investigations and without the support necessary to bring the persons charged to The Hague).

58. Editorial, *The Crimes of Terrorists*, N.Y. TIMES (Apr. 2, 2015), http://www.nytimes.com/2015/04/03/opinion/the-crimes-of-terrorists.html (endorsing an appeal made to the UNSC to refer the Islamic State to the ICC).

59. Somini Sengupta, *United Nations Security Council Examines North Korea's Human Rights*, N.Y. TIMES (Dec. 22, 2014), http://www.nytimes.com/2014/12/23/world/asia/united-nations-security-council-examines-north-koreas-human-rights.html (noting that the UN Commission of Inquiry on North Korea recommended that the Security Council refer North Korea to the ICC).

in the politically charged situation in Palestine[60] despite the evidentiary and institutional challenges such a move is likely to impose.[61]

Rather plainly, then, these observations ought to help shape the next phase of the relationship between civil society and the ICC. Because the Court's challenges appear likely to worsen before they improve, the institution would clearly benefit from efforts designed to help it effectively meet its responsibilities while managing public expectations. Accordingly, those members of civil society vested in the Court's long-term success should take any available steps that might ease the ever-increasing burdens placed on the ICC, particularly on the OTP.[62] At the same time, they ought to adopt practices designed to enhance the way the institution is viewed in the court of public opinion, helping to advance the ICC's beleaguered status in the so-called "perception game."[63] As the following Parts demonstrate, however, the opportunistic use of the Article 15 communications process runs the risk of undermining both of these important aims.

IV. THE COSTS ASSOCIATED WITH ARTICLE 15 COMMUNICATIONS

A. The Administrative Burden

As the ICC became operational, the administrative burden created by the Article 15 communications process was a noted concern.[64] In fact, one organizer worried that the OTP would "be bombarded with communications alleging violations of the Rome Statute," perhaps as many as 1000 a week.[65] While this dire prediction has not come to pass, the resources required to process the more than 11,500 submissions received

60. *See* Khaled Abu Toameh & Tovah Lazaroff, *Palestinians Attempting to Fast Track War Crimes Suits Against Israel at ICC*, JERUSALEM POST (Apr. 6, 2015, 10:52 PM), http://www.jpost.com/Arab-Israeli-Conflict/Palestinians-attempting-to-fast-track-war-crimes-suits-against-Israel-at-ICC-396362 (explaining that the Palestinian leadership is seeking to file charges against Israel in the ICC).

61. *See, e.g.*, Kevin Jon Heller, *The ICC in Palestine: Be Careful What You Wish For*, JUST. IN CONFLICT (Apr. 2, 2015), http://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/ [hereinafter Heller, *The ICC in Palestine*] (noting that an ICC investigation would alienate superpowers and that Israel would likely hinder access to evidence gathering unless its actors were excluded from the investigation).

62. *See id.* ("To say that the OTP is overstretched is a considerable understatement."); Mark Kersten, *What Will Define Bensouda's Tenure? We're Still Waiting*, JUST. HUB (June 17, 2015, 11:02 AM), http://justicehub.org/article/courtside-justice-what-will-define-bensoudas-tenure-were-still-waiting (noting the OTP's limited budget and that it is "at, or very close, to its maximum case and trial capacity").

63. Mark Kersten, *Africa and the ICC: Some Unsolicited Advice*, JUST. IN CONFLICT (May 28, 2013), http://justiceinconflict.org/2013/05/28/africa-and-the-icc-some-unsolicited-advice/ [hereinafter Kersten, *Africa and the ICC*]. In response to Kersten's assessment of the Court's deficiencies in the "perception game," CICC convener William Pace pledged to restart the organization's "media 'education' efforts" that surrounded the drafting and adoption of the Court's Statute). William Pace, Comment to *id.* (May 29, 2013, 6:53 PM), https://justiceinconflict.org/2013/05/28/africa-and-the-icc-some-unsolicited-advice/#comment-11598.

64. *See* Sam Muller, *Establishing an Effective International Criminal Court*, *in* INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? 132, 144 (Steven R. Ratner & James L. Bischoff eds., 2004) (expressing concerns on the number of communications likely to be received).

65. *Id.* (basing the estimate on the number of letters received weekly by the European Court of Human Rights).

to date are nevertheless significant. This is because the OTP fulfills its statutory obligation as recipient of the communications by way of a comprehensive vetting process. Once the OTP's Information and Evidence Unit (IEU) receives and registers a communication, the IEU conducts a review.[66] The IEU's analyses are then reported to the Jurisdiction, Complementarity, and Cooperation Division (JCCD) on a weekly basis.[67] For its part, the JCCD must review the IEU's reports and generate its own reports for the Prosecutor and the Executive Committee with recommendations.[68] The Prosecutor then makes a determination after a question and comment period[69] and, if the Prosecutor concludes there is no reasonable basis for conducting an investigation, the IEU must then notify the information provider.[70] Owing to this extensive examination process, communications made for purposes other than prompting ICC-related action create a significant amount of "busy work" for multiple OTP entities, when few of the staff are likely in need of something to do to pass time.[71] Perhaps even more damaging to the Court, however, are the misperceptions that can be generated by highly publicized communications.

B. The Perception Costs of Article 15 "Complaints"

An unfortunate reality is that Article 15 communications are frequently referred to as "complaints," both by information providers and the media. Misleadingly, the term complaint suggests, consistent with its usage in the Rome Statute, that some type of legal action has been initiated at the ICC.[72] This inference is also consistent with the use of the term on the domestic level. In continental systems, for example, prosecutors are generally obliged to act upon a victim's "complaint"[73] and a victim may

66. International Criminal Court, *Annex to the "Paper on Some Policy Issues Before the Office of the Prosecutor": Referrals and Communications*, regs. 3.1, 4.1 (Sept. 2003), http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf.

67. *Id.* reg. 4.1.

68. *Id.* reg. 4.3, 4.5.

69. *Id.* reg. 4.5.

70. *Id.* reg. 4.5(a); Rome Statute, *supra* note 5, art. 15(6).

71. As of November 2014, the work of the OTP included nine preliminary examinations, four active investigations, five trials, and one appeal. Int'l Criminal Court [ICC], *Report of the Committee on Budget and Finance on the Work of Its Twenty-Third Session*, para. 36, ICC-ASP/13/15 (Nov. 18, 2014), https://www.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-15-ENG.pdf. Since that time, a surprise arrest re activated a nearly decade old case, a preliminary examination was opened in response to the declaration lodged by the government of Palestine, and the ICC Pre-Trial Chamber authorized the Prosecutor to launch a *proprio motu* investigation into the situation in Georgia. *See, respectively,* Press Release, Int'l Criminal Court, Dominic Ongwen Transferred to The Hague, ICC-CPI-20150120-PR1084 (Jan. 20, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1084.aspx; Press Release, Int'l Criminal Court [ICC], The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, ICC-OTP-20150116-PR1083 (Jan. 16, 2015), https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx; *Decision on the Prosecutor's request for authorization of an investigation,* Case No. ICC-01/15 (Jan. 27, 2016).

72. *See* Rome Statute, *supra* note 5, art. 17(1)(c) (declaring that an ICC case will be deemed inadmissible when "[t]he person concerned has already been tried for conduct which is the subject of the complaint").

73. *See, e.g.*, CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 86 (Fr.) (requiring prosecutors to investigate complaints except when the alleged facts do not support the finding of a criminal offense).

even enjoy the right to appeal when such a complaint is not pursued.[74] Similarly, persons hailing from common law systems, wherein the term complaint is distinctly tied to the initiation of litigation,[75] may well conclude that the filing of a "complaint" harkens the beginning of an ICC case. Indeed, although frequently connected to the commencement of civil actions,[76] the term "complaint" is also associated with criminal prosecutions at common law. Under the Federal Rules of Criminal Procedure in the United States, for example, the criminal process begins when a complaint is sworn before a magistrate judge.[77] As a result, hearing that a "complaint" has been filed at the Court is likely to create broadly the impression that some type of legal action at the ICC is officially underway.

Widely publicized communications pose a considerable risk of augmenting this misunderstanding. In fact, even when information providers take scrupulous care to employ the Court's communication terminology in their press releases, media coverage tends to shy away from this unfamiliar legal term, reverting instead to the term "complaint."[78] This terminology makes it a short leap for those hearing it—including those reporting on Court events—to conclude that there is, in fact, a case before the Court. This, in turn, runs the risk of making it appear that external actors—in particular members of civil society—have the ability to set the Court's agenda, inadvertently making credible the once popular claims of U.S. Court-opponents that "the ICC [would] be 'captured' not by governments but by NGOs,"[79] and that "NGOs . . . [would] have too much access and influence over the Court's investigative processes."[80] Moreover, even if the impression created is simply that a "complaint" results in an official investigation, this suggests that Court opponents were right to warn that the ICC could open unwarranted investigations with "enormous political impact."[81]

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74. *See, e.g.*, STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], §171, *translation at* http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1434 (Ger.) (stating that one who files a complaint may contest a prosecutor's failure to investigate it).

75. In Australia, for example, "[a] civil proceeding must be commenced by the filing of a complaint." MAGIS. CT. GEN. CIV. P. R. 4.04 (S.R. No. 1440/2010) (Austl.).

76. *See, e.g., id.* (stating that in Australia, a complaint is necessary to initiate a civil action).

77. FED. R. CRIM. P. 3.

78. *See, e.g.*, Press Release, European Ctr. for Constitutional & Human Rights, The International Criminal Court Must Investigate UK Military Abuses Against Iraqi Detainees from 2003 to 2008 as War Crimes (Jan. 10, 2014), http://www.ecchr.eu/tl_files/Dokumente/Universelle%20Justiz/UK-ICC,%20Press%20Release,%202014-01-10.pdf (exclusively using the term "communication"); *UK Politicians Accused of Iraq War Crimes,* AL JAZEERA (Jan. 10, 2014), http://www.aljazeera.com/news/europe/2014/01/uk-politicians-accused-iraq-war-crimes-20141110230724774.html (drawing from the press release, yet replacing the word "communication" with "complaint"); *British Politicians and Generals Targeted in Iraq Abuse Case*, GUARDIAN (Jan. 11, 2014), http://www.theguardian.com/law/2014/jan/12/iraq-war-crimes (exclusively using the term "complaint"); Per Lijas, *Top U.K. Defense Officials Accused of War Crimes*, TIME (Jan. 13, 2014), http://world.time.com/2014/01/13/top-u-k-defense-officials-accused-of-war-crimes/ (exclusively using the term "complaint").

79. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations of the S. Comm. on Foreign Relations*, 105th Cong. 64 (1998) (prepared statement of John R. Bolton) [hereinafter Bolton Statement].

80. W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 319 (2006) (citing the prospect that this influence would be wielded by "NGOs with an anti-U.S. agenda" as "[t]he major U.S. concern").

81. John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's*

In reality, however, external actors have no authority to bring about a Court investigation or prosecution, and an extensive vetting process takes place after communications are filed. Once a matter proposed for investigation makes it past the numerous screening procedures noted above,[82] OTP must then obtain judicial approval before it can commence an official investigation.[83] Following this—before specific charges can be brought—OTP must convince the Pre-Trial Chamber that there are reasonable grounds to believe that the person has committed crimes that fall within the jurisdiction of the Court.[84] Even if this hurdle can be overcome, a case cannot be brought to trial unless the Prosecutor satisfies the Court at a confirmation of charges hearing that there are substantial grounds to believe the person committed the crimes charged.[85] As the ICC Pre-Trial Chamber has repeatedly explained, this latter procedure constitutes a "mechanism . . . designed to protect the rights of the Defence against wrongful and wholly unfounded charges,"[86] by "distinguishing those cases that should go to trial from those that should not."[87]

Critically, these procedures align with those of a reputable court and are employed at no small cost to the ICC.[88] Indeed, because due process tends to mean protracted process,[89] the protections involved contribute significantly to the glacial operational pace for which the Court is frequently criticized.[90] In fact, the multiple safeguards employed before a case can be initiated (or a prosecution commenced) rival or exceed those generally available at the domestic level, a distinction that seems fitting for a Court responsible for prosecuting the gravest crimes known to humankind.[91] Unfortunately, however, the suggestion that a communication automatically results in an ICC case creates the opposite perception. In fact, the belief that anyone can invoke the Court's jurisdiction simply by filing a "complaint"

Perspective, 41 VA. J. INT'L L. 186, 194 (2000) (drawing on the U.S. experience with independent prosecutors to demonstrate how the ICC Prosecutor could create "dramatic news . . . without ever bringing formal charges").

82. *See supra* notes 65–70 and accompanying text.

83. Rome Statute, *supra* note 5, art. 15(3).

84. *Id.* art. 58(1).

85. *Id.* art. 61(5)–(6).

86. Prosecutor v. Dyilo, ICC-01-/04-01/06-803, Decision on the Confirmation of Charges, para. 37 (Jan. 29, 2007).

87. Prosecutor v. Mbarushimana, ICC-01/04-01/10-465, Decision on the Confirmation of Charges, para. 41 (Dec. 16, 2011).

88. *See* GIDEON BOAS ET AL., 3 INTERNATIONAL CRIMINAL PROCEDURE 185–86 (2011) (noting difficult hurdles the court goes through to ensure legal sufficiency).

89. "The course of justice, conducted in scrupulous compliance with fair trial procedures, is often by nature a slow process . . . ." Press Release, General Assembly, Assembly Appraises Progress Made by War Crimes Tribunals; Judges Describe Obstacles, U.N. Press Release GA/9652 (Nov. 8, 1999) (quoting then-President of the ICTR, Navanethem Pillay).

90. In practice, it seems that the confirmation of charges provision has added more time to the process than initially anticipated. SCHABAS, *supra* note 7, at 735 (noting the lengthy decisions delivered). It should be noted, however, that a thorough pre-trial review may inure to the benefit of the prosecution and detriment of the accused. In the Gbagbo case, for example, the Pre-Trial Chamber adjourned the hearing after it "requested the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges." Prosecutor v. Gbagbo, ICC-02-/11-01/11-656, Decision on the Confirmation of Charges Against Laurent Gbagbo, para. 9 (June 12, 2014). One year later, after adducing further evidence, a set of amended charges against Gbagbo were confirmed. *Id.* para. 278.

91. For a similar view, see BOAS ET AL., *supra* note 88, at 185–86 (contending that a confirmation of charges hearing "provides greater protection for the rights of the suspect, enhances the credibility of the court or tribunal, and could reduce inefficiency in later stages of the proceedings").

resurrects and bolsters widespread, once-popular claims that the ICC could be used to pursue "unfounded charges" and "politicized prosecutions."[92]

Communications and associated commentaries that name specific individuals and claim (or suggest) that ICC charges have been brought against them are apt to exacerbate this problem and create the disagreeable perception that the Court's procedures can be manipulated for political advantage. This, in turn, is liable to resurrect concerns that were so significant that they shaped the drafting process of the ICC statute. Notably, early drafts of the statute authorized State Parties—which, unlike communications filers, have the authority to trigger the Court's jurisdiction[93]—to do so by lodging a "complaint" with the Court.[94] At Rome, however, the title "Complaint" turned into "Referral of a situation by a State Party"[95] because the relevant provision was amended to require that States refer "situations," rather than specific cases.[96] As Kirsch and Robinson explain, this change was designed to "reduce the arguably unseemly prospect of States Parties referring complaints against specific individuals" and to diminish the attendant perception that the Court could be used to "settle scores."[97] Accordingly, by filing "complaints" that target specific individuals,

92. *E.g.*, Statement by the President, Office of the Press Sec'y, Signature of the International Criminal Court Treaty (Dec. 31, 2000), http://clinton4.nara.gov/textonly/library/hot_releases/December_31_2000.html.

93. Rome Statute, *supra* note 5, art. 13(a). The Court's jurisdiction can also be triggered by a Security Council referral or upon the Prosecutor's own motion. *Id.* art. 13(b)–(c). It is the latter possibility at which Article 15 communications are targeted. Notably, OTP conducts its preliminary examination activities in exactly the same manner, "irrespective of whether the Office receives a referral from a State Party or the Security Council or acts on the basis of information received pursuant to article 15." THE OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2012, *supra* note 4, paras. 3, 10 (2012), http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf (noting that, in accordance with Article 53, the Prosecutor must always consider jurisdiction, admissibility, and interests of justice concerns before commencing a formal investigation). The triggering distinction becomes relevant after this analysis, as only *proprio motu* investigations require judicial authorization. Rome Statute, *supra* note 5, art. (15)(3). In addition, only referring States and the Security Council have the right to seek judicial review if the Prosecutor determines that there is no reasonable basis to conduct an investigation. *Id.* art. 53(3).

94. William A. Schabas, *Complementarity in Practice: Creative Solutions or a Trap for the Court?*, *in* THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 25, 31 (Mauro Politi & Federica Giola eds., 2008) [hereinafter Schabas, *Complementarity in Practice*].

95. *Id.*; Rome Statute, *supra* note 5, art. 14.

96. Schabas, *Complementarity in Practice*, *supra* note 94, at 31–32 (noting that the altered title was likely prompted by the fact that States were "prevented from submitting a specific case or crime to the Court"). Security Council referrals appear to be likewise constrained, although apparently not because the Rome Statute's provision regarding them confers jurisdiction when "a situation" is referred to the Prosecutor. Rome Statute, *supra* note 5, art. 13(b). Instead, the limitation is attributable to the fact that the faithful exercise of the Council's Chapter VII peace and security powers requires it to deal with situations rather than the fate of particular individuals. *See* Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 627, 632 (Antonio Cassese et al. eds., 2002) (noting that, despite the requirement of handling situations rather than individual cases, there may be rare instances in which "the impunity of specific individuals would constitute *per se* a threat to the peace," which would enable the Council to refer their cases to the Court).

97. Philippe Kirsch & Darryl Robinson, *Referrals by States Parties*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 96, at 619, 623. Despite this, it is, of course, still possible for states to use the referral process "as a pretext for pursuing political agenda." Karnavas, *supra* note 16, at 23 (discussing the Comoros' Mavi Marvara referral).

information providers create the precise harm in the court of public opinion that the ICC drafters sought to avoid.

This, in turn, exposes a real tension between what makes for an effective strategic communication and what is good for the Court. Because communications and publicity "go together hand in hand as part of an overall strategy,"[98] information providers may lean towards crafting communications and related materials in ways that make them more likely to garner media attention. To that end, suggesting that a high ranking government official "has been accused of war crimes before the International Criminal Court in The Hague"[99] or that an information provider is "[t]aking [a] . . . Prime Minister to the International Criminal Court"[100] is more likely to make headlines than a press release that simply states that the ICC Prosecutor has been asked to look into a matter.

Further concerns arise when one contemplates the additional effects likely created by this type of publicity. Victims and others interested in the alleged crimes will be apt to blame the Court when, as will almost invariably be so, an investigation is not launched.[101] Media followers may likewise attribute the Court's failure to proceed on a highly publicized matter to *realpolitik* or other unsavory reasons[102] while others may erroneously perceive the Court's failure to act as further evidence of its inability to produce results, reinforcing what is perhaps one of the most popular and damaging attacks on the Court to date.[103]

C. *Remedial Measures and the Office of the Prosecutor*

These observations perhaps logically prompt the question of whether and how the ICC can act to protect its interests in the so-called "perception game."[104] One answer might be for the Court to consider "adopting modalities to combat or at least limit" communications that constitute "abusive attempts to drag the ICC into the sordid quagmire of domestic politics"[105] or otherwise evidence an instrumental use of the Court's processes. For such an approach to be successful in the wake of

98. Lobel, *Courts as Forums*, *supra* note 10, at 560 (discussing strategic litigation).

99. *Complaint Against John Howard to the International Criminal Court*, AUSTL. INDEP. MEDIA NETWORK (Jan. 11, 2015), http://theaimn.com/complaint-john-howard-international-criminal-court/.

100. Cadman, *supra* note 9.

101. It is frequently maintained that the Court has *never* opened a formal investigation as a result of an Article 15 communication. *See, e.g.*, Rachel Zoll, *Int'l Court Case Against Ex-Pope Fizzles*, MERCURY NEWS (June 13, 2013), http://www.mercurynews.com/ci_23451674/intl-court-case-against-ex-pope-fizzles. While this is technically true, the reality is somewhat more nuanced. *See, e.g.*, Fabricio Guariglia & Emeric Rogier, *The Selection of Situations and Cases by the OTP of the ICC*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 41, at 350, 357 (acknowledging that a lone communication will ordinarily be insufficient to prompt action, but maintaining that "all relevant communications contribute to the Office's overall information" and noting that Article 15 communications were received with respect to the situations in Kenya and Cote D'Ivoire).

102. For specific examples of this in response to the Vatican-targeted communication, *see infra* Parts VI, VII.

103. *See supra* notes 53–55 and accompanying text.

104. *See* Kersten, *Africa and the ICC*, *supra* note 63 (arguing that this is currently a losing effort for the Court and that the ICC should adopt "a professional communication strategy which does not shy away from political controversies or rely exclusively on legal arguments").

105. Karnavas, *supra* note 16, at 31 (criticizing a Cambodian political party that hired a law firm to engage in an Article 15-related public relations campaign).

information provider-generated publicity, however, it would first require an exception to the OTP policy of maintaining the confidentiality of its communications analyses.[106] This would free the OTP to render public and reasoned decisions, which might help to counter the erroneous inferences otherwise apt to be drawn when a communication is rejected.[107] In support of this approach, one might reasonably argue that the highly publicized nature of a communication warrants deviation from a policy that is designed to protect the confidentiality of information and the "safety, well-being and privacy" of information providers.[108] By its very nature, a highly publicized communication means there is no confidentiality to protect and that its authors don't fear reprisal for providing the information.

Consistent with this analysis, OTP has selectively made exceptions to its confidentiality policy in the wake of media reports and public inquiries.[109] Yet adopting more extensive exceptions to respond to strategic communications would likely mean public criticism of civil society, potentially alienating some of the key entities upon whom OTP relies for help in its investigations and prosecutions.[110] Moreover, OTP may be disinclined to deviate too far from its current practice, as relatively private analyses provide a certain amount of cover when communications are not acted upon. Keeping communications generally under wraps curtails public questions and criticism, which is particularly helpful when requests are rejected or permitted to linger indefinitely owing to some non-legal objective.[111] OTP might also see other advantages to maintaining the status quo, as greater transparency regarding

106. *See supra* note 6 and accompanying text.

107. For specific examples of erroneous inferences made in response to the Vatican-targeted communication, *see infra* Parts VI, VII.

108. INT'L CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE, at r. 49 (2013). In addition to Rule 49, Rule 46 has been cited by OTP in support of its confidential treatment of communications. *See id.* at r. 46 ("[T]he Prosecutor shall protect the confidentiality of such information and testimony or take any other necessary measures, pursuant to his or her duties under the Statute.").

109. *See, e.g.*, Elena Arekaljan, *APC's Petition: International Criminal Court to Probe Patience Jonathan*, NIGERIANNATION (Mar. 17, 2015), http://www.nigeriannation.com/news/apcs-petition-international-criminal-court-to-probe-patience-jonathan.aspx (describing an instance in which the OTP responded to a press inquiry by stating that "the Office of the Prosecutor of the International Criminal Court can confirm receipt of the communication referred to *since the sender of the communication has made this fact public in the media*") (emphasis added); *see also* Press Release, Int'l Criminal Court, The Determination of the Office of the Prosecutor on the Communication Received in Relation to Egypt, ICC-OTP-20140508-PR1003 (May 8, 2015) (providing "clarifying information on its determination regarding a communication received in relation to the situation in Egypt" after "recent media reports and enquiries from the public").

110. *See supra* notes 38–40 and accompanying text; *see also* Prosecutor v. Bemba Gombo, ICC-01/05-01/08-2721, Decision on the Admission into Evidence of Items Deferred in the Chamber's "Decision on the Prosecutor's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute," para. 26 (June 27, 2013) (permitting the Prosecution to submit numerous reports by NGOs in support of its case-in-chief). One of the reports was written by the Fédération Internationale des Droits de l'Homme (FIDH), *id.* paras. 5(c), 16, 18–21. The FIDH has filed and backed numerous, well-publicized Article 15 communications. *See, e.g.*, Press Release, FIDH, Cambodia: ICC Preliminary Examination Requested into Crimes Stemming from Mass Land Grabbing (Oct. 7, 2014), https://www.fidh.org/International-Federation-for-Human-Rights/asia/cambodia/16176-cambodia-icc-preliminary-examination-requested-into-crimes-stemming-from (detailing an Article 15 communication presenting the Cambodian government's land acquisition efforts as crimes against humanity).

111. *See, e.g., id.* (citing a fully viable communication known to the author that had not been acted upon for political reasons).

its selection policies could lead to a call for judicial intervention "on behalf of the victims who do not see their interests sufficiently taken into account by the OTP."[112]

Even setting these self-protective concerns aside, however, OTP arguably ought not to be saddled with the task of fashioning a remedy for the problems created by strategic communications. If anything, this merely augments the administrative burden that the communications process imposes on an already overtaxed organ of the Court.[113] Moreover, even assuming OTP were able to fine-tune its responses to address only those communications most likely to create dangerous misperceptions about the Court, this limited public commentary might have a chilling effect on communications, undermining rather than fostering victim access to the Court. Finally, it is doubtful that a legal response from OTP could constitute an effective counter to existing, widespread, and misleading publicity. As an initial matter, important ground will be lost in the time it takes to respond. More importantly, public rejections rife with legalese are unlikely to attract adequate media attention in a way that would effectively address the misperceptions already created.[114] Moreover, even in the unlikely event that an accessibly crafted rejection were to receive extensive media attention, these ideal conditions are unlikely to make the Court whole. As law has recognized elsewhere,[115] many of those who read the misleading publicity in the first instance will never see its subsequent correction.

In other words, irrespective of any Court-created response, the best way to protect the ICC in the court of public opinion is for information providers who have a vested interest in the Court's long-term success to exercise greater care in how they use and publicize the Article 15 communication process. On the most fundamental level, this means that the process should not be used as an "attention-getting strategy for advancing [a] non-ICC related agenda,"[116] no matter how laudable the alternative objectives, as these types of communications not only create unnecessary work for the Court, but present a distinct risk of inadvertently contributing to the ICC's perception problems. A closer analysis of the September 2011 Vatican-targeted communication helps to illustrate why this is so.

V. THE VATICAN-TARGETED COMMUNICATION: STRATEGIC OR GENUINE?

Before considering the ways in which the Vatican-targeted ICC effort lends unwitting credence to some of the most popular criticisms of the Court, it makes sense to first address whether the request for an ICC investigation was strategic in nature,

112. Kai Ambos, *Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik*, *in* INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 55, 58 (Wolfgang Kaleck et al. eds., 2007).

113. *See supra* notes 62, 64–66 and accompanying text.

114. It strains credulity to suppose that the legal reasons behind a decision not to investigate might attract press coverage comparable to that associated with a sensationalistic claim. For example, while a Lexis search reveals more than 100 articles in English that reported on the Vatican-targeted communication in the month after it was filed, a like search during the month after its rejection reveals fewer than twenty articles on the topic. *See generally* LEXIS ADVANCE, https://advance.lexis.com.

115. In libel law, a retraction in the same publication vehicle is ordinarily not a defense in a defamation action because "[t]housands may have read the libelous matter that never saw its refutation." Cass v. New Orleans Times, 27 La. Ann. 214, 219 (1875).

116. Karnavas, *supra* note 16, at 15.

or whether it was made with the genuine aim of securing Court action. After all, many of the statements made by the relevant information provider—the Center for Constitutional Rights (CCR) acting on behalf of the Survivor's Network of Those Abused by Priests (SNAP)—suggest the request was genuine and, if these assertions are true, the communication falls outside this Article's area of concern.

First, in one way or another, each of the three related filings the CCR submitted to the OTP on the matter "urge [the] office to initiate an investigation and prosecution of high-level Vatican officials."[117] In addition, those associated with the effort appealed to Vatican insiders to share evidence with the ICC Prosecutor,[118] requested victims come forward with evidence to support the communication,[119] and publicly called on the Court "to take [the] case seriously and do the right thing."[120] What is more, in response to the significant commentary generated by its September 2011 media campaign, the CCR specifically admonished those who supported its effort, but expressed doubt about its aim, maintaining that it "brought this case to the ICC because it belongs there—not only to shine a much needed and long overdue spotlight on the issue."[121] Nevertheless, other insider statements suggest that the endeavor was not really designed to bring about an ICC investigation or prosecution. Instead, the Vatican-targeted effort was described as part of an ongoing (and frustrating) attempt to incentivize the Church to alter its policies regarding priests accused of abuse.[122] In fact, as one leading SNAP figure explained the ICC effort, the group had to "try all

117. Communication Letter, *supra* note 18. *See* International Criminal Court, Victims' Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-Level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity and Torture as a Crime Against Humanity, at para. 82, ICC File No. OTP-CR-159/11 (Sept. 13, 2011), http://s3.documentcloud.org/documents/243877/victims-communication.pdf [hereinafter CCR September Filing] (describing a report noting "the prevalence of cases concerning institutions affiliated with the Catholic Church"); Letter from Pamela C. Spees, Senior Staff Attorney, Ctr. for Constitutional Rights, to Luis Moreno Ocampo, Prosecutor, Int'l Criminal Court (Apr. 11, 2012), https://ccrjustice.org/sites/default/files/attach/2014/12/CCR_SNAP_SupplementalICCSubmission%282012-04-11%29.pdf [hereinafter Letter Supplementing ICC Communication] (stating that the September 2011 filing "urged an investigation into the responsibility of four high-level Vatican officials" and that "the situation require[d] a prosecutor with international jurisdiction to undertake a serious and thoroughgoing investigation of the systemic nature of these crimes").

118. "I wanted to make an appeal to anyone in the Vatican . . . a special plea for those who work in churches or used to work in them, to come forward with the evidence . . . ." *Sex Abuse Victims Call for Vatican Insiders to Speak Out*, INTERAKSYON (Sept. 21, 2011), http://www.interaksyon.com/article/13493/sex-abuse-victims-call-for-vatican-insiders-to-speak-out (quoting Vincent Warren of the Center for Constitutional Rights (CCR) as also saying people with information "have to hand it to the ICC").

119. *Call for Bishops to Release Files*, IRISH TIMES (Sept. 13, 2011), http://www.irishtimes.com/news/call-for-bishops-to-release-files-1.883433.

120. *Id.*

121. Pam Spees, *In the Case Against Vatican Officials for Rape and Sexual Violence, We've Come to the End of the Beginning*, CTR. FOR CONST. RTS. (Sept. 27, 2011), http://www.ccrjustice.org/home/get-involved/tools-resources/inside-ccr/case-against-vatican-officials-rape-and-sexual-violence [hereinafter Spees, *We've Come to the End*].

122. "We've been doing this a long time, and it's just hard to figure out what we can do because we've tried so many things, and of everything we've tried nothing has succeeded to make church officials change their policies . . . ." *Group Seeks Investigation of Pope, Others*, BLADE (Sept. 14, 2011), http://www.toledoblade.com/Religion/2011/09/14/Group-seeks-investigation-of-Pope-others.html (quoting Survivor's Network of Those Abused by Priests (SNAP) President Barbara Blaine).

the channels" it could because the Church will change its approach "only when there is external pressure."[123]

Understandably, this external pressure did not materialize when the CCR first effectively (yet quietly) initiated the Article 15 process by email in May 2011.[124] Only the intense publicity campaign crafted to accompany its second such filing the following September had this intended effect.[125] This later submission, described by the CCR as a "complaint," was accompanied by a widely distributed press release proclaiming that "Vatican officials" had been charged with "crimes against humanity."[126] Within two weeks, more than 100 news articles appeared on the topic worldwide, thanks to an ambitious publicity operation, which included an in-person visit to The Hague where a CCR attorney "walk[ed] to the Court with victims to hand prosecutors boxes full of documents."[127] Victims were also invited to "[j]oin CCR and SNAP on it's [sic] European Tour,"[128] which included twelve city visits and ended in Rome in order to "bring the case to the Vatican's door."[129]

While this significant publicity campaign may seem designed to put pressure on the ICC Prosecutor to act, there is much to indicate otherwise. Indeed, even the attorney who authored the CCR filings publicly acknowledged that she was "not hopeful" about the prospects for an investigation.[130] What is more, this assessment was consistent with the views espoused by multiple academics and international criminal law practitioners who weighed in on the issue, both in the press and the legal

123. *Id.* (quoting SNAP President Barbara Blaine).

124. OTP provided the self-proclaimed Article 15 communication with the reference number "OTP-CR-159/11," the reference included in OTP's ultimate rejection of the matter, which refers to the communication it received in May 2011. Rejection Letter, *supra* note 19. Despite this and despite the fact that the communication itself is appropriately titled, the CCR website refers to the filing as a "preliminary communication." *SNAP v. the Pope, et al*, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/home/what-we-do/our-cases/snap-v-pope-et-al (last visited May 16, 2016).

125. "International human rights bodies have paid increasing attention to the crisis of sexual violence in the Catholic Church following CCR's filing, in September 2011, of a case with the International Criminal Court on behalf of SNAP against the former Pope and other high-level Vatican officials for crimes against humanity." Press Release, Ctr. for Constitutional Rights, Vatican Officials Questioned by Second UN Committee About Sexual Violence (May 5, 2014), http://ccrjustice.org/home/press-center/press-releases/vatican-officials-questioned-second-un-committee-about-sexual. The extreme nature of the campaign, described herein, is consistent with the conclusion that the Court's Article 15 mechanism was used strategically. *See, e.g.*, Lobel, *Courts as Forums*, *supra* note 10, at 560 (explaining how litigation and publicity "go together hand in hand as part of an overall strategy").

126. First September 2011 Press Release, *supra* note 1.

127. *Abuse Victims Seek Court Case Against Pope*, USA TODAY (Sept. 9, 2011), http://usatoday30.usatoday.com/news/religion/story/2011-09-13/international-court-pope-abuse/50389966/1.

128. *Join CCR and SNAP on It's European Tour- EUROPE*, CTR. FOR CONST. RTS. (last updated Sept. 15, 2011), http://www.ccrjustice.org/home/get-involved/events/join-ccr-and-snap-its-european-tour-europe.

129. First September 2011 Press Release, *supra* note 1; *see also* MICHAEL D'ANTONIO, MORTAL SINS: SEX, CRIME, AND THE ERA OF THE CATHOLIC SCANDAL 334–35 (2013) (stating that Megan Peterson, a victim, went with Pamela Spees to The Hague and several other press conferences). This was followed by other efforts that drew attention to the filing, including numerous additional press releases and advocacy pieces. *See, e.g.*, Press Release, Ctr. for Constitutional Rights, September 13 Marks One-Year Anniversary of International Criminal Court Filing on Vatican Officials for Crimes Against Humanity (Sept. 13, 2012), http://www.ccrjustice.org/home/press-center/press-releases/september-13-marks-one-year-anniversary-international-criminal (providing an update one year after the original filing). The following year, the CCR submitted yet another public filing. *See* Letter Supplementing ICC Communication, *supra* note 117.

130. *Abuse Victims Seek Court Case Against Pope*, *supra* note 127 (quoting CCR attorney Pam Spees).

blogosphere.[131] Significantly, most of these appraisals viewed the investigation request as destined to fail not because of political or other extraneous considerations. Rather, it was commonly observed that the relevant offenses fell short of the ICC's statutory requirements for crimes against humanity.[132] In addition, some experts pointed out that much of the conduct at issue predated the Court's temporal jurisdiction.[133] Before engaging with these critiques, then, it makes sense to consider these necessary prerequisites for the Court's jurisdiction over crimes against humanity.

A. Certain Threshold Requirements for ICC Action

As a starting point, the Court's temporal jurisdiction is prospective. Accordingly, the ICC may only consider matters that have occurred on or after July 1, 2002, the date upon which the Court's Statute entered into force.[134] In addition, the ICC may only consider conduct that falls within its designated subject matter jurisdiction.[135] With respect to crimes against humanity, the Court's Statute bestows jurisdiction only when any one of an extensive list of prohibited acts (which include rape and torture) is committed "as part of a widespread or systemic attack directed against a civilian population."[136] Moreover, the word "attack" is a legal term of art. In order to establish an "attack," the Statute requires both the "multiple commission of [prohibited] acts" against a civilian population and that these offenses were committed "pursuant to or in furtherance of a State or organizational policy to commit such attack."[137]

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131. "I don't know if this is the most ludicrous thing I've seen, but I certainly don't expect it to go anywhere . . . ." Kevin Jon Heller, Response to *Can the Vatican Be Subject to ICC Prosecution?*, OPINIO JURIS (Sept. 13, 2011, 8:10 PM), http://opiniojuris.org/2011/09/13/can-the-vatican-be-subject-to-icc-prosecution/ [hereinafter Heller, Response]; *see also* Francis X. Rocca, *Victims Say Criminal Charges Against the Pope Not a Stunt*, USA TODAY (Sept. 14, 2011), http://usatoday30.usatoday.com/news/religion/story/2011-09-13/pope-sexual-abuse/50389998/1 (citing Italian professor Giorgio Sacerdoti's conclusion that "[t]here will be no follow up" to the filing which will instead "be set aside"); Mac McClelland, *Putting the Pope on Trial*, MOTHER JONES (Sept. 19, 2011), http://www.motherjones.com/rights-stuff/2011/09/pope-vatican-sex-abuse-trial (opining that "it's extremely unlikely this complaint, one of many thousands the ICC has received, is going anywhere").

132. *See, e.g.*, Julian Ku, *Can the Vatican Be Subject to ICC Prosecution?*, OPINIO JURIS (Sept. 13, 2011), http://opiniojuris.org/2011/09/13/can-the-vatican-be-subject-to-icc-prosecution/ (concluding that the filing suffered from "massive jurisdictional issues . . . as well as substantive issues related to the ICC's jurisdiction"); Dov Jacobs, *The ICC Should Resist Its "Boy Scout Mentality" in Relation to Vatican "Crimes Against Humanity" for Child Abuse*, SPREADING THE JAM (Sept. 15, 2011), http://dovjacobs.com/2011/09/ (pointing out the limits of the Court's temporal jurisdiction and noting that the communication "fails to convince" regarding the substantive requirements for crimes against humanity).

133. *See, e.g.*, *Abuse Victims Urge ICC to Prosecute the Pope*, RADIO NETH. WORLDWIDE (Sept. 13, 2011), https://www.rnw.org/archive/abuse-victim-urge-icc-prosecute-pope (reporting Goran Sluiter's opinion that temporal jurisdiction was doubtful); Paddy Agnew, *Abuse Victims File Complaint Against Pope with Criminal Court in The Hague*, IRISH TIMES (Sept. 14, 2011), http://www.irishtimes.com/news/abuse-victims-file-complaint-against-pope-with-criminal-court-in-the-hague-1.598547 (reporting that "[c]ommentators said that it was unlikely the court would take on this case, given many of the crimes took place before 2002").

134. Rome Statute, *supra* note 5, art. 11(1).

135. *Id.* art. 5.

136. *Id.* art. 7(1). In addition, the perpetrator of the act must know that his conduct is part of a widespread or systematic attack against a civilian population. *Id.*

137. *Id.*

B. Temporal Jurisdiction Problems?

Given the limits placed on the Court's temporal jurisdiction, it is perhaps of little surprise that some have identified the Vatican-targeted communication as potentially problematic. Indeed, while there is substantial evidence that children and other vulnerable persons were sexually abused by Catholic clergy members on a massive scale, the overwhelming majority of this information relates to conduct that occurred before the ICC became operational in mid-2002.[138] This timing is particularly interesting as, at least in the United States, 2002 marked a turning point for the Church with respect to its handling of sexual abuse claims.[139] That year, press coverage on the issue surpassed anything previously seen when reports surfaced that U.S. bishops "had shuffled accused abusers from parish to parish without informing the police or public."[140] What followed was a number of reform efforts, including the June 2002 adoption of the Charter for the Protection of Children and Young People,[141] a document whose requirements include prompt response mechanisms for allegations of sexual abuse, mandatory reporting to public authorities, and cooperation with consequent investigations.[142] While implementation of the Charter has been inconsistent at best,[143] a flaw unfortunately shared by comparable reforms adopted abroad,[144] presumably these efforts have nevertheless pared down the number of clergy sex offenses over which the Court might potentially have jurisdiction.[145] Even more critically, as the following Part demonstrates, these reform endeavors (and the apologies that accompanied them) contribute to the communication's subject matter jurisdiction deficiency.

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138. *See, e.g.*, CCR September Filing, *supra* note 117, at 8–31 (providing an overview of the abuse in residential schools in Canada, the last of which closed in 1996; discussing reports generated in Ireland that covered events that took place between 1962 and 2002, 1914 and 2004, 1974 and 2004, and 1996 and 2009; and describing numerous investigations in the United States, all but one of which were launched in 2002 and 2003).

139. "News stories about instances of clergy sexual abuse had been trickling out for decades, but not until 2002 did the abuse scandal become a major national story." *The Pope Meets the Press: Media Coverage of the Clergy Abuse Scandal*, PEW RES. CTR. (June 11, 2010), http://www.pewforum.org/2010/06/11/the-pope-meets-the-press-media-coverage-of-the-clergy-abuse-scandal/ (noting that once a U.S. newspaper ran a series on the topic, it "triggered an avalanche of reporting on sexual abuse by priests in the United States").

140. *Id.*

141. *See, e.g.*, Laurie Goodstein & Sam Dillon, *Bishops Set Policy to Remove Priests in Sex Abuse Cases*, N.Y. TIMES (June 15, 2002), http://www.nytimes.com/2002/06/15/national/15BISH.html?pagewanted=all (describing the new policy to combat the alleged abuses).

142. U.S. CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE, arts. 2, 4 (2002), http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/Charter-for-the-Protection-of-Children-and-Young-People-revised-2011.pdf.

143. *See, e.g.*, Stacy St. Clair et al., *Priest Cases Show Abuse Issues Persist*, CHI. TRIB. (Apr. 7, 2013), http://articles.chicagotribune.com/2013-04-07/news/ct-met-secret-priest-files-20130407_1_priest-cases-joliet-diocese-personnel-records (noting that records obtained by the newspaper contradicted Charter promises and providing several examples, including an instance of a priest who continued parish work for four years after the passage of the Charter, despite previous and numerous accusations of his inappropriate behavior with young boys).

144. For example, the Irish Bishop's Conference agreed in 1996 on a set of procedures to govern allegations of clerical child sexual abuse. Commission of Investigation, Report into the Catholic Diocese of Cloyne, para. 1.16 (2011). These guidelines, however, "were not fully or consistently implemented." *Id.* para. 1.17.

145. *See Charter for the Protection of Children and Young People*, DIOCESE OF WILMINGTON, http://www.cdow.org/abuse_report.html (last visited June 13, 2016) (chronicling the ways in which the diocese had complied with the Charter and the likely results of this compliance).

C. *Substantive Jurisdiction Problems*

Indeed, even assuming that the clergy sex offenses committed since July 1, 2002 are of a scale that might be deemed "widespread,"[146] this fact alone is insufficient to support a charge of crimes against humanity at the ICC. Rather, these crimes will only fall within the Court's jurisdiction if they were committed as part of an attack against a civilian population,[147] which the Statute defines as "a course of conduct involving the multiple commission of acts [such as rape] against any civilian population, *pursuant to or in furtherance of* a State or organizational policy to commit such attack."[148] In other words, "[a]n aggregate of crimes by individuals acting on their own initiative do not amount to an 'attack.'"[149] Rather, there must be "an element of planning or direction"[150] and, as ICC case law makes clear, "the policy to carry out the attack against the civilian population must be attributed to a State or an organisation."[151]

What is more, this policy requirement takes on even greater significance when read in conjunction with the ICC's Elements of Crimes,[152] a statutorily recognized

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146. "Widespread," as defined in ICC jurisprudence, requires crime commission on a large scale: "massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims." Prosecutor v. Bemba Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 83 (June 15, 2009). The Vatican-targeted communications also allege systematicity, which ICC case law has defined in part as "an organised plan in furtherance of a common policy." Prosecutor v. Katanga, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, para. 397 (Sept. 30, 2008). Some scholars lean towards equating the term "systematic" in Article 7 with the "policy" requirement that appears in the provision. *See, e.g.*, Roger S. Clark, *History of Efforts to Codify Crimes Against Humanity: From the Charter in Nuremburg to the Statute of Rome*, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 8, 21 (Leila Nadya Sadat ed., 2011) (opining that "'[p]olicy' (of a state or organization) is pretty close to 'systematic'"); *see also* Larissa van den Herik, *Using Custom to Reconceptualize Crimes Against Humanity*, *in* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 80, 94 (Shane Darcy & Joseph Powderly eds., 2010) (concluding that "the policy requirement of Article (7)(2)(a) excludes the possibility that crimes against humanity are committed as part of an attack that is widespread but not systematic"). Others maintain that the term "systematic" "entails a higher threshold of associative activity and effort to coordinate crimes" than does the policy requirement. Darryl Robinson, *Crimes Against Humanity: A Better Policy on 'Policy'*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 41, at 705, 714 (citing to various authorities); *see also* Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 50–51 (1999) [hereinafter Robinson, *Defining Crimes Against Humanity*] (advancing a similar interpretation). Because this Article finds the policy element lacking, this negates a finding of systematicity, irrespective of which approach is followed in interpreting the term. Accordingly, it is not necessary to consider this aspect of the communication's claim.

147. Rome Statute, *supra* note 5, art. 7(1).

148. *Id.* art. 7(2)(a) (emphasis added).

149. Darryl Robinson, *Essence of Crimes Against Humanity Raised by Challenges at ICC*, EJIL: TALK! (Sept. 27, 2011), http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/.

150. Robinson, *Defining Crimes Against Humanity*, *supra* note 146, at 48 (noting that the decision to expressly include the policy element was controversial and part of a necessary compromise).

151. Prosecutor v. Gbagbo, ICC-02/11-01/11-656, Decision on the Confirmation of Charges Against Laurent Gbagbo, para. 217 (June 12, 2014) (noting that this is required by Article 7(2)(a) of the Statute); *see also* Prosecutor v. Mudacumura, ICC-01/04-01/12-1, Decision on Prosecutor's Application under Article 58, para. 22 (July 13, 2012) (providing that the policy must have "a civilian population as the *primary object* of the attack").

152. "The Elements of Crimes impose stricter discipline on the prosecution of ICC crimes than found only in the Statute." David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 92 (2002).

document designed to assist the Court in interpreting and applying the Statute's substantive provisions.[153] According to the Elements, the phrase "'policy to commit such attack' requires that the State or organization *actively promote or encourage* such an attack against a civilian population".[154] The Elements further provide that, in exceptional circumstances, the policy element can be accomplished by a failure to act, but only when there is a deliberate omission that "is consciously aimed at encouraging such attack."[155] Considering these provisions in conjunction with the Statute's express requirement, one sees the drafters' intent to place "a special emphasis on the policy element."[156] Of critical importance for the Vatican-targeted communication, the combined effect is that crimes directed against the civilian population that are "simply tolerated or condoned by a state or an organization would not constitute an attack.... *These crimes would therefore not qualify as crimes against humanity under the Statute.*"[157]

This, in turn, leads to the fatal deficiency of the Vatican-targeted filings. At most, these filings suggest that Church officials (appallingly) accepted and contributed to the risk of continued clergy offenses while employing a policy aimed at self-preservation.[158] Indeed, even Geoffrey Robertson—the first individual to actively make the case for prosecuting the Pope for crimes against humanity—concedes as much.[159] In his 2010 book, *The Case of the Pope*, Robertson acknowledges that "[i]t could never be said

153. Rome Statute, *supra* note 5, art. 9 (dictating the requirements for adoption and amendments and mandating that the document's provisions be consistent with the Statute).

154. INT'L CRIMINAL COURT, ELEMENTS OF CRIMES, art. 7, para. 3 (2002) [hereinafter ELEMENTS OF CRIMES] (emphasis added).

155. *Id.* at 5 n.6 (expressly providing that the policy requirement "cannot be inferred solely from the absence of any governmental or organizational action"). As Ambos points out, the state or organization must also have a duty to act, and the ability to protect against the attack, before it can be liable for this omission. 2 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: THE CRIMES AND SENTENCING 71 (2014).

156. 1 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL PART 281 (2013).

157. Paola Gaeta, *War Crimes and Other International 'Core' Crimes*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 737, 756 n.59 (Andrew Clapham & Paola Gaeta eds., 2014) (emphasis added). Cassese uses very similar language in his book. ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 106–07 (3d ed. 2013) (noting that the Rome Statute's requirements are more stringent than is dictated by customary international law and criticizing the requirement by asking, "[w]ould it not be sufficient for the practice to be accepted, or tolerated, or acquiesced in by the state or the organization, for those offences to constitute crimes against humanity?"). Grover appears to misunderstand this quoted language, however, by interpreting it as a call for broadening the reach of the crime under the Rome Statute. LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 276–77 (2014).

158. *See, e.g.*, CCR September Filing, *supra* note 117, paras. 183–84. Similarly, an investigation conducted in Ireland concluded that incidents of sexual abuse "were managed primarily with a view to protecting the Congregation and the Institution from the harm that would be done if [it] became public.... The policy facilitated further abuse when offenders were transferred within the Congregation or permitted to leave in good standing." COMM'N TO INQUIRE INTO CHILD ABUSE, 1 THE COMMISSION REPORT: ST JOSEPH'S INDUSTRIAL SCHOOL, ARTANE ('ARTANE'), 1870–1969, para. 7.845(3) (2009), http://www.childabusecommission.ie/rpt/pdfs; *see also* Comm. on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, para. 29, U.N. Doc. CRC/C/VAT/CO/2 (Feb. 25, 2014) (observing that "in dealing with allegations of child sexual abuse, the Holy See has consistently placed the preservation of the reputation of the Church and the protection of the perpetrators above the child's best interests").

159. GEOFFREY ROBERTSON, THE CASE OF THE POPE: VATICAN ACCOUNTABILITY FOR HUMAN RIGHTS ABUSE 143 (2010).

that the Pope or [other Church officials] were active in encouraging sex abuse . . . however much they should have been aware that 're-assigning' paedophiles was a green light for re-offending".[160] In fact, Robertson ultimately responded to the many legal experts who criticized his campaign as doomed to fail under the Rome Statute[161] by noting "common ground" between him and his critics, "especially over the difficulty under the chapeau of Article 7 of the Rome Statute as a result of those meddlesome 'Elements of Crime.'"[162]

Accordingly, it is of little surprise that the Vatican-targeted communications—submitted shortly after Robertson's well-publicized campaign—suffered similar criticism, with multiple legal experts quickly concluding that the conduct that forms the basis of the Vatican-targeted communications falls outside of the ICC's competence.[163] Yet, just as Robertson's provocative newspaper editorials and associated efforts[164] successfully "generated enormous media coverage,"[165] so has the campaign attached to the Vatican-targeted communications. And, just as it was speculated that—jurisdictional deficiencies notwithstanding—Robertson's endeavor could "be a useful PR exercise" rather than something that would bring about legal

160. *Id.* (emphasis removed). Robertson goes on to blame the Elements of Crimes as the real impediment to prosecuting the Pope and then claims that the heightened policy requirement found in the Elements "water[s] down" the Statute's provisions regarding command responsibility. *Id.* at 143–44. This second claim is erroneous, however, as it links two unrelated matters. Command responsibility, as a mode of liability, is an irrelevant consideration unless and until the Court has subject matter jurisdiction. It is this latter issue that the Elements address, by assisting the Court in its interpretation and application of the Statute's provision on crimes against humanity. As Jacobs notes, the CCR filing suffers from a similar flaw. Jacobs, *supra* note 132 (explaining that modes of liability are "'subsidiary' to the main crime, which still has to be constituted").

161. *See, e.g.*, Dapo Akande, *Questioning the Statehood of the Vatican*, EJIL: TALK! (Sept. 15, 2010), http://www.ejiltalk.org/questioning the statehood-of-the-vatican/ (noting it would be "difficult to argue" that there was an attack directed against the civilian population); Marko Milanovic, Comment to *Can the Pope Be Sued? Maybe . . .*, OPINIO JURIS (Apr. 3, 2010, 7:42 AM), http://opiniojuris.org/2010/04/03/can the pope be sued maybe/ (opining that it was "dubious in the extreme that the actual crimes in question can be qualified as crimes against humanity" particularly because of the ICC's policy element); Jordan J. Paust, Comment to *Can the Pope Be Arrested in Connection with the Sexual Abuse Scandal?*, EJIL: TALK! (Apr. 14, 2010, 7:32 PM), http://www.ejiltalk.org/can-the-pope-be-arrested-in-connection-with-the-sexual-abuse-scandal/ (observing that the "extremely limited definition of crimes against humanity" in the Rome Statute makes such a prosecution problematic); Marko Milanovic, *Yet More on Arresting the Pope*, EJIL: TALK! (Apr. 25, 2010), http://www.ejiltalk.org/yet-more-on-arresting-the-pope/ (describing the prospects for making such a case as "difficult if not impossible").

162. Dapo Akande, *Geoffrey Robertson Responds on the Statehood of the Vatican*, EJIL: TALK! (Oct. 13, 2010), http://www.ejiltalk.org/geoffrey-robertson-responds-on-the-statehood-of-the-vatican/.

163. *See, e.g.*, Jason Walsh, *Why the ICC Likely Won't Charge Pope over Catholic Church Sex Abuses*, CHRISTIAN SCI. MONITOR (Sept. 15, 2011), http://www.csmonitor.com/World/Europe/2011/0915/Why-the-ICC-likely-won t charge-pope-over-Catholic-Church-sex-abuses (citing British attorney Neil Addison's conclusion that the conduct alleged did not constitute crimes against humanity); Laurie Goodstein, *Abuse Victims Ask Court to Prosecute the Vatican*, N.Y. TIMES (Sept. 13, 2011), http://www.nytimes.com/2011/09/14/world/europe/14vatican.html (attributing a similar conclusion to Mark Ellis).

164. Geoffrey Robertson, Opinion, *Put the Pope in the Dock*, GUARDIAN (Apr. 2, 2010), http://www.theguardian.com/commentisfree/libertycentral/2010/apr/02/pope-legal-immunity-international-law; Geoffrey Robertson, *Pope Must Answer for Crimes Against Humanity: No Legal Immunity – the Vatican Should Feel the Full Weight of International Law*, SYDNEY MORNING HERALD (Apr. 4, 2010), http://www.smh.com.au/it-pro/pope-must-answer-for-crimes-against-humanity-20100403-rkro.html.

165. Dapo Akande, *Can the Pope Be Arrested in Connection with the Sexual Abuse Scandal?*, EJIL: TALK! (Apr. 14, 2010), http://www.ejiltalk.org/can-the-pope-be-arrested-in-connection-with-the-sexual-abuse-scandal/.

action,[166] so has the Article 15 communication venture been deemed "more of an ethical statement before the international community than a real attempt at a court case."[167] In other words, and as is the general consensus,[168] the Vatican-targeted investigation request was a strategic communication and, as will be demonstrated, one whose subject matter jurisdictional deficiency creates unique perception problems for the Court.

VI. THE PERCEPTION PROBLEMS CREATED BY IGNORING THE POLICY REQUIREMENT

A. Decontextualizing Crimes Against Humanity

Because there is no evidence to indicate that Church officials actively promoted or encouraged an attack against its most vulnerable members, nor indeed that there was a Church policy to commit such an attack, these necessary conditions for the Rome Statute's definition of crimes against humanity are simply not addressed in the media campaign associated with the Vatican-targeted communication. In fact, rather than acknowledge the ICC requirement of a widespread or systematic attack *directed against a civilian population*, the relevant press releases instead refer to "the systematic and widespread concealing of rape and child sex crimes."[169] This, coupled with other statements, such as that "[t]he jurisdiction of the ICC includes rape, sexual violence, and torture as crimes against humanity,"[170] suggests that multiple ordinary crimes are sufficient to invoke the Court's jurisdiction.

Accordingly, the Vatican-targeted effort—presumably inadvertently—employs a technique long embraced by Court opponents in their quest to create alarm about the reach of the ICC. Indeed, in bids to engender concerns about "an activist Court and Prosecutor . . . broaden[ing] the Statute's language in an essentially unchallengeable fashion,"[171] ICC adversaries routinely uncouple the underlying crimes from the contextual elements required for crimes against humanity. One example of this is in John Bolton's 1998 congressional testimony in which he attacks the Statute's provision

166. Marko Milanovic, Comment to *Even More on Legal Action Against the Pope: It Looks Like it Will Happen*, OPINIO JURIS (Apr. 14, 2010, 6:15 AM), http://opiniojuris.org/2010/04/13/even-more-on-legal-action-against-the-pope-it-looks-like-it-will-happen/.

167. Walsh, *supra* note 163 (quoting University of Westminster Professor David Chandler).

168. *See, e.g.*, Heller, Response, *supra* note 131 (concluding that the filing was "clearly designed to raise the profile of the systematic abuse"); Ku, *supra* note 132 (concluding that the "CCR has already gotten most of what they want out of this filing, in terms of media coverage and public awareness"). Similarly, Mark Ellis, Executive Director of the International Bar Association, noted that the CCR allegations did not seem to fit the ICC definition of Crimes against Humanity, and that the CCR's request for an investigation was not in line with "why and how the I.C.C. was created," but that "the filing does something that's important. It raises awareness." Goodstein, *supra* note 163.

169. First September 2011 Press Release, *supra* note 1; Press Release, Ctr. for Constitutional Rights, Major Human Rights Report Affirms that Sexual Abuse by the Clergy is "Torture, Inhuman and Degrading Treatment," (Sept. 26, 2011), http://www.ccrjustice.org/home/press-center/press-releases/major-human-rights-report-affirms-sexual-abuse-clergy-torture.

170. Press Release, Ctr. for Constitutional Rights, Embattled Clergy Sex-Abuse Survivors Submit New Evidence to International Criminal Court (Apr. 11, 2012), https://ccrjustice.org/home/press-center/press-releases/embattled clergy sex abuse survivors submit new evidence.

171. Bolton Statement, *supra* note 79, at 59.

on crimes against humanity for including "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[172] Describing the language as "vague and elastic," Bolton paints a concerning picture about the unlucky President who "guesses wrong" regarding what constitutes an inhumane act.[173] Designedly missing from this doomsday scenario, however, is the fact that this leader's plight is hardly a sympathetic one, as criminal liability could only be incurred at the ICC if there were in fact a state policy in place to commit an attack against a civilian population. Consequently, by similarly disregarding the Statute's contextual requirements, which were designed to create a "reasonably high threshold" for such crimes,"[174] the Vatican-targeted effort creates the problematic impression that the Court's subject matter jurisdiction is far broader than it actually is.

Indeed, by failing to note the Statute's requirement of an attack against a civilian population and instead asserting that there are "two crimes: the rape or sexual violence committed by individual clergy and then the cover-ups . . . by church officials in the aftermath,"[175] the publicity campaign makes credible other—and potentially even more damaging—claims made against the ICC. In particular, this disaggregation suggests—wrongly—that critics are correct in maintaining that it is "bit deceptive" to state that the Court's reach is limited to its four core crimes.[176]

All this, of course, creates a misleading picture of the ICC and one that is consistent with the view made popular by Court opponents. It also contrasts sharply with reality and a definition of crimes against humanity whose contextual requirements expressly include a policy element. As David Scheffer—who led the US delegation at Rome—explained to Congress, the Statute requires "a magnitude test for the triggering of charges of crimes against humanity" that would enable the United States to "easily defeat" any claims made against its forces for these crimes.[177] What is more, it is widely believed that the Statute's policy element—its requirement that the attack must involve crimes committed against a civilian population pursuant to or in furtherance of a state or organizational policy—exceeds that which is required for

172. Rome Statute, *supra* note 5, art. 7(1)(k).

173. Bolton Statement, *supra* note 79, at 60.

174. David J. Scheffer, *War Crimes and Crimes Against Humanity*, 11 PACE INT'L L. REV. 319, 334 (1999); *see also* Claus Kress, *On the Outer Limits of Crimes Against Humanity: The Concept of Organization Within the Policy Requirement: Some Reflections on the March 2010 ICC* Kenya *Decision*, 23 LEIDEN J. INT'L L. 855, 861 (2010) (noting that "[t]he contextual requirement of crimes against humanity reflects the wish of states that these . . . rather heavy restrictions on their sovereignty only apply in particular instances of human rights violations").

175. Spees, *We've Come to the End*, *supra* note 121.

176. Ronald J. Rychlak & John M. Czarnetsky, *Federalism and Separation of Powers: Federalism and the International Criminal Court*, 10 ENGAGE J. FEDERALIST SOC'Y PRAC. GROUPS 50, 50 (2009) (asserting that the Court also has jurisdiction over crimes like forced pregnancy, while failing to acknowledge the additional requirements for crimes against humanity). Somewhat ironically, both of these authors served as advisers to the Holy See's delegation at Rome. *Id.*

177. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. On Int'l Operations of the S. Comm. on Foreign Relations*, 105th Cong. 17–18 (1998) (prepared statement of Hon. David J. Scheffer) [hereinafter "Scheffer Statement"] (noting that U.S forces are not trained to commit crimes against humanity); *see also* Bartram S. Brown, *The Statute of the ICC: Past, Present, and Future*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 61, 70 (Sarah B. Sewell & Carl Kaysen eds., 2000) (concluding that the Statute's crimes against humanity provision has a "high jurisdictional threshold [that] goes well beyond the requirements of general international law").

crimes against humanity under customary law.[178] Cassese, for example, lamented the fact that conduct "simply tolerated or condoned by a state or an organization would not constitute an attack," noting that "[c]learly, this requirement goes beyond what is required under international customary law."[179]

For Scheffer, this higher threshold provided a useful and compelling counter to claims that the United States should be fearful of the Court. When asked whether the ICC placed Americans in danger, Scheffer's "no" answer explained that the United States could always take steps to preempt Court action,[180] but that this would only be necessary "if in fact we have a government that does plot and plan crimes against humanity."[181] Yet those who read the Vatican-targeted communication will be left with a decidedly different impression: That leaders can be hailed before the Court for crimes against humanity for policies that *don't* in fact target the civilian population, but rather that inadvertently contribute to the commission of the underlying crimes. This is because the communication maintains that the Statute's policy requirement is met by Church actions (such as "priest shifting") and inactions "that facilitated, promoted or otherwise encouraged the attack."[182] Yet, as noted, establishing an "attack" under the Rome Statute requires more than simply identifying an organizational policy that may *enable* the commission of the underlying crimes.[183] Rather, as the Court's jurisprudence has expressly recognized, "[t]he very language of the Statute and Elements of Crimes requires that a course of conduct establishing the existence of an attack be executed 'pursuant to or in furtherance of a State or organizational policy' *to attack a civilian population*."[184]

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178. The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber rather famously adopted a lower (policy-free) threshold for crimes against humanity, concluding that "'[t]here was nothing in the [ICTY] Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes." Prosecutor v. Kunarac, Case No. IT 96-23, IT-96-23/1-A, Judgment, para. 98 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (noting, in accompanying footnote 114, "some debate" in Tribunal jurisprudence as to whether a policy or plan is a required element of crimes against humanity under customary international law); *see also* Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 271–83 (2002) (adopting the position that there is no policy requirement for crimes against humanity under customary international law). *But see* William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 959 (2008) (criticizing the *Kunarac* decision's conclusion that there is no policy requirement under customary international law and decrying the accusation as a "results oriented political decision").

179. CASSESE ET AL., *supra* note 157, at 107.

180. *See* Rome Statute, *supra* note 5, art. 17(1) (providing that a case is inadmissible at the ICC if it is or has been the subject of a genuine, domestic investigation or prosecution).

181. THE RECKONING (Renaissance Films 2003).

182. CCR September Filing, *supra* note 117, para. 183.

183. For example, while a majority of the Pre-Trial Chamber accepted that a policy to punish and expel civilians from the Rift Valley was sufficient to meet the requirements of Article 7(2)(a), it found that a policy to gain political power and a uniform voting block "may not aim at committing an attack against the civilian population" and therefore "falls outside the legal framework of crimes against humanity." Prosecutor v. Ruto, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 213 (Jan. 23, 2012) (explaining that this political aim might instead provide a motive or purpose for a policy to commit an attack).

184. Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgment Pursuant to Article 74 of the Statute, para. 1114 (Mar. 7, 2014) (emphasis added). This aligns with the provision in the Elements of Crimes that addresses policy by omission; a deliberate failure to act may constitute a policy when it is "consciously aimed at encouraging such an attack." ELEMENTS OF CRIMES, *supra* note 154, at 5 n.6; *see also Katanga*, ICC-01/04-01/07-3436, para. 1108 (providing that the term "policy" in Article 7(2)(a) "refers essentially to the

B. Legitimacy Concerns

Despite this shortcoming in the investigation request, one might nevertheless be inclined to defend the Vatican-targeted effort as an action that falls within the proper scope of advocacy. After all, because "law is not always clear and never is static," lawyers are generally permitted to argue for its extension or modification—even when they believe their contentions will ultimately fail—provided that "they can make good faith arguments in support of their clients' positions."[185] Such arguments in this case could cite to the work of respected jurists that calls for a broad interpretation of Article 7(2)(a)'s policy requirement, including claims that a policy can be established by demonstrating criminal negligence and recklessness as to the underlying offences[186] and even that the policy behind the attack may be met by "tolerance[] or acquiescence."[187]

Notably, however, these broad interpretations of the policy requirement are difficult (if not impossible) to harmonize with the explicit language of the Statute. For example, the latter expressly requires the commission of multiple, prohibited acts "pursuant to or in furtherance of a State or organizational policy to commit such attack," with "such attack" referring to the immediately preceding language of an "[a]ttack *directed against* the civilian population" (emphasis added).[188] As Groome rightly points out, "the phrase 'directed against' denotes something purposeful—not accidental."[189] Accordingly, the argument that a policy that negligently or recklessly contributes to the commission of the underlying crimes could satisfy the requisite statutory threshold completely contradicts the ordinary meaning of this statutory language.[190] By the same token, while a policy to commit an attack against a civilian population could certainly be effectuated by deliberate inaction,[191] the same cannot be said of a policy that merely tolerates or acquiesces in the commission of the underlying crimes. While reprehensible, neither negligence, recklessness, tolerance, nor acquiescence fulfills the express statutory requirement of a state or organizational policy to commit an attack directed against the civilian population.

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fact that a State or organisation intends to carry out an attack against a civilian population"). Similarly, the decision refers to "State[s] or organisation[s] seeking to encourage an attack against the civilian population." *Id.* para. 1109. In addition, ICC jurisprudence has interpreted the phrase "directed against" a civilian population to mean "that the civilian population must be the *primary object* of the attack." Prosecutor v. Bemba Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 76 (June 15, 2009).

185. MODEL RULES OF PROF'L CONDUCT r. 3.1 cmt. (2014). The relevant rule provides, in pertinent part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." *Id.* r. 3.1.

186. Dermot Groome, *The Church Abuse Scandal: Were Crimes Against Humanity Committed?*, 11 CHI. J. INT'L L. 439, 464 (2011).

187. 2 AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, *supra* note 155, at 72.

188. Rome Statute, *supra* note 5, art. 7(2)(a).

189.. Groome, *supra* note 186, at 462.

190.. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S 331.

191.. Indeed, the Elements of Crimes recognize as much by noting that, in exceptional cases, the policy requirement may be met by "a deliberate failure to take action which is consciously aimed at encouraging such attack." ELEMENTS OF CRIMES, *supra* note 154, at 5, n.6.

Critically then, these shortcomings point to a distinct difference between what constitutes ethically permissible legal advocacy and what is good for the Court. Indeed, in order for the ICC to enjoy normative legitimacy, it must have the "right to rule,"[192] something that would be lacking should the Court extend its subject matter jurisdiction beyond the boundaries delineated in its agreed-upon Statute. As a result, advocating a move in this direction empowers ICC opponents in their dire predictions of an activist court with unchallengeable and unlimited jurisdiction.[193] This, in turn, runs the risk of undermining the ICC's perceived or sociological legitimacy, creating questions about whether the Court can be trusted to adhere to its constitutive document.[194]

Thus far, then, we have noted a series of perception problems stemming from the Vatican-targeted communication's subject matter jurisdictional shortcomings, the substance of which varies depending upon the relevant audience's familiarity with the Court's Statute. Those unacquainted with the Rome Statute's provisions will be apt to conclude that there are almost no limits to the Court's jurisdiction and that leaders may be called to account for crimes against humanity irrespective of their connection to the commission of the underlying crimes. By contrast, those conversant with the Statute's language will be apt to question the ICC's fidelity to the language negotiated and then agreed upon in Rome, prompting questions about the new institution's normative and sociological legitimacy.

C. Additional Costs

While the above discussion introduces some new problems created by the Vatican-targeted effort, it also bears noting the ways in which the campaign specifically contributed to a number of the general costs of strategic communications identified earlier in this work. First among these observations is that the strategic communication created unnecessary work for the ICC's chronically underfunded OTP, which attributed the two-year delay between the first communication and its ultimate rejection to the necessity for "meaningful review."[195] In addition, the highly publicized September 2011 submission created a host of intangible costs for the Court stemming from the decision to describe the communication as a "complaint"[196] that "Charges Vatican Officials with 'Crimes Against Humanity.'"[197] This fostered the

192.. Buchanan & Keohane, *supra* note 46, at 405.

193.. *See, e.g.*, Bolton Statement, *supra* note 79, at 59 (maintaining in addition that the ICC "is—most emphatically—*not* a Court of limited jurisdiction").

194.. *See, e.g.*, Buchanan & Keohane, *supra* note 46, at 407 (noting that this a critical component for securing the state support necessary for the Court's long-term success); *see also* Bodansky, *supra* note 45, at 709–10 (noting that state support for an institution is dependent upon "whether they trust it to make good decisions").

195. Rejection Letter, *supra* note 19. It also bears noting that the use of limited resources to address strategic investigation requests contributes to the glacial pace of the ICC process, a marked source of post-operational criticism for the ICC. *See, e.g.*, Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES (Apr. 2, 2006), http://www.nytimes.com/2006/04/02/magazine/02darfur.html?pagewanted=print&_r=0 (concluding that the ICC's work is being conducted "[s]lowly, too slowly for some").

196. *SNAP v. the Pope, et al*, *supra* note 124. *See, e.g.*, Press Release, Ctr. for Constitutional Rights, Dutch Commission Report Highlights Need for International Response to Clergy Sex Abuse (Dec. 16, 2011), http://www.ccrjustice.org/newsroom/press-releases/dutch-commission-report-highlights-need-international-response-clergy-sex-abuse (stating that the CCR had filed a "complaint" against the pope).

197. *ICC Vatican Prosecution*, CTR. FOR CONST. RTS. (Sept. 13, 2011), http://ccrjustice.org/

impression both that the Court's jurisdiction has been successfully invoked and that external actors—specifically, members of civil society—have the ability to bring charges at the Court without any type of internal vetting process.[198] Moreover, by making it seem as though specific individuals were facing ICC charges, with media commentary and headlines in turn propagating this mistake,[199] the Court was made to appear as a forum that affords the "unseemly prospect" of targeting specific individuals and the opportunity to manipulate its docket in order to "settle scores."[200] Even more problematically, by successfully creating these misimpressions, the effort suggests that critics were right to worry about Court action making "dramatic news," irrespective of the merits of the matter at issue or its eventual outcome.[201]

Perhaps the most troubling consequences of the Vatican-targeted campaign, however, stem from the misperceptions created for the victims of clergy sexual abuse. By fostering the impression that there were (or would be) ICC cases directed against the former Pope and other high-level Vatican officials, victims were presented with the false hope of accountability for the church figures who, quite reprehensibly, failed to protect them from harm. This re-victimization is not only disconcerting, but also creates worrying aftereffects for the Court, as victims are likely to believe that the ICC is to blame for the fact that the relevant prosecutions have failed to materialize. In fact, the CCR specifically directed the world to draw this conclusion, maintaining in a press release that "if [this case] doesn't go anywhere, it will not be because the ICC lacks jurisdiction over these crimes or the men involved; it will be due to a lack of political will to adhere to the principle that no one should be held above or beyond the law."[202] Then later, after being informed that the ICC "complaint" had been rejected, victims of clergy sexual abuse were specifically told that this was not because—as explained in detail above, and as OTP expressly noted in its May 2013 rejection of the Vatican targeted communication—"[s]ome of the allegations described in [the]

ICCVaticanProsecution.

198. In fact, the author of the CCR communication told attendees of a May 2012 symposium about "a case we [the CCR] brought against Joseph Ratzinger, now known as Pope Benedict XVI." Pam Spees, *Surfacing Rhonda*, 15 CUNY L. REV. 309, 310 (2012).

199. Multiple media reports referred to the "case" against the Pope, while others misreported that Vatican officials had been charged. *See, e.g.*, Mike Corder & Rachel Zoll, *Clergy Sex Abuse Victims File International Court Case Against Pope*, WORLD POST (Sept. 13, 2011), http://www.huffingtonpost.com/2011/09/13/clergy-sex-abuse-victims-court_n_959626.html (stating that SNAP was "pursuing the case"); *Child Abuse Victims Sue Pope for Crimes Against Humanity*, DAILY NATION (Sept. 13, 2011), http://www.nation.co.ke/News/world/Child+abuse+victims+sue+Pope+for+crimes+against+humanity++/-/1068/1235856/-/1277ncn/-/index.html (quoting Pam Spees as stating that Vatican officials had been "charged in this case"); Karen McVeigh, *Pope Benedict Resigns: Sex Abuse Survivors Hope Move Eases Prosecution*, GUARDIAN (Feb. 11, 2013), https://www.theguardian.com/world/2013/feb/11/pope-resigns-sex-abuse-survivors (referring to the "case at the ICC" and the "case [filed] against the pope"); *Child Abuse Victims Accuse Pope of Crimes Against Humanity*, ABS CBN NEWS (Sept. 14, 2011), http://news.abs-cbn.com/global-filipino/world/09/14/11/child-abuse-victims-accuse-pope-crimes-against-humanity (including a quote from Pam Spees of the CCR discussing "[t]he Vatican officials charged in this case"). Similarly, the CCR website identifies its ICC campaign as "SNAP v. the Pope, et al." *SNAP v. the Pope, et al*, *supra* note 124.

200. *See supra* notes 93–97 and accompanying text (discussing the reason why states were not given the opportunity to file complaints at the Court).

201. Bolton Statement, *supra* note 79, at 60 (noting that "simply the fact of launching massive criminal investigations can have an enormous political impact" and citing the U.S. experience with independent prosecutors as an example).

202. Spees, *We've Come to the End*, *supra* note 121.

communication do not appear to fall within the Court's temporal jurisdiction, and other allegations do not appear to fall with the Court's subject-matter jurisdiction."[203] Rather, SNAP attributed the rejection to the fact that the Catholic Church is an "ancient and well-entrenched" institution, whereas the ICC is "relatively new and somewhat overwhelmed."[204] What is more, victims continue to be advised to hold out hope for future ICC action,[205] setting the Court up for further failure in the eyes of this sector of the international community. These observations, in turn, demonstrate that significant costs can also be created for the ICC when a strategic communication is *rejected,* an issue considered in greater detail in the following Part.

VII. PERCEPTION PROBLEMS CREATED BY THE REJECTION OF THE COMMUNICATION

A. The Belief that the ICC Will Not Target Western Leaders

It perhaps goes without saying that the aforementioned public accusation that the Court permits certain figures to commit crimes with impunity creates reputational harm for the ICC, both in the eyes of victims and the general public. Of even greater concern for the Court, however, is that members of the international community are apt to draw this conclusion for themselves, irrespective of their familiarity with the information provider's claim. This is because, in contrast to pre-operational claims that the Court would target countries like the United States for political impact,[206] the ICC in practice has instead been "lenient" towards America[207] and other Western nations. For example, the Court has been reproached for "sitting on numerous complaints against Western leaders who are accused of causing untold suffering from wars they started in the Middle East."[208] Consequently, the post-operational Court currently contends with an entirely different criticism than it encountered previously: That powerful Western figures, like those who lie at the heart of the Vatican-targeted communication, and who are alleged to bear "direct and superior responsibility for the crimes against humanity of rape and other sexual violence committed around the world,"[209] are immune from ICC prosecution. In effect, the sheer fact of the

203. Rejection Letter, *supra* note 19.

204. *Regarding the ICC, Chin Up!*, SNAP (June 13, 2013), http://www.snapnetwork.org/_regarding_the_icc_chin_up (quoting Megan Peterson).

205. "In May 2013, the ICC prosecutor declined to open a full investigation, but indicated they would reconsider upon submission of new evidence." *SNAP v. the Pope, et al, supra* note 124. While it is true that the Rejection Letter indicates that the decision not to proceed may be reconsidered, pursuant to the Court's Rules, this language *must* be included *whenever* a communication is rejected. Rejection Letter, *supra* note 19; INT'L CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE, *supra* note 108, r. 49(2).

206. Bolton Statement, *supra* note 79, at 60.

207. *International Criminal Court: Let the Child Live*, ECONOMIST (Jan. 25, 2007), http://www.economist.com/node/8599155. This perception may be poised to change. *See* THE OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION, *supra* note 4, para. 134 (noting that the OTP is continuing its preliminary examination of the situation in Afghanistan, which includes potential crimes involving U.S. forces).

208. Charles Kazooba, *African Legislators See Bias in ICC Workings*, E. AFR. (June 7, 2010), http://www.theeastafrican.co.ke/news/-/2558/932638/-/item/0/-/j8g11vz/-/index.html (attributing this accusation to African parliamentarians).

209. First September 2011 Press Release, *supra* note 1.

communication's rejection appears to provide further evidence that "powerful states [are] able to shield themselves and their clients" from ICC justice.[210]

B. The Belief that the ICC Is Biased Against Africa

Vitally, this observation maps onto what is arguably the most pervasive and powerful criticism presently directed at the ICC: that the institution operates with an anti-Africa bias.[211] This selective justice claim began its ascent once the Court's docket became more established, yet exclusively focused on situations in Africa.[212] The accusation quickly became part and parcel of media coverage on the Court, prompting the common defense that the situations then under consideration at the ICC derived from so-called self-referrals—requests made by African states (at that time, Uganda, the Democratic Republic of Congo, and the Central African Republic) for the ICC to conduct investigations on their own territories—and the fourth, the situation in Darfur, was the result of a UN Security Council referral.[213] In other words, the member states that referred situations on their own territories and the UN Security Council were responsible for the geographic concentration of investigations and prosecutions, not the Court.

This message, however, was at least partially undermined with the advent of the ICC's next investigation, as the first use of the ICC Prosecutor's *proprio motu* powers continued to keep the Court in Africa by expanding then-ongoing investigations to include Kenya.[214] Yet, "Kenya itself mooted the possibility of ICC investigations"[215] and, according to numerous sources, the behind the scenes maneuvering that followed resulted in a so-called "backdoor referral."[216] Nevertheless the perception problem

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210. Jendayi Frazer, Commentary, *International Courts and the New Paternalism: African Leaders Are Targets Because Ambitious Jurists Consider Them to Be "Low-Hanging Fruit,"* WALL ST. J. (July 24, 2015), http://www.wsj.com/articles/international-courts-and-the-new-paternalism-1437778048.

211. *See, e.g.*, Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. REV. (Feb. 6, 2014), http://www.nybooks.com/articles/2014/02/06/africa-attacks-international-criminal-court/ (noting that "in its eleven-year history, the [ICC] has prosecuted only Africans"); *Ugandan Leader Calls on Africa to Quit ICC*, AL JAZEERA (Dec. 12, 2014), http://www.aljazeera.com/news/africa/2014/12/ugandan-leader-calls-africa-quit-icc-201412121712353977.html (stating that the court "unfairly targets Africans" and that African nations should pull out of the treaty).

212. Noting that "African leaders have taken note of the ICC's intense interest in their continent," Bosco points to the charging of al-Bashir as the point at which "[t]he backlash swelled." David Bosco, *Why Is the International Criminal Court Picking Only on Africa?*, WASH. POST (Mar. 29, 2013), https://www.washingtonpost.com/opinions/why-is-the-international-criminal-court-picking-only-on-africa/2013/03/29/cb9bf5da-96f7-11e2-97cd-3d8c1afe4f0f_story.html [hereinafter Bosco, *Picking Only on Africa?*].

213. George Lerner, *Ambassador: U.S. Moving to Support International Court*, CNN (Mar. 24, 2010), http://www.cnn.com/2010/US/03/24/us.global.justice/ (quoting a defense of the Court's geographical concentration put forward by U.S. Ambassador Stephen Rapp); Franny Rabkin, *Africa: World Court Faces Charges of 'Judicial Imperialism,'* ALLAFRICA (July 23, 2010), http://allafrica.com/stories/201007230728.html (dubbing this defense "the self-referral argument," describing it as the "main response" to bias accusations, and questioning its merit).

214. Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010).

215. Max du Plessis, *The African Union, the International Criminal Court and al-Bashir's Visit to Kenya*, INST. FOR SEC. STUD. (Sept. 15, 2010), https://www.issafrica.org/iss-today/the-african-union-the-international-criminal-court-and-al-bashirs-visit-to-kenya.

216. "In fact, the [Kenyan then-] prime minister and the president invited the prosecutor—said,

continued to worsen, particularly because the ICC's field of then-exclusively African investigations expanded in response to a Malian self-referral,[217] a second UN Security Council referral, this time involving Libya,[218] and a request for an investigation on its territory from non-member, African state Ivory Coast.[219]

All told, allegations of bias against Africa continue to plague the ICC, despite efforts to combat the notion. For example, U.N. Human Rights Commissioner Navi Pillay recently pointed out that six of the eight investigations then in play were *invited* by the respective African states, with Sudan and Libya the result of UNSC referrals.[220] Moreover, OTP members have taken pains to stress that the office's current field of preliminary examinations include numerous situations outside of the African continent[221] and, indeed, one such examination lately segued into the Court's first non-African formal investigation.[222] Yet, despite the many efforts to address the anti-Africa claim, in particular by educating the public about how the Court's jurisdiction is triggered, the ubiquitous allegation of bias has succeeded in undermining the Court's perceived legitimacy in numerous quarters. In Kenya, for example, one voter described the ICC as "a tool of Western countries to manipulate undeveloped countries."[223] What is more, despite the recent (and limited) geographical expansion of the Court's investigations, "the anti-ICC zeal of certain African states is showing no signs of abating."[224] Accordingly, when it is repeatedly emphasized that most non-

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'Prosecutor, you do this,' they said, 'we'll refer it to you.'" Am. Bar Ass'n Int'l Criminal Court Project, *WICC Cap Hill Briefing With Ambassador Rapp*, YOUTUBE (June 17, 2013), https://www.youtube.com/watch?feature=player_embedded&v=OKxzXnHFWuM (comments of Ambassador Stephen Rapp) (noting that "at the last minute" this position changed to one in which the state instead wished for the Court to proceed without a referral, but with Kenyan cooperation, such that "it was effectively a situation where the country brought the ICC in"). As explained by Hassan Omar Hassan, head of the Kenyan National Commission on Human Rights, a direct self-referral was not feasible because it "would have been a de facto admission that Kenya is unable to prosecute the perpetrators, and that would have put [it] under the umbrella of failed states, . . . [so] the President and the Prime Minister wanted to save themselves from embarrassment in that regard." Nick Wadhams, *After Kenyan Stalling, the ICC Will Investigate Post-Election Riots*, TIME (Nov. 6, 2009), http://content.time.com/time/world/article/0,8599,1935921,00.html.

217. *See, e.g.*, Letter from Malick Coulibaly, Minister of Justice, Republic of Mali, to Prosecutor, Int'l Criminal Court (July 13, 2012), http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf (referring a case to the ICC).

218. S.C. Res. 1970 (Feb. 26, 2011).

219. *See, e.g.*, Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale [Statement of Recognition of the Jurisdiction of the International Criminal Court] (Apr. 18, 2003), http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf (Côte d'Ivoire) (recognizing the jurisdiction of the ICC and promising compliance with the investigation); Letter from Alassana Ouattara, President, Côte d'Ivoire, to the President and Prosecutor, Int'l Criminal Court (Dec. 14, 2010), http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf (confirming acceptance of ICC jurisdiction).

220. Sihle Mlambo, *Navi Pillay Defends ICC Role in Africa*, IOL NEWS (July 9, 2015), http://www.iol.co.za/news/africa/navi-pillay-defends-icc-role-in-africa-1882972.

221.. *See* Guariglia & Rogier, *supra* note 101, at 355 (noting on-going preliminary examinations on three different continents along with the fact that this diversity "may not be sufficient to persuade skeptical minds").

222. In January 2016, the Court's launched its first non-African investigation when the ICC Pre-Trial Chamber authorized the Prosecutor to investigate the situation in Georgia. *See Decision on the Prosecutor's request for authorization of an investigation, supra* note 7271.

223.. Bosco, *Picking Only on Africa?*, *supra* note 212.

224.. Mark Kersten, *Why is the International Criminal Court stepping out of Africa and into Georgia?* JUSTICE IN CONFLICT (Feb. 6, 2016) (noting that adding "only one country outside [Africa] won't change their argument much" and that the new investigation "won't change the view that the court works in the

African actors are currently left to commit crimes with impunity,[225] the Court's rejection of the Vatican-targeted communication appears to substantiate these concerns of bias. In fact, the rejection prompted this very response, with one commentator remarking, "Of course it was rejected. The ICC specializes in Africans."[226]

C. The Belief that the ICC Ignores Crimes of Sexual Violence

Another potential—and certainly unintentional—consequence of the strategic communication is that its rejection may mistakenly be seen as evidence that the Court remains insufficiently committed to prosecuting sexual and gender-based crimes, a once pervasive and legitimate appraisal of the ICC's early operation.[227] At Rome, the Women's Caucus for Gender Justice worked to make sure that the Rome Statute included a gender perspective.[228] The resultant Statute is the first ever international instrument to explicitly recognize sex crimes as underlying crimes for both crimes against humanity and war crimes.[229] As the Court became operational, however, its first Prosecutor, Luis Moreno-Ocampo, made no use of these innovations.[230] Instead, his 2005 report to the UN Security Council made little mention of then-widespread crimes of sexual violence in Darfur, prompting an NGO-generated public call for the Court to "demonstrate it takes gender crimes seriously."[231] At the time, Moreno-Ocampo was also neglecting his statutory obligation to appoint an adviser on sexual and gender violence,[232] opting to operate without such an adviser for the first five years

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favor of Western states").

225.. *See, e.g.*, Reason Wafawarova, *ICC and Empty Justice*, HERALD (Jun. 18, 2015), http://www.herald.co.zw/icc-and-empty-justice/ (discussing the impunity of countries such as the United States and Israel).

226.. Reader comments to Rachel Zoll, *Pope Benedict XVI International Criminal Court Investigation Requested By Clergy Sex Abuse Victims Rejected*, HUFFINGTON POST (Jun. 13, 2013) (screen shot on file with author).

227.. *See ICC Must Demonstrate It Takes Gender Crimes Seriously*, WOMEN'S INITIATIVES FOR GENDER JUSTICE (June 30, 2005), http://www.iccnow.org/documents/WIGJMediaReleaseDarfur30Jun2005.pdf (illustrating instances in which the ICC did not prosecute gender-based crimes) [hereinafter WOMEN'S INITIATIVES FOR GENDER JUSTICE].

228.. Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 22–23 (2009) (concluding that "what the CICC was to the pro-ICC NGOs, the WCGJ was to the feminist ones"); *see also* Augustínyová & Dumbryte, *supra* note 35, at 46–47 (discussing the reasons why the WCGJ was so successful).

229. INT'L CRIMINAL COURT, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES, para. 1 (2014), https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes—June-2014.pdf. The Statute's relevant provisions on war crimes and crimes against humanity were "taken almost verbatim from the proposal of the Women's Caucus." Augustínyová & Dumbryte, *supra* note 35, at 47; *see also* Sellers, *supra* note 39, at 313 (describing the Rome Statute's provisions, in comparison to its ad hoc predecessors, as "legal heaven, replete with dessert").

230. *See* Meredith Tax, *Women Have Human Rights, Too*, GUARDIAN (Dec. 13, 2010), http://www.theguardian.com/commentisfree/cifamerica/2010/dec/13/international-criminal-court-moreno-ocampo (explaining how "[u]nfortunately, Luis Moreno-Ocampo, the ICC's first prosecutor, has shown little grasp of the statute he is supposed to be enforcing").

231. WOMEN'S INITIATIVES FOR GENDER JUSTICE, *supra* note 227.

232. Rome Statute, *supra* note 5, art. 42(9).

of his term[233] rather than avail himself of high-level expertise to take on the novel and important task of "mainstreaming crimes against women."[234] In the absence of such assistance, Moreno-Ocampo was heavily criticized for failing to include gender-based charges in what became the Court's first prosecution,[235] with members of civil society again vocalizing their disappointment that "widespread rape and sexual slavery [were] crimes ignored by the Court in their [sic] investigations and consequently in the case against Mr. Lubanga."[236] Moreno-Ocampo's subsequent refusal to amend Lubanga's charges brought about even more stinging, public criticism, this time from the Trial Chamber that heard the case.[237] At Lubanga's 2012 sentencing hearing—just after the close of Moreno-Ocampo's term in office—the presiding judge announced in open court that "[t]he chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence," a rebuke that was widely reported around the world.[238] Lubanga's conviction also prompted civil society to resurrect its critique of the narrow charges,[239] alongside a call for the OTP to consider the lessons that could be learned from its first prosecution and to "review its limited investigations strategy."[240]

To her credit, while still Prosecutor-elect, the current Prosecutor, Fatou Bensouda, promised a stronger gender policy[241] and has since evidenced a sincere

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233. Niamh Hayes, *Investigating and Prosecuting Sexual Violence at the ICC*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 41, at 801, 838 (describing the eventual appointment of Catherine MacKinnon as "largely symbolic").

234. Tax, *supra* note 230.

235. *See, e.g.*, Letter from Brigid Inder, Exec. Director, Women's Initiatives for Gender Justice, to Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court (Aug. 2006), http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf (expressing "grave concern at the narrow charges being brought by the Office of the Prosecutor (OTP) in the case against Thomas Lubanga Dyilo, specifically the absence of charges for gender based crimes").

236. Joint Press Release, Congolese Coal. for Transitional Justice & Women's Initiatives for Gender Justice, Failed DRC Investigations by the ICC Claim NGOs (Aug. 31, 2006), http://www.iccnow.org/documents/Press_FailedDRCInvestigationsByICC_31Aug06_en.pdf.

237. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-2901, Decision on Sentence Pursuant to Article 76 of the Statute, para. 60 (July 10, 2012) (" [N]ot only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis.").

238. *Id. See generally* Michelle Faul, *Congolese Warlord Sentenced to 14 Years in Prison*, BOSTON GLOBE (July 11, 2012), https://www.bostonglobe.com/news/world/2012/07/10/congolese-warlord-sentenced-years-prison/WiKdNuiqBUtJzUTbMiXgAK/story.html; Marlise Simons, *International Criminal Court Issues First Sentence*, N.Y. TIMES (July 10, 2012), http://www.nytimes.com/2012/07/11/world/europe/international-criminal-court-issues-first-sentence.html?_r=0.

239. *See, e.g.*, *Rights Groups Hail DR Congo Warlord Conviction*, AFR. REV. (Mar. 14, 2012), http://en.starafrica.com/news/rights-groups-hail-dr-congo-warlord-conviction-222695.html (discussing civil society's criticism of the failure to prosecute crimes of sexual violence, thereby "deny[ing] justice and potential reparations to many victims"); David Smith, *Congo Child Army Leader Thomas Lubanga Found Guilty of War Crimes*, GUARDIAN (Mar. 14, 2012), http://www.theguardian.com/law/2012/mar/14/congo-warlord-thomas-lubanga-icc (discussing the criticism for the failure to charge Lubanga with sexual violence crimes).

240. Smith, *supra* note 239.

241. Statement of Fatou Bensouda, *supra* note 40. This announcement was clearly welcomed by civil society. *See, e.g.*, *Statements from Civil Society Welcoming Prosecutor Bensouda*, COAL. FOR THE INT'L CRIM. CT. (June 15, 2012), http://www.iccwomen.org/documents/Welcoming-Prosecutor-Bensouda.pdf (expressing particular support for Bensouda's promise of a stronger gender policy).

commitment to repairing this damaged aspect of the Court's reputation.[242] Yet these advances have arrived after nearly a decade of criticism on the topic and have garnered only marginal recognition in mainstream media.[243] By contrast, social media demonstrates a long memory, going so far as to link the rejection of the Vatican-targeted communication to the Court's troubled history regarding crimes of sexual violence.[244] Accordingly, the OTP's rejection of the filing could easily be misinterpreted in this regard, consequently undermining some of the significant and legitimate strides the second Prosecutor has made regarding the Court's approach to sexual and gender based crimes.

CONCLUSION

It is difficult to overstate the bond between civil society and the ICC and easy to understand why members of this group have been classified as "self-perceived stakeholders" in the institution.[245] As we have seen, civil society—in particular NGOs—played an essential role in the Court's creation, helping to successfully facilitate negotiations at Rome and leaving a noticeable imprint on the ICC Statute. Since that time, the group has remained equally vital to the Court's operation, from early year advocacy measures, including a pivotal ratification campaign, to contemporary outreach efforts and even providing direct support and training for ICC staff. These extensive contributions reflect the group's important commitment to the Court's anti-impunity objective and its aim to deliver justice to "victims of unimaginable atrocities that deeply shock the conscience of humanity."[246]

In light of these priorities, it is not surprising that some ICC supporters have embraced the prospect of using the Article 15 communication process as a means to accomplish non-Court related objectives. Critically, well-publicized strategic communications are liable to generate global awareness of atrocities that might otherwise pass under the international community's radar. This recognition, in turn, has the potential to accomplish a host of laudable goals, including the possibility that intense international pressure will be brought to bear so as to bring an end to harmful

242. *See, e.g.*, Louise Chappell & Rosemary Grey, *Forging New Paths for Gender Justice at the International Criminal Court?*, WOMEN, PEACE & SEC. ACAD. COLLECTIVE (Mar. 5, 2014), https://wpsac.wordpress.com/2014/03/05/forging-new-paths-for-gender-justice-at-the-international-criminal-court/ (concluding that there has been a "marked improvement in the ICC's efforts to address sexual violence" and that "there is reason to hope that the ICC has learnt important lessons from its initial failures"); *see also* THE OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, STRATEGIC PLAN 2012–2015, at 3 (2013) (including amongst its strategic goals "enhanc[ing] the integration of a gender perspective in all areas of our work and continu[ing] to pay particular attention to sexual and gender based crimes").

243. *See, e.g.*, Marlise Simons, *International Criminal Court to Focus on Sex Crimes*, N.Y. TIMES (June 5, 2014), http://www.nytimes.com/2014/06/06/world/europe/international-criminal-court-to-focus-on-sex-crimes.html (discussing the adoption of the new policy); Benjamin Durr, *ICC Puts 'Rape Campaign' in CAR on Trial*, AL JAZEERA (Nov. 30, 2014), http://www.aljazeera.com/indepth/features/2014/11/icc-puts-rape-campaign-car-trial-20141130106337344 6.html (acknowledging the importance of the *Lubanga* decision on this issue).

244. Stephen Smith Cody (@StephenSCody), TWITTER (June 13, 2013, 2:52 PM), https://twitter.com/StephenSCody/status/345297600041320449 ("What do Pope Benedict and Lubanga have in common? The ICC won't try either for crimes of sexual violence.").

245. Keller, *supra* note 44, at 19.

246. Rome Statute, *supra* note 5, pmbl.

conduct. As this work has demonstrated, however, the potential advantages created by launching a strategic communication cannot be considered in isolation. Rather, precisely because civil society has a stake in the venture, its members ought not to engage in the practice before considering the potential effects on the Court.

Some of these considerations are practical in orientation. For example, the fact that the ICC Office of the Prosecutor is underfunded and already operating at or near capacity ought to enter into the cost-benefit analysis before using the communication process instrumentally. If a request is not intended to generate an actual investigation, is it worth the additional, unnecessary work its submission generates for the OTP? By the same token, court supporters should bear in mind that the resources dedicated to processing these submissions are by necessity diverted from other efforts, thereby inadvertently contributing to the much-maligned glacial pace of ICC operations.

Of even greater importance is the tension this work exposes between what makes for an effective strategic communication and what is good for the Court. Media interest will undoubtedly be higher when a press release alleges that a high profile figure is facing ICC charges than when it more faithfully reports that the Court's Prosecutor has been asked to consider opening an investigation. Yet, at what cost to the ICC? In effect, this tactic does the work of Court opponents for them, by creating the impression that external actors—in particular NGOs—are at liberty to determine the Court's docket and that they can use this power to target specific individuals. In fact, these very pieces of misinformation have long held a place in anti-ICC rhetoric and have enjoyed the benefit of traction precisely because the general public tends to know so little about the Court.

Notably, the Vatican-targeted communication and its attendant publicity campaign reinforce these and other misconceptions made popular by those who sought to undermine the ICC's chances for success. By essentially ignoring the Rome Statute's contextual requirements for crimes against humanity, the Vatican-targeted effort suggests both that there are almost no limits to the Court's jurisdiction and that leaders are at risk of such prosecutions, irrespective of any connection to the underlying crimes. As established, Court opponents used precisely these misleading arguments to inspire fear about the ICC's potential reach over U.S. leaders. What is more, inasmuch as the argument for Vatican leader liability rests on the fact that the negotiated and agreed upon language for the Court's jurisdiction over crimes against humanity can be ignored, the campaign buttresses earlier voiced concerns that the ICC would serve as an activist court with unchallengeable and unlimited jurisdiction.

Perhaps the most troublesome perception problems revealed in this work, however, are those that stem from the ICC's ultimate rejection of the strategic communication. Despite the propriety of this resolution, clergy sex abuse victims have been led to believe a different story, which paints the Court as weak, overwhelmed, and lacking the necessary will to bring high-level figures to account. This, in turn, supports troublesome, contemporary allegations that Western leaders are exempt from ICC prosecution and appears to provide further evidence that the Court is indeed biased against Africa. What is more, in direct contradiction of recent and important efforts undertaken by the current Prosecutor, the rejection has resurrected claims that the ICC is not taking gender crimes seriously.

These troubling (mis)perception problems illustrate why the Vatican-targeted campaign ought to serve as a cautionary tale for those tempted to submit strategic communications. In addition to the quantifiable costs of submitting unsustainable

requests, the potential for intangible harm to the ICC is significant, particularly when campaigns are driven by NGOs that have the clout and ability to attract international attention. At a minimum, then, Court supporters ought to be sensitive to the reality in which the ICC operates and to the long-standing and more recent criticisms that have shaped the Court's reputation. Pivotally, submitted communications and their attendant publicity should take care to neither exploit nor inadvertently reinforce common misperceptions about ICC operations. As the institution struggles to meet its responsibilities and manage public expectations, civil society ought to adopt practices that enhance the way the ICC is viewed in the court of public opinion. As this Article demonstrates, strategic communications run the risk of significantly undermining this important objective.