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AFRICA AND THE INTERNATIONAL CRIMINAL COURT

Behind the Backlash and Toward Future Solutions



An Honors Paper for the Department of
Government and Legal Studies

By Marisa O'Toole

Bowdoin College, 2017

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Introduction

Following the end of World War II, members of international society acknowledged its obligation to address international crimes of mass barbarity. Determined to prevent the recurrence of such atrocities, members took action to create a system of international individual criminal legal accountability. Beginning with the Nuremberg and Tokyo War Crimes trials in 1945¹ and continuing with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993² and the International Criminal Tribunal for Rwanda (ICTR) in 1994³, the international community commenced its ad hoc prosecution of individuals for the commission of international crimes.

In 1998 the international community went further and took the groundbreaking step of establishing a standing international arbiter of justice: the International Criminal Court (ICC). Through the Court's establishing treaty, the Rome Statute, the international community created the first permanent international criminal judicial organ charged with the prosecution of individuals accused of the most serious international crimes, specifically crimes against humanity, genocide, war crimes, and crimes of aggression.⁴ The ICC's temporal jurisdiction, however, is limited to those crimes committed from July 1, 2002 forward.⁵ This Statute and the signing thereof signified a pioneering event. For the first time in history, states, as signatories to the Rome Statute, voluntarily agreed to submit to the jurisdiction of an international court for the prosecution of individuals charged with the

¹“The International Criminal Court: Origins, Jurisdiction and the ‘African Bias,’” *South African History Online*, (October 24, 2016), <http://www.sahistory.org.za/article/international-criminal-court-origins-jurisdiction-and-african-bias>.

² United Nations Security Council, Resolution 827, “International Criminal Tribunal for the former Yugoslavia (ICTY),” May 25, 1993, http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf.

³ United Nations Security Council (SC), Resolution 955, “Establishment of the International Criminal Tribunal for Rwanda (ICTR) and adoption of the Statute of the Tribunal,” November 8, 1994, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>.

⁴ International Criminal Court, *Rome Statute of the International Criminal Court* (The Hague: International Criminal Court, 2011), <http://www.refworld.org/docid/3ae6b3a84.html>. [This corresponds to the version of the Statute updated through November 2010.]

⁵ Ibid.

perpetration of international crimes.⁶ In 2002, the Court commenced its investigations into such crimes.

The road for the ICC thus far, however, has been fraught with criticism. Ironically, the most vociferous Court naysayers come from its largest regional membership bloc and some of its most ardent initial supporters: Africa. With all but one of its ten investigations involving Africa and African nationals,⁷ the Court has faced significant backlash from African states asserting that the Court has an African bias. In just the past few months, Burundi, South Africa, and The Gambia have attempted withdrawal from the Court, issuing harsh criticisms against a Court that they see as selectively targeting Africa, pursuing a neo-colonial agenda, hindering peace processes, and disrespecting heads of state. While both South Africa and The Gambia have recently rescinded their motions to withdraw from the Court, Burundi remains in the process of severing its ties with the ICC. In the meantime, the AU at-large has signed a non-binding agreement in recent months to withdraw en masse from the Court, though such a process remains unclear and likely to take a long time. In light of these recent withdrawal attempts from the Court, the ICC's strained and scarred relationship with Africa has emerged as a topic of great and pivotal global interest. An inquiry into this African backlash is thus both topical and informed by rich discussion within the international community.

In examining the ICC and African responses to the Court, I aim to tackle five related and central questions. First, what are the central concerns underlying contemporary African critiques of the Court? Second, how may those critiques be linked to historical state and African concerns previously expressed in regards to international tribunals, such as the ICTY and ICTR, as well as during the Rome Statute negotiations? Third, how do the concerns of African leaders compare to the perceptions of local Africans, victims, and civil society actors regarding the Court? Fourth, how do local, victim, and civil society concerns relate to historical concerns and critiques of international tribunals? Fifth, what changes to the Court

⁶ "The International Criminal Court: Origins, Jurisdiction and the 'African Bias,'" *South African History Online*.

⁷ "Situations under investigation," International Criminal Court, accessed September 20, 2016, <https://www.icc-cpi.int/pages/situations.aspx>.

might make it a more effective international adjudicative institution for Africans and, consequently, for those that may be subject to it in the future?

Examining and answering these five main questions involves an investigation into the history that predated the ICC and current African concerns. It is reasonable to begin this historical analysis with an examination of the concerns that surrounded the ICTY and ICTR, especially given that ICC negotiations and investigations significantly overlapped with these tribunals. Additionally, this historical inquiry includes an analysis of the nine years of negotiations that led to the Rome Statute. The timeline then extends through the Court's actions in practice and into present day discussion about the Court and African perceptions of it.

In Chapter 1, I will delve into the history pre-dating the Court, examining the various state and African concerns expressed regarding the ICTY and ICTR, as well as during the Rome negotiations. Such an analysis will rely upon sources such as news media, UN documents, International Law Commission documents, African government documents, fieldwork, and various other academic scholarship. The analyses in this chapter will work to form a basis for initial state and African concerns about international adjudicative institutions and international justice. These concerns will serve as crucial warning signs for the Court as the story of the current ICC-Africa relationship unfolds in Chapter 2.

Chapter 2 will then focus on current African concerns with the ICC and will examine both the general critiques made by the African Union and various African leaders and specific reactions in individual cases. The case of Darfur, for example, reflects the broad critique of the African Union and its leaders, as it involves concern over the Court's selective bias, imperialist tendencies, effect on peace, and interference with a sitting head of state.⁸ The Darfur case, as well, presents an example of a United Nations Security Council referral, which will demonstrate state concerns with this political body. Kenya similarly entails the prosecution of a sitting head of state and neo-colonial criticisms of the Court, though it was

⁸ Roland J.V. Cole, "Africa's Relationship with the International Criminal Court: More Political than Legal," *Melbourne Journal of International Law* 14, no. 2 (2014): 4, <http://www.lexisnexis.com/lncui2api/api/version1/getDocCui?lni=5BNN-HY50-01GK-Y19H&csi=270944,270077,11059,8411&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>.

initiated by the Chief Prosecutor. Uganda, a state self-referral, exemplifies concerns over the Court's effect on peace and the politics involved in the selective prosecution of perpetrators. In examining these cases and the concerns of African leaders and the AU, I will rely on the substantial body of scholarship that has analyzed the African bias question and these particular cases.

Chapter 3 will examine local African perspectives to see if and how African citizens' perceptions of the Court differ from those of their leaders. I aim to investigate how local Africans, both victims and non-victims, as well as African civil society actors, perceive the Court. Using these contemporary concerns, I will investigate how these critiques relate to those raised against the ICTY and ICTR.

In Chapter 4, I will discuss changes that could be made to the Court to improve its efficacy and legitimacy in the eyes of Africans and generally improve its international stature. These recommendations will build upon those that have been made by scholars and NGOs to improve the Court in its ability to deliver justice to people. While systemic-level changes may be more difficult to accomplish in regards to the ICC, many more state and individual-level solutions will emerge as promising strategies for achieving a Court that truly serves the people most affected by the heinous international crimes within its jurisdiction.

The ICC presents scholars with the fascinating interconnection between politics and international law. And though scholars have examined the ICC and its efficacy as an international adjudicative institution from the lenses of realism, liberal institutionalism, and constructivism, Waltz' well-known levels of analysis⁹ in international relations offers a more fitting framework for understanding the challenges and solutions involved in the ICC-Africa relationship. Though Waltz' analysis specifically locates the central causes of war, his theoretical framework provides a basis for studying other phenomena within international relations. This framework considers situations, including their causes and effects, at three levels: (1) the individual level, which focuses on the key roles played by specific people; (2) the state level, which focuses on the nature and characteristics of individual states; and (3) the societal level, which emphasizes the impact of the larger state system on international

⁹ Kenneth N. Waltz, *Man, the State, and War: A Theoretical Analysis*, Revised edition (New York: Columbia University Press, 2001), 12.

behavior.¹⁰ And while these levels certainly interconnect, it is analytically useful to locate phenomena on each level when considering their roots, consequences, and potential remedies.

In this story of the ICC and Africa, we will see challenges rooted in all three levels — individual, state, and society — yet feasible solutions largely grounded on the state and individual levels. While societal-level initiatives cannot be ignored, international constraints prevent them from offering realistic avenues for Court reform. Fortunately, state-level and especially individual-level prescriptions provide viable pathways for the Court to better deliver justice.

In this project, I aim to examine the African backlash in a way that both contributes, yet challenges and adds nuance to, scholars' theoretical conceptions of the Court, reactions to it, and its potential for efficacy as an international adjudicative institution. Such an endeavor will enhance our understanding of institutions like the ICC. In light of Africa's mounting opposition to the Court and the recent African withdrawal attempts from its membership, such an understanding could not come at a better time.

¹⁰ Ibid.

Chapter 1: A History of Warning Signs

In the wake of the horrors of World War 2, members of international society acknowledged the pressing need to address crimes of mass barbarity on an international level.¹¹ In 1945, the world's major Allied powers, consisting of the United States, France, the United Kingdom, and the Soviet Union, signed the London Agreement. This agreement established an international military tribunal for the purpose of trying the major war criminals of the Axis powers.¹²

The London Agreement brought about the establishment of the International Military Tribunal, which would hold what became known as "The Nüremberg Trials." Additionally, the Agreement included within it the Nüremberg Charter, which constructed three international crime categories: (1) crimes against the peace, which constituted war initiation; (2) war crimes, which included deportation, ill treatment, and murder; and (3) crimes against humanity, which encompassed the persecution of civilians for their race, ethnicity, religious, or political beliefs.¹³ Following the Nüremberg Charter, the Allied powers enacted the Tokyo Charter, which established the International Military Tribunal for the Far East to try accused Japanese war criminals.¹⁴

Though an important first step in establishing international criminal legal accountability for crimes of mass barbarity, the Nüremberg Trials were not without their critics. In 1946, following the conclusion of Nüremberg, U.S. Senator Robert Taft expressed doubt regarding the trials' legitimacy and objectivity, remarking, "About this whole judgement there is the spirit of vengeance and vengeance is seldom justice."¹⁵ Dating back to

¹¹ "The International Criminal Court: Origins, Jurisdiction and the 'African Bias,'" *South African History Online*.

¹² "London Agreement of August 8th 1945," in *Nuremberg Trial Proceedings*, vol. 1, <http://avalon.law.yale.edu/imt/imtchart.asp>.

¹³ "Charter of the International Military Tribunal," in *Nuremberg Trial Proceedings*, vol. 1, <http://avalon.law.yale.edu/imt/imtconst.asp>.

¹⁴ "The International Criminal Court: Origins, Jurisdiction and the 'African Bias,'" *South African History Online*.

¹⁵ John F. Kennedy, Caroline Kennedy, and Robert F. Kennedy, *Profiles in Courage* (New York: HarperPerennial Modern Classics, 2006), 199.

seventy years ago, concerns about the partiality and selectivity of international criminal justice, and particularly the concept of “victor’s justice,”¹⁶ were already on states’ radars.

In 1949, the United Nations revised and enacted four Geneva Conventions that founded legal protocols for wartime treatment of civilians, combatants and prisoners of war.¹⁷ During this time, the International Law Commission, followed by the General Assembly’s Committee on International Criminal Jurisdiction, began examining the question of establishing an international criminal court. However, with the onset of the Cold War states were unable to agree on the question of an international adjudicative body, causing the discussions and drafts regarding such a court to forestall.¹⁸ From the late 1940s through the end of the Cold War, atrocities in Cambodia, East Timor,¹⁹ and Uganda were largely overlooked by the international community, which failed to take legal action against these crimes.²⁰

Following the end of the Cold War and nearly fifty years after Nüremberg and the Tokyo Tribunal, the international community revisited the question of international justice in the face of further horrific crimes. In response to the perpetration of atrocities in the former Yugoslavia and Rwanda in the 1990s, the UN Security Council took action to establish legal criminal accountability. However, just as there were concerns with the Nüremberg Trials, so

¹⁶ “Victor’s justice” is a popular international relations term which refers to the selective prosecution of the “losers” of a particular conflict. Greenwood Encyclopedia of International Relations defines it as, “When victors in war convict and punish leaders or soldiers of the defeated side, which may or may not mean that real justice is done.” See Cathal J. Nolan, “Victor’s Justice,” in *Greenwood Encyclopedia of International Relations*, (Santa Barbara, CA: ABC-CLIO, 2002), https://login.ezproxy.bowdoin.edu/login?url=http://search.credoreference.com/content/entry/abcintrel/victor_s_justice/0.

¹⁷ “The International Criminal Court: Origins, Jurisdiction and the ‘African Bias,’” *South African History Online*.

¹⁸ William Schabas, ed., *International Criminal Law*, Cambridge Companions to Law (Cambridge, U.K.: Cambridge University Press, 2015), 140.

¹⁹ Paul R. Bartrop, *Genocide: The Basics*, 1 Edition (New York: Routledge, Taylor & Francis Group, 2015), 70; 74.

²⁰ “Idi Amin,” in *New World Encyclopedia*, (New World Encyclopedia, 2013), http://www.newworldencyclopedia.org/entry/Idi_Amin; Ramesh Thakur and Peter Malcontent, eds., *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo: United Nations University Press, 2004), 34.

too would there be critiques of the justice rendered by these tribunals. Such concerns shed light on later criticisms of the ICC.

The International Criminal Tribunal for the Former Yugoslavia (ICTY)

What Happened?

Alongside Eastern Europe's communist collapse and revival of nationalism in the late 1980s and early 1990s, Yugoslavia went through fierce economic and political upheaval. Political leaders of different ethnicities employed pro-nationalist language to incite terror and distrust among them and to undermine any sense of a united Yugoslav identity. Yugoslavia began to collapse as Yugoslav republics declared independence, resulting in fighting and an eventual horrific three-sided battle for territory between Serbs, Bosnian Muslims (Bosniaks), and Croats.²¹

During this period of conflict, perpetrators committed a vast array of egregious human rights violations, including summary executions, rape, torture, capricious large-scale internment, hostage-taking, deportation, displacement, abuse of prisoners, and the arbitrary destruction of cities and private property.²² All sides of the conflict, including Serbs, Croats, and Bosniaks, committed heinous crimes against one another. In total, an estimated 100,000 plus people died and two million citizens were displaced.²³

In light of reports of these atrocities, the UN Security Council began to monitor humanitarian violations in the region. In 1993, the UNSC passed Resolution 808, which established the International Criminal Tribunal for the Former Yugoslavia, providing the Tribunal with the jurisdiction to prosecute war crimes and other egregious offences claimed to have been committed in the former Yugoslavia during the conflict.²⁴ In Resolution 827's preamble, the drafters of the Tribunal established its explicit goal as the restoration of

²¹ United Nations International Criminal Tribunal for the former Yugoslavia, "The Conflicts," accessed October 17, 2016, <http://www.icty.org/en/about/what-former-yugoslavia/conflicts>.

²² Theodor Meron, "Answering for War Crimes: Lessons from the Balkans," *Foreign Affairs* 76, no. 1 (1997): 2, doi:10.2307/20047904.

²³ United Nations International Criminal Tribunal for the former Yugoslavia, "The Conflicts."

²⁴ Christopher Greenwood, "The International Tribunal for Former Yugoslavia," *International Affairs (Royal Institute of International Affairs 1944-)* 69, no. 4 (1993): 642, doi:10.2307/2620590.

international security and peace in the region.²⁵ Among its other objectives were to combat impunity with impartial prosecutions, provide victims with justice, and assist domestic judicial and legal systems with capacity building.²⁶

Since its establishment the Tribunal has indicted 161 individuals, convicted 32 of them, and established rape as a crime against humanity.²⁷ In these respects, the ICTY has achieved success and has made an important contribution to international justice. Despite these achievements, however, the Tribunal has also faced several severe challenges that have hindered its ability to deliver upon many of its lofty, and perhaps unrealistic, objectives.

Challenges

One of the large challenges that faced the ICTY was the initial difficulty of promoting cooperation among states whose individuals were subject to its jurisdiction, as well as between states and the Tribunal itself. As Theodor Meron argues, this challenge “plagued” the Tribunal from the very beginning, as the institution struggled to achieve cooperation from Serbian, Bosnian, and Croatian leaders.²⁸ Without a police power, the ICTY had to rely upon pressure from the UNSC and the international community to persuade recalcitrant states to deliver defendants to the Tribunal and cooperate with its investigations.²⁹

The Tribunal not only struggled to garner cooperation, however, but it also failed in its outreach to the victims that it was actually meant to serve. Located in the Netherlands and operating while conflict was still raging in the Balkans, the Tribunal’s activities have been overwhelmingly distant from the local communities within the region. Tribunal offices and activities have been heavily concentrated in The Hague, while the Court has held a miniscule presence within the Balkans. Though continuing violence during the Tribunal’s first few years likely supported the decision to locate the ICTY away from the region, the Tribunal’s

²⁵ *Ibid.*, 643.

²⁶ Richard H Steinberg, *Assessing the Legacy of the ICTY* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2011), 25, <http://dx.doi.org/10.1163/9789004215641>.

²⁷ “Landmark Cases,” *United Nations International Criminal Tribunal for the Former Yugoslavia*, accessed December 3, 2016, <http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases>.

²⁸ Meron, “Answering for War Crimes: Lessons from the Balkans,” 3.

²⁹ *Ibid.*

failure to involve citizens and domestic actors in the process has been a great oversight. According to Adam Smith, Balkans citizens were “an afterthought,” considering its dismal outreach and public relations programs, as well as the fact that, as of 2009, no Balkans citizen was employed by the ICTY.³⁰

The ICTY’s difficulty connecting to local communities has been further exhibited by local Bosnian and Serbian perceptions of the Tribunal. In a 2009 survey of 1,400 Serbs of sixteen years-old or older, 50% of respondents either knew “Nothing” or “A little” about the ICTY.³¹ Additionally, of those respondents with no or scant knowledge of the Tribunal, 72% held a “Mostly negative” or “Extremely negative” view of the Tribunal, citing feelings of the Tribunal’s partiality and bias against Serbs as their major complaints.³² Criticisms of the Tribunal’s political biases have been bolstered and fueled by the fact that, for a while at the beginning, only Serbs were indicted and prosecuted.³³

Bosnians, though more favorable of the Tribunal, have similarly criticized the ICTY for its inability to deliver justice promptly and clearly. In a 2010 study of local Bosnian perceptions of the ICTY, Diane Orentlicher revealed these frustrations with the Tribunal’s work. According to this study, Bosnians believed that the Tribunal was delivering imperfect justice, citing frustrations with the lightness of sentences, the lengthy and complicated process, the politicization of the courtroom, and the ability of high-level perpetrators to delay justice as their central grievances with the ICTY.³⁴

In addition to the ICTY’s disconnectedness from local communities, the Tribunal struggled to incorporate state institutions into the justice process. The fact that little attention

³⁰ Adam M. Smith, *After Genocide: Bringing the Devil to Justice* (Amherst, N.Y.: Prometheus Books, 2009), 82.

³¹ Organization for Security and Co-operation in Europe Mission to Serbia, “Public Perception in Serbia of the ICTY and the National Courts Dealing with War Crimes” (Serbia: OSCE Mission to Serbia, 2009), 12, http://wcjp.unicri.it/proceedings/docs/OSCESrb ICTY_Perception_in_Serbia.pdf.

³² *Ibid.*, 14; 16.

³³ Meron, “Answering for War Crimes: Lessons from the Balkans,” 6.

³⁴ Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Justice Initiative: International Center for Transitional Justice, 2010), 14–16, http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/that-someone-guilty-20100707/that-someone-guilty-20100708.pdf.

was paid to the role of locals in the quest for justice highlights the “pervasive emasculation of almost all government and civil society functions” that occurred within the region during the ICTY’s operation.³⁵ This absence of local involvement signaled the region’s lack of ownership over the justice process within the region. According to Smith, the ICTY was viewed “as yet another slight to the country’s attempts to attain some domestic stake in the operation of the state. It is little wonder that the Court’s reception has been so cool.”³⁶

One last and major criticism of the Tribunal is perhaps the most glaring, given the ICTY’s stated purpose of restoring security and peace in the former Yugoslavia. Rather than fulfilling this goal, the Tribunal has been marked by an inability to contribute to peace.³⁷ The Tribunal itself “had no major impact, positive or negative, on national reconciliation” as of 1997, four years into its operation.³⁸ Far from contributing to peace and security, the region has experienced “a mainstreaming of radicalism” and “an entrenching of the very ethnic animosities that led to the brutal wars of the 1990s.”³⁹ The massacre at Srebrenica, the height of the war’s despicable crimes, occurred in 1995, after the ICTY had been operational for two years and had indicted two major leaders in the conflict.⁴⁰ This, along with other examples, reveal the Tribunal’s clear inability to instill security and peace. Yet, considering the complexities of the situation in the former Yugoslavia and the fighting that continued during the Tribunal’s proceedings, it would have been very difficult for the ICTY to achieve its explicit goal of fostering peace and reconciliation in the region.

³⁵ Smith, *After Genocide*, 82.

³⁶ *Ibid.*, 92.

³⁷ James Gow, Milena Michalski, and Rachel Kerr, “Space Capsule Justice: The ICTY and Bosnia — Image, Distance and Disconnection,” *The Slavonic and East European Review* 91, no. 4 (2013): 823–24, doi:10.5699/slaveastorev2.91.4.0818.

³⁸ Meron, “Answering for War Crimes: Lessons from the Balkans,” 6.

³⁹ Smith, *After Genocide*, 63.

⁴⁰ United Nations International Criminal Tribunal for the former Yugoslavia, “The Conflicts.”

The International Criminal Tribunal for Rwanda (ICTR)

What Happened?

While officials at the ICTY were beginning to investigate and prosecute crimes in the former Yugoslavia, perpetrators in Rwanda were committing similarly horrific crimes that would lead to the formation of the ICTR. Dating back to the late 1950s under Belgian colonial rule, ethnic conflict between the Hutus, Rwanda's majority ethnic group, and the Tutsis, its main minority ethnic group, embroiled Rwanda. Fighting intensified between the two groups in 1990, when the Rwandan Patriotic Front (RPF), largely composed of Tutsi refugees who had been violently expelled from Rwanda by Hutus, began attacking Rwanda. Though a peace agreement between the government and the RPF was reached in the 1993 Arusha Accords, it would not last.⁴¹

Following the April 6, 1994 shooting down of the plane of the Burundian president and Rwandan president, a Hutu, Hutu extremists engaged in a massive genocidal campaign. In the span of one hundred days, Hutu extremists massacred an estimated one million Tutsis and moderate Hutus. The RPF in turn committed atrocities against Hutus as it captured military control of Rwanda.⁴²

In response to these atrocities, the UNSC called upon the Secretary General to create a Commission of Experts for investigating and reporting on the Hutu crimes. Finding clear and substantial evidence of genocide, in October of 1994 the Commission advocated for the establishment of a tribunal. The Rwandan government, now controlled by the RPF Tutsis, supported such a tribunal and proclaimed its complete cooperation with the process. Under Resolution 955 the UNSC authorized the creation of the ICTR under the UN Charter's Chapter VII authority. The new tribunal would have jurisdiction over crimes against

⁴¹ "Rwanda: A Brief History of the Country," *Outreach Programme on the Rwanda Genocide and the United Nations*, accessed October 18, 2016, <http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml>.

⁴² *Ibid.*

humanity, genocide, and crimes committed in violation of Article III to the Geneva Conventions and Additional Protocol II between January 1 and December 31 of 1994.⁴³

As with the ICTY, the Security Council boldly and perhaps unrealistically aimed to stop such horrific crimes, deliver justice to the perpetrators, and foster national reconciliation, restoration, and lasting peace.⁴⁴ Since 1995, the ICTR has indicted 93 individuals, convicted 62 of them, and become the first international tribunal to rule on genocide, define genocide, and establish rape as a genocidal act.⁴⁵ Yet again, despite these marked accomplishments, the Tribunal has been plagued by challenges and critiques which have hampered its ability to achieve its ambitious goals.

Challenges

Though the Rwandan government was initially receptive to the establishment of the ICTR, Rwandan officials began opposing the tribunal once they realized the scope of international involvement in the process and how disconnected its form of justice would be from that of Rwandans.⁴⁶ The Rwandan government also objected to the Tribunal's temporal limitation, preferring that the jurisdictional time period extend further back to crimes prior to the Arusha Accords and less far forward, so that retribution crimes by Tutsis against Hutus would not fall within the ICTR's scope.⁴⁷ Additionally, the government wanted punishments to include the death penalty and for genocide to be the only crime covered within the Tribunal's jurisdiction, so as to again protect retribution crimes committed by Tutsis.⁴⁸ The government also opposed the ICTR's location in Arusha, Tanzania, arguing that the

⁴³ Lilian A. Barria and Steven D. Roper, "How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR," *The International Journal of Human Rights* 9, no. 3 (September 2005): 354-355, doi:10.1080/13642980500170782.

⁴⁴ Rosemary Byrne, "Promises of Peace and Reconciliation: Previewing the Legacy of the International Criminal Tribunal for Rwanda," *European Review* 14, no. 4 (October 2006): 489, doi:10.1017/S1062798706000500.

⁴⁵ "The ICTR in Brief," *United Nations Legacy Website of the International Criminal Tribunal for Rwanda*, accessed December 3, 2016, <http://unictr.unmict.org/en/tribunal>.

⁴⁶ Smith, *After Genocide*, 69.

⁴⁷ Barria and Roper, "How Effective Are International Criminal Tribunals?," 355.

⁴⁸ *Ibid.*

Tribunal's deterrent ability "will be lost if the trials were to be held hundreds of miles away from the scene of the crime."⁴⁹

Such concerns forecast the Rwandan government's lack of cooperation with the Tribunal. In fact, the government under President Paul Kagame actively opposed the Tribunal, running a "high-saturation ad campaign" to persuade locals to condemn the ICTR and organizing protests against it.⁵⁰ Locals carried out such protests on multiple occasions, including in 2002⁵¹ and 2004,⁵² when protestors openly opposed the UN and its imposition of justice.

As with the ICTY, many of the complaints by the government and citizens alike have revolved around a feeling of disconnect between the Tribunal and the region it was meant to serve. President Kagame outwardly rebuked the ICTR's attempt to deliver justice outside of Rwanda,⁵³ arguing that Rwanda "need[ed] the people of Rwanda to see this justice for themselves."⁵⁴ Given the Tribunal's great physical distance from local Rwandans, it is unsurprising that many have been unable to directly experience the Tribunal's work. To reach the ICTR in Arusha, Rwandans would have to travel by bus across Rwanda, Uganda, and Kenya before reaching Tanzania.⁵⁵ This cost \$60, or a typical Rwandan's month's earnings.⁵⁶

⁴⁹ Yacob Haile-Mariam, "The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court," *Hastings International and Comparative Law Review* 22, no. 4 (1999): 698.

⁵⁰ Dina Temple-Raston, *Justice on the Grass Three Rwandan Journalists, Their Trial for War Crimes and a Nation's Quest for Redemption* (New York: Free Press, 2005), 124–25.

⁵¹ *Ibid.*, 124.

⁵² "Rwanda; Thousands Demonstrate Against UN Tribunal," *Hirondelle News Agency (Lausanne)*, February 29, 2004, <http://allafrica.com/stories/200403011211.html>.

⁵³ Temple-Raston, *Justice on the Grass Three Rwandan Journalists, Their Trial for War Crimes and a Nation's Quest for Redemption*, 125.

⁵⁴ *Ibid.*, 71–72.

⁵⁵ *Ibid.*, 125.

⁵⁶ *Ibid.*

This disconnect is similarly bolstered by local perceptions of the ICTR. According to Steven Ratner, “many Rwandans tend to hold an overwhelmingly negative opinion of international justice.”⁵⁷ Dina Temple-Raston’s study reveals this feeling of negativity and alienation, with Hutu inmates in Rwandan jails expressing their disdain with the international justice system for high-level perpetrators, who they saw as living posh lives “better than our lives in freedom.”⁵⁸ Such sentiment reveals a disconnect between local and international justice and perhaps a preference for local accountability and punishment. Similarly, victims expressed their outrage with the light sentencing of perpetrators. Two women who had been rape victims in particular stated their indignation that what they had suffered and would forever suffer from the rape was worse than the punishment their perpetrators received from the ICTR.⁵⁹

Such disconnect from Rwandan society has been inherently intertwined with concerns that, due to Rwanda’s lack of ownership over the process, the goal of national reconciliation was unfeasible. During the establishment of the ICTR, Rwandan academics like James Bucyana worried that this Western style of justice would impede the ability of Rwandans to achieve reconciliation and would further entrench ethnic hostilities between Tutsis and Hutus.⁶⁰ Rather than imposing Western justice, the international community should have served as an aid in the process of reconciliation, recognizing that the goal of national reconciliation was something to be attained by Rwandans.⁶¹ Concerns over the Tribunal’s ineptitude in regards to reconciliation were well-founded, as hostilities and murders have persisted among Tutsis and Hutus.⁶² By 2004, Tutsis dominated the valuable jobs in Rwanda,

⁵⁷ Steven R. Ratner, *International War Crimes Trials: Making a Difference? Proceedings of an Interdisciplinary Conference at the University of Texas School of Law, Austin, Texas, November 6-7, 2003* (Austin, Texas: University of Texas, Austin School of Law, 2004), 86.

⁵⁸ Temple-Raston, *Justice on the Grass Three Rwandan Journalists, Their Trial for War Crimes and a Nation’s Quest for Redemption*, 128.

⁵⁹ *Ibid.*, 153.

⁶⁰ James Bucyana, “The International Penal Tribunal for Rwanda and National Reconciliation,” *Int’l J. Refugee L.* 8 (1996): 622–23.

⁶¹ *Ibid.*, 625.

⁶² Smith, *After Genocide*, 69.

leaving Hutus feeling disenfranchised.⁶³ In the words of one Hutu man, “This isn’t over. There will be another genocide. Maybe not as bad as the killing in 1994, but there will be another. The majority people won’t let this stand.”⁶⁴

The Court has also been criticized for its partiality due to its temporal jurisdiction and one-sided prosecution of perpetrators. Early on in the development of the ICTR, Bucyana expressed concern that limiting the temporal jurisdiction of the Tribunal would leave out histories and crimes that had been committed prior to January 1, 1994. In Bucyana’s words:

Hearing only one category of crimes committed in a specified and restricted time period leaves other condemnable crimes unchallenged. Such justice favours [*sic*] wrongdoers of one camp at the expense of victims of the other camp. This sorrow will be all the more harrowing and the injustice all the more flagrant, because one group of victims will have to pay twice: First, through their loss, and secondly, through having to pay but without being compensated themselves.⁶⁵

One-sided justice would indeed develop, as the ICTR has only tried Hutus for crimes, despite the RPF’s clear perpetration of atrocities before and after the genocide. Many Rwandans thus view the Tribunal as biased. Such biased accountability has painted the ICTR “as a victor’s tribunal instead of being an international impartial tribunal.”⁶⁶ In calling for the prosecution of Tutsi perpetrators, many critics are simultaneously lambasting the Tribunal for its partiality while calling for another form of partiality, this time one that favors Hutus.

Attempts to prosecute both sides of the conflict, however, were met with great resistance from the Rwandan government, local organizations, and local Rwandans. In 2002, Chief Prosecutor Carla Del Ponte broached the possibility of prosecuting RPF members who had allegedly committed war crimes, which sparked an indignant reaction from President

⁶³ Temple-Raston, *Justice on the Grass Three Rwandan Journalists, Their Trial for War Crimes and a Nation’s Quest for Redemption*, 244.

⁶⁴ *Ibid.*

⁶⁵ Bucyana, “The International Penal Tribunal for Rwanda and National Reconciliation,” 624–25.

⁶⁶ Rassemblement pour le Retour des Réfugiés et la Démocratie au Rwanda, “The International Criminal Tribunal for Rwanda Must Rise Above Politics,” Press Release, (July 23, 2001), <http://www.inshuti.org/rdr35a.htm>, as quoted in Smith, *After Genocide*, 126.

Kagame.⁶⁷ Witness organizations, including Ibuka, which represented genocide survivors, threatened to stop working with the Tribunal.⁶⁸ When Del Ponte went to Kigali to discuss the possibility of two-sided prosecution, she was met with three thousand protestors shouting at her to “Go home.”⁶⁹ The Rwandan government eventually refused to work with the ICTR by denying potential witness visas, thus forcing the Tribunal to choose between trials of Hutus or no trials whatsoever.⁷⁰ The government also successfully demanded Del Ponte’s resignation; she was replaced by Hassan Bubacar Jallow, a prosecutor with no intention of pursuing RPF crimes.⁷¹

Common Challenges from the ICTY and ICTR Experiences

Looking at the experiences of the ICTY and ICTR, one can discern some common and severe challenges that both Tribunals have faced. These difficulties and critiques can be broken down into five themes: (1) lack of government cooperation with the Tribunal; (2) disconnect between the Tribunal and locals/victims; (3) lack of domestic institution building/ownership of the justice process; (4) inability to contribute to reconciliation/peace; and (5) perceived and often real one-sided justice. Unfortunately, the ICC would not learn from these pitfalls.

Falling into the Trap: The ICC’s Replication of IJ’s Past Mistakes

Problematically, the ICC would come from and be modeled after these two tribunals, both of which have been undoubtedly plagued by serious issues. As Smith notes, in each of the international criminal justice institutions established, the victims, perpetrators, states, and local communities affected by the crimes have been “left behind.”⁷² Rather than serving the victims and locals affected by the heinous crimes, the ICC has offered “justice from on

⁶⁷ Temple-Raston, *Justice on the Grass Three Rwandan Journalists, Their Trial for War Crimes and a Nation’s Quest for Redemption*, 124.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Gregory Mthembu-Salter, “Rwanda: Law, Justice and Power,” *openDemocracy*, June 26, 2009, <http://www.opendemocracy.net/article/rwanda-power-law-and-justice>.

⁷¹ Ibid.

⁷² Smith, *After Genocide*, 67.

high,”⁷³ repeating several of the mistakes of the ICTY and ICTR and overpowering “long-held, respected indigenous tools for forgiveness and reconciliation.”⁷⁴ Smith, commenting on the work of Vojin Dimitrijevic, finds that the people on the ground simply do not see or feel international justice the way that those in The Hague do.⁷⁵ Turning now toward the ICC’s creation, one will be able to see some similar and glaring forewarnings to the Court.

The Creation of the ICC

Lead Up

Following the fall of the Berlin Wall, the subsequent re-opening of international cooperation,⁷⁶ and the coincident human rights focus of the Western and Eastern blocs,⁷⁷ the UN General Assembly called upon the UN International Law Commission, an expert body, to write a treaty that would create a permanent international criminal court.⁷⁸ General Assembly Resolution 44/39, adopted in the 44th Session in 1989, called for the establishment of an international criminal court to prosecute individuals and entities guilty of transnational illicit drug trafficking and other transnational crimes.⁷⁹ In the UN Committee on Crime Prevention and Control’s 11th meeting held in 1990, the committee also called for the consideration of an international criminal court that would try the most serious international crimes through the universal jurisdiction principle.⁸⁰ Such international crimes typically

⁷³ Ibid., 109.

⁷⁴ Ibid., 74.

⁷⁵ Smith, *After Genocide*, 67; Vojin Dimitrijevic, “Justice Must Be Done and Be Seen to Be Done: The Milosevic Trial,” *East European Constitutional Review* 11 (2002): 62.

⁷⁶ José Doria et al., eds., *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko: In Memoriam Professor Igor Pavlovich Blishchenko (1930-2000)*, International Humanitarian Law Series, v. 19 (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2009), xix.

⁷⁷ Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008), 37; Louise I. Shelley, “Human Rights as an International Issue,” *The Annals of the American Academy of Political and Social Science* 506 (1989): 46.

⁷⁸ Smith, *After Genocide*, 34.

⁷⁹ General Assembly, Resolution 44/39, “International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and Other Transnational Criminal Activities,” December 4, 1989, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/44/39.

⁸⁰ UN. Committee on Crime Prevention and Control, “Report of the Committee on Crime Prevention and Control on Its 11th Session, 5-16 February 1990,” Draft Documents/Reports/Official Documents (United

include crimes against humanity, genocide, war crimes, drugs and arms trafficking, and other violations of international law.⁸¹ For nine years, the ILC debated the establishment of a court to prosecute such atrocities. These debates reveal members' underlying concerns regarding a permanent international arbiter of justice and illuminate current critiques of the Court.

Throughout the early 1990s, actors from governments, legal backgrounds, academia, NGOs, and various other fields continued a concerted push for criminal accountability at the international level.⁸² In 1990, the ILC recognized the concerns of many of these actors and stated, "It has now emerged that international crime has achieved such wide dimensions that it can endanger the very existence of States and seriously disturb international peaceful relations."⁸³ States widely supported the creation of a permanent international criminal court, though they varied in their opinions about its appropriate structure and jurisdictional scope.⁸⁴ African states, both separately and as regional blocks, also overwhelmingly supported the Court and were some of the Court's largest proponents during negotiations.⁸⁵

There was also an early recognition and conception of the benefits of an international criminal court for the global legal community. The ILC discussed in its first report the advantage of an international criminal court that would promote uniform legal application

Nations: Economic and Social Council (ECOSOC), April 10, 1990), <http://hdl.handle.net/11176/182162>. "Universal jurisdiction" is the legal principle which enables national courts to prosecute individuals for serious international crimes, including genocide, war crimes, crimes against humanity, and torture, regardless of that individual's nationality, the State's own interests, or where the crime was committed. See "Universal Jurisdiction," *International Justice Resource Center*, February 7, 2010, <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>.

⁸¹ "International Crime Law and Legal Definition," *US Legal, Inc.*, accessed March 22, 2017, <https://definitions.uslegal.com/i/international-crime/>.

⁸² Schiff, *Building the International Criminal Court*, 39.

⁸³ International Law Commission, *Report of the International Law Commission on the work of its forty-second session, 1 May - 20 July 1990, Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10* (1990), 22.

⁸⁴ International Law Commission, *Report of the International Law Commission on the work of its forty-second session*, 24.

This will be a point of contention for states throughout the negotiations and may reveal current tensions and concerns with the Court.

⁸⁵ Gerhard Werle, ed., "Africa and the International Court: Then and Now," in *Africa and the International Criminal Court*, International Criminal Justice Series 1 (The Hague: Asser Press, 2014), 15. African initial perceptions of and involvement with the Court will be revealed later in the chapter and draw an interesting juxtaposition to present day perceptions.

and the best assurance of objectivity in trying crimes.⁸⁶ Such uniformity and objectivity would be characterized in its report a year later as necessary for viable and sustained international order.⁸⁷

In this 1992 report by the Working Group on the Question of an International Criminal Jurisdiction, members also asserted that an international criminal court would provide justice in cases where they perceived national courts had largely failed to do so. The Commission remarked that many instances of crimes against humanity had occurred without punishment at the state level, either due to state bias or incapacity. Absent punishment or accountability for these actions, members believed that international law would lose its legitimacy. Moreover, they acknowledged that situations can become further complicated and challenging to adjudicate at the state level when the State itself has been implicated in the alleged crimes.⁸⁸ When states are unable to properly address crimes themselves, members argued that an international criminal court would be able to handle the case. In the Working Group's words,

the problem is not that national courts are working improperly or are misconstruing the provisions of international treaties or the meaning of general international law. The problem is that such courts, and the system of national jurisdiction generally, seem ineffective to deal with an important class of international crime, especially State-sponsored crime or crime which represents a fundamental challenge to the integrity of State structures. Reinforcing national criminal justice systems is not likely to address this need.⁸⁹

⁸⁶ International Law Commission, *Report of the International Law Commission on the work of its forty-second session*, 22.

⁸⁷ International Law Commission, Working Group on the Question of an International Criminal Jurisdiction, *Report of the Working Group on the Question of an International Criminal Jurisdiction*, in *Report of the International Law Commission on the work of its forty-fourth session, 4 May - 24 July 1992, Official Records of the General Assembly, Forty-seventh session, Supplement No. 10*, by International Law Commission (1992), 86.

⁸⁸ This desire to combat state ineptitude and/or recalcitrance is fascinating, given later concerns with outside imposition and neo-colonialism.

⁸⁹ *Ibid.*, 62; 39.

This point is interesting, as the Court will eventually only try individuals, rather than states themselves. If crimes are really state sponsored, then one has to go after the heads of state to condemn those crimes. This will be a major source of backlash against the Court later on.

To skeptics, the 1992 Working Group stated that, "...the task of constructing an international order, an order in which the values which underlie the relevant rules of international law are respected and made effective, must begin somewhere."⁹⁰ Establishing international accountability for egregious international crimes was a logical step toward creating such a world. In the words of the Working Group, "Unless responsibility can be laid at the door of those who decide to commit heinous crimes of an international character, the suppression of those crimes will be that much more difficult."⁹¹ This statement involves two key components: (1) that an international criminal court would serve to enhance respect for and the efficacy of international law, and (2) that international legal responsibility from an international criminal court would contribute to quashing those crimes.⁹²

Red Flags

Though international actors generally agreed that international accountability for international crimes was necessary, throughout the negotiations ILC members reflected concerns regarding how a permanent international criminal court would function in practice. Some of the sharpest debates were over the Court's jurisdiction and which bodies would have to consent to an individual case. Such discussions highlight state concerns with the Court's relationship to national judiciaries, state sovereignty, and how states might work alongside the Court.

Members also disagreed about the role to be played by the UN Security Council and its relationship to the Court, as they expressed unease with the UNSC's potential political influence over the institution. In addition, States debated over which actors should have the ability to initiate proceedings or inform the Court of a situation, some desiring a wider net of potential initiators and others seeking a more narrow scope of actors. Others envisioned a very different approach which revolved around supporting national judiciaries. These members emphasized concerns with disrupting state judicial systems, fortifying domestic judiciaries, and keeping judicial proximity to the victim communities.

⁹⁰ Ibid., 64.

⁹¹ Ibid.

⁹² How can these standards be measured? Was this setting the Court up to disappoint?

Jurisdiction

One major source of contention regarding an international criminal court was what kind of jurisdiction the court would have. Under one model, the ICC would have exclusive jurisdiction, meaning that all crimes under the Court's competences would fall solely within the Court's jurisdiction.⁹³ In the Commission's 1991 and 1992 reports, some states argued that exclusive jurisdiction would be the cleanest and simplest model and advocated for a stronger court with compulsory and exclusive jurisdiction for certain crimes, meaning that general consent to the Court constituted consent to individual cases and that only the Court had jurisdiction over certain crimes.⁹⁴ Others opposed this approach, however, and some questioned whether the Court's jurisdiction would apply only to crimes committed by nationals of State parties or to those committed by nationals of both State and non-state parties,⁹⁵ potentially signaling unease with a non-state party being subjected to the Court's exclusive jurisdiction.

In a second model, the ICC and national courts would have concurrent jurisdiction. This would involve state parties determining on an individual case basis whether to subject the case to its own jurisdiction or to refer it to the Court.⁹⁶ In their 1992 Report, members spoke about concurrent jurisdiction in light of the belief that, "...the basic purpose of a court is to assist states in finding solutions to problems involving serious offences of an international character."⁹⁷ The report acknowledged "the danger of disrupting satisfactory

⁹³ International Law Commission, *Report of the International Law Commission on the work of its forty-second session*, 24.

⁹⁴ International Law Commission, *Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (1991)*, 86; International Law Commission, Working Group on the Question of an International Criminal Jurisdiction, *Report of the Working Group on the Question of an International Criminal Jurisdiction*, in *Report of the International Law Commission on the work of its forty-fourth session*, 59.

⁹⁵ International Law Commission, *Report of the International Law Commission on the work of its forty-second session*, 25.

⁹⁶ *Ibid.*

⁹⁷ International Law Commission, Working Group on the Question of an International Criminal Jurisdiction, *Report of the Working Group on the Question of an International Criminal Jurisdiction*, in *Report of the International Law Commission on the work of its forty-fourth session*, 66.

Here is an early recognition of the role of the Court in assisting states, though the Commission does not elaborate on how it would do so. Would the Court play a role in domestic institution building?

implementation of the existing systems,”⁹⁸ while they also recognized that a significant issue posed by an international criminal court was its potential hindrance upon state sovereignty.⁹⁹ Concurrent jurisdiction would thus better protect against these state concerns, while it would also foster more domestic judicial ownership.

While those opposed to this approach recognized that more States would agree to it, because it is less of a hindrance on sovereignty, they nonetheless expressed “strong reservations” as to concurrent jurisdiction.¹⁰⁰ This side believed that such a system would require intricate analysis of how to jurisdictionally meld national courts and the Court, which would potentially create jurisdictional conflicts and thus “paralysis and injustice.”¹⁰¹ In this view, concurrent jurisdiction would spur incredibly difficult conflicts with little chance of resolving them. Sovereignty “was no longer as absolute as it had been in the past” and States could not use this to block justice.¹⁰²

Consent Requirement

Another issue of concern was whose consent would be required for the Court to hear an individual case. One side argued that only the consent of the territorial state, or the state where the alleged crime occurred, should be required, since this would “facilitate investigation and collection of evidence.”¹⁰³ Others believed that such a requirement would allow territorial states to interfere with the trials by using their territorial dominance to

⁹⁸ International Law Commission, *Report of the International Law Commission on the work of its forty-second session*, 22.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, 86.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, 87.

This is foreshadowing the issue of complementarity, especially when parameters are not made clear. Here is a lack of clarity regarding competency and a recognition that jurisdictional disputes in a complementary system could potentially stall justice.

¹⁰³ International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (1994), 24.

control the trials, which would therefore hinder the Court and foster impunity.¹⁰⁴ They thus argued that the custodial state, or the state whose national the suspect was, should also have to consent to the Court's jurisdiction, so as to guarantee "the presence of the accused."¹⁰⁵ Linked to the previous concern regarding state interference, other members worried that such a mechanism would allow states to disrupt individual cases on behalf of their nationals.¹⁰⁶

Another view held that States should be given the option to select national criminal jurisdiction, even if they generally consented to the Court's jurisdiction. These proponents preferred that the consent of the territorial state be given priority, as this solution would better preserve sovereignty and most States already adhered to the principle of territoriality. They also recognized the drawback of the perpetrating or victim state conducting the trial, yet argued that the advantages of the system would outweigh the disadvantages.¹⁰⁷

While most held that agreement of the territorial state was essential, many were hesitant to require additional states to provide consent. In their view, such a requirement would allow numerous states to deny the Court jurisdiction, and thus to severely limit the Court's ability to adjudicate.¹⁰⁸ Another side took these paralysis concerns to the extreme and advocated for no special territorial state privilege and no other state consent requirement.¹⁰⁹ According to this view, international crimes were the concern of the whole international community and consent to the Court should entail consent to the Court's jurisdiction over a State's nationals as well.¹¹⁰

¹⁰⁴ International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session*, 24.

¹⁰⁵ *Ibid.*

Such an approach, in which both the territorial and custodial states would have to consent to the court's jurisdiction, would likely have made it more difficult for the Court to hear cases.

¹⁰⁶ *Ibid.*

¹⁰⁷ International Law Commission, *Report of the International Law Commission on the work of its forty-third session*, 88.

Such a system would have the benefit of holding trials closer to the victim communities.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

The Role of the Security Council

Another major source of contention between states was the role the Security Council would play in the Court. As the preeminent international body charged with addressing security issues facing the international community, the UNSC was created by the UN Charter to be a powerful institution. Far from being neutral, however, the UNSC is an inherently political institution, with only five permanent members and ten rotating non-permanent members with positions on the Council.¹¹¹ The permanent five, consisting of the United States, the United Kingdom, France, China, and Russia, would hold particularly strong sway in the referral of security situations, if the Council was to be given such a responsibility.¹¹² If any one of the five permanent members vetoed a referral decision, the case would not get referred, which would thus give these five states immense power.¹¹³

Given the political character of the UNSC, and the permanent five in particular, ILC members were particularly wary of the ICC-UNSC relationship. This concern was amplified by the period in which the negotiations were occurring, given that the UNSC in the early 1990s had begun to assert itself more by imposing sanctions and deploying peacekeeping missions in the Middle East and Africa.¹¹⁴ Members were specifically worried that an ICC heavily influenced by the UNSC would not be impartial or independent, but would rather be influenced by the politics of its most prominent members. In turn, referrals would fall in line with the UNSC's political preferences and no case would be able to be brought against any permanent member of the Council.¹¹⁵ Unease with the UNSC's ICC role was also

¹¹¹ "Members of the United Nations Security Council," *United Nations Security Council*, accessed November 8, 2016, <http://www.un.org/en/sc/members/>.

¹¹² The Security Council did hold such sway over referrals in both the establishment of the ICTY and the ICTR, thus lending historical potency to states' concerns with the Council's powerful referral role in international judicial institutions like the ICC.

¹¹³ "Voting System and Records for the United Nations Security Council," *United Nations Security Council*, accessed November 8, 2016, <http://www.un.org/en/sc/meetings/voting.shtml>.

¹¹⁴ Newsteam Staff, "The UN Security Council (UNSC)," *Council on Foreign Relations*, September 2, 2015, <http://www.cfr.org/international-organizations-and-alliances/un-security-council-unsc/p31649>.

¹¹⁵ Fanny Bendetti, "A Report on the Negotiations for the Creation of an International Criminal Court," accessed November 8, 2016, <https://www.wcl.american.edu/hrbrief/v5i1/html/icc2.html>.

complicated by the U.S. turn against the Court as the summer of 1998 neared its end,¹¹⁶ which positioned the United States as a non-party to the Statute yet an influential referral player on the Council.

In light of this, several ILC members discussed what role the UNSC should have in consenting to cases. Some suggested that the UNSC's consent should be required only for cases involving a threat or breach of peace or an act of aggression. Others resisted requiring consent by the UNSC for the initiation of proceedings for crimes of aggression, holding that doing so could potentially establish inequality among those accused of such crimes. These members asserted that the Court must be held to a UNSC positive finding of a threat or act of aggression but not necessarily vice versa, as this would create unfairness among large and small states. Such a double standard would be legally unacceptable.¹¹⁷

Concern about keeping the Court and the UNSC distinct also arose, as such advocates argued that the Court must operate as a judicial organ free from the politics of the UNSC. Due to the absence of a system of checks and balances or oversight of the UNSC, the two institutions needed to be distinguished. A truly independent court, from their view, would improve the UN Charter system and allow for both justice and political wisdom to prevail. Relying upon the UNSC for a determination of aggression or threat thereof would stall the justice process, as oftentimes the Council had been unable to make such a determination when it should have, or they had vetoed a determination for political, rather than legal reasons.¹¹⁸

The potential UNSC veto and referral powers were also areas of serious contention. One side of the debate argued that a UNSC veto might hinder "respect for the principles of non-discrimination and equal justice."¹¹⁹ Relatedly, there was concern with the UNSC's

¹¹⁶ Smith, *After Genocide*, 37.

¹¹⁷ International Law Commission, *Report of the International Law Commission on the work of its forty-third session*, 90-91.

¹¹⁸ *Ibid.*

Here we see an explicit recognition of the politics of the UNSC and the dangers of conferring too much power upon it. This is an early expression of the need to keep the law and politics as distinct as possible.

¹¹⁹ International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session*, 24.

ability to refer specific individuals to the Court. Ultimately, members agreed in the ILC's 1993 Working Group Report that the UNSC would only have the power to refer general situations, with a prosecutor having the discretion to investigate and prosecute specific individuals.¹²⁰ The role of the UNSC and its influence over the ICC process remain major points of disagreement today.

Initiation Proceedings

Another central concern during the ILC negotiations was who would have the power to initiate proceedings. In the ILC's 1991 Report, numerous members argued that States should only have the power to inform the Court of potential crimes and alleged perpetrators, while the power to initiate a case and bring charges should belong to a prosecutor's office within the Court.¹²¹ According to these members, allowing States to have this power would invite political motivations and threaten the objectivity and fairness of the process.¹²²

Others argued that all State parties to the Code of Crimes against the Peace and Security of Mankind, regardless of whether the case involves their territory or nationals, should have the ability to inform the Court of cases. Another view pushed for NGOs, intergovernmental organizations, and individuals to have the power to inform the Court about cases, due to these groups' greater flexibility with their involvement in international relations.¹²³ These members wanted to expand the set of actors who could inform the Court about violations.

Beyond the ability to inform the Court of cases, many also wanted to broaden the number of players who could officially refer cases. In the ILC's 1991 Report, one member asserted that crimes against the peace and security of mankind necessarily involve

¹²⁰ International Law Commission, Working Group on a Draft Statute for an International Criminal Court, *Report of the Working Group on a Draft Statute for an International Criminal Court*, in *Report of the International Law Commission on the work of its forty-fifth session, 3 May - 23 July 1993, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10*, by International Law Commission (1993), 109.

¹²¹ International Law Commission, *Report of the International Law Commission on the work of its forty-third session*, 90.

¹²² *Ibid.*

¹²³ *Ibid.*, 90-91.

individuals with the support or agreement of a State.¹²⁴ Thus, States, or at least those states, should not be the only referring power; rather, the General Assembly, the UNSC without the ability to veto, and UN recognized national liberation movements should have the power to refer cases.¹²⁵ A related view expressed concern with the UNSC's veto power and thus suggested that the General Assembly should have referral power, given that it was the most internationally representative body, had Charter competencies to address peace and security issues, and could act in the event of a UNSC veto.¹²⁶

Alternate Visions for the Court

Supporting National Judiciaries

Many members discussed the possibility of focusing on national judiciary building, either instead of or in addition to establishing an international criminal court. In the first case, some members argued that, rather than establishing a permanent international criminal court, the international community should instead focus on fortifying existing national courts so that they may better adjudicate international crimes themselves. This member thus argued that the international community should endeavor instead to bolster national criminal judiciaries, rather than create a new institution, so that they may fulfill responsibilities already set out by international criminal treaties.¹²⁷

The 1992 Working Group agreed that, for some circumstances, such as smaller countries suffering from finite judicial and legal capacities, bolstering national judiciaries

¹²⁴ Ibid., 91.

¹²⁵ Ibid.

Here is a recognition that individuals often do not act alone, but rather with the tacit consent of the State. Yet, members would decide to establish a Court that would only try individuals, rather than states, for international crimes.

¹²⁶ International Law Commission, Working Group on a Draft Statute for an International Criminal Court, *Report of the Working Group on a Draft Statute of an International Criminal Court*, in *Report of the International Law Commission on the work of its forty-fifth session*, 109.; International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session*, 44.

¹²⁷ International Law Commission, Working Group on the Question of an International Criminal Jurisdiction, *Report of the Working Group on the Question of an International Criminal Jurisdiction*, in *Report of the International Law Commission on the work of its forty-fourth session*, 63.

Here is an early recognition of already existing problems with the concept of concurrent jurisdiction and its inability to build up domestic institutions or foster domestic ownership of the criminal justice process.

would be the preferred solution. Such a boost could be facilitated by sending experienced judges from nearby judiciaries to these states, creating regional collaborative appeal courts, or providing courts with judicial training and aid.¹²⁸ In this way, the international community could engage in domestic institution building and foster domestic ownership over the justice process. Thus, both sides of the argument generally agreed as to the importance of building national judicial capacity.

Yet, the Working Group also recognized that the international criminal court would be primarily designed to address cases in which the State is unable or unwilling to prosecute cases impartially.¹²⁹ The Court would be most useful in circumstances in which no other venue exists which could give a fair trial and especially where political factors may impede the justice process.¹³⁰ Another approach called for the Court to do both. The Court could act in an advisory capacity to national courts for certain cases, serving as “a tool for international pressure” and as a framework and shaper of global public opinion.¹³¹ Similarly, the Court could offer optional preliminary rulings regarding the extent of the State’s involvement in the conflict; this would then permit a determination of whether the State could appropriately try the suspected individuals in the situation.¹³² In response to this, however, members cited concerns with the impartiality and fairness of national trials under certain circumstances, especially where the State itself may be implicated in the crimes.¹³³ Another option would be for the Court to assist national courts with potential legal standards or principles, so as to facilitate decisions in national courts.¹³⁴

¹²⁸ *Ibid.*, 70.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ International Law Commission, *Report of the International Law Commission on the work of its forty-third session*, 89.

¹³² International Law Commission, Working Group on the Question of an International Criminal Jurisdiction, *Report of the Working Group on the Question of an International Criminal Jurisdiction*, in *Report of the International Law Commission on the work of its forty-fourth session*, 70.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, 63.

As these various suggestions reveal, members were cognizant of the importance of keeping national judiciaries close to the justice process. The 1992 Working Group explicitly recognized the need to foster closeness of justice and argued that, when feasible, the Court's hearing of a case should occur in the state, or at a minimum, in the region, where the alleged crime occurred.¹³⁵ Here one can see the ILC's early acknowledgement of the importance of proximity of victims to the judicial proceedings. Yet, at the same time members also admitted that there was a danger in having trials too close to the state where the crimes were committed, as doing so could "cast a political shadow over judicial proceedings" and lead to impartiality and security concerns.¹³⁶ Despite this concern, members still held that the domestic location of trials was preferable and that outside locations should be used "only when it is both practicable and consistent with the interest of justice to do so."¹³⁷ However, it is unclear how closeness of justice to the State would be logistically feasible with a permanent, sitting Court, unless there was an outreach mechanism by which victims could easily access the Court or its local offices, or if the Court heavily prioritized domestic trials.

Africa's Unique Role and Embrace of the Court

Africa Leading the Charge

One of the most interesting stories of the ICC negotiations was the essential and leading role that African nations played in supporting the Court's establishment.¹³⁸ Led by high-level officials like Attorneys General, Ministers of Foreign Affairs, and Ministers of Justice, African nations were heavily engaged in the negotiations.¹³⁹ Africans were in every commission, held eight of the thirty-one Vice Presidencies of the diplomatic conference, and

¹³⁵ *Ibid.*, 68.

¹³⁶ International Law Commission, *Report of the International Law Commission on the work of its forty-second session*, 116.

¹³⁷ *Ibid.*

Notice how vague and ambiguous these parameters of "practicable and consistent with the interest of justice" are. Such lack of clarity may potentially pose an issue in regards to the concept of complementarity and what constitutes judicial competency.

¹³⁸ Werle, "Africa and the International Court: Then and Now," 15.

¹³⁹ *Ibid.*, 14.

served as the chair of the Drafting Committee.¹⁴⁰ African delegates consistently advocated for a standing, objective, and powerful ICC that would both handle international crimes and assist with fortifying national judiciaries.¹⁴¹

South African Development Community (SADC) Support for the Court

The South African Development Community (SADC) was a particularly fervent supporter of the ICC throughout the negotiation process. In its 1997 meeting, Ambassador Josiah Jele Khiphusizi, speaking as a permanent representative of South Africa on the SADC's behalf, expressed enthusiasm and support for an international criminal court. In his view, establishing a permanent international criminal court would both punish criminals for their atrocities and deter such future acts.¹⁴² After several meetings, members during the September 11 to September 14, 1997 meeting agreed to ten fundamental principles for a Court, pictured in Figure 1.

¹⁴⁰ Ibid.

¹⁴¹ Ibid., 15.

¹⁴² Josiah Jele Khiphusizi, "The Permanent Mission of South Africa to the United Nations" (Speech delivered at the Sixth Committee of the 52nd General Assembly, New York, October 21, 1997), Coalition for the International Criminal Court.

- 0_ Support for the early establishment of an international criminal court;
- 1_ The ICC should be effective, independent and impartial and should operate within the highest standards of international justice;
- 2_ The court should be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. Moreover, States should not attempt to shield the accused from justice;
- 3_ The ICC should be responsible, sensitive and give special consideration to victims, particularly women and children;
- 4_ The ICC should be unfettered by the veto of the Security Council;
- 5_ The independence of the prosecutor must be guaranteed by the Statute and should have the necessary powers to initiate investigations and prosecute ex-officials;
- 6_ The ICC must enjoy the maximum co-operation of all States, including non State Parties where possible;
- 7_ The court should have inherent jurisdiction over the crimes of genocide, crimes against humanity and serious violations of the laws and principles applicable in armed conflict. In addition, aggression should also be included within the jurisdiction of the court if consensus can be so reached;
- 8_ The opt-in mechanism ought to apply in respect of treaty based crimes; and finally
- 9_ Human rights must be fully respected in all aspects of the ICC Statute, particularly those relating to the rights of the accused and the right to a fair trial.

Figure 1: SADC 10 Principles for an International Criminal Court

Source: Screenshot from: Khiphusizi (1997)

In light of these ten principles, one can see some key points of concern for SADC members in regards to what an international criminal court would look like. SADC members desired an effective and objective court, as supported by an independent prosecutor and the ability to be undeterred by a UNSC veto. Additionally, members invoked the principle of complementarity and sought cooperation of states with the Court. SADC members also supported an opt-in mechanism in which states could individually accept jurisdiction for certain crimes. Lastly, members desired a court that was especially concerned with and accountable to the victims. For the SADC, inclusion of these principles in the Statute was “essential to the effective establishment and functioning of an international criminal court.”¹⁴³

Regional Declaration of Support at Dakar

In February of 1998, months before the Rome Conference, representatives from various African nations met for the African Conference in Dakar and declared their support

¹⁴³ Ibid.

Whether the ICC has lived up to these principles in current practice will likely have a large effect on SADC support for the Court.

for the ICC's establishment. In underlining the importance of establishing such a Court for Africa and the entire world, they stressed a Court that would be "independent, permanent, impartial, just and effective."¹⁴⁴ The attendees, like the SADC members, also discussed the importance of keeping the ICC separate from any political interference from the UNSC, as well as the need to have an independent prosecutor and a financial source that would not impact its independence and objectivity.¹⁴⁵

Aside from the emphasis on independence, members also declared the importance of complementarity. In their view, national and regional judiciaries should hold the "primordial" role in prosecutions and the Court should only act when such systems were either unable or unwilling to address crimes within its jurisdiction.¹⁴⁶ This idea of the ICC as a "court of last resort"¹⁴⁷ is embodied in the principle of complementarity, in which the Court only adjudicates international crimes when domestic judicial systems will not or cannot adjudicate such crimes themselves. Yet, to be effective, the Court would need states to cooperate with it when it is adjudicating cases.¹⁴⁸

African Voices at the Rome Conference

Throughout the Rome Conference, African delegates from various countries shared their visions of the Court. During the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998, delegates from various African states revealed their preferences for the ICC. These preferences reflected potential concerns that African nations had with the Court and how it would operate.

Like their SADC and Dakar predecessors, all delegates were keen to stress the importance of creating a court that would be independent of political influences, either from states or from the UNSC, and that would have an independent prosecutor. In addition to these

¹⁴⁴ African Conference, "Dakar Declaration on the Establishment of the International Criminal Court," February 6, 1998, <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ United Nations High Commissioner for Refugees, "International Criminal Court (ICC)," in *Refworld*, (2017), <http://www.refworld.org/publisher/ICC.html>.

¹⁴⁸ African Conference, "Dakar Declaration on the Establishment of the International Criminal Court."

concerns, delegates supported the principle of complementarity, as well as the need to build up domestic judiciaries.¹⁴⁹ In light of contemporary African critiques of the Court, these common concerns will become all the more prescient.

Certain concerns and visions, however, were more particular to certain states. For example, Mr. Omar, the South African delegate representing the SADC, strongly advocated against impunity and viewed the Court as a mechanism for international peace.¹⁵⁰ He stated,

The establishment of an international criminal court would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment of international peace. In view of the crimes committed under the apartheid system, the International Criminal Court should send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished.¹⁵¹

Additionally, Mr. Omar was particularly concerned with State integrity and equality in the international arena and the Court's role in promoting these.¹⁵² Mr. Raditapole, the Mosotho delegate, agreed with the SADC's position, though he did not himself emphasize these points.¹⁵³

Mr. Raditapole did, however, express a different viewpoint than other African representatives in pushing for a more powerful Court that would not be hindered by states. To achieve this, he argued for the Court to have far reaching powers in order to attain State

¹⁴⁹ United Nations, "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998" (Official Records, Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, New York, 2002), 65; 69; 74; 77, http://legal.un.org/diplomaticconferences/icc-1998/docs/english/vol2/a_conf_183_sr2.pdf#page=2.

¹⁵⁰ Ibid., 65.

¹⁵¹ Ibid.

¹⁵² Ibid.

This assertion of integrity and equality of States within the international sphere was enshrined in the 1648 Treaty of Westphalia. Mohammed Ayoob discusses how Third World States are more attached to this concept of equality and non-interference than Western States. See Mohammed Ayoob, *The Third World Security Predicament: State Making, Regional Conflict, and the International System*, Emerging Global Issues (Boulder, Colo.: Rienner, 1995).

¹⁵³ Ibid., 69.

cooperation and for automatic jurisdiction over all statutorily-defined crimes.¹⁵⁴ In his view, the Court should be the body to determine the unwilling or unable standard of complementarity and “complementarity should not be invoked with the aim of obstructing justice.”¹⁵⁵ Mr. Asmani, the Tanzanian delegate, expressed a similar desire that sovereignty and complementarity not come at the expense of judicial inaction.¹⁵⁶

The Kenyan delegate, Mr. Wako, took a somewhat different view on this issue, expressing concern with the Court holding too much power. Mr. Wako stressed that the powers of the prosecutor would have to be specifically delineated so as to minimize abuse of power, signaling potential concern with a Court process that was too invasive. He further argued that the Court’s financing procedure not impinge upon its independence.¹⁵⁷

The Mountain of Warning Signs

Taken together, concerns raised from the experiences of the ICTY and ICTR, as well as those expressed during ICC negotiations, warned of trouble to come for the Court. From the ICTY and ICTR experiences, key issues were raised regarding: (1) a lack of governmental cooperation with the Court; (2) judicial distance from locals/victims; (3) a failure to foster domestic ownership/institution-building; (4) a failure to foster reconciliation/peace; and (5) a perception of one-sided justice. Similarly, concerns raised by various states and African leaders illuminate issues with: (1) complementarity; (2) state sovereignty; (3) state cooperation with the Court; (4) State and UNSC politics; (5) referral/initiation powers; and (6) domestic institution building. Such historical concerns ultimately shed light on the contemporary African backlash against the ICC. This backlash and the connection between current and past African critiques will be explored next.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

Again, here is the concept of complementarity highlighted by delegates. However, this delegate is recognizing the potential abuse of the concept and supporting a Court that would be able to prevent States from misusing it.

¹⁵⁶ Ibid., 74.

¹⁵⁷ Ibid., 77.

Chapter 2: Africa Lashes Back

Just two months before members of the international community agreed to establish the International Criminal Court via the Rome Statute, British Nigerian scholar Funmi Olonisakin made a few ominous predictions. In May of 1998, Olonisakin predicted that Africa, with its recent crimes in various parts of the continent, would be an early region of focus for the Court.¹⁵⁸ Though such violations were in part a motivating factor for African nations to push for the Court¹⁵⁹ and to sign numerous international conventions to demonstrate their “collective willingness to combat impunity,” Olonisakin asserted that the past had shown that actually combatting impunity had been hindered by individual states’ inability to implement such agreements.¹⁶⁰ According to Olonisakin, African states were only likely to work with the ICC when doing so was in their best interest.¹⁶¹ Regional and political allegiances might thus prevent African states from arresting ICC suspects and delivering them to the Court and the Court could really only be successful in situations where “there is no clear authority and sovereignty is blurred.”¹⁶² Such was the outlook for Africa and the ICC as the Court would commence its operation.

As the Court began to take its first cases, it would indeed focus on Africa and engender great resistance as a result. With nine out of its ten “situations” located in Africa,¹⁶³ the Court has almost exclusively focused on the prosecution of African perpetrators of African crimes. This apparent targeting of Africa by the ICC, coupled with the ICC’s indictments of two sitting African heads of state, has sparked a massive African backlash by several African leaders and the AU against the Court. Virtually unrecognizable from the supportive body of countries that had called for the establishment of the ICC back in the

¹⁵⁸ Funmi Olonisakin, “A Permanent International Tribunal: African Perspectives,” *ODI HPN*, May 1998, <http://odihpn.org/magazine/a-permanent-international-tribunal-african-perspectives/>.

¹⁵⁹ Philipp Kastner, “Africa — A Fertile Soil for the International Criminal Court?,” *Die Friedens-Warte* 85, no. 1/2 (2010): 132.

¹⁶⁰ Olonisakin, “A Permanent International Tribunal: African Perspectives.”

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ “Situations under Investigation,” *International Criminal Court*, accessed February 12, 2017, <https://www.icc-cpi.int/pages/situations.aspx>.

1990s, in recent years numerous African nations have increasingly sought to disparage, undermine, and even withdraw from the Court.

The Backlash Begins

On January 31, 2017, African leaders met at the AU Summit in Addis Ababa and, in a non-binding decision, agreed to a plan for Africa's collective withdrawal from the ICC.¹⁶⁴ Though still in its very early stages, with no established timeline or steps, the plan calls for African nations to fortify their own judiciaries and to enlarge the jurisdiction of the African Court of Justice and Human Rights to thus "reduce the deference to the ICC."¹⁶⁵ This move came after three African nations, Burundi, South Africa, and The Gambia, decided to withdraw from the Court late in 2016, though both South Africa and The Gambia have recently rescinded their plans for withdrawal. In February of 2017, new Gambian president Adama Barrow wrote to the United Nations to revoke his country's withdrawal from the Court, citing his commitment to human rights, the Rome Statute, and the ICC.¹⁶⁶ Having been blocked from withdrawal by its High Court, which ruled its withdrawal unconstitutional, South Africa has also recently rescinded its withdrawal from the ICC.¹⁶⁷ These withdrawals, or at least attempts thereof, nonetheless beg the question: what pushed these states to this point? Though uncovering with certainty the reasons beneath this backlash is an impossible task, an examination into each nations' criticisms of the Court will shed much needed light upon this extremely topical issue.

¹⁶⁴ Elias Meseret, "African Leaders Agree to Mass Withdrawal From ICC," *Time*, February 1, 2017, <http://time.com/4656211/african-union-withdraw-international-criminal-court/>.

¹⁶⁵ *Ibid.*

¹⁶⁶ Merrit Kennedy, "Under New Leader, Gambia Cancels Withdrawal From International Criminal Court," *NPR.org*, The Two-Way edition, sec. International, accessed March 24, 2017, <http://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court>.

¹⁶⁷ Norimitsu Onishi, "South Africa Reverses Withdrawal From International Criminal Court," *The New York Times*, March 8, 2017, sec. Africa, <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html>.

Burundi Backs Out

On October 12, 2016, Burundi's National Assembly voted to withdraw from the ICC.¹⁶⁸ In April of that same year, the Court had begun a preliminary examination into Burundian political violence alleged to have occurred between 2015 and 2016.¹⁶⁹ Repudiating this examination, the Burundian government lashed out at the Court and argued that the ICC's involvement would fuel "potentially negative forces and their cronies" to commit additional violence.¹⁷⁰ Yet, the main thrust of Burundi's criticisms were not centered around concerns with peace. Rather, Burundi's withdrawal was largely framed as a refusal to submit to what they saw as an imperialist Court.

Calling the Court an "instrument" used for the purposes of destabilizing the world's poor nations, the government accused the Court of pursuing "a regime change agenda, masterminded by Western powers."¹⁷¹ In their press release announcing their withdrawal, Burundi's Council of Ministers claimed that the Burundian government had been fighting terrorists who were attempting to overthrow its institutions.¹⁷² According to the Council, these terrorists were funded and aided by certain western nations and have not been condemned or reported by those countries since.¹⁷³

The Burundian government alleged that western powers were not only supporting rebels against it, but that they were also using their financial power over the Court to influence its case selection. In that same press release, the Council discussed the Court's financing, in which the EU provides more than 70% of its funding. This structure, according to the Council, has created a Court that is "an instrument of political pressure on the

¹⁶⁸ Diane Uwimana, "Burundi MPs Vote for the Withdrawal from ICC," *IWACU English News*, October 12, 2016, <http://www.iwacu-burundi.org/englishnews/burundi-mps-vote-for-the-withdrawal-from-icc/>.

¹⁶⁹ "Burundi Walks Away from the ICC," *IRIN*, October 19, 2016, <https://www.irinnews.org/news/2016/10/19/burundi-walks-away-icc>.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Philippe Nzobonariba, "Press Release of the Meeting of the Council of Ministers of Thursday, 06 October 2016" (Press Release, Bujumbura, Burundi, October 7, 2016), <http://www.burundi.gov.bi/spip.php?article1534>. [Nzobonariba is noted as "Secretary-General Government and Government Spokesman."]

¹⁷³ *Ibid.*

Governments of poor countries or a means of destabilizing them.”¹⁷⁴ Thus, in the eyes of Burundi’s government, ICC investigations of African statesman, like its investigation of the Burundian violence, have been “under the impulse of the great powers.”¹⁷⁵

Burundi, according to the Council, had initially joined the Court to fight impunity and was committed to this fight, claiming to be in the process of investigating the political violence that the Court was trying to take over. According to the Council, the ICC’s intrusion violates the Rome Statute’s complementarity principle and amounts to “a serious and flagrant violation of sovereignty and national security.”¹⁷⁶ The Council also pointed out that, at the same time as certain world powers are using the Court to force the hand of international law down upon Burundi, these states have themselves refused to submit to the Court’s jurisdiction in an effort to protect their own nationals. Calling the major powers out for their hypocrisy, Burundi refused to remain a party to a statute that is, in their view, controlled by countries who are not parties to it.¹⁷⁷

South Africa Follows Suit

Just one week later, South Africa followed Burundi and decided to begin its own withdrawal process from the Court.¹⁷⁸ Similarly to Burundi’s claims, South African leaders criticized the Court for targeting African leaders¹⁷⁹ and for forcing Africans to “continue to

¹⁷⁴ Ibid.

This notion of a nexus between funding and imperialistic control of the Court has been reinforced by prominent African scholars, such as Ugandan scholar Mahmood Mamdani. Mamdani argues that the Court “is dancing to the tune of Western States. Given Africa’s traumatic experience with the very same colonial powers that now, in effect, direct the ICC, it is an unfortunate case of déjà vu,” **as quoted without citation in**, Mwangi S. Kimenyi, “Can the International Criminal Court Play Fair in Africa?,” *Brookings Institution*, November 30, 2001, <https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa/>.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Department of Justice and Constitutional Development: Republic of South Africa, “Briefing to the Media by Minister Michael Masutha on the Matter of International Criminal Court and Sudanese President Omar Al Bashir” (Press Release, October 21, 2016), http://www.justice.gov.za/m_statements/2016/20161021-ICC.html.

¹⁷⁹ Owen Bowcott, “Sudan President Omar Al-Bashir Leaves South Africa as Court Considers Arrest,” *The Guardian*, June 15, 2015, sec. World news, <https://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan>; “South Africa to Quit International Criminal Court,” *Al Jazeera*,

unjustifiably bear the brunt of the decisions of the ICC,” citing the referral of the Sudanese case as the most recent example.¹⁸⁰ According to one African minister, executing the ICC arrest warrant for Sudanese president al-Bashir would result in “regime change.”¹⁸¹ In regards to concerns with the Court’s alleged imperialist overtones, South Africa echoed Burundi’s critiques.

Yet, South Africa’s concerns about the Court run deeper and involve the government’s image of its own role as a player in the international sphere and African politics. Under Article 89(1) of the Rome Statute, State parties are required to comply with the ICC’s arrest warrants,¹⁸² even if those warrants are for high-level officials, such as sitting heads of state, who would otherwise be protected by diplomatic immunity. In June of 2015, Sudanese president Omar al-Bashir travelled to South Africa for an AU summit and left without arrest. In explaining their failure to arrest Bashir, South African Minister of the Presidency Jeff Radebe cited AU treaty obligations, presumably head of state immunities, as a legal barrier to handing over heads of state like Bashir.¹⁸³ South Africa endeavored to engage in formal talks with the Court to discuss such concerns, as well as to propose amendments to the Statute so as to remedy confusion within the Statute’s consulting and cooperation requirements for members, again presumably in relation to head of state immunities.¹⁸⁴ At the same time, South Africa was seeking to begin bilateral and multilateral

October 21, 2016, <http://www.aljazeera.com/news/2016/10/south-africa-formally-applies-quit-icc-media-161021044116029.html>.

¹⁸⁰ “ANC: ICC No Longer Useful,” *News24*, June 14, 2015, <http://www.news24.com/SouthAfrica/News/ANC-ICC-no-longer-useful-20150614>.

¹⁸¹ “South Africa to Withdraw from War Crimes Court,” *BBC News*, October 21, 2016, sec. Africa, <http://www.bbc.com/news/world-africa-37724724>.

¹⁸² International Criminal Court, *Rome Statute of the International Criminal Court*, art. 89.

¹⁸³ Thulani Gqirana, “Radebe: ‘We Have Challenges with the ICC,’” *Mail & Guardian*, June 25, 2015, sec. National, <http://www.lexisnexis.com/lxacui2api/api/version1/getDocCui?oc=00240&hnsd=f&hgn=t&lni=5HG4-1GW1-F198-MOM3&hns=t&perma=true&hv=t&hl=t&csi=270944%2C270077%2C11059%2C8411&secondRedirectIndicator=true>.

¹⁸⁴ *Ibid.*

negotiations with other African nations in order to quicken the reform process for the African Court on Human and Peoples' Rights, as well as for various other regional tribunals.¹⁸⁵

South African courts, however, were not pleased with the government's refusal to arrest and deliver Bashir to the ICC. Having issued an emergency court order in 2015 for Bashir's arrest at the Johannesburg Summit, the High Court in 2016 reaffirmed the unconstitutionality of the government's failure to arrest Bashir.¹⁸⁶ Labeling the government's actions as "disgraceful conduct",¹⁸⁷ the Court rebuked South Africa's inaction, foreshadowing its later position against the government's recent attempt at ICC withdrawal.

Attempts at withdrawal from the Court would come not long after South Africa's own High Court lambasted its failure to apprehend Bashir, as South Africa began the process in the fall of 2016. Among South Africa's chief reasons for withdrawal were its duties as a promoter of peace in Africa and its obligations under customary law. South Africa's Diplomatic Immunities and Privileges Act of 2001 offers diplomatic immunities and privileges to heads of state, among other high-level persons.¹⁸⁸ In the government's press release, Minister Michael Masutha asserted that the Rome Statute's requirement to arrest indicted sitting heads of state impeded South Africa's ability to engage in international relations with other countries, especially those nations undergoing severe conflicts.¹⁸⁹ In this view, South Africa's diplomatic responsibilities necessitated withdrawal from the Court.

Turning away from the ICC and toward Africa's own judicial mechanisms, Masutha reaffirmed South Africa's commitment to combating impunity and fostering peaceful

¹⁸⁵ Ibid.

¹⁸⁶ Peter Dube, "Bashir Case Goes to South Africa's Supreme Court of Appeal," *The East African*, February 12, 2016, <http://www.theeastafrican.co.ke/news/Bashir-case-goes-to-South-Africa-Supreme-Court-of-Appeal/2558-3073348-65vm4b/index.html>.

¹⁸⁷ "South African Court Rules Failure to Detain Omar Al-Bashir Was 'Disgraceful,'" *The Guardian*, March 15, 2016, sec. World news, <https://www.theguardian.com/world/2016/mar/16/south-african-court-rules-failure-to-detain-omar-al-bashir-was-disgraceful>.

¹⁸⁸ Republic of South Africa, *Diplomatic Immunities and Privileges Act, 2001*, vol. 437, Act No. 37, 2001 22876 (Cape Town: Government Gazette, 2001), art. 8(1), http://www.saflii.org/za/legis/num_act/diapa2001363.pdf.

¹⁸⁹ Department of Justice and Constitutional Development: Republic of South Africa, "Briefing to the Media by Minister Michael Masutha on the Matter of International Criminal Court and Sudanese President Omar Al Bashir."

solutions and declared they would do so by continuing to work with the AU and the African Court on Human and People's Rights, as well as other "international human rights instruments."¹⁹⁰ According to South African Minister of International Relations and Cooperation, Maite Nkoana-Mashabane, the Rome Statute itself conflicts with the vital aim of peaceful resolutions to conflicts.¹⁹¹ In his words, "peace and justice must be viewed as complementary and not mutually exclusive."¹⁹² From the perspective of South African leaders, withdrawing from the Court will enable the government to fulfill its international diplomatic responsibilities, hold perpetrators accountable, and promote peaceful solutions, all without the perceived meddling of an allegedly biased international body in African affairs.

Such efforts, however, have been forestalled by the South African High Court's ruling that the government's withdrawal is unconstitutional. According to the High Court, such a withdrawal is invalid, as the government failed to consult the South African Parliament prior to beginning the process.¹⁹³ This ruling likely fueled the South African government's recent revocation of its withdrawal from the ICC, though it is unclear if the government intends to pursue another route to withdraw from the Court. Given the ruling party's massive majority in parliament, withdrawal via legislature would likely prevail.¹⁹⁴

Out Goes The Gambia

Less than a week after South Africa initiated its withdrawal from the ICC, The Gambia followed suit. On October 25, 2016, The Gambia's information minister, Sheriff Bojang, justified his country's withdrawal by pointing to the Court's selective prosecution of Africans. Bojang labeled the Court as a tool "for the persecution of Africans and especially their leaders" and an institution that has turned a blind eye to Western crimes.¹⁹⁵ The minister

¹⁹⁰ Ibid.

¹⁹¹ "South Africa to Quit International Criminal Court."

¹⁹² Ibid.

¹⁹³ Onishi, "South Africa Reverses Withdrawal From International Criminal Court."

¹⁹⁴ Ibid.

¹⁹⁵ "Gambia Withdraws from International Criminal Court," *Al Jazeera*, October 26, 2016, <http://www.aljazeera.com/news/2016/10/gambia-withdraws-international-criminal-court-161026041436188.html>.

pointed to at least thirty Western countries that had perpetrated “heinous war crimes against independent sovereign states and their citizens” but had gone un-examined by the Court.¹⁹⁶ Echoing the anti-imperialist sentiments of the Burundian and South African leaders, Bojang called the ICC the “International Caucasian Court” and described it as pursuing the humiliation of Africans.¹⁹⁷ Leading up to their withdrawal, President Jammeh in a 2015 meeting with Chief Prosecutor Bensouda had formally and unsuccessfully requested an ICC investigation into the migrant crisis as a way to hold the EU accountable for thousands of African refugee and migrant deaths.¹⁹⁸ Here, again, what was perceived as the Court’s selective prosecution and imperialist targeting of African countries prompted yet another African country to attempt to sever its ties with the ICC. While such severance has been stopped by incoming President Barrow, The Gambia’s initial attempt to withdraw from the Court and the reasons behind it are worth analysis.

As these recent examples of withdrawal illustrate, the criticisms behind current African opposition to the Court are multifaceted and complex. However, these criticisms, as well as those that will be evoked in the case studies of Darfur, Kenya, and Uganda, and in the examination of the AU-ICC relationship, can be broken down into four main critiques described by Roland Cole: (1) the Court’s selective bias; (2) the Court’s neocolonial/imperialistic agenda; (3) the Court’s inhibition of peace processes; and (4) the Court’s lack of respect for heads of state.¹⁹⁹ Though not all encompassing, these four concerns comprise the thrust of present African resistance to the Court and will thus be useful later in developing strategies to increase the ICC’s legitimacy in the eyes of Africans and bring Africa back within the Court’s fold.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ “Gambia’s Jammeh Expels European Union Diplomat, Asks ICC to Investigate Death of African Migrants at Sea,” *Mail & Guardian Africa*, June 6, 2015, <http://mgafrica.com/article/2015-06-06-gambia-jammeh-expels-european-union-diplomat-asks-icc-to-investigate-death-of-african-migrants-at-sea/>.

¹⁹⁹ Roland J.V. Cole, “Africa’s Relationship with the International Criminal Court: More Political Than Legal,” *Melbourne Journal of International Law* 14, no. 2 (March 1, 2014): 4, <http://www.lexisnexis.com/lncui2api/api/version1/getDocCui?lni=5BNN-HY50-01GK-Y19H&csi=270944,270077,11059,8411&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true>.

The Criticisms Explained

Selective Bias

The first criticism, selective bias, revolves around the issue of which cases the Court has chosen to pursue. By virtue of this selection, this criticism also involves which cases the Court has *not* selected for investigation. Nine out of the Court's ten investigations have been in Africa, leading many African leaders and civil society actors to charge the Court with an Africa bias.

Tim Murithi argues that the Court's nearly exclusive selection of African cases "has created a distorted perception amongst African governments regarding the underlying intention behind the establishment of the Court."²⁰⁰ Given that countries around the world continue to perpetrate war crimes, while Africa remains the nearly sole focus of the Court, African leaders view the Court as administering "selective justice."²⁰¹ A common critique, says Murithi, is that the ICC only chooses cases that will not "alienate its main financial supporters."²⁰² Prominent Ugandan scholar, author, and activist, Mahmood Mamdani supports this critique and argues that the Court chooses to investigate cases where the target is a U.S. adversary and chooses not to investigate those where the governments are U.S. allies.²⁰³ In the words of Tedros Adhanom, Ethiopian foreign minister, "The court has transformed itself into a political instrument targeting Africa and Africans."²⁰⁴

This charge that the Court is intentionally targeting a specific world region is as pernicious as it is, unfortunately, predictable. Back in 2001, Henry Kissinger acknowledged

²⁰⁰ "A Fractious Relationship: Africa and the International Criminal Court," Perspectives: Political Analysis and Commentary from Africa (Cape Town, South Africa: Heinrich Böll Foundation Southern Africa, 2012), 4, https://www.boell.de/sites/default/files/2012-08-Perspectives_Africa_1_12.pdf.

²⁰¹ *Ibid.*, 5.

²⁰² *Ibid.*

As has been mentioned previously, 70% of the ICC's budget is provided by the EU, making the EU the Court's "main financial supporters" referred to here by Murithi.

²⁰³ Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror*, 1st ed (New York: Pantheon Books, 2009), 284, **as cited in** David Hoile, *Justice Denied: The Reality of the International Criminal Court* (London: The Africa Research Centre, 2014), 26.

²⁰⁴ Shane Hickey, "African Union Says ICC Should Not Prosecute Sitting Leaders," *The Guardian*, October 12, 2013, sec. World news, <https://www.theguardian.com/world/2013/oct/12/african-union-icc-kenyan-president>.

the ambiguity of the Rome Statute's defined crimes and the tendency for this lack of clarity to lead to "politicized application."²⁰⁵ In fact and as history has shown, this selectivity, even among choosing which perpetrators within a conflict to prosecute, has been a staple of past international tribunals, including those established in the wake of WW2 and after the Yugoslavian and Rwandan conflicts. General Curtis Lemay, the WW2 general responsible for the fire raids against the Japanese, explicitly recognized the power politics and "victor's justice" involved in international justice when he remarked, "If we'd lost the war, I'd have been hung as a war criminal."²⁰⁶ The perception of political manipulation in the form of the selective application of the Rome Statute and the selective prosecution of certain perpetrators poses serious credibility concerns for international adjudicative institutions like the ICC.

Human Rights Watch perhaps puts it best:

When officials from or supported by powerful states have been able to avoid international prosecutions, the legitimacy of international justice, and, in turn, the ICC as its flagship institution, is called into question.²⁰⁷

Neo-colonialism/Imperialistic Agenda

The second major, and related criticism of the ICC, revolves around claims of neo-colonialism and imperialism. In essence, this is the belief that certain stronger countries are endeavoring to indirectly control weaker countries through legal, economic, and financial means.²⁰⁸ In regards to the ICC, this criticism amounts to perceptions of the Court as a legal tool of the West used to destabilize, humiliate, and/or thwart African countries.

²⁰⁵ Henry A. Kissinger, "The Pitfalls of Universal Jurisdiction," *Foreign Affairs*, July 1, 2001, <https://www.foreignaffairs.com/articles/2001-07-01/pitfalls-universal-jurisdiction>.

²⁰⁶ Christian P. Potholm, "Chapter 4: Sustained but Controlled Ruthlessness," in *Winning at War: Seven Keys to Military Victory throughout History* (Lanham, M.D.: Rowman & Littlefield Publishers, 2010), xciii.

²⁰⁷ Human Rights Watch, "Human Rights Watch Memorandum for the Eighth Session of the International Criminal Court Assembly of States Parties" (Memorandum, November 2009), 3.

²⁰⁸ Ibrahim Gassama, "Africa and the Politics of Destruction: A Critical Re-Examination of Neocolonialism and Its Consequences," *Oregon Review of International Law* 10, no. 2 (2008): 338, **as cited in** Steve Odero, "Politics of International Criminal Justice: The ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis," in *Prosecuting International Crimes in Africa*, ed. Chacha Murungu and Japhet Biegon (Pretoria: Pretoria University Law Press, 2011), 154.

Featured heavily in the criticisms by Burundian, South African, and Gambian officials during their ICC withdrawal announcements, this critique of the Court has been voiced by numerous African leaders in regards to various African cases, including the Darfur and Kenya referrals. Kenyan foreign minister Moses Wetangul has called the Court's activities "very suspect" and charged that the general application of "so-called universal jurisdiction in criminal matters has been laced with some racial undertones."²⁰⁹ Rwandan President Paul Kagame has echoed this sentiment, asserting that the ICC "has been put in place only for African countries, only for poor countries."²¹⁰ Further painting the Court as an imperialist institution, Kagame has also stated,

Is it only the African involved in criminal activity? We have to fight this tendency for Europeans to always cast themselves in the role of judge and the African always as the guilty party. We have to fight it on all fronts.²¹¹

This criticism has deep roots in the very foundations of international law and the development of the universality principle contained within the concept of universal jurisdiction. As Steve Odero explains in his analysis of this neo-colonialism critique, colonial powers used the specter of international law to justify colonialism in Africa, in that such powers employed international law to legitimate their subjugation of African peoples under the guise of civilizing the undeveloped world.²¹² Anghie and Chimni further assert that colonialism brought about international law's integral concept of universality by spreading

²⁰⁹ Abayomi Azikiwe, "Africans Rally behind Sudan President," *Workers World*, March 12, 2009, http://www.workers.org/2009/world/sudan_0319/.

²¹⁰ "Rwandan President Says ICC Targeting African Countries," *AFP*, July 31, 2008, http://www.sudantribune.com/spip.php?page=imprimable&id_article=28103.

²¹¹ Shyaka Kanuma, "I Refuse to Be a Servant of the West," *The East African*, December 20, 2008, <https://www.jamiiforums.com/threads/i-refuse-to-be-a-servant-of-the-west.22091/>.

²¹² Odero, "Politics of International Criminal Justice: The ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis," 155.

and applying the law to colonies as the law for all countries.²¹³ Scholars thus point to an inherent power dynamic intertwined with international law, universality, and sovereignty.²¹⁴

Having used international law to rationalize the subjugation of African peoples, these same powers are now said to be paradoxically using the law as a symbol of their dedication to human rights and as a means of prosecuting Africans.²¹⁵ Some scholars have argued that one can view the use of the law to both protect and prosecute Africans as a continuance of colonialism's "civilizing mission."²¹⁶ It thus comes as no surprise, as Anghie and Chimni state, that African states, former colonies themselves, might be gravely concerned with the operationalization of international criminal law by stronger countries.²¹⁷

Scholars assert that this distrust of international legal institutions is only further fueled by the "Double Standard" problem, in which countries are not treated equally under international law.²¹⁸ This is most explicitly borne out by the composition of the UNSC, on which the United States, China, and Russia all hold permanent seats, yet none are parties to the Rome Statute. Such UNSC protection of countries like the United States from ICC accountability, as Jalloh argues, confirms for Africans their notions of both selective justice and neo-colonialism.²¹⁹ Their position on the Council, coupled with their non-member status to the Court, shield these major powers from facing accountability at the ICC.

²¹³ Antony Anghie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*," *Chinese Journal of International Law* 2, no. 1 (January 1, 2003): 86, doi:10.1093/oxfordjournals.cjilaw.a000480.

²¹⁴ Ibid.

²¹⁵ Mahmood Mamdani, "Darfur, ICC and the New Humanitarian Order," *Pambazuka News*, September 17, 2008, <https://www.pambazuka.org/governance/darfur-icc-and-new-humanitarian-order>.

²¹⁶ Anghie and Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*," 86.

²¹⁷ Ibid., 84.

²¹⁸ Charles Chernor Jalloh, "Regionalizing International Criminal Law?," *International Criminal Law Review* 9, no. 3 (July 1, 2009): 492, doi:10.1163/157181209X457956.

²¹⁹ Ibid.

Inhibition of Peace Processes: The Peace versus Justice Debate

A third major criticism leveled against the Court involves the well-known and controversial “peace versus justice” debate²²⁰ among international justice scholars. At the crux of this dichotomy is the idea that international criminal tribunals, by indicting and prosecuting perpetrators, discourage perpetrators from coming to peaceful resolutions and thus, protract the conflict. By this logic, immunity, rather than prosecution, motivates perpetrators to halt their violence and thus fosters peace.²²¹

Though scholars like Pam Akhavan and others take issue with what they see as a false dichotomy between peace and justice,²²² the debate as to the working relationship between peace and legal accountability rages on. Some argue that there is a “duty to prosecute” and that such prosecution deters crimes, promotes reconciliation by individualizing guilt, and establishes rule of law in otherwise unstable situations.²²³ Others, on the contrary, point to the importance of political context and hold that judicial intervention can destabilize regions and inflame local divisions, thus endangering the possibility of peaceful settlement.²²⁴ According to this view, the prosecution-peace promotion relationship is not self-evident and one must consider the ability of trials to invoke hostility among people and to be used as

²²⁰ The peace-justice relationship is an empirical question up for debate within the scholarly community. See Payam Akhavan, “Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism,” *Human Rights Quarterly* 31, no. 3 (2009): 624–54, doi:10.1353/hrq.0.0096; Rachel Kerr and Eirin Mobekk, *Peace and Justice* (Hoboken: Wiley, 2013), <http://public.eblib.com/choice/publicfullrecord.aspx?p=1272663>; Linda M. Keller, “The False Dichotomy of Peace versus Justice and the International Criminal Court,” *Hague Justice Journal* 3, no. 1 (2008), https://www.tjsl.edu/sites/default/files/files/Keller_Uganda_ICC_EN.pdf; Kenneth A. Rodman, “Peace Versus Justice,” in *Encyclopedia of Global Justice*, ed. Deen K. Chatterjee, Springer Reference (Dordrecht: Springer, 2011), http://rp3yk7jm6a.search.serialssolutions.com/?ctx_ver=Z39.88-2004&ctx_enc=info%3Aofi%2Fenc%3AUTF-8&rft_id=info%3Aasid%2Fsummon.serialssolutions.com&rft_val_fmt=info%3Aofi%2Ffmt%3Akev%3Amtx%3Abook&rft.genre=bookitem&rft.title=Encyclopedia+of+Global+Justice&rft.au=Rodman%2C+Kenneth&rft.atitle=Peace+Versus+Justice&rft.date=2011-01-01&rft.volume=2&rft.spage=824&rft.epage=827&rft.externalDocID=3707300363¶mdict=en-US.

²²¹ For an overview of the “peace versus justice” debate, see Akhavan, “Are International Criminal Tribunals a Disincentive to Peace?,” 625.

²²² *Ibid.*, 629; Kerr and Mobekk, *Peace and Justice*, 117; Keller, “The False Dichotomy of Peace versus Justice and the International Criminal Court,” 14; M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability,” *Law and Contemporary Problems* 59, no. 4 (Fall 1996): 12.

²²³ Rodman, “Peace Versus Justice,” 825.

²²⁴ *Ibid.*, 826.

potential political platforms, and, in contrast, the ability of amnesties to foster truthfulness and reconciliation.²²⁵

More than just a topic of debate among scholars, the peace versus justice issue is one of direct concern to many African critics of the Court. Given that individuals suspected of planning, funding, beginning, and carrying out atrocities in civil wars are often the players later involved in peace negotiations and their implementation, Murithi quite logically asserts the existence of a peace-justice tension.²²⁶ Though the establishment of the ICC was expected to bring “a new era of respect for human rights, peace, justice and reconciliation,”²²⁷ and the founders of the Rome Statute themselves hoped that the ICC would deter the most serious international crimes,²²⁸ many critics perceive the Court as negatively impacting peace and stability in the regions it targets. Such concerns with the potential conflict between peace and justice have been expressed both historically in the Yugoslavian and Rwandan cases, as well as in the three ICC case studies of Darfur, Uganda, and Kenya. Scholars also connect the last major critique, regarding the prosecution of sitting heads of state, to concerns with threatened peace and stability.²²⁹

Lack of Respect for Head of State Immunity

This final concern regarding head of state immunity stands out among the others as a concern of a legal nature. Essentially, this critique amounts to the conflict between the sovereign and diplomatic immunities afforded under international law and the Rome Statute's Article 27 provision, which establishes that the Statute “shall apply equally to all persons without any distinction based on official capacity.”²³⁰ Despite the Rome Statute's clear assertion that heads of state would not be exempt from criminal culpability, sovereign

²²⁵ Ibid.

²²⁶ “A Fractious Relationship: Africa and the International Criminal Court,” 5.

²²⁷ André Mbata Mangu, “The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview,” *Africa Development/Afrique et Développement* 40, no. 2 (2015): 9.

²²⁸ International Criminal Court, *Rome Statute of the International Criminal Court*.

²²⁹ Roland J.V. Cole, “Africa's Relationship with the International Criminal Court: More Political Than Legal,” 683.

²³⁰ International Criminal Court, *Rome Statute of the International Criminal Court*, art. 27, sec. 1.

and diplomatic immunity are nonetheless important components of international law.²³¹ Sovereign equality among all countries within the UN fundamentally means that no state is allowed to meddle in another's domestic jurisdiction; to do so, by prosecuting another states' high ranking official, would imply violation of that state's sovereignty.²³²

Despite this, there is precedent for international courts seeking prosecution against current heads of state. Though in *DRC v. Belgium* the ICJ ruled against the validity of the Court of Brussels' arrest warrant for a DRC Minister of Foreign Affairs, the Court implied that prosecution by an appropriate international body would be acceptable.²³³ Slobodan Milosevic's indictment by the ICTY, as well as Charles Taylors' indictment by the Special Court for Sierra Leone (SCSL), provide further evidence of the precedent for prosecuting sitting heads of state.²³⁴ Though the prosecution of such individuals is clearly precedential, African leaders have levelled the charge that the ICC does not respect head of state immunity and have most forcefully made this argument in the context of the Sudanese and Kenyan cases.

Having established these four main African critiques of the Court, it is now useful to turn to some case studies to illustrate how these critiques are relevant in practice. The cases of Darfur, Kenya, and Uganda will not only bring these core critiques to life, but will do so from differing angles and with differing emphases. The diversity within these cases reveals the complexity of the challenges that the ICC faces in confronting the backlash.

²³¹ Anthony Dworkin and Katherine Iliopoulos, "Crimes of War – The ICC, Bashir, and the Immunity of Heads of State," *Crimes of War Project*, accessed January 24, 2017, <http://www.crimesofwar.org/commentary/the-icc-bashir-and-the-immunity-of-heads-of-state/>.

²³² Ibid.

²³³ ICJ, "Democratic Republic of Congo v. Belgium: Case Concerning the Arrest Warrant of 11 April 2000," *ICJ Reports*, Vol. 2002, (Judgement of February 14, 2002), para. 61.

²³⁴ Nikki de Coninck, "The Head of State Immunity Doctrine in the Al Bashir Case: Is the Arrest Warrant Lawful?" (Master of Law in International and European Public Law, Accent Human rights Thesis, Tilburg University, 2011), 13–14, <http://arno.uvt.nl/show.cgi?fid=114710>.

Case 1: Darfur*The Conflict*

In 2003, rebel groups in Darfur, Sudan, including the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) armed themselves against the Sudanese Government, claiming that the government was discriminating against Darfur, particularly in its failure to provide the region with adequate social programs and infrastructure.²³⁵ Beginning in March, armed conflict raged between the Sudanese Government and these numerous rebel groups.²³⁶ Following an April 2003 rebel attack on the El Fasher airport, Bashir and fellow high-ranking Sudanese government officials constructed a counter-insurgency plan against the rebels.²³⁷

During this campaign, the Sudanese Armed Forces and their allies, including the Janjaweed militia, the Sudanese Police Forces, the Humanitarian Aid Commission (HAC), and the National Intelligence and Security Service (NISS), allegedly attacked Darfur citizens, particularly the Masalit, Fur, and Zaghawa groups, whom the government presumed to be closely tied to the rebel groups. Government forces allegedly perpetrated crimes against humanity, genocide, and war crimes throughout the campaign primarily against these ethnic groups. Such crimes included: pillaging towns and villages; murdering and exterminating thousands of civilians; raping thousands of civilian women; forcibly transferring hundreds of thousands of civilians; torturing civilians; contaminating the water pumps and wells of towns and villages; and encouraging tribes allied with the Government to resettle in these groups' villages and lands.²³⁸

Since 2004 the Sudanese Government and the rebels have attempted and agreed to numerous ceasefires, with the most recent example being Bashir's extension of a ceasefire at

²³⁵ Thomson Reuters Foundation, "Darfur Conflict," *Thomson Reuters Foundation News*, July 31, 2014, <http://news.trust.org//spotlight/Darfur-conflict>.

²³⁶ "The Prosecutor v. Omar Hassan Ahmad Al Bashir: Alleged Crimes (Non-Exhaustive List)," *International Criminal Court*, accessed December 22, 2016, <https://www.icc-cpi.int/darfur/albashir/pages/alleged-crimes.aspx>.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

the end of 2016.²³⁹ Since the conflict began, it has displaced over 2.3 million people and, though the number is debated, has killed an estimated 300,000 people.²⁴⁰ Despite a massive AU-UN joint peacekeeping mission that has sought to aid the millions of internally displaced persons (IDPs), the region remains embroiled in fighting and brutality.²⁴¹

The UNSC Steps In

On July 30, 2004, the UN Security Council passed Resolution 1566 to declare Darfur an international security and peace threat and call upon the Sudanese Government to disarm the Janjaweed, take them into custody, and hold them accountable for their atrocities.²⁴² Later in 2004 and having found that Sudan was not cooperating with the previous resolution, the UNSC passed Resolution 1564, which called for the establishment of an international commission of inquiry to investigate crimes committed by all parties in Darfur and the identification of those individual perpetrators.²⁴³ The International Commission of Inquiry on Darfur then found that the Sudanese Government and the Janjaweed committed “serious violations of international human rights and humanitarian law” and that, while the Sudanese government itself had not pursued genocide, certain individuals may have done so.²⁴⁴

In light of these findings and despite deliberating other avenues for holding the perpetrators accountable, the UNSC ultimately decided to refer Darfur to the ICC. This decision followed the recommendation of the International Commission of Inquiry on Darfur

²³⁹ Foundation, “Darfur Conflict”; “Al Bashir Extends Ceasefire in Darfur, Two Areas till End 2016,” *Radio Dabanga*, October 11, 2016, <https://www.dabangasudan.org/en/all-news/article/al-bashir-extends-ceasefire-in-darfur-two-areas-till-end-2016>.

²⁴⁰ Foundation, “Darfur Conflict.”

²⁴¹ Salil Shetty, “Chemical Weapons Are Being Used against the Darfuris. This Is a War Crime,” *The Guardian*, September 29, 2016, sec. Opinion, <https://www.theguardian.com/commentisfree/2016/sep/29/chemical-weapons-used-against-darfuris-war-crime>; “Sudan: Blame Traded over Civilian Deaths in Darfur,” *Al Jazeera*, January 3, 2017, <http://www.aljazeera.com/news/2017/01/sudan-civilian-deaths-darfur-170103081006839.html>.

²⁴² United Nations Security Council, Resolution 1556, “Report of the Secretary-General on the Sudan” (UN Document, 2004), [https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1556\(2004\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1556(2004)), para. 6.

²⁴³ United Nations Security Council, Resolution 1564, “Report of the Secretary-General on the Sudan” (UN Document, 2004), <https://www.un.org/en/sc/documents/resolutions/2004.shtml>, para. 1, 12.

²⁴⁴ Matthew Happold, “Darfur, the Security Council, and the International Criminal Court,” *The International and Comparative Law Quarterly* 55, no. 1 (2006): 228.

that “the ICC is the only credible way of bringing alleged perpetrators to justice.”²⁴⁵ Interestingly, the United States had advocated for a joint UN/AU tribunal to try the alleged crimes committed in Darfur, which would have been located in Arusha, Tanzania.²⁴⁶ Nonetheless, on March 31, 2005, the UNSC referred Darfur as its first case to the ICC.²⁴⁷

The Indictments

Since it began investigating the Darfur case, the ICC has issued arrest warrants for both government and rebel perpetrators for a mix of war crimes and crimes against humanity. On the government side, the ICC has issued warrants for Sudanese President Omar al-Bashir, Minister of State for the Interior of the Government of Sudan Ahmad Harun, alleged Militia/Janjaweed leader Ali Kushayb, and Minister of National Defence and former Minister of the Interior and Special Representative for the Sudanese President in Darfur Abdel Hussein.²⁴⁸ On the rebel side, the Court has issued warrants for Chairmen and General Coordinator of Military Operations of the United Resistance Front Abu Garda and Commander-in-Chief of the Justice and Equality Mouvement Collective-Leadership Abdallah Banda.²⁴⁹ Bashir, the most high profile of all of the indicted, has been accused by

²⁴⁵ International Commission of Inquiry on Darfur, “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 Sept 2004” (Geneva, January 25, 2005), para. 2-10.

²⁴⁶ Happold, “Darfur, the Security Council, and the International Criminal Court,” 229. The U.S. push for an AU-UN tribunal to expand upon the ICTR’s institution is interesting, as part of the American rationale was to allow the AU and Africa to have “a leading accountability role.” In their view, such an approach would also streamline the legal process, build off of knowledge gained from the Rwandan prosecutions, and have the advantage of a longer temporal jurisdiction. The Bush administration at the time opposed the ICC and its potential for political prosecutions. See Patrick Goodenough, “UN Under Fire over Darfur; US in New Push for Sanctions,” *CNS News*, July 7, 2008, <http://www.cnsnews.com/news/article/un-under-fire-over-darfur-us-new-push-sanctions>.

²⁴⁷ Happold, “Darfur, the Security Council, and the International Criminal Court,” 225. Happold points to the referral’s problematic language, which includes provisions protecting the United States and various other contributing States from prosecution. See *Ibid.*, 235.

²⁴⁸ “The Prosecutor v. Omar Hassan Ahmad Al Bashir: Alleged Crimes (Non-Exhaustive List)”; “Harun and Kushayb Case: The Prosecutor v. Ahmad Muhammad Harun (‘Ahmad Harun’) and Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’),” *International Criminal Court*, accessed December 27, 2016, <https://www.icc-cpi.int/darfur/harunkushayb>; “Hussein Case: The Prosecutor v. Abdel Raheem Muhammad Hussein,” *International Criminal Court*, accessed December 28, 2016, <https://www.icc-cpi.int/darfur/hussein>.

²⁴⁹ “Case Information Sheet: Situation in Darfur, Sudan, The Prosecutor v. Baha Idriss Abu Garda,” *International Criminal Court*, March 7, 2016, <https://www.icc->

the ICC of playing “an essential role in coordinating the design and implementation of the common plan” in which he allegedly enlisted the Janjaweed to carry out heinous crimes against the rebels.²⁵⁰

Country Reactions to the Referral

On the same day that the UNSC made Darfur its first ICC referral, a Sudanese Representative to the Council lambasted the Council’s action, remarking,

The resolution just adopted is full of exceptions, in view of the fact that the State concerned with these exceptions is not party to the ICC. By the same token, we would like to remind the Council that the Sudan also is not party to the ICC ... the Council today did not settle the question of accountability in Darfur. Rather, it exposed the fact that this Criminal Court was originally intended for developing and weak States, and that it is a tool for the exercise [*sic*] of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues in this world, rife with injustice and tyranny.²⁵¹

Clearly expressed within these remarks are the selective justice and anti-imperialist critiques against the Court, as well as the rather explicit assertion of the UNSC’s hypocrisy in referring a non-member state to the Court when several of its permanent members are also non-members.

Given this immediate sentiment after the Darfur referral, it is no great surprise that Sudan would refuse and still refuses to cooperate with the Court, particularly in regards to handing over Bashir.²⁵² According to Victor Peskin, the Sudanese government has remained an “openly” and “staunchly defiant regime” in the face of the ICC’s investigation, refusing to

[cpi.int/iccdocs/PIDS/publications/AbuGardaEng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/AbuGardaEng.pdf); “Banda Case: The Prosecutor v. Abdallah Banda Abakaer Nourain,” *International Criminal Court*, accessed December 27, 2016, <https://www.icc-cpi.int/darfur/banda>.

²⁵⁰ “The Prosecutor v. Omar Hassan Ahmad Al Bashir: Alleged Crimes (Non-Exhaustive List)”; Conor Gaffey, “Sudan Is Fighting on Three Fronts. Here’s Who Is Doing the Fighting,” *Newsweek*, August 10, 2016, <http://www.newsweek.com/whos-fighting-who-sudans-three-conflict-fronts-489172>.

²⁵¹ United Nations Security Council, “Minutes, 5158th Meeting” (UN Document S/PV.5158, New York, March 31, 2005), 12.

²⁵² “A Fractious Relationship: Africa and the International Criminal Court,” 6.

comply with the ICC's requests for interviews and documents relating to the conflict.²⁵³ In response to the arrest warrants for Harun and Kushayb, Minister Al-Zubayr Bashir Tasha pledged to "cut the throat of any international official...who tries to jail a Sudanese official in order to present him to the international justice."²⁵⁴ Tasha further referred to the Chief Prosecutor at the time, Luis Moreno-Ocampo, as "an intruder" with "no jurisdiction here."²⁵⁵ Rather than hold those indicted accountable, Bashir promoted Harun to Minister of State for Humanitarian Affairs²⁵⁶ and retaliated against the investigation by expelling sixteen humanitarian agencies from the country.²⁵⁷

In March of 2009 and supposedly due to perceived stability concerns regarding Bashir's prosecution, Sudan, the AU, the Arab League, Russia, and China requested that the UNSC suspend the Darfur case.²⁵⁸ However, divisions within the Council, and particularly the opposition of France, the United Kingdom, and the United States, rendered the Council incapable of invoking Article 16 of the Rome Statute to suspend the case.²⁵⁹ Yet, the UNSC's failure to suspend the case has not stopped African countries from, in effect, deferring Bashir's arrest. The AU and individual African nations have widely condemned the ICC's move to indict Bashir and refused to arrest him, despite his trips to Djibouti, Kenya, Chad, South Africa, and Uganda.²⁶⁰ Bashir has still not been arrested, and in 2014, Chief Prosecutor

²⁵³ Victor Peskin, "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan," *Human Rights Quarterly* 31, no. 3 (2009): 664; 666; 669.

²⁵⁴ "Sudanese minister threatens action against international court proponents," *BBC Monitoring Middle East - Political Supplied by BBC Worldwide Monitoring*, March 1, 2007, www.lexisnexis.com/hottopics/lnacademic.

²⁵⁵ Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court, Address to the United Nations Security Council (5 Dec. 2007).

²⁵⁶ Benson Olugbo, "Positive Complementarity and the Fight against Impunity in Africa," in *Prosecuting International Crimes in Africa*, ed. Chacha Murungu and Japhet Biegon (Pretoria: Pretoria University Law Press, 2011), 264.

²⁵⁷ Peskin, "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan," 676; Foundation, "Darfur Conflict."

²⁵⁸ Peskin, "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan," 675.

²⁵⁹ *Ibid.*, 675-676.

²⁶⁰ "A Fractious Relationship: Africa and the International Criminal Court," 6; Lizabeth Paulat, "Uganda Defies ICC, Bashir Arrest Warrant," *VOA*, May 13, 2016, <http://www.voanews.com/a/uganda-defies-icc-bashir-arrest-warrant/3328987.html>.

Bensouda temporarily suspended active investigation into Bashir's crimes, due to the UNSC's inability to apprehend him.²⁶¹

Criticisms Embodied in the Darfur case

Darfur presents a fascinating case for analysis, as it involves all four core African criticisms against the ICC and an additional legal argument against the Court, while it also arose out of a UNSC referral. Though African leaders have levelled each criticism against the Court in relation to the Darfur case, each major criticism essentially culminates in a forceful attack on the Court for supposedly selectively and intentionally violating a weaker state's sovereignty and inhibiting peace processes as a result. But first, the legal argument against the Court deserves brief consideration.

A Legal Argument against ICC involvement in Darfur

The central legal argument posed against the ICC's investigation of Darfur holds that, because Sudan is not a party to the Rome Statute and because Sudan had not specially agreed to cooperate with the Court, the UNSC lacked the legal right to refer to the Court alleged crimes perpetrated in Sudan.²⁶² To complicate this jurisdictional argument, the Sudanese government has also argued that the ICC's investigation violates its own principle of complementarity. This is based upon their claim that the Sudanese judicial system was well-capable as an independent and ethical set of institutions to handle the cases.²⁶³

However, reforms to address partisanship in the Sudanese courts have not been carried out, thereby reducing the credibility of this claim. Moreover, despite Khartoum's creation of special criminal courts to try Darfur crimes, such courts were limited to low-level crimes not under the ICC's jurisdiction. Since their establishment, these courts have not prosecuted a single high level official involved with the chain of command and widespread

²⁶¹ "ICC Prosecutor Shelves Darfur War Crimes Inquiries," *BBC News*, December 12, 2014, sec. Africa, <http://www.bbc.com/news/world-africa-30458347>.

²⁶² This argument is invalid, as the UNSC has the legal authority to refer non-state parties to the Court. For an argument as to the admissibility of the Sudanese referral, in particular, see Issaka K. Souaré, "Sudan: What Implications for President Al-Bashir's Indictment by the ICC?," Situation Report (Institute for Security Studies, September 25, 2008), <https://www.globalpolicy.org/images/pdfs/0925implications.pdf>.

²⁶³ "Sudan: Justice, Peace and the ICC," July 17, 2009, 11, <https://d2071andvip0wj.cloudfront.net/152-sudan-justice-peace-and-the-icc.pdf>.

immunity provisions persist. Many judges, as well, remain political loyalists to the ruling NCP.²⁶⁴ In light of Sudan's weak attempts to impose legitimate legal accountability that would match prosecution at the ICC's level, the legal criticism lacks much force.

Selective Bias

On March 8, 2009, shortly after the ICC issued its first warrant for Bashir, the Arab Bar Union released a statement saying that the Court "ignored atrocities committed by Israel on the Palestinian people...despite the many calls for investigations into the crimes committed by Israel against Palestinians."²⁶⁵ Further painting the Court as a selective administer of justice, during the UNSC vote to pass the Darfur referral resolution Sudanese representative Elfatih Mohamed Ahmed Erwa claimed that the Court operated by double standards and was "sending a message that exemptions were only for major Powers."²⁶⁶ In a December 2008 Crisis Group interview, numerous NCP figures expressed that they also believed the Court was biased.²⁶⁷

Neo-colonialism/Imperialism Critique

Intertwined with the selective bias critique is the even more common African assertion that the ICC's investigation into Darfur illustrates the Court's neo-colonial agenda. Sudanese representative Erwa, during the same UNSC vote to pass the Darfur referral resolution, declared that the UNSC interpreted justice in terms of "exceptions and exploitation of crises in developing countries and bargaining among major Powers" and claimed that "the ICC was intended for developing and weak countries and was a tool to exercise cultural superiority."²⁶⁸ In the same 2008 Crisis Group interview, several NCP

²⁶⁴ Ibid., 10-11.

²⁶⁵ Sudanese Media Center, March 8, 2009, **as quoted without further citation in** Azikiwe, "Africans Rally behind Sudan President."

²⁶⁶ United Nations Security Council, "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court" (Press Release, March 31, 2005), <http://www.un.org/press/en/2005/sc8351.doc.htm>.

²⁶⁷ "Sudan: Justice, Peace and the ICC," 10.

²⁶⁸ United Nations Security Council, "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court."

figures further characterized the referral as a violation of Sudanese sovereignty and labeled the Court as a tool used to cripple Sudan.²⁶⁹ Bashir and his NCP party have in fact consistently painted the Court and the Chief Prosecutor at the time as a Western tool for regime change and opponent of Islamism and, in doing so, have rallied thousands of supporters in opposition to this perceived imperialist agenda.²⁷⁰ Former AU chairperson and former Libyan Prime Minister Muammer al-Qaddafi added fuel to the fire in 2009 when he called the ICC's indictment of Bashir "a direct violation of the sovereignty of small independent countries and interference in their domestic affairs."²⁷¹ Taken together, the selective bias and neo-colonialism critiques of various African leaders in regards to the Darfur referral present some heavy charges against the Court and its credibility.

Head of State Immunity Concerns

Not unconnected from the selectivity and neo-colonial concerns with the Court, African critics of the ICC Darfur intervention have also argued that prosecuting Bashir, as a sitting head of state, has consequences both for Sudan's sovereignty and regional security. The AU, in its opposition to the indictment of sitting heads of state, explicitly asserted that such indictments undercut the "sovereignty, stability, and peace" of parties to the Statute.²⁷² The AU Peace and Security Council (PSC) has further criticized the referral and indictment, partly in the interest of Sudan's democratic governance.²⁷³ The AU as a body has explicitly challenged the Court's legal ability to indict sitting heads of state, perceived to derive from Article 27 of the Rome Statute,²⁷⁴ arguing that the Rome Statute does not take precedence

²⁶⁹ "Sudan: Justice, Peace and the ICC," 10–11.

²⁷⁰ Ibid., i; Andrew Heavens, "Sudan's Bashir Rallies Arab Tribesmen in Darfur," *Reuters*, March 18, 2009, <http://www.reuters.com/article/us-sudan-wacrimes-darfur-idUSTRE52H3OA20090318>.

²⁷¹ Azikiwe, "Africans Rally behind Sudan President."

²⁷² "Sudanese Paper Supports Push by African Leaders to Have Own Court," *BBC Monitoring Middle East - Political Supplied by BBC Worldwide Monitoring*, January 31, 2015.

²⁷³ African Union Peace and Security Council, "Communique of the 175th Meeting of the Peace and Security Council" (Communique, Addis Ababa, Ethiopia, March 5, 2009), <http://www.peaceau.org/uploads/iccarrestwarranteng.pdf>.

²⁷⁴ International Criminal Court, *Rome Statute of the International Criminal Court*, art. 27, sec. 1.

over state officials' immunity when those officials' states are not members of the Court²⁷⁵ and has firmly stated that such sitting leaders "should not be prosecuted while in office."²⁷⁶ So strong is this critique against head of state indictment that many attribute Bashir's indictment to be the major force behind the wave of African backlash against the Court.²⁷⁷ Yet, given leaders' interwoven concerns with peace, selective justice, and neo-colonial agendas, it is unclear if African governments would arrest Bashir even if he were to leave office and no longer possess head of state immunities.

Peace v. Justice

The final African critique of the ICC's involvement with the Darfur case is the related concern with the ICC's potential destabilizing effect on Sudan. During the UNSC vote to pass the resolution to refer the Darfur case to the Court, Sudanese representative Erwa claimed that referring the situation would impede peace processes and make the matter more complicated.²⁷⁸ Bashir's government has further argued that the ICC's intervention would drive instability in the region.²⁷⁹ The Sudanese government was also simultaneously dealing with potential South Sudanese secession and independence,²⁸⁰ which would eventually be achieved in 2011.²⁸¹

²⁷⁵ "A Fractious Relationship: Africa and the International Criminal Court," 6.

²⁷⁶ Hickey, "African Union Says ICC Should Not Prosecute Sitting Leaders."

²⁷⁷ See Kurt Mills, "'Bashir Is Dividing Us': Africa and the International Criminal Court," *Human Rights Quarterly* 34, no. 2 (2012): 410, doi:10.1353/hrq.2012.0030; Robert Marquand, "African Backlash Against International Courts Rises," *The Christian Science Monitor*, October 6, 2009, <https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/48267-african-backlash-against-international-courts-rises.html>; Roland J.V. Cole, "Africa's Relationship with the International Criminal Court: More Political Than Legal."

²⁷⁸ United Nations Security Council, "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court."

²⁷⁹ Peskin, "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan," 673.

²⁸⁰ "Darfur: International Criminal Court's Decision on Bashir Arrest Warrant," *Human Rights Watch*, February 3, 2010, <https://www.hrw.org/news/2010/02/03/darfur-international-criminal-courts-decision-bashir-arrest-warrant>.

²⁸¹ "South Sudan Country Profile," *BBC News*, February 24, 2017, sec. Africa, <http://www.bbc.com/news/world-africa-14069082>.

The AU has agreed that the Court's involvement would have negative consequences for Sudan's security. In its March 5, 2009 meeting, the AU (PSC) sent out a communique asserting that Bashir's indictment would seriously interfere with and subvert the ongoing peace, reconciliation, and democratic processes. In their view, his indictment would "have the potential to seriously undermine the ongoing efforts to address the many pressing peace and security challenges facing the Sudan and may lead to further suffering for the people of the Sudan and greater destabilization of the country and the region."²⁸² While justice was important to members of the PSC, they also held that "the search for justice should be pursued in a way that does not impede or jeopardize the promotion of peace."²⁸³ As was noted earlier, the primary stated motivation behind calls for the UNSC to defer Bashir's indictment and arrest were concerns over the effects of Bashir's prosecution on peace and stability within Sudan, thus lending weight to this particular critique.

Darfur Investigation Critiques: In a Nutshell

As the first UNSC referral to the ICC, the Darfur case thus offers a lens into the criticisms of what is seen as this political, western-centric UN institution of which actors, and particularly Africans, had been keenly concerned with throughout the Rome negotiations. In the legal argument against the Court's intervention, the Sudanese government pointed to the UNSC's perceived lack of legal authority to refer the situation, while they also claimed that such a referral violated complementarity and thus Sudan's sovereign ability to handle its own cases. The politics of UNSC referrals and power within the ICC process further played out in African criticisms of the Court's apparent selective bias and double standards, in their belief that the UNSC was using the Court as a Western imperialist tool, and in their claims that indictments against Bashir further violated Sudanese sovereignty. Even the concern with the inhibition of peace processes, though not expressly tied to political charges against the UNSC and the Court, does connect to the head of state issue, as well as a potential perception of cavalier, western-style justice that does not consider local contexts when demanding legal accountability.

²⁸² African Union Peace and Security Council, "Communique of the 175th Meeting of the Peace and Security Council."

²⁸³ Ibid.

Case 2: Kenya*The Conflict*

Leading up to the Kenyan presidential election on December 27, 2007, Rail Odinga was poised to win and declared victory two days later, after votes put him strongly ahead.²⁸⁴ By December 30, however, the votes had swung incumbent President Mwai Kibaki's way, and the chairman of the Electoral Commission of Kenya declared Kibaki the winner, despite days later confessing that he did not know who the winner was.²⁸⁵ Odinga supporters challenged the results and pledged to inaugurate Odinga instead.²⁸⁶ Investigators have since uncovered evidence of vote rigging, including suspicious tally sheets and invalid ballots and suspicions of fraud in more than one-third of the constituencies.²⁸⁷

Soon after the results were announced, violence erupted along ethnic lines, as Kibaki was of the majority Kikuyus and Odinga was of the Luos.²⁸⁸ In only 59 days, the fighting slaughtered between 1,000 and 1,400 people,²⁸⁹ while police officers shot unarmed protestors, youth gangs torched homes, and riots erupted.²⁹⁰ Witnesses described the violence in terms of "Tribal war" as young men battled soldiers along ethnic lines.²⁹¹

Perpetrators allegedly committed crimes against humanity in Nairobi, North Rift Valley, South Rift Valley, Central Rift Valley, Western Province, and Nyanze Province. In addition to taking thousands of lives, perpetrators also purportedly committed more than 900 acts of documented sexual violence and rape, seriously injured more than 3,500 people, and

²⁸⁴ James Brownsell, "Kenya: What Went Wrong in 2007?," *Al Jazeera*, March 3, 2013, <http://www.aljazeera.com/indepth/features/2013/03/201333123153703492.html>.

²⁸⁵ Ibid.

²⁸⁶ Jeffrey Gettleman, "Disputed Vote Plunges Kenya Into Bloodshed," *The New York Times*, December 31, 2007, <http://www.nytimes.com/2007/12/31/world/africa/31kenya.html>.

²⁸⁷ Ibid.

²⁸⁸ Brownsell, "Kenya."

²⁸⁹ "Kenya: Situation in the Republic of Kenya," *International Criminal Court*, accessed December 27, 2016, <https://www.icc-cpi.int/kenya>; Brownsell, "Kenya."

²⁹⁰ Brownsell, "Kenya."

²⁹¹ Gettleman, "Disputed Vote Plunges Kenya Into Bloodshed."

displaced 350,000 more. Such crimes included: burning people alive, destroying IDP shelters, beheadings, hacking people to death with machetes and pangas, terrorizing communities with checkpoints to pick victims according to ethnicity, gang rape, genital mutilation, and forcing families to witness such mutilation.²⁹²

ICC Intervention

Prior to ICC intervention, then UN Secretary General Kofi Annan had pushed Kenya multiple times to establish a local tribunal to try the alleged post-election crimes.²⁹³ Despite support from both Kibaki and Odinga, however, the Kenyan Parliament refused to agree to such a tribunal in early 2009.²⁹⁴ In March 2010, new ICC Chief Prosecutor Fatou Bensouda used her proprio motu powers, the first time any ICC Prosecutor had done so, to launch an investigation into the Kenyan violence between June 1, 2005 and November 26, 2009.²⁹⁵

The Court issued warrants against William Samoei Ruto, suspended Kenyan Minister of High Education, Science and Technology and MP for Eldoret North, as well as for Joseph Arap Sang, a Kass FM radio broadcaster.²⁹⁶ While Ruto was charged with coordinating a common plan to commit widespread systematic attacks against civilians that amounted to crimes against humanity, Sang was charged with contributing to this common plan by using his radio show to help advertise the plan, amplify violence, and broadcast lies.²⁹⁷ Also on March 8, the Court issued a warrant for Uhuru Muigai Kenyatta, current President and former Deputy Prime Minister and Minister of Finance at the time of the alleged atrocities,

²⁹² “Kenya: Situation in the Republic of Kenya.”

²⁹³ Hanibal Goitom, “Kenya: Kofi Annan Calls for Local Tribunal to Prosecute Suspects of 2007 Violence,” *Global Legal Monitor*, June 17, 2009, [//loc.gov/law/foreign-news/article/kenya-kofi-annan-calls-for-local-tribunal-to-prosecute-suspects-of-2007-violence/](http://loc.gov/law/foreign-news/article/kenya-kofi-annan-calls-for-local-tribunal-to-prosecute-suspects-of-2007-violence/).

²⁹⁴ *Ibid.*

²⁹⁵ “Kenya: Situation in the Republic of Kenya.”

²⁹⁶ “The Prosecutor v. William Samoei Ruto and Joshua Arap Sang: Alleged Crimes (Non-Exhaustive List),” *International Criminal Court*, accessed December 29, 2016, <https://www.icc-cpi.int/kenya/rutosang/pages/alleged-crimes.aspx>.

²⁹⁷ *Ibid.*

charging him with various crimes against humanity, including rape and murder.²⁹⁸ On August 2, 2013 the Court expanded its warrants to charge Kenyan national Walter Osapiri Barasa with offences against administration and corrupting ICC witnesses.²⁹⁹ Later, on March 10, 2015, the Court issued warrants against Kenyan lawyer Paul Gicheru and Kenyan national Philip Kipkoech Bett for similar offences of corruption against ICC witnesses.³⁰⁰

Due to lack of sufficient evidence against Ruto and Sang, however, the case against them was terminated without prejudice on April 5, 2015. Similarly, charges against Kenyatta were withdrawn due to insufficient evidence. Barasa's case remains in the Pre-Trial Stage, while Gicheru and Bett remain at-large.³⁰¹

Government Response

Following their ICC summonses in 2011, Kenyatta and Ruto, former bitter adversaries, formed the Jubilee Alliance and won the country's 2013 election.³⁰² During their campaign, they vilified the ICC and engendered a Kenyan protest opposing outside meddling into Kenyan matters.³⁰³ In 2011, Kenya also requested a UNSC deferral of the case,³⁰⁴ which the AU supported in its 16th Summit later that year.³⁰⁵ The Government called upon the AU to demand that Kenyatta, who at this point was President, would not have to attend trial.³⁰⁶

²⁹⁸ "The Prosecutor v. Uhuru Muigai Kenyatta: Alleged Crimes (Non-Exhaustive List)," *International Criminal Court*, accessed December 29, 2016, <https://www.icc-cpi.int/kenya/kenyatta/pages/alleged-crimes.aspx>.

²⁹⁹ "Barasa Case: The Prosecutor v. Walter Osapiri Barasa," *International Criminal Court*, accessed December 29, 2016, <https://www.icc-cpi.int/kenya/barasa>.

³⁰⁰ "Gicheru and Bett Case: The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett," *International Criminal Court*, accessed December 29, 2016, <https://www.icc-cpi.int/kenya/gicheru-bett>.

³⁰¹ "Kenya: Situation in the Republic of Kenya."

³⁰² Kenneth Roth, "Africa Attacks the International Criminal Court," *The New York Review of Books*, January 8, 2014, <http://www.nybooks.com/articles/2014/02/06/africa-attacks-international-criminal-court/>.

³⁰³ Ibid.

³⁰⁴ "Chronology of Events: Kenya," *Security Council Report*, accessed January 26, 2017, <http://www.securitycouncilreport.org/chronology/kenya.php?print=true>.

³⁰⁵ African Union, "Decisions, Declarations, and Resolution of the Assembly of the African Union Sixteenth Ordinary Session" (Decisions & Declarations of the Assembly, Addis Ababa, Ethiopia, January 30, 2011), https://au.int/web/sites/default/files/decisions/9645-assembly_en_30_31_january_2011_auc_assembly_africa.pdf.

³⁰⁶ Roth, "Africa Attacks the International Criminal Court," January 8, 2014.

The Government³⁰⁷ and the AU³⁰⁸ in 2013 then requested once more that the UNSC defer the case under its Article 16 power. However, this effort failed to gain the support of even a majority of the fifteen UNSC members in a vote.³⁰⁹

The UNSC's failure to defer the case did not stop Kenyatta from berating the Court and defending himself from its charges against him. Despite refusing to appear at prior court dates due to his presidential responsibilities, Kenyatta agreed to appear at The Hague in 2014 after the Court declared that he must be physically present at the proceedings.³¹⁰ Before agreeing, however, Kenyatta handed his presidential duties over to Ruto, so as to appear at the Court as a private individual, rather than a president, and to thus supposedly protect Kenya's sovereignty.³¹¹ When he arrived at the ICC, Kenyatta "mounted a vigorous defense" which eventually resulted in his charges being withdrawn.³¹² In the fall of 2015 the Kenyan government advocated for an amendment to Rule 68, which had admitted pre-recorded evidence into the ICC case against Ruto where those witnesses had since abandoned their testimony.³¹³ The appeals courts were already considering the correct application of this rule and on February 12, 2016, ruled that the Trial Chamber had erred in admitting the pre-recorded evidence in Ruto and Sang's case.³¹⁴ In addition to these attempts, Kenya has also

³⁰⁷ United Nations Security Council, "Identical Letters Dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations Addressed to the Secretary-General and the President of the Security Council," October 22, 2013, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf.

³⁰⁸ United Nations Security Council, "Letter Dated 31 October 2013 from the Permanent Observer of the African Union to the United Nations Addressed to the President of the Security Council," November 1, 2013, 31, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_639.pdf.

³⁰⁹ Roth, "Africa Attacks the International Criminal Court," January 8, 2014.

³¹⁰ Sella Oneko and Alfred Kiti, "Uhuru Kenyatta to Attend ICC Hearing in the Hague," *Deutsche Welle*, June 10, 2014, sec. Africa, <http://www.dw.com/en/uhuru-kenyatta-to-attend-icc-hearing-in-the-hague/a-17979369>.

³¹¹ Ibid.

³¹² Roth, "Africa Attacks the International Criminal Court," January 8, 2014.

³¹³ Aggrey Mutambo, "Kenya Seeks Change in ICC Rule," *Daily Nation*, September 8, 2015, <http://www.nation.co.ke/news/politics/Kenya-seeks-change-in-ICC-rule/1064-2863426-8m5objz/index.html>.

³¹⁴ "Ruto and Sang Case: ICC Appeals Chamber Reverses Trial Chamber V(A)'s Decision on Admission of Prior Recorded Testimony" (Press Release, International Criminal Court, February 12, 2016), <http://www.icc-cpi.int/Pages/item.aspx?name=pr1189>.

engaged its diplomats in garnering support for a mass African withdrawal from the Court.³¹⁵ Like Sudan's reaction to the Darfur referral, Kenya has vehemently resisted the Court's investigation into its country's conflict.

Criticisms Embodied in the Kenyan Case

Unlike the Darfur referral, Kenya's case presents an opportunity to examine a Chief Prosecutor-initiated case where, despite the lack of an active UNSC role in referring the case, Africans have still leveled charges of neo-colonialism and imperialism against the Court itself. Though leaders have similarly criticized the Court for its selective bias and targeting of a head of state in the Kenyan case, Kenyatta and fellow leaders have mounted a particularly aggressive campaign against the Court as an imperialist institution within the context of the Kenyan referral. Such criticisms accentuate Kenya's perceived lack of domestic control over its judicial process, as well as the sentiment that the Court is intentionally smiting Kenya.

Sitting Head of State and Selective Bias

Though not the crux of criticisms related to the Kenyan case, leaders have nonetheless pointed to concerns with prosecuting Kenyatta as a sitting head of state and another African country in general, despite atrocities committed elsewhere in the world.³¹⁶ Following a September 2013 al-Shabaab attack in Nairobi, the Kenyan government argued that Kenyatta needed to have the ability to address domestic terrorism, which they viewed the prosecution as hindering.³¹⁷ Stability was only one concern related to the prosecution of Kenyatta, however, as the AU has also condemned Kenyatta's prosecution as an infringement on African state sovereignty, much like they did with regards to Bashir's indictment.³¹⁸ Also similar to the Bashir case, Kenyan Foreign Minister Amina Mohamed has

³¹⁵ Roth, "Africa Attacks the International Criminal Court," January 8, 2014.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ "African Union Agrees on ICC Immunity for Heads of State," *Agence France Presse, The Telegraph*, October 12, 2013, sec. World, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10374538/African-Union-agrees-on-ICC-immunity-for-heads-of-state.html>.

pointed to head of state immunity as an international legal “principle that has existed for a long time.”³¹⁹

In addition to this head of state concern, African leaders discussing the Kenyan referral have echoed Darfur referral criticisms regarding the Court’s selective bias. In 2011, Jean Ping, AU Commission Chief, accused the Court of “rendering justice with double standards.”³²⁰ Relatedly, Kenyatta at the 2013 AU Summit remarked,

All the people indicted before that court, ever since its founding, have been Africans(...)We would love nothing more than to have an international forum for justice and accountability, but what choice do we have when we get only bias and race-hunting at the ICC?³²¹

The Big Critique: Neo-colonialism/Imperialistic Agenda

Since the beginning of the Court’s investigation into Kenya’s post-election violence, Kenyatta has deliberately framed its relations with the Court as a sovereignty issue.³²² Following the 2013 charges against Ruto and Sang, the Jubilee Alliance engendered “an anti-imperialist sentiment among Kenyans” of which Kenyatta and Ugandan President Yoweri Museveni further fueled at Kenyatta’s presidential swearing-in ceremony.³²³ Museveni, in his address to the crowd, saluted Kenyan voters for their “rejection of the blackmail by the court and those who seek to abuse this institution for their own agenda.”³²⁴ At the AU Summit later in 2013, Kenyatta laid this sentiment out quite clearly, stating,

³¹⁹ Ibid.

³²⁰ Richard Lough, “African Union Accuses ICC Prosecutor of Bias,” *Reuters*, January 30, 2011, <http://www.reuters.com/article/ozatp-africa-icc-idAFJOE70T01R20110130>.

³²¹ “Kenyan President Attacks ICC as ‘Toy of Declining Imperial Powers,’” *The Voice of Russia*, October 12, 2013, http://sputniknews.com/voiceofrussia/news/2013_10_12/Kenyan-president-attacks-ICC-as-toy-of-declining-imperial-powers-2526/.

³²² Daniel Howden, “Kenyan Victims of 2007 Violence Complain after President’s Trial Delayed,” *The Guardian*, October 31, 2013, sec. World news, <https://www.theguardian.com/world/2013/oct/31/kenya-uhuru-kenyatta-trial-delay>.

³²³ Jessica Hatcher, “Controversy as Kenya Salutes Uhuru Kenyatta as New Leader,” *The Guardian*, April 9, 2013, sec. World news, <https://www.theguardian.com/world/2013/apr/09/controversy-kenya-uhuru-kenyatta-uganda>.

³²⁴ Ibid.

The ICC has been reduced to a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers (...) It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us (...) Africa is not a third-rate territory of second-class peoples. We are not a project, or experiment of outsiders.³²⁵

In 2016, Kenyatta vowed to continue to defy the Court's attempts to abuse their "sovereignty, security, and dignity as Africans" in his push for Africa to leave the ICC.³²⁶ He then capitalized on the dropped charges against Ruto and Sang, expressing vindication in May of 2016 when the supposedly politically-motivated indictments were vacated.³²⁷ He further claimed that the Court "was being manipulated by certain elements" in order "to influence Africans."³²⁸ In this same interview, Kenyatta expressed powerful sentiments related to domestic ownership over the justice process, asserting,

Our position has always been reform the ICC if you want our continued participation. We have put the same case before the Security Council – that this organization [*sic*] requires reform. And if we're not going to get the kind of reforms that we need, we are going to pull out. Let us form our own court that is going to actually handle these issues because it looks like those who pay the court are the ones who tell the court what to do. That wasn't the basis of setting up the court.³²⁹

Kenyan Critiques: In a Nutshell

The Kenyan case, though similar to the Darfur case in terms of the head of state and selective bias criticisms, provides an intense focus on African perceptions of the Court's apparent neo-colonial/imperialistic agenda. Unlike the Darfur referral, the Kenyan referral criticisms are directed solely at the Court and its supposed manipulation by outside, western

³²⁵ "Kenyan President Attacks ICC as 'Toy of Declining Imperial Powers.'"

³²⁶ "African Union Members Back Kenyan Plan to Leave ICC," *Agence France-Presse, The Guardian*, February 1, 2016, sec. World news, <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court>.

³²⁷ Patrick Smith and Mark Anderson, "Kenya: We Have Been Vindicated - Uhuru Kenyatta," *The Africa Report*, May 13, 2016, <http://www.theafricareport.com/East-Horn-Africa/kenya-we-have-been-vindicated-uhuru-kenyatta.html>.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

forces. Such vehement criticisms, which attack the core of the ICC's legitimacy and mission, provide a stunning look into deep-seated African distrust of the Court and thus reveal a massive challenge for the Court in its continued operation.

Case 3: Uganda

The Conflict

Since the 1990s, the Ugandan government and the Lord's Resistance Army, a rebel group with the aim of establishing a state centered around the Ten Commandments, have been embroiled in a civil war in which both sides have committed atrocities.³³⁰ LRA Leader Joseph Kony has been accused of abducting 30,000 Acholi children to serve as child soldiers or sex slaves in his army, which thus complicates the prosecution of LRA members who were initially victimized, abducted, and abused by LRA leadership.³³¹ The LRA has been accused of murdering, kidnapping, sexually enslaving, and mutilating civilians, conscripting child soldiers, and destroying houses and camp settlements.³³² The Ugandan government, for its part, has been accused of committing crimes during their counterinsurgency campaign and have allegedly aimed to quash the Acholi and civilian support for the rebels.³³³ Their alleged crimes include displacing people into "forced camps" without providing adequate amenities for them, arbitrarily arresting, treating, and torturing civilians, murder, assault, rape and defilement, and the use of child soldiers.³³⁴ Museveni has also been accused of corruption and the nefarious distribution of natural resources and has notably abolished his own presidential term limits.³³⁵

³³⁰ "Uganda: Conflict Profile," *Insight on Conflict*, July 2010, <http://www.insightonconflict.org/conflicts/uganda/conflict-profile/>.

³³¹ *Ibid.*

³³² "Kony et al. Case: The Prosecutor v. Joseph Kony and Vincent Otti," *International Criminal Court*, accessed February 19, 2017, <https://www.icc-cpi.int/uganda/kony>.

³³³ Human Rights Focus (HURIFO), "Between Two Fires: The Plight of IDPs in Northern Uganda" (Gulu, Uganda: HURIFO, 2002), 43.

³³⁴ *Ibid.*

³³⁵ "Uganda: Conflict Profile."

Despite two years of negotiations between the Ugandan Government and the LRA in the Juba talks³³⁶ and some temporary stability in 2008, the LRA continues to perpetrate heinous crimes and has even spread to the Eastern Democratic Republic of Congo (DRC), Central African Republic (CAR), and Sudan.³³⁷ In December of 2008, Uganda, Sudan, and the DRC jointly attacked the LRA with U.S. backing, prompting the LRA to call for a ceasefire in early 2009.³³⁸ Yet, Kony refuses to agree to a peace deal so long as the ICC holds charges against him.³³⁹ As the conflict rages on, some 1.6 million people from Northern Uganda have been displaced, while over 100,000 have been killed, mutilated, or kidnapped.³⁴⁰

ICC Intervention

Unlike the Darfur and Kenyan cases, the Ugandan situation was referred to the ICC by the Ugandan government itself.³⁴¹ In January of 2004, the Ugandan government stated,

Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise of global justice. Uganda pledges its full cooperation to the Prosecutor in the investigation and prosecution of LRA crimes, achievement of which is vital not only for the future progress of the nation, but also for the suppression of the most serious crimes of concern to the international community as a whole.³⁴²

³³⁶ Yusuf Kiranda, "Juba Peace Talks Collapse: A Golden Opportunity Is Slipping Through Our Hands," Country Report, Country Reports (Uganda: Konrad-Adenauer-Stiftung: Uganda Office, June 12, 2008), <http://www.kas.de/uganda/en/publications/13956/>.

³³⁷ "Uganda: Conflict Profile."

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ "Uganda: Situation in Uganda," *International Criminal Court*, accessed February 19, 2017, <https://www.icc-cpi.int/uganda>.

³⁴² Government of Uganda, "Referral of the Situation Concerning the Lord's Resistance Army" (Kampala, Uganda, December 2003), para. 6., **as quoted by** Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics & International Affairs* 21, no. 2 (June 2007): 182–83, doi:10.1111/j.1747-7093.2007.00069.x.

Contained within this statement are the recognition that previous efforts at peace had failed, the hope that ICC prosecution would bring that much needed peace, and the key expectation that such prosecution would only focus on LRA crimes — something that harkens back to the ICTR's experience with the Kagame government.

Indeed, though the ICC is investigating alleged war crimes and crimes against humanity committed in the civil war between the Ugandan government and the LRA since July 1, 2002, the Court has only issued warrants for LRA perpetrators.³⁴³ The ICC has thus far issued warrants against LRA Leader Joseph Kony, LRA Vice-Chairmen and Second-in-Command Vincent Otti, LRA Deputy Army Commander Okot Odhiambo, LRA Deputy Army Commander Raska Lukwiya, and LRA Brigade Commander Dominic Ongwen.³⁴⁴ Arrest warrants for Kony, Otti, and Ongwen were issued on July 8, 2005,³⁴⁵ and though Kony and Otti remain at-large, Ongwen is currently in the midst of trial after having allegedly defected from the LRA in January of 2015 and turning himself into the Court.³⁴⁶ All three leaders have been charged with numerous crimes against humanity, while Kony and Otti have also been charged with several war crimes, allegedly perpetrated in Northern Uganda after July 1, 2002.³⁴⁷ Lukwiya's case was terminated after his death in July of 2007, while Odhiambo's was terminated following his death in September of 2015.³⁴⁸

Government Reaction

Since the Ugandan case was a self-referral, the Ugandan government was, at least initially, very supportive of the investigation and pledged full compliance. In turning jurisdiction over to the Court, the Ugandan government considered: (1) the scale and

³⁴³ "Uganda: Situation in Uganda."

³⁴⁴ "Kony et al. Case: The Prosecutor v. Joseph Kony and Vincent Otti"; "Ongwen Case: The Prosecutor v. Dominic Ongwen," *International Criminal Court*, accessed February 19, 2017, <https://www.icc-cpi.int/uganda/ongwen>.

³⁴⁵ "Kony et al. Case: The Prosecutor v. Joseph Kony and Vincent Otti."

³⁴⁶ "Uganda: Situation in Uganda."

³⁴⁷ "Kony et al. Case: The Prosecutor v. Joseph Kony and Vincent Otti"; "Ongwen Case: The Prosecutor v. Dominic Ongwen."

³⁴⁸ "Kony et al. Case: The Prosecutor v. Joseph Kony and Vincent Otti."

seriousness of the alleged crimes; (2) the great benefit that the Court would provide to victims and toward fostering reconciliation and social healing; and (3) the Ugandan government's inability to apprehend the suspected most-responsible perpetrators.³⁴⁹ Such notions of the Court's ability to hold perpetrators accountable and do so in a way that would contribute to peace and reconciliation are striking to contrast with later conceptions of the Court by Museveni himself.

Interestingly and despite his public statements suggesting otherwise, the understanding from Ugandan President Museveni's end was that the Court would only be prosecuting LRA crimes.³⁵⁰ Museveni in early 2004, shortly after the referral stated, "I am ready to be investigated for war crimes...and if any of our people were involved in any crimes, we will give him up to be tried by the ICC (...) And in any case, if such cases are brought to our attention, we will try them ourselves."³⁵¹ Comments by government officials and analyses by international justice scholars, however, suggest otherwise.

As Akhavan argues, Uganda referred its situation out of security concerns related to the LRA and the need to hold them accountable through apolitical trials.³⁵² In a 2008 interview with Sarah Nouwen and Wouter Werner, a Ugandan government minister stated that the goal of the referral was "to intimidate these thugs [the LRA], to show that they were sought by many more."³⁵³ Additionally, in Ugandan Defence Minister Mbabazi's statements to the Ugandan Parliament in late July of 2004, he framed the ICC's investigation in terms of LRA crimes and assured Parliament that "the number of people to be handled by the ICC

³⁴⁹ International Criminal Court Pre-Trial Chamber II, "Decision on the Admissibility of the Case under Article 19(1) of the Statute" (Pre-Trial Chamber II Decision, The Hague, The Netherlands, March 10, 2009), para. 37.

³⁵⁰ Branch, "Uganda's Civil War and the Politics of ICC Intervention," 188.

³⁵¹ "Museveni Pledges to Cooperate with ICC to Probe Uganda War Crimes," *Agence France-Presse, Space Media Network*, February 25, 2004, sec. War. Wire, <http://www.spacewar.com/2004/040225143401.8peoxfh1.html>.

³⁵² Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *The American Journal of International Law* 99, no. 2 (2005): 404, doi:10.2307/1562505.

³⁵³ Sarah M. H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21, no. 4 (November 1, 2010): 950, doi:10.1093/ejil/chq064.

does not exceed five,³⁵⁴ again insinuating that the ICC would only be pursuing LRA atrocities.

Unsurprisingly, given these comments, the Ugandan government has since made several threats against the Court in which they have said they would withdraw the referral if Ugandan and government officials who claim innocence were to be prosecuted.³⁵⁵ Museveni himself has turned against the Court since the referral, rebuking the Court in the context of both the Ugandan and Kenyan referrals by calling the Court “useless.”³⁵⁶ He has further accused the ICC of blackmail, incompetence, and self-interest.³⁵⁷

Criticisms Embodied in the Ugandan Case

Criticisms in the Ugandan case focus both on the principle of complementarity and the prosecution's perceived inhibition of peace processes. As a self-referral, criticisms of the ICC's investigation into Uganda are fascinating, especially considering the Ugandan government's prior statements regarding the Court's ability to deliver global justice and contribute to peace, reconciliation, and healing within Uganda. Given the government's initial receptiveness to the Court's involvement, these critiques are particularly interesting to unwrap. This change of heart and the evidence from official comments suggest that Ugandan support for the Court extended only in-so-far as the government wouldn't be held accountable by its justice.

The Complementarity Critique

Complementarity was a principle of fundamental importance to many involved in the Rome negotiations. This idea that the Court would only prosecute when national courts were either unable or unwilling to try perpetrators, while central to the Court's functioning, was

³⁵⁴ “Statement of the Ugandan Defence Minister Mbabazi,” Hansard Official Report (Hansard, July 29, 2004), http://hansard.parliament.go.ug/cmisis/browser/Sites/website-documents/documentLibrary/Hansards/Hansards_2004, **as cited by** Nouwen and Werner, “Doing Justice to the Political,” 950. [The Hansard file is inaccessible.]

³⁵⁵ Branch, “Uganda's Civil War and the Politics of ICC Intervention,” 188.

³⁵⁶ “Uganda's Museveni Dismisses the ‘Very Useless’ ICC,” *News24*, October 25, 2016, <http://mgafrica.com/article/2016-10-25-ugandas-museveni-dismisses-the-very-useless-icc/>.

³⁵⁷ Hatcher, “Controversy as Kenya Salutes Uhuru Kenyatta as New Leader.”

nonetheless problematic from the beginning, given that the Rome Statute provides no guidance for determining the competency of a national judiciary.³⁵⁸ Despite this lack of guidance, some scholars and legal professionals within the Ugandan judiciary have asserted that Uganda has capable judiciaries.³⁵⁹

At the 2010 Review Conference of the Rome Statute of the International Criminal Court, Justice Kiza, Head of the Special War Crimes Division of the High Court of Uganda, asserted that the Ugandan courts were able and willing to prosecute those indicted by the Court. Kiza did, however, request assistance from the international community in building up the courts by training prosecutors.³⁶⁰ Thus, the question as to whether the ICC appropriately has jurisdiction to try the crimes committed during Uganda's Civil War is one rife with contention, not only within Uganda, but among scholars and lawyers in the international legal community.

The Big Critique: Peace v. Justice

The major critique embodied in the Ugandan case revolves not around its legal admissibility but rather around the classic "peace versus justice debate." Scholars like Adam Branch have argued that there is no incentive for LRA commanders to negotiate a peace deal, given the threat of ICC prosecution. According to Branch, "nobody can convince the leaders of a rebel movement to come to the negotiating table and at the same time tell them that they will appear in courts to be prosecuted."³⁶¹ Prior to its referral, Uganda in 2000 signaled its

³⁵⁸ "The International Criminal Court: Origins, Jurisdiction and the 'African Bias,'" *South African History Online*.

³⁵⁹ See Branch, "Uganda's Civil War and the Politics of ICC Intervention," 187; Review Conference of the Rome Statute and Assembly of States Parties to the Rome Statute of the International Criminal Court, eds., *Review Conference of the Rome Statute of the International Criminal Court: Kampala, 31 May - 11 June 2010: Official Records*. (The Hague, The Netherlands: Assembly of States Parties, International Criminal Court, 2010).

³⁶⁰ Review Conference of the Rome Statute and Assembly of States Parties to the Rome Statute of the International Criminal Court, *Review Conference of the Rome Statute of the International Criminal Court*. The ICTJ has in fact provided Uganda's International Crimes Division of the High Court with judicial exchanges and training, as well as expert advice regarding victim outreach and participation, witness protection, and amnesty. See "Uganda: ICTJ's Role," *International Center for Transitional Justice*, February 25, 2011, <https://www.ictj.org/our-work/regions-and-countries/uganda>.

³⁶¹ Branch, "Uganda's Civil War and the Politics of ICC Intervention," 183.

belief that amnesties, as opposed to prosecutions, might incentivize the LRA to participate in peace talks.³⁶² After Acholi mobilized in an effort to foster peace, the Ugandan Parliament passed the Uganda Amnesty Act of 2000, which provided LRA leaders with amnesty.³⁶³ Akhavan, however, notes that no LRA leader used the Act and thus concludes that the Act was a failure.³⁶⁴

The ICC's arrest warrants effectively nullify the Amnesty Act,³⁶⁵ which thereby renders Uganda's actual commitment to peace through amnesty dubious, at best, given that they themselves referred the situation to the Court. Museveni, upon referring the case to the Court, had expressed to then-Chief Prosecutor Moreno-Ocampo that he intended to modify the Amnesty Act in order to remove protections for the LRA leadership.³⁶⁶ Once again, the Ugandan government's political motivations for the referral perhaps reveal its inconsistent commitment to legal accountability in the context of the conflict's alleged crimes. Branch suggests that the warrants were part of Uganda's military strategy, in that it legitimized the government's cause and thus allowed it to enhance its militarism against the rebels.³⁶⁷ The ICC's investigation into the LRA, in this view, would position the Ugandan government as the right side of the conflict and potentially empower the military to use greater force against their opponents.

Yet again, in another example of Uganda's inconsistent dedication to legal accountability and in blatant disregard of the ICC's arrest warrants, Uganda offered "total amnesty" to Kony in 2006 in an attempt to end the civil war.³⁶⁸ Criticizing the UN's inability to arrest Kony, Museveni remarked that the UN had failed to fulfill its duty to arrest the most

³⁶² Ibid., 184.

³⁶³ Ibid.

³⁶⁴ Akhavan, "The Lord's Resistance Army Case," 410.

³⁶⁵ Branch, "Uganda's Civil War and the Politics of ICC Intervention," 184.

³⁶⁶ International Criminal Court, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC" (Press Release, January 29, 2004), https://web-beta.archive.org/web/20071029021206/http://www.icc-cpi.int/pressrelease_details&id=16.html&l=en.

³⁶⁷ Branch, "Uganda's Civil War and the Politics of ICC Intervention," 184.

³⁶⁸ Jeevan Vasagar, "Lord's Resistance Army Leader Is Offered Amnesty by Uganda," *The Guardian*, July 4, 2006, sec. World news, <https://www.theguardian.com/world/2006/jul/05/uganda.topstories3>.

responsible perpetrator.³⁶⁹ During this time, the Sudanese and Southern Sudanese governments were attempting negotiations with the LRA and, according to UN reporting, LRA violence substantially decreased during this period.³⁷⁰ LRA fighters had been living and fighting in Sudan and had previously been receiving munitions from the Sudanese government.³⁷¹

Riek Machar, Southern Sudan's Vice President, supported the notion that peace had to happen before legal accountability could be pursued, remarking, "Our priority is ending the war, bringing a peaceful settlement and then, after that, any legal process can take place."³⁷² He further stated that arresting the suspected perpetrators "would be obstructing a major process,"³⁷³ meaning the ongoing peace processes. While Machar's approach to the peace versus justice debate leaves room for justice to follow after peace, it nonetheless reveals concern among African leaders that ICC intervention may prolong turmoil and suffering within the very region its prosecutions are meant to serve.

Ugandan Critiques: In a Nutshell

Uganda's initial support and cooperation with the ICC undoubtedly adds a twist to their later and present critiques of the Court's intervention. Though upon referral Uganda lauded the ICC for its perceived ability to hold perpetrators accountable and contribute to peace in Uganda, such praise appeared to be contingent upon the Ugandan government's ability to use the Court to its own advantage. Indeed, remarks made by officials during the referral period suggest that the Ugandan government aimed to use ICC intervention as a means of quashing the LRA.

The dubious nature of this referral undoubtedly connects to criticisms that the Court's investigation into the Ugandan crimes violates the Rome Statute's principle of

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Ledio Cakaj, "Joseph Kony and Mutiny in the Lord's Resistance Army," *The New Yorker*, October 3, 2015, <http://www.newyorker.com/news/news-desk/joseph-kony-and-mutiny-in-the-lords-resistance-army>.

³⁷² Vasagar, "Lord's Resistance Army Leader Is Offered Amnesty by Uganda."

³⁷³ Ibid.

complementarity, which thus calls into question the legitimacy of the Court's proceedings in the case. Moreover, the Ugandan government's inconsistent policy toward amnesty and legal accountability further complicates its criticism that the Court is inhibiting peace processes in Uganda by imposing the law. While scholars generally and in the context of the Ugandan case recognize the validity of peace concerns as related to legal accountability, the Ugandan government's flip-flopping has made the task of determining where it stands on this issue murky, at best.

The AU-ICC Relationship: A Tense Dynamic

Turning away from the individual case studies, an examination into collective African dynamics with the Court, embodied best in the actions of the African Union, is in order. Upon such an examination, it is clear that no love is lost in the relationship between the African Union and the ICC, as the AU continues to oppose the ICC and refuse to cooperate with it. According to Murithi, "the AU sees its relationship with the ICC as so damaged that it is actively exploring how to make the Court's future presence in Africa irrelevant."³⁷⁴ Those are hardly the actions of an institution supportive of and optimistic about the Court's work.

In July of 2009 and having unsuccessfully requested UNSC deferral of ICC proceedings against Bashir, the AU in its summit meeting passed a decision pledging non-cooperation with the Court regarding the arrest of Bashir. The AU connected this refusal to comply with concerns about the viability of peace in Sudan, as well as the dignity and sovereignty of the African continent.³⁷⁵ Once again, the major critiques are connected to and mutually reinforce one another.

On February 2, 2010, the AU sought an amendment to the Rome Statute to give the UN General Assembly deferral power for cases in situations where the UNSC had not made

³⁷⁴ "A Fractious Relationship: Africa and the International Criminal Court," 8.

³⁷⁵ Assembly of the African Union, "Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)(Doc. Assembly/AU/13(XIII))" (AU Summit Decision, Thirteenth Ordinary Session, Sirte, Great Socialist People's Libyan Arab Jamahiriya, July 3, 2009), <http://reliefweb.int/report/sudan/decision-meeting-african-states-parties-rome-statute-international-criminal-court>.

a decision.³⁷⁶ African experts Akande, Du Plessis, and Jalloh argue that this amendment push reflects the severity of AU concerns regarding peace and justice, as well as concerns over the UNSC's enhanced role, particularly in regards to the Sudanese case.³⁷⁷ They also point to potential legal problems associated with it, such as whether the UN Charter confers upon the General Assembly the authority to act in situations where the UNSC is actively involved.³⁷⁸ They thus conclude that, legally, the General Assembly would be able to act only in so far as they acted with secondary responsibility, in situations where the UNSC was not presently deliberating the specific request for deferral.³⁷⁹ Despite this, the Rome Statute's requirements for specific amendments make it is unlikely that such an amendment could get the required support of seven-eighths of the state parties that it needs to pass.³⁸⁰

The AU, for its part, has not stopped trying to assert itself against the ICC. At their 2013 meeting in Addis Ababa, the AU again staunchly opposed the prosecution of sitting heads of state and, in particular, the indictments against Kenyatta and Bashir. Just as they had done in their previous statements and decisions, the AU connected their concern with sitting head of state prosecutions to concerns with sovereignty and peace, while they also highlighted the Court's "unfair treatment of Africa and Africans."³⁸¹

One year later, the AU shifted its focus to African judiciaries and expanding their jurisdiction relative to the ICC. In 2014, the AU Assembly of Heads of State and Government met in Malabo, Equatorial Guinea to adopt the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Under this protocol, the AU extended the future Court's jurisdiction to the four classes of international crimes covered by the ICC (genocide, crimes against humanity, war crimes, and crimes of

³⁷⁶ "African Union Seeks ICC Statute Amendment," *Daily News Egypt*, February 3, 2010, <https://www.thefreelibrary.com/African+Union+seeks+ICC+statute+amendment.-a0218161980>.

³⁷⁷ Dapo Akande, Max Du Plessis, and Charles Jalloh, *An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (Pretoria, South Africa: Institute for Security Studies, 2010), 12.

³⁷⁸ *Ibid.*, 13-14.

³⁷⁹ *Ibid.*, 15.

³⁸⁰ *Ibid.*, 16.

³⁸¹ Faith Karimi, "African Union Accuses ICC of Bias, Seeks Delay of Leaders' Cases," *CNN*, October 12, 2013, <http://www.cnn.com/2013/10/12/world/africa/ethiopia-au-icc-summit/index.html>.

aggression). The protocol further granted immunity to sitting heads of state or government, or other senior-level officials while in office.³⁸² The AU's specific legal action to grant immunity to sitting heads of state and other high-level officials illustrates AU force behind its criticisms and reveals their commitment to opposing the prosecutions of such individuals while they are in office.

In addition to these AU measures, the AU has also increasingly pushed for a permanent African seat on the Security Council. With no African representation on the "P5" within the Council, African critics of the Council's make-up have increasingly perceived the Council's ability to refer cases to the ICC as perpetuating the dominance of the developed North over the developing South.³⁸³ Such concerns undoubtedly resonate with the neo-colonial/imperialist agenda critique examined in the case studies and recent African withdrawals from the Court.

At the UN General Assembly's 68th session in 2013, African leaders advocated for a permanent seat. Maite Nkoana-Mashabane, South African Minister of International Relations, asserted, "The 70% of the issues that go to the Security Council are about us, so it cannot continue to be without us."³⁸⁴ In 2016 at its 26th Summit, the AU enhanced its demands and called for two permanent seats with the veto power and five non-permanent seats, which would expand the Council from 15 to 26 members.³⁸⁵ In light of the AU's recent

³⁸² African Union, "Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights" (Treaty, Malabo, Equatorial Guinea, June 27, 2014), https://au.int/web/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf, art. 28a; 46a.

³⁸³ "The International Criminal Court: Origins, Jurisdiction and the 'African Bias,'" *South African History Online*.

While gaining a permanent African seat on the Council would enhance Africa's role in the referral process, it would have a much more limited impact in the deferral process, as deferral requires nine affirmative votes and no permanent member veto. See Lawrence Moss, "The UN Security Council and the International Criminal Court: Towards a More Principled Relationship," *International Policy Analysis* (Berlin: Friedrich-Ebert-Stiftung, Global Policy and Development, 2012), 7, <http://library.fes.de/pdf-files/iez/08948.pdf>.

³⁸⁴ Gift Phiri, "African Nations Push for Permanent UNSC Seat," accessed January 17, 2017, <http://www.aljazeera.com/indepth/features/2013/09/african-nations-push-for-permanent-unscc-seat-2013924133231925482.html>.

³⁸⁵ Kizito Sikuka, "Africa: UN Security Council Reforms - Africa Demands Action," *Southern African News Features (Harare)*, February 10, 2016, <http://allafrica.com/stories/201602100416.html>.

agreement for a mass African withdrawal from the Court, the saga of the AU's contentious relationship with the ICC and the UNSC continues.

Connections to Historical Concerns

Looking back at the African backlash as exemplified by the recent withdrawals, the three case studies, and the AU-ICC relationship, a clear nexus exists between these criticisms and those evoked in Chapter 1's analysis of historical international justice concerns. From concerns with selective justice and the perceived neo-colonial/imperialistic agenda, to the peace versus justice debate, to questions regarding head of state prosecutions, to the intense resistance from governments whose individuals are subjected to prosecution, clear parallels arise between historical and present critiques. An analysis into these parallels provides an interesting perspective on current concerns and their evidently enduring legacies.

Selective Bias and Neo-colonial/Imperialistic Agenda Parallels

In the analyses of the ICTY, the ICTR, and the discussions and negotiations leading up to the Rome Statute, various actors expressed concerns with selective justice and a feared nefarious neo-colonial agenda in regards to international judicial institutions. In the case of the ICTY, locals, and Serbs in particular, viewed the Court as biased against Serbs and perhaps rightfully so, as during the first few years of its operation the ICTY only indicted and prosecuted Serbs. Additionally, one of the ICTY's major challenges was its physical distance from those it was meant to serve and its failure to foster domestic ownership over the judicial process. Such challenges reflect both concerns with selective bias in prosecutions, as well as resistance to seemingly imposed forms of judicial accountability from the outside.

The ICTR, as well, struggled with the "victor's justice" dilemma and the one-sided prosecutions of Hutus, again contributing to notions of selective bias. In another clear connection to present African concerns with the ICC, Kagame and the RPF continually framed the ICTR as a western imposition of justice, pointing to the Tribunal's distanced location and external staffing. Like the ICTY, the ICTR also struggled with fostering domestic ownership of prosecutions, which again reflects current African concerns with neo-colonial/imperialistic control of judicial processes that involve Africa.

Throughout the ICC discussions and negotiations, as well, States and African leaders in particular called for impartiality, fairness and objectivity, thus signaling their concerns that bias could be an issue. Actors also raised concerns over domestic ownership of justice and the need to strengthen national judiciaries, which again ties to the neo-colonial thread. Moreover, numerous actors and Africans in particular raised alarms over the scope of the UNSC's and major powers' power over the Court, suggesting that political biases were clearly on African minds from the beginning. Debates over referral and initiation mechanisms, consent requirements, and jurisdiction further relate to questions regarding various actors' relative roles in the judicial process. Such debates call attention to historical and present concerns regarding whose voices and agendas have power in the ICC's judicial process, and whose do not.

Peace versus Justice Parallels

The "peace versus justice debate," as well, finds its roots back in the historical concerns outlined in the studies of the ICTY, ICTR, and ICC negotiations. In the establishing documents for both the ICTY and ICTR, the expectation was that the two tribunals would foster peace and reconciliation in their respective regions of focus. As was discussed in Chapter 1, however, both tribunals have failed to do so. In the former Yugoslavia, the ICTY failed to contribute to peace and reconciliation and the region actually experienced radicalization since intervention. One of the most vicious events of the conflict, the Srebrenica massacre, occurred in the midst of indictments. In Rwanda, as well, the ICTR failed to foster reconciliation. Victims and locals discussed in the previous chapter expressed that, to the contrary, Rwanda experienced an entrenchment of hostilities after the prosecutions.

During the negotiations for the ICC, however, various actors pointed to the potential peaceful power of legal accountability. Recall that Mr. Omar, the South African delegate who represented the SADC, explicitly advocated for the Court's role as a promoter of international peace. Ambassador Josiah Jele Khiphusizi, another South African representative speaking on the SADC's behalf, had similarly promoted the ICC's potential ability to deter crimes and thus contribute to peace. This past faith in the law's ability to foster peace is not only intriguing in light of current African criticisms of the Court's effect

on peace, but also encouraging in that it signals potential hope for the Court's future if key reforms are made.

Prosecuting Sitting Heads of State Parallels

The experiences of the ICTY and ICTR regarding the prosecution of sitting heads of state varied, while during the Rome negotiations the specific question of prosecuting such officials was not directly addressed and thus, not perceived as a key issue then. The ICTY set a precedent for the international prosecution of sitting heads of state by prosecuting Milosevic and Karadzic, while the ICTR failed to prosecute those suspected of crimes within the ruling RPF in Rwanda. As was discussed in Chapter 1, prosecutor Del Ponte's attempts to investigate RPF crimes ran up against staunch resistance from the Rwandan government, who opposed any governmental accountability.

While the question of sitting head of state prosecution was not explicitly addressed during negotiations for the ICC, members did consistently express their commitment to fighting impunity at the highest levels, suggesting that even prominent officials should not be above prosecution. Given the severe African backlash against head of state indictments, perhaps actors did not envision that the Court would actually pursue prosecutions of sitting heads of state. When this became a reality, African leaders fought back hard.

Other Parallels: Government Resistance and Non-Cooperation

In addition to the parallels with the four main criticisms is the connection between historical and present governmental resistance to international prosecutions. In both the ICTY and ICTR experiences, governments actively resisted international judicial accountability as delivered by the tribunals. In the case of the ICTR, the Rwandan government rallied locals against the ICTR through an intense anti-tribunal slander campaign.

In the case studies of Darfur, Kenya, and Uganda, governmental resistance to prosecutions is rather clear, though certainly complicated in the Ugandan case. The Ugandan government's initial support of and then opposition to the ICC is reminiscent of the Rwandan government's turn on the ICTR, which suggests that the possibility of governmental accountability for crimes fueled backlash against the courts in both instances. Such parallels

shed light on the challenges of garnering governmental support for international prosecutions, particularly when institutions like the ICC lack enforcement mechanisms³⁸⁶ to facilitate accountability. With the ICC largely at the whim of state members to aid in the arrest process, such resistance and non-cooperation trends are incredibly problematic for the Court's long-term viability.

Taking Stock of the Backlash

This chapter has endeavored to detail both the immediate and multi-faceted nature of the African backlash against the ICC. Africa's transition in Chapter 1 from one of the Court's most ardent advocates to its role in Chapter 2 as the Court's most vehement critic is indeed a fascinating switch to study. The concerns raised by the recent withdrawal attempts of Burundi, South Africa, and The Gambia, as well as those drawn out through the case studies of Darfur, Kenya, and Uganda and the examination of the AU-ICC relationship, reveal the complex and serious nature of African critiques of the Court.

These four main critiques (selective bias, neo-colonial/imperialistic agenda, inhibition of peace processes, and lack of respect for heads of state) work together in interesting ways to challenge both the integrity and credibility of the Court, as well as the Court's ability to foster peace for the victims and communities it is meant to serve. Considering the historical connection that these concerns have to the critiques and challenges faced by the ICTY and the ICTR, as well as the concerns raised during the Rome negotiations, these criticisms are clearly deeply-rooted and enduring in the context of international legal accountability. Such connections between historical and present critiques allow one to understand the depth of the various issues and to seek ways to avoid making similar mistakes in the future.

Learning from these common critiques is indeed crucial, given that such concerns have already begun to propel African nations to withdraw from the Court. With the AU's recent plan to collectively withdraw from the Court in the not-so-distant future, the international community cannot afford to let these concerns go unaddressed. But first, a look

³⁸⁶ Gwen P. Barnes, "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir," *Fordham International Law Journal* 34, no. 6 (2011): 1587, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj>.

at local African perceptions is in order, as, after all, who is the Court meant to serve if not the people living near and most-affected by the crimes?

Chapter 3: Victim/Local and Civil Society Voices

Having explored both the historical concerns raised in Chapter 1 and the current critiques of African leaders investigated in Chapter 2, we must now turn to the perspectives of those most affected by the crimes, as well as the insights of those who help advocate for them: the victims-locals and civil society actors. Examining the perceptions of African victims and locals is important in its own right, as understanding how the people most affected by the prosecuted crimes perceive the Court and its work is crucial for evaluating the Court's efficacy. African victim and local perspectives are also important to consider in relation to the concerns raised by governments in the previous chapters, as their voices may provide an interesting contrast between elite and local actors' perspectives.³⁸⁷

One cannot conduct such an analysis, however, without also examining the reactions of broader African civil society. From their support for the Rome Statute to their continued advocacy for the Court and efforts at the local level, African civil society has played a key role in bridging the divide between the ICC and the people it serves. This essential function will prove vital when considering future policy recommendations for the Court in its effort to regain African support.

Early Expectations and Current Pitfalls

From the beginning of the Rome Conference, the focus of the ICC's justice was supposedly upon the victims of the perpetrators it would be prosecuting. To begin the Conference, then UN Secretary-General Kofi Annan declared that "the overriding interest must be that of the victims, and of the international community as a whole."³⁸⁸ The ICC itself would reinforce this explicit focus on the victims eight years later, when the Pre-Trial Chamber described the Rome Statute as providing victims with "an independent voice and

³⁸⁷ Due to source limitations, the victim and local voices and perspectives come from fragmented sources, such as news articles, national polls, fieldwork, and reports from various victims' rights groups. These perspectives are thus not systematic and do not represent the voices of all African victims and locals in regards to the ICC.

³⁸⁸ United Nations, "UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must Be that of Victims and World Community as a Whole" (UN Press Release, June 15, 1998), <http://www.un.org/press/en/1998/19980615.sgsm6597.html>.

role in proceedings before the Court.”³⁸⁹ Thus, both the Court and influential actors have championed the Court as an institution endeavoring to both serve and empower victims in the justice process.

Yet, has the Court really empowered and served victims in its pursuit of justice? Anecdotal evidence and analyses by scholars suggest that the answer is perhaps a disappointing, “No.” According to one victim, “The court hears the voices of the people who perpetrated this violence, not the victims.”³⁹⁰ Peter Kagwanja, CEO of the Africa Policy Institute, further challenges the notion that the ICC has prioritized victims in its pursuits and instead suggests a kind of justice from on high. Referring to Kenya, Kagwanja states,

The kind of hang 'em [*sic*] high justice you see at the ICC has absolutely nothing to do with the victims. For the last five years IDPs have been in camps rain come, rain go. Children who were born when they were displaced are now five years [old]. What has the ICC done to ensure these kids go to school? What has [the] ICC done to ensure that these people are resettled as it pursues this other kind of justice?³⁹¹

Sara Kendall and Sarah Nouwen reinforce this notion that the Court, in practice, does little to serve the victims of the crimes it tackles. According to them, the Court in its victim-centered rhetoric and victim legal categorization has created “a deity-like and seemingly sovereign entity, ‘The Victim’, which transcends all actual victims and corresponds to no individual victims in their particularity.”³⁹² The Court simply does not appear to back up its claim to

³⁸⁹ International Criminal Court, “Decision on the Application for Participation in the Proceedings of VPRS 1-6” (Pre-Trial Chamber I, January 17, 2006).

³⁹⁰ Mark Kersten, “The ICC, A Victims’ Court? It Could Happen,” *Justice in Conflict*, November 21, 2015, <https://justiceinconflict.org/2015/11/21/the-icc-a-victims-court-it-could-happen/>.

³⁹¹ Olive Burrows, “ICC Trials Have Done Little for Victims,” *Capital News*, September 12, 2013, <https://www.capitalfm.co.ke/news/2013/09/icc-trials-done-little-victims/>.

This quote reveals the disconnect between victims and the justice rendered by the ICC, as it highlights differences in victim priorities versus those pursued by the legal mechanisms of the ICC. The explicit mention of “this other kind of justice” also indicates a potential feeling among victims that the ICC is imposing an outside form of justice. While directly providing for these services may not rightfully be the ICC’s responsibility, it is nonetheless important to recognize and consider this clear and major issue of local disconnect when evaluating the Court’s present and future viability as a judicial institution.

³⁹² Sara Kendall and Sarah Nouwen, “Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood,” SSRN Scholarly Paper (Rochester, New York: Social Science Research Network, August 12, 2013), 8, <https://papers.ssrn.com/abstract=2313094>.

serving victims once one looks below the surface of its goals to see the practical impact of its work.

Victim and Local Perspectives: A Mixed Bag of Perceptions

Investigating this impact, in fact, reveals interesting divisions among victims and locals regarding the work of the Court. Such mixed perceptions undoubtedly highlight the complexity of the Court's victim and local relations and the need to parse out various strands of criticism, as well as the strands of hope that some of the perceptions leave room for. Divisions among victims and locals regarding the Court exist on several dimensions, including: (1) knowledge and interaction with the Court; (2) perceptions of their indicted leaders; (3) perceptions of the Court's bias; (4) how to handle atrocities and priorities in relation to justice, including peace versus justice concerns; and (5) frustrations with the slow and limited justice process. It is to these dimensions that we now turn.

Knowledge of and Interaction with the Court

One factor of division among many victims and locals is the relative knowledge that they have of the Court and how it works. According to a study of 622 victim participants³⁹³ from Uganda, Kenya, Cote d'Ivoire, and the DRC, a majority of victim participants lacked adequate knowledge of the ICC.³⁹⁴ In the words of one DRC victim,

As victims, we do not understand. We need more information so we understand our case. Intermediaries are struggling to inform us. They provide information when they have it, but the problem is to reach us. Their means are limited. There are not enough efforts to keep the victims informed.³⁹⁵

³⁹³ Victim participants are victims of crimes under ICC investigation who participate in the ICC's proceedings. See Stephen Smith Cody et al., "The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court" (Human Rights Center: UC Berkeley School of Law, 2015), 1, <http://escholarship.org/uc/item/6v00x9jf.pdf>.

³⁹⁴ *Ibid.*, 71.

³⁹⁵ *Ibid.*, 43.

This foreshadows civil society arguments that NGOs need more funds and support from the Court in order to perform their intermediary function.

While the survey of Ugandan victims and locals potentially contradicts this by finding that 60% of respondents had heard of the ICC,³⁹⁶ this does not mean that those respondents had an in-depth knowledge of the ICC and its work.

A different study indeed suggests this lack of awareness about the intricacies of the Court's processes, particularly in regards to victims' rights in the Court. DRC community groups in South Kivu reported that "the population is not at all informed about its rights. This is the reason why most experience difficulties in seeking justice."³⁹⁷ At the same time, some NGOs in Ituri Province in the DRC have asserted that the ICC's involvement has enabled child soldiers to realize that they could make a claim at the Court as victims,³⁹⁸ thus suggesting evidence of positive knowledge among some victims.

Those who had a firmer grasp on the Court and victim rights likely developed such a knowledge-base by virtue of their higher levels of interaction with the Court. Additionally, the victim participants study found that personal satisfaction with the ICC depended upon victim participants' individual interactions with the ICC staff and their lawyers,³⁹⁹ again suggesting the variability in victim perceptions. Another study of victims found that, in the DRC, victims who directly participated in the Court proceedings were "to some extent satisfied by the procedures and the work undertaken by the ICC."⁴⁰⁰ Thus, not only are victims and locals divided regarding their knowledge of the ICC, but this division also likely impacts their level of involvement with the Court and, connected to this, their level of satisfaction with its work.

³⁹⁶ Phuong Pham et al., "When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda" (Human Rights Center: UC Berkeley School of Law; Payson Center for International Development; International Center for Transitional Justice, 2007), 5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448368.

³⁹⁷ Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," April 2010, 18, http://www.vrwg.org/VRWG_DOC/2010_Apr_VRWG_Impact_of_ICC_on_victims.pdf.

³⁹⁸ *Ibid.*, 25.

³⁹⁹ Cody et al., "The Victims' Court?," 72.

⁴⁰⁰ Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," 17.

Perceptions of their Leaders

One of the most glaring divisions among African victims and locals relates to the very leaders that criticized the Court so much in Chapter 2, as it involves varying victim and local perceptions of their individual African leaders. Such division implies that local perceptions of African leaders may impact local perceptions of courts that try to go after those leaders, thus further suggesting that African victims and locals are divided over their views of the ICC. In Chapter 1, we saw President Kagame's masterful ability to demonize the ICTR and rally popular sentiment against it, manifesting itself in the fierce local protests against the Tribunal's intervention. When it comes to the ICC's victims, both Kenyatta and Bashir have also successfully fomented popular local resistance to the Court.

When Kenyatta was elected in 2013, some Kenyans deplored Kenyatta, while others celebrated his victory and joined his anti-ICC rhetoric. At a hair salon, while some non-Kikuyus lamented the "impunity and negative ethnicity"⁴⁰¹ symbolized by Kenyatta's victory, several female Kikuyu staff members, from Kenyatta's tribe, cheered "in glee as they watched their new leader hold his freshly inked oath up for the cameras like a child with a certificate at sports day."⁴⁰² One woman remarked, "If Kenyans had the confidence to vote for this guy, then he cannot have done anything bad."⁴⁰³ In 2014, prior to Kenyatta's appearance at The Hague, protestors gathered with a banner that said "hands off our prez, he is innocent."⁴⁰⁴ Such evidence suggests that local views of their leaders and their perceptions of his guilt, which may in part be informed by ethnic politics, shape how they view the Court and its involvement in their country's matters.

⁴⁰¹ Negative ethnicity is a term coined by Koigi wa Wamwere which refers to ethnic bias, hatred, and the feeling of superiority, and which accounts for the entrenched, pre-colonial and colonial roots of ethnic tensions in Africa. See Koigi wa Wamwere, *Negative Ethnicity: From Bias to Genocide*, An Open Media Book (New York: Seven Stories Press, 2003), 22.

⁴⁰² Hatcher, "Controversy as Kenya Salutes Uhuru Kenyatta as New Leader."

⁴⁰³ Ibid.

⁴⁰⁴ Owen Bowcott, "Kenya's Uhuru Kenyatta Becomes First Head of State to Appear before ICC," *The Guardian*, October 8, 2014, sec. World news, <https://www.theguardian.com/world/2014/oct/08/kenya-uhuru-kenyatta-head-of-state-icc-hague>.

President Bashir, despite facing popular resistance and protests in 2013 and brewing opposition in 2016,⁴⁰⁵ has also engendered vitriol for the Court among some Sudanese and other sympathetic nationals. On March 8, 2009, tens of thousands of protestors rallied in Darfur in support of Bashir and in opposition to the ICC.⁴⁰⁶ Two days later, Palestinians in Lebanese camps echoed the neo-colonial criticism and rallied in support of Bashir, holding a banner that read, “Palestinian people in Lebanon’s camps stand by Sudanese President and people against colonization.”⁴⁰⁷ Sudanese living in Syria then rallied in Damascus the following day, also in support of Bashir.⁴⁰⁸ One week later, protestors threw stones at the French embassy in Khartoum to protest Bashir’s indictments, while thousands of Arab Rizeigat tribesman rallied behind Bashir at a speech in Darfur and pledged their allegiance to the president.⁴⁰⁹

In light of these Kenyan and Sudanese examples, it is clear that stark divisions amongst local Africans exist regarding their perceptions of their leaders, and in part by virtue of this split, regarding their opinions of the Court. These anecdotes suggest the ability of leaders like Kenyatta and Bashir to use inflammatory rhetoric in order to incite hatred of and opposition to the ICC, as well as the absorption of both leaders’ neo-colonial critique of the Court among certain locals and sympathetic nationals living elsewhere. While significant numbers of locals and victims oppose such leaders and their hateful rhetoric, as will be exemplified in the analyses to come, it is nonetheless important to consider the clusters of local Africans that buy into their leaders’ anti-ICC messages.

Perceptions of ICC Bias

Like the critics explored in chapters 1 and 2, some African victims and locals, and particularly Ugandans, for whom more evidence is available, perceive the Court as biased. From the beginning of the Court’s involvement in the Ugandan case, Museveni’s

⁴⁰⁵ “Sudan’s Bashir Vows to Crush Opposition Protests,” *The New Arab*, December 12, 2016, <https://www.alaraby.co.uk/english/news/2016/12/12/sudans-bashir-vows-to-crush-opposition-protests>.

⁴⁰⁶ Azikiwe, “Africans Rally behind Sudan President.”

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Heavens, “Sudan’s Bashir Rallies Arab Tribesmen in Darfur.”

involvement in the referral doomed the Court's ability to be seen as an objective and independent investigator.⁴¹⁰ The Office of the Prosecutor (OTP) has done itself no favors in combatting this bias criticism, as they have failed to seek investigations into potential crimes committed by Ugandan government forces.⁴¹¹ Taking issue with this prosecutorial bias, victim communities in Uganda have remarked, "The ICC looks at only the LRA as the perpetrators of insecurity and yet forces like the UPDF did the same and the ICC has not handled them."⁴¹² Among some Acholi victims, the perception brews that the Prosecutor does not consider UPDF crimes of forcibly displacing Acholi as grave enough to prosecute.⁴¹³

Such victim frustrations with the Court's prosecutorial discretion reveal both aggravation with the Court's one-sided prosecution, as well as the potential lack of knowledge on the part of victims. Elizabeth Evenson in her Human Rights Watch report, for instance, points to the possibility that the OTP lacks the necessary evidence to prosecute the UPDF.⁴¹⁴ Thus, part of the victims' bias criticism may be due to a lack of awareness as to the Court's legal limitations. Nonetheless, it is important to note that this bias criticism differs from the overarching selective bias criticism touted by African leaders. As Kenneth Roth asserts, African victims of atrocities largely do not support the African criticism of selective prosecution.⁴¹⁵ Given the Ugandan evidence, it appears that victims are more critical of the selective prosecution of certain perpetrators within a conflict, rather than with the general targeting of certain conflicts. Such a difference is worth noting.

⁴¹⁰ Elizabeth Evenson, *Unfinished Business: Closing Gaps in the Selection of ICC Cases* (New York: Human Rights Watch, 2011), 25.

⁴¹¹ *Ibid.*, 27.

⁴¹² Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," 14.

⁴¹³ Marlies Glasius, "What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations," *Human Rights Quarterly* 31, no. 2 (2009): 502.

⁴¹⁴ Evenson, *Unfinished Business*, 27.

⁴¹⁵ Roth, "Africa Attacks the International Criminal Court," January 8, 2014.

Perceptions on Justice, Priorities, and Peace

Another key division among African victims and locals regards what type of resolution, or justice process they prefer, what their conflict and post-conflict priorities are, and how they believe peace and justice interact. In the study of victim participants from Uganda, Kenya, Cote d'Ivoire, and the DRC, researchers found that the majority of victim participants want to see convictions come to fruition.⁴¹⁶ A 2009 poll of Kenyans backs this assertion up, as 55% favored trials for individuals responsible for the post-election violence, while 47% favored an amnesty solution.⁴¹⁷

Yet, as the breakdown in this Kenyan poll suggests, locals are divided over what justice mechanisms they prefer. Ugandan victims are also highly divided over what types of justice they desire,⁴¹⁸ which undoubtedly makes it incredibly difficult for the Court to deliver appropriate justice if there is no agreed upon standard of what that justice looks like. In another study of Ugandan victims and locals from the most heavily impacted areas of the Ugandan conflict, Ugandans were asked which mechanisms they believed were most appropriate for handling the UPDF or LRA crimes.⁴¹⁹ In response, 29% said the ICC, 28% said the Ugandan national court system, and 20% said the Amnesty Commission; more than 50% of respondents agreed or strongly agreed that "it is important to have trials for the LRA leaders."⁴²⁰ While these figures reveal that most favor trials and that nearly the same number of victims and locals support the ICC handling prosecutions as they do the Ugandan national courts, taken together, more victims and locals favor an alternative to the ICC's involvement.

⁴¹⁶ Cody et al., "The Victims' Court?," 71.

⁴¹⁷ Thomas Darnstädt, Helene Zuber, and Jan Puhl, "'A Dangerous Luxury': The International Criminal Court's Dream of Global Justice," *Spiegel Online*, January 14, 2009, <http://www.spiegel.de/international/world/a-dangerous-luxury-the-international-criminal-court-s-dream-of-global-justice-a-601258.html>.

⁴¹⁸ Erica Hall, "What Sort of Justice Do Survivors of Sexual War Crimes Want?," *The Guardian*, April 12, 2016, sec. Global development, <https://www.theguardian.com/global-development/2016/apr/12/justice-survivors-sexual-war-crimes-violence-in-conflict>.

⁴¹⁹ Pham et al., "When the War Ends," 4.

⁴²⁰ *Ibid.*, 4–5.

In fact, Ugandans' "[o]verwhelming support" for the 2000 Uganda Amnesty Act, which provides all rebels who surrendered with immunity and is still in-force,⁴²¹ suggests a disconnect between the ICC's form of justice and the justice preferred by locals. Though the amnesty law directly contradicts the ICC's mission to hold perpetrators legally accountable for their actions, Ugandans don't see their support for amnesty as running contrary to justice. According to one victim,

Our people do not see our traditional system here as a form of impunity. In fact, I would say that if Joseph Kony were to be taken away to the Hague or elsewhere to be tried, the Acholi people would not be satisfied. They would not accept that matters would have been concluded. We believe that it is only when rituals of cleansing and reconciliation have been carried out that true justice would have been done.⁴²²

Other victims have similarly exposed the rift between how local Ugandans may prefer to deliver justice and how the West, through the ICC, renders its own form of accountability. According to a *Der Spiegel* expose on another LRA victim, Calvin Ocora, "He doesn't want Moreno-Ocampo and the West to come save the day, stating that, 'Western criminal justice doesn't bring us any closer to peace. We could have had peace a long time ago without The Hague.'"⁴²³ Reflecting the African leaders' critique of neo-colonial imposition with these statements, others also accentuate the disconnect between the Court and the victim/local community by challenging the perceived luxurious treatment that perpetrators get at The Hague.⁴²⁴ Such criticisms echo those made by Rwandan victims and locals in regards to the ICTR.

Both Ugandan and Sudanese victims also grapple in differing ways with their priorities in relation to justice, as well as their perceptions that the ICC's justice may be thwarting the attainment of much-needed peace in their regions. In the population study of

⁴²¹ Katherine Southwick, "Investigating War in Northern Uganda," *Yale Journal of International Affairs* 1 (2005): 109, <http://yalejournal.org/wp-content/uploads/2011/01/051110southwick.pdf>; "The Amnesty Act," Chap. No. 294 (2000), <http://www.ulii.org/node/23788>.

⁴²² Barney Afako, *Seeking Alternatives in Justice: The Experience of Northern Uganda* (London: African Rights, 2001), 5, **as quoted by** Southwick, "Investigating War in Northern Uganda," 115.

⁴²³ Darnstädt, Zuber, and Puhl, "'A Dangerous Luxury.'"

⁴²⁴ *Ibid.*; Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," 12.

affected Acholi and non-Acholi, researchers asked respondents whether they favored peace with amnesty or peace with trials; 80% said peace with amnesty, 54% expressed preferences for LRA leaders' confessions and apologies or for subsequent reconciliation, reintegration, and forgiveness for them, while 41% desired trials and/or retributive punishment, such as incarceration. More than 81% believed that amnesty would contribute to peace and 86% remarked that if amnesty was the only way to attain peace, they would accept it.⁴²⁵ Such figures reveal that an overwhelming majority of affected Ugandans desire peace with amnesty, want truth and reintegration mechanisms, believe that amnesty will foster peace, and would accept amnesty without trials if it was the only path to peace. Trials were the least desirable option.

Further Ugandan anecdotes support this local perception that peace must be a priority and that the ICC's justice process is likely derailing this goal. Pasca Lakob, a Ugandan victim whose family and friends had been murdered by the LRA, stated, "His atrocities are so evil, there's no punishment that could fit the crime. They might as well pardon him," while Northerners and main victims of the LRA have similarly risen against the ICC to advocate for amnesty in order to foster peace.⁴²⁶ Such anecdotes are supported by Ugandans' vast support for the Uganda Amnesty Act, as noted earlier.

This striking support for amnesty connects to victim and local divisions over the effects of justice and the proper priorities in current conflict or post-conflict situations. According to the study of victim participants, researchers found that victim participants are afraid of retaliation for their participation.⁴²⁷ Nigerian lawyer, human rights activist, and former National Human Rights Commission (NHRC) Chairman⁴²⁸ Chidi Odinkalu writes that Sudanese victims and locals fear that Darfur's destabilization, a likely result of Bashir's

⁴²⁵ Pham et al., "When the War Ends," 5.

⁴²⁶ Tim Cocks, "Uganda's War Victims Prefer Peace over Punishment," *Reuters*, April 30, 2007, <http://uk.reuters.com/article/uk-uganda-rebels-idUKL3016119620070430>.

⁴²⁷ Cody et al., "The Victims' Court?," 72.

⁴²⁸ "Biography of Chidi Odinkalu," *Nigerian Biography*, March 21, 2016, <http://www.nigerianbiography.com/2016/03/biography-of-chidi-odinkalu.html>.

arrest absent any transition plan, could wreak havoc on people across the region.⁴²⁹ Such concerns have propelled victims to call for reliable protection alongside the search for justice.⁴³⁰ In the words of Odinkalu,

Victims now seem to be the people paying the highest cost for international justice. They suffer threats of death, exile, and other forms of persecution for their commitment to justice with little protection, assistance or acknowledgement from governments or international institutions.⁴³¹

Prosecutor Bensouda, in a December 2014 meeting with the Security Council, recognized the brutality and violence continually suffered by Darfur victims. Bensouda acknowledged the ongoing plight of rape victims victimized by perpetrators that were not being held accountable, criticized the Council's dangerous investigative approach in what are sensitive victim-perpetrator circumstances in Darfur, and pointed to the inability of UNSC investigators to offer victim protection after conducting their investigations.⁴³² The Chief Prosecutor's recognition of Darfur's tumultuous state of affairs only lends power to the peace concerns voiced in reference to the ICC's involvement.

In Uganda, victims and locals similarly focus on peace and basic necessities when discussing their dire conflict-ridden situations. For the hundreds of thousands of Ugandans in Internally Displaced Persons (IDP) camps, access to basic health and educational amenities is severely limited.⁴³³ Many of these IDPs understandably prioritize the attainment of these essentials and peace over justice.⁴³⁴ In the study of the Acholi and non-Acholi most impacted by the Ugandan violence, only 3% of respondents named justice as a primary priority.⁴³⁵

⁴²⁹ Odinkalu, Chidi Anselm, "Saving International Justice in Africa," *Pambazuka News*, August 6, 2009, <http://www.pambazuka.org/governance/saving-international-justice-africa>.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² "Amid Growing Brutality in Darfur, International Criminal Court Prosecutor Urges Security Council to Rethink Tactics for Arresting War Crime Suspects" (Meetings Coverage: Security Council 7337th Meeting (AM), United Nations, December 12, 2014), <https://www.un.org/press/en/2014/sc11696.doc.htm>.

⁴³³ Evenson, *Unfinished Business*, 24–25.

⁴³⁴ Darnstädt, Zuber, and Puhl, "A Dangerous Luxury."

⁴³⁵ Pham et al., "When the War Ends," 3.

In fact, many victims and locals held the perception that the ICC's involvement was impeding peace processes, echoing the larger peace versus justice critique of African leaders in the previous chapter. According to Northern Ugandan victim communities,

The ICC has promoted justice over peace [...] which has scared away the rebels [...] from coming out and facing the traditional justice system which is regarded [by their communities] as the best method of bringing total peace. The traditional justice system cannot bring total peace but can only appease.⁴³⁶

Similarly, in 2006 the leader of a Ugandan IDP camp told UN under-secretary general for humanitarian affairs, Jan Egeland, "We don't want the International Criminal Court (ICC). We want peace [...] how will the trial of five people bring us those we have lost? Will the ICC really bring peace, or fuel war again?"⁴³⁷ This statement once again underscores peace versus justice concerns, as well as the prioritization of legal accountability and the questioning of the value such processes hold for victims.

Yet, just as scholars like Akhavan assert that the peace versus justice debate is not a clear dichotomy, so too do Ugandan victims and locals offer differing conceptions of the peace-justice relationship. While 90% of respondents in the Acholi and non-Acholi population survey believed that dialogue with the LRA could attain peace and 86% believed that pardoning the LRA could achieve peace, 70% also believed that holding perpetrators in Northern Uganda accountable was important. 50% believed in holding LRA leaders accountable, 48% believed in holding all members of the LRA accountable, and 55% believed that UPDF perpetrators should be tried.⁴³⁸ These numbers reveal a mixture of accountability with truth-seeking goals and amnesty, and thus also show that such goals may not be mutually exclusive.

⁴³⁶ Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," 22.

This quote also expresses the perception that the West is imposing justice on Africans.

⁴³⁷ André-Michel Essoungou, "Uganda: Justice or Peace: The International Criminal Court's Impossible Test Case," trans. Robert Corner, *Le Monde Diplomatique*, April 2007, <https://www.globalpolicy.org/component/content/article/164/28635.html>.

⁴³⁸ Pham et al., "When the War Ends," 4.

This difference in supporting LRA versus UPDF prosecutions may reflect the earlier concerns raised with prosecutorial bias.

In fact, some respondents from the same study seemed to suggest that justice could follow peace and that it was more of a timing issue. 64% of respondents who had heard of the ICC said they would suggest that the Court cease with its arrest warrants or wait to issue such warrants until after peace had been achieved, while 76% stated that the ICC's trials at the moment could potentially threaten the then-current peace process in Juba, Sudan.⁴³⁹ These sentiments reflect the previous victim assertions regarding their priorities in relation to justice and perhaps imply that victims would respond more favorably to ICC justice processes once peace, stability, and basic necessities are achieved.

Some, however, believed that the ICC and its intervention in Uganda had had a beneficial impact on peace. In the same study of Ugandan victims and locals, 71% of respondents who had heard of the ICC believed that the ICC had helped decrease violence in the conflict and 64% believed that the ICC had contributed to incentivizing the LRA toward peace talks.⁴⁴⁰ Despite this recognition that the ICC could bring some peace benefits to the Ugandan conflict, others still recognized the double-edged sword of the ICC's intervention. In the view of another Ugandan victim in a different victim-based study,

As much as the indictment of top LRA commanders initiated and forced the LRA rebels to talk peace with the government [...] it also frustrated the peace talks as the rebels demanded the withdrawal of the indictment as a condition to continue with the peace [...]. This will in the long run impact negatively on the current peace realized by the people in the region.⁴⁴¹

In light of victims' and locals' varying opinions regarding appropriate justice mechanisms, conflict and post-conflict priorities, and the relationship between peace and justice, victim and local perceptions on these issues are quite multi-faceted and complex. Their perspectives regarding these big questions go far beyond the simplistic peace versus justice dichotomy to encompass deeper considerations about the value of certain types of justice and the ways in which peace and justice may or may not work together in different

⁴³⁹ Ibid., 5.

⁴⁴⁰ Ibid.

These figures appear a bit contradictory to the previously cited figure, in which 76% of respondents believed that the ICC's trials threatened the current peace process.

⁴⁴¹ Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," 22.

contexts or at different times. Thus, their voices serve to complicate and enrich the peace versus justice criticisms of actors in the previous two chapters and provide food for thought for the Court moving forward.

Frustrations of the Optimists

As this discussion of varying African victim and local perspectives of the Court has shown, the people most directly impacted by the Court's targeted crimes hold mixed and/or divergent beliefs, including negative and positive elements, regarding the Court and its work. The positive elements of their perspectives are particularly interesting, given the overwhelmingly negative rhetoric of certain African leaders from the previous chapter. Such positive strands give hope that African victims and locals do see some value in the ICC and what it does, though they also reveal points of intense frustration with the Court. This frustration, which revolves around the Court's slow, cumbersome process⁴⁴² and the inherent legal limitations of its work, stems in part from the knowledge-gap explored earlier.

As Odinkalu argues, victims and locals held the original hope that the ICC would stop impunity among powerful individuals in Africa and foster an African society where dignity, peace, and justice rule and where their government supports its people.⁴⁴³ Now, according to Odinkalu, Africans at the ground level doubt these initial expectations.⁴⁴⁴ The victim participants study supports Odinkalu's characterization, as researchers found that victim participants became distrustful and disappointed with the long time-tables of the trials.⁴⁴⁵ The victims felt that the Court had driven up hopes of putting perpetrators away but have since

⁴⁴² Scholars have pointed to the ICC's long time-tables in its investigations, citing trial delays and difficulties with investigating certain actors, which are often unavoidable delays that come with the territory of international criminal investigations. See Antonio Cassese, "Is the ICC Still Having Teething Problems?," *Journal of International Criminal Justice* 4, no. 3 (2006): 324–25; 336; 340; Kai Ambos, "Slow Wheels of Justice: The ICC's Disappointing Track Record," *Spiegel Online*, December 14, 2011, sec. International, <http://www.spiegel.de/international/world/slow-wheels-of-justice-the-icc-s-disappointing-track-record-a-803796.html>; Kyle T. Jones, "The Many Troubles of the ICC," *The National Interest*, December 6, 2012, <http://nationalinterest.org/commentary/the-many-troubles-the-icc-7822>.

⁴⁴³ Odinkalu, Chidi Anselm, "Saving International Justice in Africa."

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Cody et al., "The Victims' Court?," 72.

became disappointed in their inability to do so.⁴⁴⁶ Kenyan, Ugandan, and Sudanese anecdotes further reveal this transition from high hopes to intense disappointment.

In Kenya, some held the hope that the ICC would deliver them justice but have since become frustrated and aggrieved by the perceived lack of justice and interethnic negativity. At the same hair salon in Kenya where some hairdressers had celebrated Kenyatta's victory, other hairdressers were "bemoaning impunity and negative ethnicity" and saying that these things were "killing Kenya."⁴⁴⁷ Connected to frustrations with the Court's inability to hold Kenyatta and other high-level Kenyan perpetrators accountable, Kenyan victims also expressed frustration with the delayed trials of Kenyatta and Kenya's attempts to stall Kenyatta's appearance in court.⁴⁴⁸ Fergal Gaynor, a lawyer appointed by the ICC to represent 20,000 ordinary Kenyans who lost homes, livelihoods, and loved-ones during hugely fatal, orchestrated ethnic clashes, put it simply: "The victims are angry."⁴⁴⁹ Impunity and the slow justice process are turning victims and locals sour toward the Court and its promises.

In Uganda, as well, victims were initially very hopeful about the Court's intervention, though lost this faith in the Court's ability to assist them as time went on.⁴⁵⁰ Writing in 2011, Evenson's HRW report revealed that the Court's inability to hold either side accountable for crimes had damaged its credibility in the eyes of Ugandan victims.⁴⁵¹ Victims felt frustrated with the Court's lack of resources and the continued declarations that there were ongoing investigations, without giving any specifics as to what was actually going on in the investigations.⁴⁵² Some remarked that, "the ICC has failed to have the LRA leaders arrested and its prosecution process is very slow and has [thus] not met the expectations of the victims for justice," while others "feel disappointed [...] it seems like the ICC is stuck, [with] no

⁴⁴⁶ Kersten, "The ICC, A Victims' Court?"

⁴⁴⁷ Hatcher, "Controversy as Kenya Salutes Uhuru Kenyatta as New Leader."

⁴⁴⁸ Howden, "Kenyan Victims of 2007 Violence Complain after President's Trial Delayed."

⁴⁴⁹ Ibid.

⁴⁵⁰ Odinkalu, Chidi Anselm, "Saving International Justice in Africa."

⁴⁵¹ Evenson, *Unfinished Business*, 26.

⁴⁵² Ibid.

cooperation.”⁴⁵³ Alphonse Otto, an older man who was living in Pabbo refugee camp in 2007, believes that perpetrators must be held responsible for their crimes but is irked by the Court’s failure to deliver this accountability. Otto remarked in reference to Kenyatta, “He has committed a crime and must face justice. Instead of talking, why doesn’t the ICC take action?”⁴⁵⁴

Sudanese victims, as well have grown weary of the ICC’s process and have given up on its ability to deliver justice. Darfur victims, following Prosecutor Bensouda’s decision to halt the Court’s active investigation into Bashir, withdrew from participation in the Bashir case.⁴⁵⁵ The slow and seemingly hopeless process had deterred victims of some of the most gruesome crimes from lending their voice to the proceedings. Darfur victims are not alone in this discouragement, as researchers have found that the ICC’s slow and complex application process and case backlogs have prevented victim voice in key aspects of court proceedings.⁴⁵⁶

While such anecdotes reveal victims’ and locals’ clear frustrations with the length of the justice process and the inability of justice to be delivered, their criticisms also likely connect to their lack of a comprehensive understanding of the legal process regarding its stages, duration, and limitations. Such knowledge-gap issues are even more clearly illuminated by Ugandan frustrations with the Court’s limited number of arrests, the nature of its arrests, and its limited temporal jurisdiction. According to a study of Ugandan victims, many regularly asked, “[W]hy is one war criminal indicted when many more remain free?”⁴⁵⁷ Similarly, victims were frustrated that charges did not cover all of the victim communities

⁴⁵³ Victims’ Rights Working Group, “The Impact of the Rome Statute System on Victims and Affected Communities,” 11.

⁴⁵⁴ Cocks, “Uganda’s War Victims Prefer Peace over Punishment.”

⁴⁵⁵ Nicholas Kaufman, “Situation in Darfur, Sudan in the Case of The Prosecutor v. Omar Hassan Ahmed Al-Bashir, Victims’ Notification of Withdrawal from the Case against Omar Hassan Ahmed Al-Bashir” (Public Document, Pre-Trial Chamber II, International Criminal Court, The Hague, October 19, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_19748.PDF. [Kaufman is listed as “Legal Representative of Victims a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09, a/0448/09, a/0449/09 & a/0450/09.”]

⁴⁵⁶ Mariana Pena and Gaelle Carayon, “Is the ICC Making the Most of Victim Participation?,” *International Journal of Transitional Justice* 7, no. 3 (November 1, 2013): 527–28, doi:10.1093/ijtj/ijt021.

⁴⁵⁷ Victims’ Rights Working Group, “The Impact of the Rome Statute System on Victims and Affected Communities,” 13.

that had been affected by the atrocities, asking why “victims who suffered from the same atrocities, by the same groups, where [*sic*] not taken into account by investigators, [thus] creating frustrations.”⁴⁵⁸

Though such critiques are certainly understandable given the dire situations these victims continue to face, the Court likely has good practical and legal reasoning for not pursuing the crimes pointed to by victims. Looking at the Court’s limited resources and the nature of prosecutorial discretion, it would be impossible for the OTP to indict and prosecute every perpetrator within a conflict, even if victims perceived certain perpetrators to be more directly responsible for their own harm. Nor was the Court ever intended to carry on prosecutions in this manner. Additionally, the OTP also has the onus of considering the nature and seriousness of crimes, as well as the available evidence, which further precludes them from indicting and prosecuting all whom the victims believe deserve to stand trial. Nonetheless, such criticisms, coming from the very people most harmed by these crimes, are real and powerful.

Connected to frustrations with the Court’s limited scope of arrest warrants are Ugandan grievances with the Court’s limited temporal jurisdiction. For many of the Acholi, the conflict in Uganda goes back to 1986, when the Southern NRA succeeded Northern rulers and the government killed Acholi civilians and soldiers out of reprisal.⁴⁵⁹ Since 1996, the Ugandan government has been interning the Acholi in camps.⁴⁶⁰ Thus, Ugandan victims are frustrated with the Court’s inability to try crimes that date back to the 1986 developments, as such a limitation leads to an incomplete picture of the conflict.⁴⁶¹ It thus makes sense that many victims and locals, as revealed through earlier analyses, preferred accountability for UPDF crimes in addition to LRA crimes, and sometimes at even higher levels. Again, however, such concerns are likely tied to a misunderstanding about the Court’s

⁴⁵⁸ Ibid.

⁴⁵⁹ Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army*, African Arguments (New York: Zed; In Association with International African Institute; David Philip; Distributed in the USA exclusively by Palgrave Macmillan, 2006), 29–30.

⁴⁶⁰ Branch, “Uganda’s Civil War and the Politics of ICC Intervention,” 181.

⁴⁶¹ Victims’ Rights Working Group, “The Impact of the Rome Statute System on Victims and Affected Communities,” 14.

jurisdiction as established by the Rome Statute, which intentionally prevented the Court from examining any crimes committed prior to 2002.

Some Positive ICC Contributions, for a Change

Despite the divisions among African victims and locals regarding their perceptions and expectations of the Court, the ICC has made some tangible, positive contributions to victims and peace. The Trust Fund for Victims, which was created under the Rome Statute to provide assistance to victims and families and to implement reparations,⁴⁶² stands as an example of such contributions. Thus far, the Trust Fund has pursued projects in the DRC, CAR, and Uganda, earmarked €5.5 million for Sexual and Gender-Based Violence Projects since 2008, and utilized thirty-four donor countries since 2004.⁴⁶³ Currently, it has €5 million earmarked for victim reparations, €12 million resources earmarked for program activities, and €625,000 in resources not yet earmarked for programs.⁴⁶⁴ Most recently, in 2016 the Trust Fund served 104,548 direct beneficiaries and 358,498 indirect beneficiaries from its Uganda and DRC projects.⁴⁶⁵

According to one victim study, the ICC's Trust Fund for Victims has begun a project in Uganda that helps provide victims and victims' families with rehabilitative resources.⁴⁶⁶ The families and their communities targeted by the Trust Fund valued these efforts and have experienced "both psychosocial and physical healing," familial reunion, and "hope and confidence."⁴⁶⁷ The victim participants study further found that victims value the process of

⁴⁶² The Trust Fund for Victims, "Annual Report Summary 2016," Programme Progress Report (The Hague, The Netherlands: The Trust Fund for Victims: International Criminal Court, 2016), 2, http://www.trustfundforvictims.org/sites/default/files/imce/summary_EN_ONLINE.pdf.

⁴⁶³ Ibid., 3; The Trust Fund for Victims, "Assistance & Reparations: Achievements, Lessons Learned, and Transitioning," Programme Progress Report (The Hague, The Netherlands: The Trust Fund for Victims: International Criminal Court, 2015), 2, http://www.trustfundforvictims.org/sites/default/files/media_library/documents/FinalTFVPPR2015.pdf.

⁴⁶⁴ The Trust Fund for Victims, "Annual Report Summary 2016," 3.

⁴⁶⁵ Ibid.

⁴⁶⁶ Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," 19.

⁴⁶⁷ Ibid.

completing an individual application to the ICC, though most do not want to directly participate in trials.⁴⁶⁸

Tracing back to the earlier peace versus justice concerns of victims and locals, some Ugandans have expressed a much more positive conception of the ICC's effect on peace, believing that the Court has been instrumental in bringing peace to the region. In Uganda's Amuru district, victims said that the Court "created fear on [*sic*] LRA which backed up the peace process hence reducing atrocities in Northern Uganda," and that the LRA indictments "has [*sic*] led to the realisation [*sic*] of peace, as the rebels have withdrawn from the region."⁴⁶⁹ Victims believed that such hopeful developments, in which victims were able to return to and rebuild their communities, "had not been realised [*sic*] before the arrest warrants against the LRA. Therefore the move undertaken by the ICC has contributed to this."⁴⁷⁰ Indeed, some victims directly attributed the ICC's involvement to the deterrence of crimes and the development of peace, believing that the ICC had deterred outside funders from continuing to support the LRA and therefore helped decrease inter-state conflict.⁴⁷¹

Thus, while divisions certainly exist within the African victim and local community regarding the ICC's effect on peace, some victims defy the peace versus justice dichotomy and believe that the Court's work, particularly in Uganda, has contributed to peace processes. Such beliefs oppose the harsh peace versus justice criticisms of African leaders in the previous chapter, which serve as the crux of Uganda's opposition to the Court's intervention. The fact that some victims disagree with their leaders and approve of the Court's effect on peace offers evidence that some support for the Court still lives.

The Hope Grows: Africa's Pro-ICC Civil Society

Though the story thus far has been one largely framed by intense strands of criticism and disappointment, both from leaders and locals, there remains one key set of actors that can

⁴⁶⁸ Cody et al., "The Victims' Court?," 72.

⁴⁶⁹ Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," 22.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid., 23–24.

provide great hope in these seemingly dire circumstances: African civil society. From the beginning, African NGOs were very involved in the Rome negotiations and in a strong way, as they provided a key push for the Rome Statute and the creation of a permanent international court on both the domestic and international levels.⁴⁷² These NGOs served as an influential part of the Coalition for the Establishment of an International Criminal Court, working alongside Western NGOs to push states to ratify the Statute.⁴⁷³ According to John Washburn, this enormous coalition consisting of 800 organizations “profoundly influenced every aspect of the Conference and deserved much of the credit for its success.”⁴⁷⁴ Playing a key role within this coalition, African NGOs “mobilized shame to stir the conscience of their governments” in support for the Statute.⁴⁷⁵

Unlike African governments, African civil society on the continent remains steadfast in their commitment to the Court. In 2007, the African Commission on Human and Peoples’ Rights (ACHPR) implored Sudan to work with the ICC on surrendering individuals with warrants related to the Darfur situation.⁴⁷⁶ Following the AU’s July 3, 2009 decision to oppose Bashir’s ICC arrest warrant, over 160 groups from over 30 African countries signed a statement criticizing this move by the AU.⁴⁷⁷ The groups stated that the AU’s decision “threatens to block justice for victims,” contradicts the AU’s own statutorily enshrined commitment to reject impunity, and violates African governments’ commitment to the Rome Statute.⁴⁷⁸ The groups further called upon African parties to the Rome Statute to reassert their

⁴⁷² Jalloh, “Regionalizing International Criminal Law?,” 450.

⁴⁷³ Roland J.V. Cole, “Africa’s Relationship with the International Criminal Court: More Political Than Legal.”

⁴⁷⁴ John Washburn, “The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century,” *Pace International Law Review* 11, no. 361 (1999): 367, <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1238&context=pilr>.

⁴⁷⁵ Jalloh, “Regionalizing International Criminal Law?,” 450.

⁴⁷⁶ Hannah Foster, “NGO Statement at Official Opening of the 41st Ordinary Session of the African Commission on Human and Peoples’ Rights” (Speech delivered at the 41st Ordinary Session of the African Commission on Human and Peoples’ Rights, Accra, Ghana, May 16, 2007).

⁴⁷⁷ Human Rights Watch, “African Civil Society Urges African States Parties to the Rome Statute to Reaffirm Their Commitment to the ICC” (Statements, July 30, 2009), <https://www.hrw.org/news/2009/07/30/african-civil-society-urges-african-states-parties-rome-statute-reaffirm-their>.

⁴⁷⁸ *Ibid.*

ICC support and cooperation and specifically cooperate in Bashir's arrest and transfer.⁴⁷⁹ They also argued that the AU should handle the UNSC's non-deferral of Bashir's case with the UNSC and not take it out on the Court.⁴⁸⁰

In September of 2009 and following the AU's decision to not arrest Bashir, African civil society groups spanning across the DRC, Kenya, Uganda, South Africa, Botswana, Nigeria, Liberia, and Sierra Leone, along with various international organizations, again urged the AU states to support the ICC in its efforts to prosecute the most serious crimes. Aloysius Toe from Foundation for Human Rights and Democracy in Liberia stated, "Governments that oppose the ICC can be expected to try to use the AU meeting to undercut the court's ability to ensure justice for African and other victims."⁴⁸¹ Georges Kapiamba from the DRC's Association Africaine de Defense des Droits de l'Homme also remarked, "The ICC is not without shortcomings, but the court remains one of the most important checks against unbridled impunity on the African continent."⁴⁸² Such civil society leaders both recognized the potential agendas behind African leaders' critiques of the Court, as well as the need for the Court to stand as a force against impunity.

In 2010, 124 organizations representing over 25 African countries urged African governments to push for accountability in the ICC's upcoming review conference, particularly in light of Bashir's harsh anti-ICC rhetoric. Executive Director of Nigeria's Civil Resource Development and Documentation Center, Oby Nwankwo, slammed the selective justice and neo-colonial criticisms and stated,

The civil society declaration is a strong showing of support for positive African government action at the Kampala conference and for the ICC more generally [...] While some leaders have tried to paint Africa as against the

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

⁴⁸¹ Human Rights Watch, "AU: African Civil Society Presses States for ICC Support" (News Release, Johannesburg, South Africa, November 2, 2009), <https://www.hrw.org/news/2009/11/02/au-african-civil-society-presses-states-icc-support>.

⁴⁸² Ibid.

ICC, our voices are a testament to the fallacy of such claims.⁴⁸³

Echoing this call to action, Executive Director of Human Rights Network in Uganda, Mohammed Ndifuna, stated,

The Kampala conference offers an exceptional occasion for African governments to help advance the global fights against impunity [...] Our leaders should use the conference to restate their commitment to justice for victims and pledge to take steps to assist the ICC.⁴⁸⁴

Once again, African civil society leaders asserted their dedication to the ICC and challenged African governments to commit alongside them.

On January 25, 2011, African civil society and international organizations maintained their pro-ICC advocacy and called upon the Kenyan government to commit to supporting the Court and halting its campaign against it.⁴⁸⁵ Following the AU's efforts to undermine the Court through its non-cooperation with the Bashir warrants, 31 African civil society and international organizations submitted a letter in 2012 expressing concern with the AU's actions and stated the need to act with caution when considering expansion of the jurisdiction of the African Court of Justice and Human Rights.⁴⁸⁶ Then again in 2013, 130 African civil society and international organizations representing 34 countries wrote to the Foreign Ministers at the AU in support of the ICC and to call upon the governments to declare their support for the Court and the Rome Statute.⁴⁸⁷ The groups recognized that ICC withdrawal "would send the wrong signal about Africa's commitment to protect and promote human

⁴⁸³ Human Rights Watch, "Africa: Civil Society Urges Support for ICC" (News Release, Johannesburg, South Africa, May 24, 2010), <https://www.hrw.org/news/2010/05/24/africa-civil-society-urges-support-icc>.

⁴⁸⁴ Ibid.

⁴⁸⁵ Human Rights Watch, "Kenya: Civil Society Organizations Call for Support for the International Criminal Court" (Statement by African Civil Society Organizations and International Organizations with a Presence in Africa, January 25, 2011), <https://www.hrw.org/news/2011/01/25/kenya-civil-society-organizations-call-support-international-criminal-court>.

⁴⁸⁶ "Letter to Foreign Ministers on the 19th African Union Summit," Letter from African Civil Society and International Organizations on the Relationship between the ICC and the AU, (July 5, 2012), <https://www.hrw.org/news/2012/07/05/letter-foreign-ministers-19th-african-union-summit>.

⁴⁸⁷ "African Civil Society Letter to Foreign Ministers, African States Parties to the International Criminal Court, Re: Support for the ICC at African Union (AU) Summit on October 11-12," Letter, (October 4, 2013), <https://issafrica.s3.amazonaws.com/site/uploads/African-civil-society-letter-to-AU-on-ICC-withdrawal-Oct-2013.pdf>.

rights and reject impunity as reflected in article 4 of the AU's Constitutive Act," while it also would severely endanger African civilians.⁴⁸⁸ While the groups acknowledged the ICC's uneven application of justice, they also asserted that "undercutting justice for crimes where it is possible because justice is not yet possible in all situations risks emboldening those who might commit grave crimes," as well as stated that expanding membership, not decreasing it, will help spread accountability.⁴⁸⁹ The groups here objected to the use of the selective bias critique as a reason to not prosecute serious crimes, while they also recognized the need to hold a broader range of actors accountable.

In 2014, a group of civil society and international organizations maintained their push and urged the International Criminal Court's Assembly of States Parties at the 13th Session to bolster, rather than subvert, the ICC.⁴⁹⁰ The group made several recommendations, including: (1) to elect judges to the Court who are the most highly qualified; (2) to safeguard the Court's independence by preventing countries like Kenya from seeking to influence the judicial process; (3) to continue to support the Court as a last resort court and to extend justice to more victims; (4) to guarantee needed resources for the Court; (5) to encourage cooperation with the Court; (6) to oppose high-level impunity at the ICC; (7) to commit as state parties to enhancing their own judicial capacity to try the most serious crimes; and (8) to dedicate as state parties the inclusion of victims' needs in the justice process.⁴⁹¹ Similarly, in December of 2015, more than 30 African civil society groups and international organizations called upon African States Parties to affirm their cooperation with the Court at their general sessions of the Assembly of States Parties.⁴⁹² In their call, the groups again urged African governments to commit to ensuring the ICC's necessary operating resources, to bolster their

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Human Rights Watch, "Recommendations by African Civil Society Groups and International Organisations with a Presence in Africa for the International Criminal Court's Assembly of States Parties 13th Session from December 8-17, 2014," *Human Rights Watch*, December 17, 2014, <https://www.hrw.org/news/2014/12/17/recommendations-african-civil-society-groups-and-international-organisations>.

⁴⁹¹ Ibid.

⁴⁹² "Over 30 African Civil Society Organisations Call for Cooperation with the ICC," *Journalists For Justice*, December 14, 2015, <http://www.jfjustice.net/complementarity/over-30-african-civil-society-and-organisations-call-for-cooperation-with-the-icc>.

own judiciaries, and to protect the Court's independence from South Africa's and Kenya's proposed amendments.⁴⁹³ Such suggestions focus on the ICC as part of the solution to justice, rather than as part of the problem, though with the recognition that improvements must be made for the ICC to better function.

As of 2016, activists throughout Africa, working with 21 African and international NGOs, urged African governments to support the Court and expressed their support for the Court and for holding leaders accountable.⁴⁹⁴ Ibrahim Tommy, from the Centre for Accountability and Rule of Law-Sierra Leone stated that, "The big clash [these days] is over African leaders, the powerful few, who really want impunity for themselves, versus the vast majority, in fact all of the victims of Africa's continent, who want justice every day."⁴⁹⁵ Echoing the sentiment that African leaders are only looking out for their own best interests, Angela Mudukuti of the Southern Africa Litigation Centre remarked, "To say that the iCC [*sic*] is targeting Africa, I think, is a misrepresentation of the situation. It's more Africans making use of the court they helped to create."⁴⁹⁶ In order to serve the victims of atrocities, Chino Obiaqwu asserts that governments must support the Court.⁴⁹⁷ Since the AU's consideration of a mass withdrawal from the Court, African civil society has continued to fight for the Court and has called upon the AU to "strengthen and support the ICC, not urge its members to quit the institution."⁴⁹⁸

Civil Society Outreach at the Local Level

Clearly staunchly opposed to African government and AU efforts to undermine and withdraw from the Court, numerous local and international NGOs, and especially faith-based

⁴⁹³ Ibid.

⁴⁹⁴ Human Rights Watch, "AU: Activists Challenge Attacks on ICC," *Human Rights Watch*, July 6, 2016, <https://www.hrw.org/news/2016/07/06/au-activists-challenge-attacks-icc>.

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

⁴⁹⁸ "Civil Society Action Against AU Call for ICC Withdrawal," *Southern Africa Litigation Centre*, September 22, 2016, <http://www.southernafricalitigationcentre.org/2016/09/22/civil-society-action-against-au-call-for-icc-withdrawal/>.

groups, have also committed to local outreach on behalf of the Court by informing locals about the ICC's investigations and the ability to participate in them as victims.⁴⁹⁹ While initially Northern Ugandan civil society, such as tribal and religious leaders and international NGOs, "appeared to turn almost unanimously against the Court's investigation" largely due to peace concerns,⁵⁰⁰ since then the picture has turned more favorably toward the ICC.⁵⁰¹ In particular, former Chief Prosecutor Moreno-Ocampo invited tribal and religious leaders to the Court, listened to them, and committed investment to domestic outreach in Northern Uganda.⁵⁰² With this shift in favorability toward the Court, local Ugandan activists have called upon the Court to do more, asking the ICC to provide victims and survivors with justice and to deter African leaders who would otherwise commit crimes, whom they fear benefit from impunity.⁵⁰³

Kenyan Civil Society Organizations (CSOs), as well, have worked to promote justice and accountability in Kenya in the face of a Kenyan government that has tried to quash them. CSOs in Kenya have attempted to push the government toward crucial judicial and police reforms, identified and in several circumstances protected ICC witnesses, and provided needed outreach to locals regarding the ICC. These groups have also been "critical watchdogs" of the Court by calling the ICC out for its lack of victim and witness protection, as well as for the prosecutor's poor evidence-building in the Kenyan cases.⁵⁰⁴

⁴⁹⁹ Jonneke Naber and Rob Watson, *African Faith-Based Communities: Advancing Justice & Reconciliation in Relation to the International Criminal Court* (The Hague: Centre for Justice and Reconciliation, 2006), 95-98; *Ibid.*, 511.

⁵⁰⁰ Glasius, "What Is Global Justice and Who Decides?," 507.

⁵⁰¹ *Ibid.*, **in reference to** Office of the Prosecutor, International Criminal Court, "Report on the Activities Performed During the First Three Years (June 2000-2006)" (The Hague, September 12, 2006), <http://www.legal-tools.org/doc/c7a850/pdf/>.

⁵⁰² Office of the Prosecutor, International Criminal Court, "Report on the Activities Performed During the First Three Years (June 2000-2006)," 16-17.

⁵⁰³ *Uganda Rights Activists Criticize ICC's Africa Strategies* (Kampala, Uganda: Press TV, 2016).

⁵⁰⁴ Chandra Lekha Sriram, "Civil Society and Transitional Justice in Kenya" (Working Paper, Security in Transition: An Interdisciplinary Investigation into the Security Gap, February 2015), 8, http://www.securityintransition.org/wp-content/uploads/2015/11/CS-and-TJ-working-paper_Kenya.pdf.

However, such efforts to hold both the government and the ICC accountable for delivering justice have been met by massive resistance from the Kenyan government, which has sought to thwart Kenyan CSOs and NGOs. The government has repressed such groups in three critical ways: (1) utilizing the NGO Coordination Board, which registers and monitors Kenyan NGOs, to deregister or threaten the groups with deregistration; (2) sabotaging legislation that controls NGO operation and funding; and (3) mobilizing anti-NGO public opinion.⁵⁰⁵ Kenyan CSOs and NGOs, despite this governmental campaign against them, continue to fight for justice and accountability and refuse to be deterred. In the words of Peter Aling'o, senior researcher for the Institute for Security Studies in Nairobi, Kenya,

The good thing about civil society in Kenya is that they are so resilient, so vibrant, and nothing can stop them. I don't think that any attempt by President Kenyatta to close the civil society space will succeed.⁵⁰⁶

African Civil Society's Critiques of the Court

While undoubtedly far more supportive of the Court than the African leaders explored in Chapter 2 or the victim and local voices investigated earlier in this chapter, African civil society actors still criticize the Court in some key respects. For one, NGOs point to the ICC's distance from the victim communities it serves and the effect that this has on its ability to serve victims. A Ugandan organization in Amuria District stated that, "the ICC had not been able to work properly because [it is] far away from the people, hence the ICC should decentralize their operations and services."⁵⁰⁷ Such a criticism perhaps reflects African victim and local concerns with ICC justice that they perceive to be imposed upon them, without consideration for their own local contexts and preferences. This disconnect is amplified by NGO critiques of the Trust Fund allocations, of which NGOs and community

⁵⁰⁵ Simon Allison, "Think Again: Civil Society in Kenya Is Down, but Not out," *Institute for Security Studies*, January 5, 2016, <https://issafrica.org/iss-today/think-again-civil-society-in-kenya-is-down-but-not-out>.

⁵⁰⁶ Ibid.

⁵⁰⁷ Victims' Rights Working Group, "The Impact of the Rome Statute System on Victims and Affected Communities," 12.

groups in the DRC believe are not enough and assert are going to unknown destinations so that “victims do not seem to benefit from them.”⁵⁰⁸

Additionally, NGOs have criticized the Court for its minimal support of the work that they, as intermediaries between the Court and the people, do. The Court has barely recognized the NGOs working to support and reach out to the victims involved with its proceedings, leading these groups to call upon the Court for enhanced training and protection for their work. Ugandan organizations specifically have urged the Court “to recognize the status and role of intermediaries including training, enumeration and protection,” while Eastern DRC NGOs have urged “for more respect” for their groups.⁵⁰⁹ Such criticisms highlight the self-perception among NGOs that they perform an important bridge function between the Court and local communities, as well as the acknowledgement that they are not being supported enough in this role.

Lastly, African NGOs also recognize the hypocrisy of certain major powers not facing accountability for their crimes⁵¹⁰ and have urged the AU to discuss its concerns with the major powers’ apparent impunity at its UNSC meetings, recognizing the ability of the United States, China, and Russia to avoid ICC accountability.⁵¹¹ At the same time, these actors also acknowledge that, “At the end of the day, victims are victims, whether African or otherwise.”⁵¹² Thus, while they agree that the OTP in its selection of certain cases has not applied accountability in a particularly fair way across the world, they also hold that the selective bias argument cannot be used to abdicate responsibility for the vicious crimes committed in Africa.

⁵⁰⁸ Ibid., 20.

⁵⁰⁹ Ibid., 18.

⁵¹⁰ Human Rights Watch, “Recommendations by African Civil Society Groups and International Organisations with a Presence in Africa for the International Criminal Court’s Assembly of States Parties 13th Session from December 8-17, 2014.”

⁵¹¹ “Civil Society Action Against AU Call for ICC Withdrawal.”

⁵¹² Human Rights Watch, “Recommendations by African Civil Society Groups and International Organisations with a Presence in Africa for the International Criminal Court’s Assembly of States Parties 13th Session from December 8-17, 2014.”

Connecting Victim/Local Concerns and Civil Society Voice to Previous Concerns

Looking through the concerns emphasized both by African victims and locals and civil society actors, one can once again tie some common threads back to the concerns raised in the previous two chapters. One clear theme that connects victim and local sentiment is the phenomenon of leaders engendering popular opposition to the Court. Among pro-Kenyatta and pro-Bashir supporters, the respective leaders were able to incite intense opposition to the ICC, which clearly resembles Kagame's fanning of anti-ICTR flames among his people.

Additionally, African victim and local perceptions underline concern with the disconnect between international adjudicative institutions and the local communities its prosecutions are targeting. Both general victim disconnect and specific anecdotes of distanced justice from Uganda connect to similar ICTY and ICTR concerns with the tribunals' physical and metaphorical (in terms of the type of justice-rendered) distance from the communities. Moreover, the Ugandan victim/local perceptions of Court bias, as well as civil society's criticism of the Court's uneven prosecution, connect to earlier perceptions among Serbs and Rwandans that the respective tribunals were pursuing one-sided justice. Such criticism also connects to the popular resistance to Bashir and Kenyatta's perceived "unfair" indictments. The lack of knowledge among African victims and locals regarding the ICC and its work, which resembles local Serbs' lack of ICTY knowledge, further illuminates the Court's disconnect from the local communities it is delivering supposed justice to.

Lastly, African victim and local perceptions, as well as the initial Ugandan NGO opposition to the Court's intervention due to peace concerns, reveal the peace versus justice tensions previously explored in the context of the ICTY, ICTR, and African leaders' critiques. Undoubtedly, victims and locals in particular and across Uganda, Kenya, and Darfur have expressed serious concerns as to the Court's effect on peace processes in their regions, though these concerns do not present themselves in the same dichromatic form as the previous actors had framed them. Rather, African victims and locals vary in their opinions on the peace-justice relationship, with some outright opposing the Court's justice as an instigator of violence, others preferring that justice follow peace, and still others viewing peace and justice as coinciding or even supporting one another. Thus, victim and local perceptions complicate the peace and justice debate explored earlier.

Parsing out Victim/Local Voice and Civil Society Calls

Given the important role of African NGOs as an intermediary between the ICC and the local communities impacted by the violence, the concerns raised by these groups must be given great weight. Clearly, the voices of African civil society are much more positive with regards to the Court than those of African leaders and many African victims and locals, whose lack of knowledge regarding the Court may play a significant role in many of their frustrations with the Court's selection of perpetrators, its impact on peace processes and the type of justice preferred and/or prioritized, and its lengthy and limited legal processes. The role of NGOs as the intermediaries is thus a crucial one. They are the voice that has been missing from African leaders' critiques, as both a strong voice for accountability, yet also a voice that recognizes the Court's faults and the need to fix them, rather than undermine and turn away from the Court. Their constant commitment to the ICC and their recurrent urges to African governments to affirm their dedication to the Court offer hope for the ICC moving forward.

Yet, these same civil society actors also recognize that certain obstacles hinder their ability to be better bridges, such as the Court's distance from local communities, its minimal support for its work, and its regional prosecutorial selectivity. Thus, while the Court has allies in African civil society, it also must listen to those allies' recommendations, as well as the critiques of African leaders, victims, and locals, and take them into account if it wants to remain viable. It is to these recommendations, as well as others, that I now turn to in the final chapter.

Chapter 4: Moving Forward

The ICC faces intense criticisms from African leaders, African victims and locals, and even African civil society actors. These criticisms, though current and in reference to the ICC specifically, run deep historically, as many key African critiques of the Court resemble similar challenges faced by the previous former Yugoslavian and Rwandan tribunals. Additionally, several red flags that were raised early on during the Rome negotiations, both by non-African and African state actors, elucidate the current African backlash that the Court faces.

Though these criticisms are not universal, as some African countries have maintained their support for the ICC, they are also not confined to the three countries studied here. The Court now faces opposition from the African Union and several African leaders — once some of its strongest supporters. Discovering the reasons behind this fascinating twist of events has been a central feature of this exploration.

The previous three chapters investigated several historical and contemporary criticisms with international justice as delivered by the ICTY, ICTR, and ICC. As the examination into the perceptions of African leaders, victims and locals, and civil society actors illuminates, the Court is up against sharp criticisms from a variety of actors. However, the analyses of certain victim, local, and civil society views toward the Court also bring hope that the Court's life in Africa has not run its course quite yet. Building upon this hope will be the focus of this final section.

Tying the Threads Together: Major Common African Critiques

Following along this thread of optimism, there is room still for the Court to repair its relationship with Africa and avoid losing the support of its most important regional membership bloc. In order to do so, the Court must address the major common criticisms leveled by African leaders, African victims and locals, and African civil society actors. The first major criticism, selective justice, involves both favoring certain sides of a conflict and pursuing or not pursuing certain conflicts and connects to neocolonialism, complementarity, political, and head of state concerns. Judicial disconnect from local populations, the second major criticism, connects to issues of physical and metaphorical distance, in the sense that the

ICC's justice is not informed by the local contexts of the situations it investigates. This criticism also connects to local knowledge gaps regarding the Court, domestic institution building concerns and complementarity, and the Court's poor support of civil society actors. Lastly, the third major critique revolves around peace concerns connected to the ICC's pursuit of legal accountability, which undoubtedly brings in issues of local context and victim consideration but also connects to sitting head of state issues.

Before turning to specific policy recommendations, however, one must first weigh these criticisms for what they are. The selective bias critique, considering the rhetoric of the African leaders making such a claim, appears at first glance to be self-serving. How can leaders, whose countries previously supported the establishment of the ICC in the name of fighting impunity, now criticize the Court for imposing accountability upon their own nationals? These actors' commitment to human rights thus appears conditional upon whether they themselves are held accountable under the law. Such impunity and hypocrisy is undoubtedly unacceptable.

Yet, these leaders and critics also have a point. The numbers do not lie; if any region were targeted as much by the ICC's investigations as the African continent has been, they too would be charging the Court with selection bias. And though such a criticism may be self-interested and egregious crimes committed should not go unpunished, no matter who is committing them, this does not mean that such frustrations and outrage have no merit. The Court has been rightfully lambasted for disproportionately targeting the African continent in its investigative pursuits and Africa has every reason to react to this apparent prejudice.

The judicial disconnect criticism, unlike the previous criticism, focuses on the nexus between the ICC's justice and the locals such justice is directed at. Though upholding the norms and values of rule of law and human rights is a worthy endeavor for its own sake, within the context of international justice, that justice has to apply to real people who've faced real harm. It is not enough for international law to deliver a model of justice deemed appropriate by the dominant actors within global society; rather, law and the justice it provides must be administered with a view to the people it serves. The importance of reaching out to victim and local communities, improving such actors' knowledge, and considering local contexts and preferences cannot be overlooked. Nor can the Court overlook

the necessity of fostering justice close to home through supporting civil society and national judiciaries.

Unfortunately, the ICC has simply not engaged with the local community enough to develop these crucial connections to justice. Too many local Africans lack basic knowledge of the Court's procedures and limitations, while many explicitly express preferences for different forms of justice or strategies that are adapted to their conflict's particular situation. Though local divisions over justice make it challenging for the ICC to determine precisely how to proceed, in pursuing its work the Court must nonetheless look into these divisions and viewpoints and partner with civil society actors who have deeper local knowledge and expertise on the ground.

For justice to endure and enact positive change, it must be viewed as legitimate by the actors whom justice involves. Such legitimacy allows locals to not only support justice delivered by the ICC, but also that delivered by their own national courts in their pursuit of legal accountability. Thus, this criticism of the ICC-local disconnect is both valid and enormously consequential for the Court to address.

The last major criticism revolves around peace concerns and is perhaps the most difficult to evaluate. Scholars, leaders, and locals themselves disagree over the specifics of the peace-justice relationship, making definitive assertions about the ICC's effect on situational peace and stability impossible and unwise to make. Nevertheless, common sense does suggest that in certain circumstances where conflict is still raging, intergroup tensions abound, and/or politics within the country or countries in question are volatile, ICC involvement may inject further instability, or at least hamper peace prospects. Moreover, for those victims and locals who live in these conflict zones, survival and peace are understandably their main priorities. It is also quite logical for a person who has witnessed, been victimized, or otherwise been connected to a conflict to believe that ICC involvement in certain cases and at certain stages threatens stability and the chance for the situation's peaceful resolution. Concerns over the destabilizing impact of sitting head of state prosecutions, while also logical, are more self-serving on the part of such leaders.

Regardless of these leaders' potentially selfish intensions and the unsettled nature of the peace versus justice debate, African criticisms of the Court's effect on peace are

understandable in their origins, likely valid in certain circumstances, and incredibly important to consider. After all, international justice is counterproductive if its effect is to produce greater turmoil or to prevent the attainment of peace. For the sake of justice and the people suffering from horrific crimes, peace is a crucial factor that the Court must heavily weigh in its work.

Addressing the Critiques

With these three major concerns and their subdivisions in mind, several policy prescriptions for the ICC are now in order, so that it may address these critiques and find a way forward in Africa. In conceptualizing these main criticisms and their potential remedies, it helps to place them within the levels of analysis framework introduced at the beginning of this investigation. Examining the policy solutions in this manner reveals that state and individual level prescriptions are the most realistic and viable strategies for the Court moving forward, though there is also dim hope on the societal level.

Societal Level Solutions: Starting at the Top

Expanding the Scope of the ICC's Investigations

One of the most glaring criticisms leveled against the Court has been the Court's perceived selective bias in its prosecutions, leading African leaders and locals inspired by their rhetoric to level charges of neocolonialism against the Court and the major powers sitting on the Security Council. This criticism is undoubtedly bolstered by the Court's track record regarding its investigations, in which nine out of ten of its ongoing situations involve African perpetrators allegedly committing crimes on African soil. These figures alone provide fuel for the Court's most vehement African critics.

Combatting these numbers by expanding its investigations into other regions would go far in countering the selective bias and neocolonial criticisms of the Court among African leaders, locals, and civil society actors. Given that the news of the Court's investigations are likely one of the more visible aspects of the ICC to the African public, the ICC's expansion of investigations would take wind away from the sails of those charging the Court with selectively applying justice in a manner consistent with imperialistic agendas.

Such an expansion, however, cannot only include investigations but must also involve prosecutions, so as to demonstrate the ICC's commitment to objectively holding perpetrators accountable without regard to their ethnicity or race. This is undoubtedly tricky, as the decision to prosecute involves certain legal criteria that cannot and should not be circumvented in an effort to please critics of the Court's apparent partiality. There will certainly be times when the Court cannot prosecute specific perpetrators due to constraints, such as lack of evidence or temporal limitations. Furthermore, even if the Court has a sound foundation for prosecuting suspected perpetrators, this does not guarantee that those individuals will be convicted. Thus, these legal realities allow for a certain degree of Court criticism to always exist, though the degree can be minimized by various other reforms that the Court can seek.

In fact, the Court has already begun preliminary investigations into Afghanistan, Colombia, Iraq, Palestine, Comoros, Cambodia, and Greece, and Ukraine. Such investigations would potentially implicate U.S., U.K., Israeli, and Russian actors in the alleged perpetration of international crimes.⁵¹³ Thus, these investigations would incriminate individuals from several of the major powers that African critics of the Court have pointed to when charging the Court with politically-motivated investigations and imperialistic agendas. Investigating powers like the United States and Russia, neither of whom are state parties to the Court but both of whom are P5 members of the UNSC, would send a strong signal that the Court operates independently of the political powers of certain countries and separate from the UNSC in particular.

Such investigations nonetheless hold many challenges, especially given that the United States, Israel, and Russia are not members of the Rome Statute, that the United States and Russia hold permanent seats on the UNSC, and that the United States and Israel are allies. The Council, though potentially limited by the prospect of a veto, might try to use its power to defer an investigation into the major powers or their allies, should such investigations move beyond the preliminary stages. Going after the United Kingdom would

⁵¹³ "Preliminary Examinations: Ongoing Preliminary Examinations," *International Criminal Court*, accessed February 27, 2017, <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>.

also risk alienating one of the Court's largest funders,⁵¹⁴ though by targeting such a large funder, the Court could combat the claim that its funders influence its actions. Additionally, the complementarity standards may prove to be a barrier for such investigations. While the United States has already argued that they have investigated war-time torture allegations against its soldiers, Bensouda has retorted that the court-martial system had not prosecuted any American soldier for the alleged crimes.⁵¹⁵ The Justice Department, for its part, had opted to not prosecute any actor for the death of a prisoner in Afghanistan.⁵¹⁶ Thus, questions remain as to the willingness of the United States to domestically hold potential perpetrators to account.

Despite these challenges, it is fair to say that the Court desperately needs to expand its geographical range of prosecutions. Going after the major powers, two of whom are not members to the Court yet possess prominent positions that have allowed them to hold other countries accountable to the Court, would be a strong way to combat the selective bias and neocolonial criticisms. Such expansion would strike a blow at the rhetoric of leaders who have criticized the Court for its selective and imperialistic agenda, thus potentially helping to combat the anti-ICC rhetoric espoused by leaders and adopted by victims. While the Court may still be unable to reach these people directly by making this change, it can further attempt to address their anti-ICC sentiments through other reforms aimed at locals, which will be discussed later.

The recognition that the Court needs to enlarge its geographical scope, however, also comes with the acknowledgement that such an expansion would be difficult to achieve in the near future. Though the initiation of preliminary investigations in the countries just discussed is encouraging, such investigations pose several political and legal hurdles for the Court. Moreover, even if the Court were to successfully open up investigations into these various

⁵¹⁴ "What Does the International Criminal Court Do?," *BBC News*, June 25, 2015, sec. World, <http://www.bbc.com/news/world-11809908>.

⁵¹⁵ Somini Sengupta and Marlise Simons, "U.S. Forces May Have Committed War Crimes in Afghanistan, Prosecutor Says," *The New York Times*, November 14, 2016, <https://www.nytimes.com/2016/11/15/world/asia/united-states-torture-afghanistan-international-criminal-court.html>.

⁵¹⁶ *Ibid.*

regions, the process would be just as slow, if not slower, as it has been in the cases it has already pursued and would thus not deliver short term results for those who seek major power accountability. Lastly, the Court's expansion cannot erase the history of its past fifteen years; no matter which conflicts the Court targets in its future investigations, it will always have a history of nearly total African focus during its first decade and a half. Expanding the ICC's scope of investigations is, therefore, a policy prescription with potential future, though little immediate, promise.

UNSC Reforms?

Related to the issue of selectivity and power politics is the role of the Security Council in the referral of situations to the Court. Throughout the negotiations for the ICC, various non-African and African leaders expressed concern regarding the role that the UNSC would play in the ICC's process and feared political manipulation by the institution. In current African leaders' critiques of the Court, as well, the Council's role in the Darfur referral has sparked indignation among leaders who view the involvement of major powers in the referral as fundamentally hypocritical and imperialistic.

Thus, while reforms to the Council cannot be achieved by the ICC itself, such developments would nonetheless help the Court combat some of the selectivity, neocolonial, and political criticisms leveled against it. Over the past year, nations without permanent representation on the Council have pushed for a Council expansion and have sought negotiations to that end. In February of 2017, African Ambassador Adikalie Foday Sumah reiterated Africa's call for an enhanced role on the Council and asserted that reform was necessary, so as to address Africa's massive under representation on the general council and its non-representation on the permanent council.⁵¹⁷ Such an expansion would give Africa a stronger voice on the general council and a permanent voice within it, which would empower African leaders to play a role in the UNSC's ICC relations and have power in the referral and deferral process. This inclusion would further cut away at the criticisms of the UNSC's

⁵¹⁷ Kabs Kanu, "Ambassador Sumah Reiterates Africa's Call for Speedy Reform of the UN Security Council," *Cocorioko: The Voice of the People*, February 11, 2017, sec. Commentary, <http://cocorioko.net/ambassador-sumah-reiterates-africas-call-for-speedy-reform-of-the-un-security-council/>.

political influence over the Court and the notion that the major powers dictate the Court's investigations.

While such an expansion would help the ICC indirectly combat some of the key legitimacy charges against it, the likelihood of Council expansion is dubious. Such an expansion would require agreement by the General Assembly, which has already failed to enact Council reform for the past two decades,⁵¹⁸ while it would also require an amendment to the Charter, to which all current permanent members of the Council would have to agree.⁵¹⁹ Once again, such a solution may be more realistic in the long-term, rather than in the short. Yet, even in the long-term such reforms have the potential to make the referral and deferral process messier and more complicated, given that more players and interests would be added to the mix of the decision-making body.

Perhaps a more viable approach for the Council, then, would be to reorient itself as a more politically sensitive institution where it avoids involvement in and prevents continued investigation into politically volatile situations. In making this conscious shift, the Council should take a step back and consider not referring cases to the ICC. Given its intrinsically political nature, the Council might better serve itself and the Court by distancing itself from the referral process and thus allowing the Court to operate with perceived objectivity and independence. However, the Council would also do well to utilize its political sensitivities and defer cases where ICC investigation into the situation has been and will likely continue to be unsuccessful and even harmful. By not referring cases and being more willing to defer them, the Council will be simultaneously using its political knowledge to separate itself from the initiation of investigations and to halt the Court from further involvement in particularly tumultuous cases.

⁵¹⁸ "Updated Security Council Must Reflect Changing Global Reality, Member States Say, as General Assembly Debates Ways to Advance Progress on Reform" (Meetings Coverage and Press Release, Seventy-First Sessions, 42nd and 43rd meetings (AM and PM), United Nations: General Assembly, November 7, 2016), <https://www.un.org/press/en/2016/ga11854.doc.htm>.

⁵¹⁹ "Chapter XVIII, Chapter XVIII: Amendments," *United Nations*, accessed May 1, 2017, <http://www.un.org/en/sections/un-charter/chapter-xviii/index.html>.

Firmly Address the Head of State Immunities Question

The last societal-level suggestion for the Court is also the most viable of the solutions on this level and involves the Court's need to publicly address the sitting head of state immunity question. Though partly connected to peace concerns surrounding the potential instability that may arise whilst a sitting leader is being prosecuted, this criticism involves more fundamentally legal questions in need of clarification. Ultimately, the OTP needs to assert in public statements its legal authority to prosecute sitting heads of state, which it can find in the precedents for such prosecutions in previous courts and in the specific ICTJ case discussed in Chapter 2, *DRC v. Belgium*. Though the Court must give due consideration to the stability and peace implications of prosecuting sitting heads of state, it cannot back down from the prosecution of such leaders simply due to their title.

From the beginning of the Rome negotiations, Africans committed themselves to fighting impunity at the highest levels. This commitment included and still includes opposing the impunity of sitting heads of state, who seek to escape accountability using their immunity privileges. It is hypocritical to now turn against this mission and assert immunity from accountability simply because of the nature of the perpetrator's position within society.

The Court must refuse to accept this hypocrisy and continue to seek prosecutions against the world's worst criminals, even if they are high-ranking government officials, if it wants to retain credibility as an institution that seeks to bring the biggest perpetrators to justice. Not prosecuting such high-level individuals, who are often some of the most egregious perpetrators, would go against its very mission to hold those "most responsible" accountable for their atrocities. Accountability for such actors is also important for victims to see that even the highest-level criminals, who are likely the most widely-visible perpetrators, cannot escape the law. Additionally, holding strong in the prosecution of all perpetrators, even sitting leaders, will be a more forceful deterrent to other leaders who might otherwise feel emboldened to commit terrible atrocities out of the supposition that they would not be held accountable for those atrocities, or at least not while they ruled.

Thus, the ICC must remain steadfast in its pursuit of the highest-level criminals, even when those criminals happen to rule a country. Firmly asserting its legal authority to prosecute such prominent perpetrators is something the Court must do. However, it must also

be recognized that the Court, by refusing to capitulate to the head of state immunity concerns of leaders, will fail to respond to what has been a very serious area of African concern. Leaders will likely continue to rebuke the Court for its prosecution of sitting heads of state, even if the OTP publicly maintains its authority to do so. This criticism will presumably and unfortunately live on as a reality of international justice.

State Level Solutions: Taking it to the State

Commit to Complementarity

Yet another way that the Court could help itself against the criticisms of its supposed neocolonial agenda would be for the Court to commit to the principle of complementarity and lend support to national judiciaries so that they themselves can adjudicate cases. Members of the ICC recognize that their commitment to complementarity has been weak and explicitly acknowledged their failure to do so in their 2010 Review Conference in Kampala.⁵²⁰ As part of this recognition, members adopted a resolution to enhance national judiciaries and international support for domestic investigations and prosecutions of crimes within the Court's jurisdiction.⁵²¹ Though some countries like Kenya, Uganda, and South Africa have begun the process of domesticating the Rome Statute so as to enable national prosecutions of the crimes under the Court's jurisdiction,⁵²² this process has thus far been "slow and laborious."⁵²³ The Court can do more.

According to Charles Jalloh, the Court must emphasize more strongly its prevention mandate and do so by enhancing its national capacity building programs to address impunity and to adhere to the complementarity principle. Such efforts will improve the Court's image

⁵²⁰ International Criminal Court, "Review Conference of the Rome Statute of the International Criminal Court: Kampala, 31 May - 11 June 2010, Annex 99" (Official Records, The Hague, The Netherlands, June 31, 2010), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-Part.I-ENG.pdf.

⁵²¹ Ibid.

⁵²² Domestication refers to the adoption of domestic legislation which incorporates an international treaty into domestic law. In regards to the Rome Statute, such countries who have domesticated the Statute have incorporated the crimes covered under the ICC's jurisdiction into their own national laws. See Michael Broache, "Bringing Home Rome: Explaining the Domestication of the Rome Statute of the International Criminal Court in Africa," SSRN Scholarly Paper (Rochester, New York: Social Science Research Network, October 18, 2015), 4–6, <https://papers.ssrn.com/abstract=2659195>.

⁵²³ "A Fractious Relationship: Africa and the International Criminal Court," 4.

by engaging the community with its work and by better informing them of the process.⁵²⁴ This effort will also help combat the neocolonial critique, as the ICC would be empowering national institutions to handle cases on their own. The Court must be careful with how they approach this strategy, however, so as to not conduct itself in such a way that the targeted countries perceive the Court to be acting like a colonial benefactor or western savior.⁵²⁵ In approaching engagement with national judiciaries and communities, the Court must work with the locals and consider local contexts, rather than attempt to impose a western model of justice, divorced from the people that justice concerns.

To more substantially commit to complementarity, the Court needs to be clearer about its guidelines for prosecution. Burke-White argues that while the ICC's admissibility criteria help to create a benchmark that countries can use for reforming their judiciaries, these guidelines are very thin and provide a merely "skeletal framework for national judiciaries."⁵²⁶ The Rome Statute provides scant direction other than that capable national courts are impartial, independent, and able to proceed with prosecutions.⁵²⁷ Thus, the Court should establish and publish clearer prosecutorial principles that will provide more concrete guidelines to countries in conducting their reforms and offer judges and jurists key guidance for evaluating the effectiveness of the judiciary.⁵²⁸ Such criteria, as Burke-White suggests, could include: how available experienced and impartial judicial personnel are, if there is viable legal infrastructure in place, if adequate functional law exists, and if law enforcement is capable of arresting individuals and conducting investigations.⁵²⁹ Making such guidelines available to national judiciaries would be a common-sense, easy reform that would have a far-ranging effect on the competency-building of national judiciaries seeking guidance.

⁵²⁴ Jalloh, "Regionalizing International Criminal Law?," 498–99.

⁵²⁵ Civil society can play a crucial role in bridging the gap between the Court and African society and mitigating potential neocolonial sentiments in connection to complementarity efforts.

⁵²⁶ William W. Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo," *Leiden Journal of International Law* 18, no. 3 (November 2, 2005): 575, doi:10.1017/S0922156505002876.

⁵²⁷ International Criminal Court, *Rome Statute of the International Criminal Court*, art. 17, sec. 2.

⁵²⁸ Burke-White, "Complementarity in Practice," 590; 576.

⁵²⁹ *Ibid.*, 576.

The Court has already begun to see the need for its enhanced efforts in complementarity, suggesting that such reforms would not be out of the realm of possibility. In 2002, the OTP under Moreno-Ocampo shifted toward the idea of positive complementarity, in which the Court would play an active role in encouraging states to pursue domestic prosecutions, rather than simply serving as a safety last resort option for countries.⁵³⁰ Given the concerns raised by the selective justice and neocolonial/imperial critiques, encouraging domestic judiciaries to prosecute international crimes within their jurisdiction would keep prosecutions closer to the people most affected and give the country agency over its own prosecutions. This would in turn lessen the physical distance between where the justice is rendered and where the people affected by the justice live and thus combat the disconnect critique, as well.

Given that numerous actors have pointed to the need for enhanced resources for rendering justice, this renewed complementarity effort cannot go without resource assistance to national judiciaries. Mark Ellis suggests the creation of an International Technical Assistance Office which would be run by a non-governmental body like the International Bar Association (IBA) or the International Legal Assistance Consortium (ILAC) and which would offer objective and technical aid to national war crimes courts, including professional and legal expertise, trial observers, and legal education.⁵³¹ This body could thus act as an arm for the ICC by performing crucial capacity building functions necessary for any real commitment to complementarity.

Foster Domestic Capacity-Building

Hand-in-hand with this commitment to complementarity is the need for the Court to help foster domestic judicial capacity-building. International adjudicative institutions like the ICC cannot leave the locals out of the process, as forgetting the local populations creates detrimental distance between the people the courts are meant to serve. As Laura Dickinson

⁵³⁰ Lionel Nichols, "The Strategy of Positive Complementarity," in *The International Criminal Court and the End of Impunity in Kenya*, Springer Series in Transitional Justice (Springer International Publishing, 2015), 31–32, http://link.springer.com/chapter/10.1007/978-3-319-10729-5_2.

⁵³¹ Mark S. Ellis, "International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions," *Hague Journal on the Rule of Law* 1, no. 1 (March 2009): 81–84, doi:10.1017/S1876404509000797.

notes, “a purely international process that largely bypasses the local population does little to help build local capacity,” since international actors fulfilling the role of justice deliverer fail to prepare and train locals to deliver justice within their own communities.⁵³² The ICC is this international process which has delivered justice in a way that is detached from the local contexts it works within.

Rather than continuing to remain detached from the domestic legal realm, the Court can support domestic law enforcement like the Special Court for Sierra Leone (SCSL), the Ad Hoc Court in East Timor, and even the ICTR have done. The SCSL, for its part, has worked with local police investigators to improve their witness protection and management skills. In East Timor, the Ad Hoc Court has helped prepare domestic prosecutors and judges who gained experience through their Court work and are now using their learned skills in their own domestic systems. The ICTR has even provided computers in Rwandan courthouses that citizens and domestic judges have been able to use for research.⁵³³ There is no reason that the ICC cannot engage in similar domestic capacity-building efforts.⁵³⁴

By engaging in domestic-capacity building, the ICC can enhance international justice on a much more global scale and expand rule of law to more regions of the world. As Odinkalu asserts, there is no choice between the ICC and national or regional judicial solutions, as all of them exist as “part of a menu.”⁵³⁵ Thus, there must be a mind shift among those that assert that the ICC is the only way and those that assert that regional and national judicial mechanisms are the only solution. These various judicial mechanisms can and must co-exist, with domestic capacity-building efforts helping them work together more smoothly

⁵³² Laura A. Dickinson, “The Promise of Hybrid Courts,” *The American Journal of International Law* 97, no. 2 (April 2003): 304, doi:10.2307/3100105.

⁵³³ Jane Stromseth, “Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?,” *Hague Journal on the Rule of Law* 1, no. 1 (March 2009): 95, doi:10.1017/S1876404509000876.

⁵³⁴ Though domestic capacity building is not expressly within its mandate, the ICC can and has engaged in positive complementarity efforts previously discussed which serve to strengthen national judicial systems. For a discussion of the ICC’s lack of a capacity building mandate in relation to other tribunals, see David Tolbert and Laura A. Smith, “Complementarity and the Investigation and Prosecution of Slavery Crimes,” *Journal of International Criminal Justice* 14, no. 2 (May 2016): 432, doi:10.1093/jicj/mqw007.

⁵³⁵ Chidi Anselm Odinkalu, “International Criminal Justice, Peace and Reconciliation in Africa: Re-Imagining an Agenda Beyond the ICC,” *Africa Development/Afrique et Développement* 40, no. 2 (2015): 282.

and effectively to create a more lawful and just global society. The Court and the OTP, having already recognized the value of positive complementarity and taken some strides to employ such a strategy, can and must continue this effort and enhance its support of national judiciaries.

State/Individual Level Solutions: Somewhere in Between

Utilize and Support African Civil Society as an Intermediary

Though the previous solutions discuss the Court's engagement with the countries its investigations involve, such engagement requires knowledge regarding *how to engage* and an understanding of the contexts within which justice is being delivered. To foster such an understanding, the Court must utilize its most supportive and widespread ally: African civil society. Civil society in Africa performs a crucial bridging function between the ICC and the local African communities involved with its investigations. As Murithi argues and as the analysis of civil society in Chapter 3 highlighted, however, African civil society can also function as a bridge between the ICC and the AU by helping to foster better dialogue between the two bodies.⁵³⁶ Ardent advocates for the Court and for accountability on African soil, African civil society actors are important partners for the Court in promoting its work and reaching out to communities that need support and/or a better understanding of the Court's abilities and limitations.

In Dominic Ongwen's recent and ongoing trial, a historic 13,000 Ugandans watched from seven screening locations in Uganda, while a delegation of ten Ugandans watched in the courtroom itself. Maria Mabinty Kamara, who serves as the Court's head of outreach for Kenya and Uganda, said that the screening centers' proximity to locals "attracted huge numbers,"⁵³⁷ which again suggests the importance of physical closeness to local communities. The ICC field offices worked with various civil society groups to make the screenings possible and those CSOs also helped offer counsel for victims who needed support with what they were witnessing. One Lukodi community member remarked, "What I

⁵³⁶ "A Fractious Relationship: Africa and the International Criminal Court," 9.

⁵³⁷ "Ongwen Trial Screenings in Uganda: Lessons in Making Justice Visible?," *Coalition for the International Criminal Court*, January 17, 2017, <http://www.coalitionfortheicc.org/news/20170119/ongwen-trial-screenings-uganda-lessons-making-justice-visible>.

am seeing today with Ongwen appearing before the court for trial has built trust in me that the justice talked about over many years ago is being delivered now to us...I am happy about what I saw.”⁵³⁸ This example of the Ugandan trial screenings exemplifies the ability of CSOs to be a crucial bridge in bringing locals into contact with the Court and in providing essential psychological support to victims. Moreover, it underscores the power of knowledge-enhancement and interaction with the Court in regards to local perceptions of its work, which again was made possible through the work of the CSOs.

Yet CSOs and scholars have recognized the Court's poor support for the work of African civil society in performing these crucial functions. Murithi argues that the ICC needs to improve its own outreach to civil society by meeting with them throughout Africa and working harder to accommodate their representatives at the Hague,⁵³⁹ while Jalloh similarly asserts that the Court must work more closely and directly with civil society in Africa “to build bridges with the local populations” and promote justice.⁵⁴⁰ Stromseth offers some recommendations for engaging with and strengthening African civil society in its justice pursuits, such as holding workshops and sharing knowledge about human rights issues and pathways to legal accountability.⁵⁴¹

In light of these criticisms of the Court's support for African CSOs and the suggestions for improved engagement, the ICC would be keen to take these constructive prescriptions seriously and seek to foster closer ties with civil society. The Court must give African CSOs working to promote international justice the credit they deserve, offer them enhanced resources to perform their work, and provide them with increased access to the Court. By doing so, the Court can embolden itself and its strongest allies in their common goal of pursuing and achieving international justice and accountability.

⁵³⁸ Ibid.

⁵³⁹ “A Fractious Relationship: Africa and the International Criminal Court,” 9.

⁵⁴⁰ Jalloh, “Regionalizing International Criminal Law?,” 498–99.

⁵⁴¹ Stromseth, “Justice on the Ground,” 97.

Give Peace a Chance

Yet another policy prescription for the ICC requires the Court to consider the particular state and individual level circumstances of the conflict under investigation. As one of the central criticisms among both African leaders and African victims-locals, the issue surrounding the Court's potential inhibition of peace processes is one that cannot go unaddressed. Though divisions exist within the scholarly community and among local Africans regarding the particulars of the peace-justice relationship, there is no doubt that in some circumstances, the pursuit of legal accountability can, at the very least, stall peace efforts and instill uncertainty among locals on the ground as to the fate of the conflict. The Court must thus take seriously both leaders' and locals' concerns in Africa regarding the thwarting of peace processes as a result of the ICC's legal pursuits.

The Rome Statute's Article 53(1) empowers the prosecutor to consider the effects that certain investigations would have on "the interests of justice" and to choose not to investigate such situations.⁵⁴² These "interests of justice" could reasonably be construed to include the interests of peace and stability in the situation under potential investigation. Additionally, Article 16 of the Rome Statute provides the UNSC with the power to defer cases,⁵⁴³ while Chapter VII of the UN Charter gives the UNSC the power to "maintain or restore international peace and security" if it finds "the existence of any threat to the peace, breach or peace, or act of aggression."⁵⁴⁴ Thus, both the OTP and the UNSC have the legal authority to consider peace when evaluating involvement in certain conflict situations.

In aiming to provide justice to victims through the law, the Court must inherently consider how its actions will impact victims and locals on the ground, as justice for justice's sake would be useless if such "justice" threatened the safety and livelihoods of the people it purports to serve. According to Katherine Southwick, "in ongoing conflict the moral duty to

⁵⁴² International Criminal Court, *Rome Statute of the International Criminal Court*, art. 53, sec. 1(c).

⁵⁴³ *Ibid.*, art. 16.

⁵⁴⁴ United Nations, "Charter of the United Nations," chap. VII, art. 39, accessed April 27, 2017. <http://www.un.org/en/charter-united-nations/>.

end atrocities necessitates a dispassionate, pragmatic analysis of cause and effect.”⁵⁴⁵ Within the context of Uganda, one must consider the nature of ongoing negotiations and how the Court’s involvement could logically hinder resolution of the conflict by agreement. One must also look to Ugandans’ overwhelming support of the Amnesty Act and the fact that the Act came about as the result of an Acholi campaign for peace. Though the Ugandan government itself referred the situation to the Court, is it worth pushing a certain conception of justice onto people who widely do not want that type of justice and are the very people to suffer from the crimes at hand? Should the Chief Prosecutor have considered the potential local perceptions of such a one-sided prosecution, as well as the investigation’s prospects for peace, in making his decision to pursue the case?

Such questions go to the issue of needing to better understand local contexts and the preferences of the victims themselves. As Southwick argues,

Where victims oppose ICC involvement on grounds that it either threatens security or their collective efforts to apply their own judicial processes, including reconciliation and democratically enacted amnesty laws, then the court should seriously consider deferring investigation.⁵⁴⁶

Similarly, Branch recognizes the need to involve victim preferences in the consideration of accountability pursuits. According to Branch,

[W]hen international prosecution is not in solidarity with local demands, then the idea that any part of humanity is entitled to punish those guilty of “crimes against humanity” necessarily entails a rejection of others’ autonomy and self-determination. The decision, on the one hand, to seek justice through punishment or, on the other, to forgo punishment in favor of justice through reconciliation, is a decision that must be made by the concrete community that is the victim of the crimes and that will have to live with the consequences of the decision....If [international law] is not [guided by those it is claiming to serve], the ICC will find its...legitimacy eviscerated.⁵⁴⁷

⁵⁴⁵ Southwick, “Investigating War in Northern Uganda,” 113.

⁵⁴⁶ *Ibid.*, 117.

⁵⁴⁷ Adam Branch, “International Justice, Local Injustice,” *Dissent Magazine*, Summer 2004, 5, <https://www.dissentmagazine.org/article/international-justice-local-injustice>.

In continuing to deny victims the opportunity to express for themselves their own preferences in regards to the conflicts they themselves have suffered from, the Court only further fuels the perception of its neocolonial, western imposition upon the African continent.

Yet, it must be acknowledged that issues may arise if the Court were to go too far in adapting itself to victims' preferences. As Chapter 3 revealed, victim and local perceptions regarding peace and justice, particularly among Ugandans, were quite divided. Some wanted justice from the ICC, some wanted their own national courts to handle prosecutions, and others wanted amnesty or a mixture of amnesty with accountability. Victims and locals also diverged regarding their views of how justice, the ICC, and peace interact. Thus, whose perceptions do you listen to if you are the ICC deciding which tact to take? Can you elevate the concerns of some victims-locals over others in strategizing justice in particular circumstances? Such issues again point to the key role that African civil society can play in clarifying for the Court, as best they can, what victims largely need and seek from the Court in its deliverance of justice.

Despite these valid concerns with adapting too much to local perceptions, the Court could do much better in considering the peace ramifications of its actions in certain situations. Branch asserts that the ICC shouldn't intervene in ongoing situations but should rather wait until stability is reached,⁵⁴⁸ which suggests that the Prosecutor would be keen to use her Article 53(1) power to not investigate Uganda while the situation is ongoing and peace concerns remain high. It further hints that perhaps the UNSC should use its Article 16 power to defer the Bashir case for similar peace concerns that have been heavily voiced by critics of the Court's intervention in Darfur. Because a deferral requires a clear political consensus among Council members, however, this solution unfortunately relies upon members' political will and ability to reach agreement.

Outside of these changes and the role of the UNSC, the Court could also publicize written materials that express its commitment to peace considerations. As Murithi notes, the OTP could produce policy papers which discuss a plan for ICC interventions to work in

⁵⁴⁸ Branch, "Uganda's Civil War and the Politics of ICC Intervention," 195.

tandem with peace processes and political reconciliation.⁵⁴⁹ Such an explicit ICC recognition of peace concerns and clear commitment to considering peace as part of its accountability strategy would signal to the international community and Africa at-large that the Court hears their concerns and is integrating those considerations into its plan of action.

Individual Level Solutions: Taking it to the People

Improve Victim Outreach

The previous solutions, as well as the criticisms voiced by victims and locals, make clear that the ICC must significantly enhance its efforts to engage with the people on the ground in and around these conflicts and pursue more substantial and significant victim outreach programs. Outreach programs enhance local knowledge of the Court's process and legal limits, while they also expand victim and local access to the Court. Once again, members recognize that this is a problem, as they did in 2010 when they acknowledged the need to enhance local knowledge of and access to the justice process.⁵⁵⁰ As was detailed in Chapter 3, many Ugandans lack an understanding of the Court's enforcement mechanisms or its ability to pause its proceedings.⁵⁵¹ Thus, the Court must do a better job of spreading such information to local communities.

The Court also needs to improve its Trust Fund resources, as Human Rights Watch points out that the Fund is currently only active in two out of nine situations and that victims' rights and involvement in the process has not been what it was envisioned to be.⁵⁵² One of African civil society's key recommendations was to dedicate as state parties the inclusion of

⁵⁴⁹ "A Fractious Relationship: Africa and the International Criminal Court," 8.

⁵⁵⁰ International Criminal Court, "Review Conference of the Rome Statute of the International Criminal Court: Kampala, 31 May - 11 June 2010, Annex 99."

⁵⁵¹ Pham et al., "When the War Ends," 8.

⁵⁵² Human Rights Watch, "Human Rights Watch Memorandum for the Eleventh Session of the International Criminal Court Assembly of States Parties," *Human Rights Watch*, November 7, 2012, <https://www.hrw.org/news/2012/11/07/human-rights-watch-memorandum-eleventh-session-international-criminal-court-assembly>.

victims' needs in the justice process.⁵⁵³ Putting more resources in the Trust Fund and toward this inclusion goal would enable the Court to better live up to its commitment to the victims.

Moreover, enhanced outreach will help to minimize victim and local frustrations with the Court and particularly those that stem from misunderstandings about the Court's abilities and procedures. Improved outreach will increase knowledge of the Court and the length of time that such legal processes can take, which will likely in turn minimize frustrations with the sluggishness of the legal system. It will also help the Court better understand the priorities of victims and perhaps adapt its strategy to better suit those needs, working alongside civil society groups to provide victims and locals with tangible benefits like reparations and social healing. This will serve to decrease the physical and metaphorical distance between the ICC and the local communities targeted by its justice.

Chapter 3 pointed out the knowledge-gaps of Africans and the frequent lack of understanding of victims' rights, which the ICC has done a poor job of prioritizing. Connected to this lack of knowledge was the suggestion that increased interaction with the ICC and its staff led to a better understanding of its work and often more favorable views of the Court. Thus, enhanced outreach will also foster better local knowledge of the Court, empower victims to pursue their legal rights, and likely create more positive perceptions of the Court among them. Though the Court cannot and should not become another development institution, it can and should expand access to its processes and utilize African civil society in an endeavor to engage with locals on the ground.

Better Understand Local Contexts

Yet another place for improvement is one that has already been evoked in the previous reform discussions: the need for the Court to develop a deeper, more-grounded understanding of the local contexts of the situations it is investigating. As Jane Stromseth argues, "understanding the local terrain deeply and fully is crucial to any strategy for achieving justice on the ground."⁵⁵⁴ Matthew Saul and James Sweeney similarly argue that

⁵⁵³ Human Rights Watch, "Recommendations by African Civil Society Groups and International Organisations with a Presence in Africa for the International Criminal Court's Assembly of States Parties 13th Session from December 8-17, 2014."

⁵⁵⁴ Stromseth, "Justice on the Ground," 91.

international law should be tailored to the particular local contexts presented by certain situations.⁵⁵⁵ Thus, the ICC, as the preeminent international adjudicative institution with the goal of providing justice for the gravest international crimes, must work to develop more comprehensive knowledge of the facts on the ground if it wants to fulfill its goal.

Developing such a deeper understanding requires resources to be put toward such aims. As Stromseth suggests, the Court should designate professional staff members to solely commit to understanding local concerns, expectations, and needs. Such a team would consist of legal and country experts and anthropologists who would work with civil society and local leaders in developing this better understanding. This team would focus upon the countries' domestic judiciaries, its peoples' opinions and expectations about justice in post-conflict situations, ethnic and other group dynamics, leaders' attitudes toward accountability, and attitudes toward truth and reconciliation methods, memorials, and reparations.⁵⁵⁶ In doing so, the Court would take into account the work being done by other international institutions, as well as by NGOs and CSOs. By focusing on these contextual elements of particular situations, the Court through this team and partnership would develop a more substantive knowledge of the conflict itself and the dynamics that may unfold with the Court's involvement. Logically, the Court should pursue such background research during the preliminary investigation stage, when the OTP is already gathering information about the conflict.

Dedicating efforts to developing a deeper understanding of the local situation, and particularly building knowledge regarding ethnic conflicts, historical perspectives, and justice preferences among the locals, will allow the Court to engage more substantially with the local community and thus further improve outreach. In addition, engaging seriously with the local contexts will open the Court's eyes to local perceptions of conflicts and better position the Court to engage in more even-handed prosecutions than they might otherwise pursue, given a relative ignorance about the dynamics of certain conflicts. While the OTP's ability to prosecute certain alleged perpetrators will again depend in part upon the Court's temporal and evidentiary limitations, better understanding local perspectives on conflicts can,

⁵⁵⁵ Matthew Saul and James A. Sweeney, eds., *International Law and Post-Conflict Reconstruction Policy*, Post-Conflict Law and Justice (Abingdon, Oxfordshire: Routledge, 2015), 96.

⁵⁵⁶ Stromseth, "Justice on the Ground," 91.

at the very least, highlight for the Court areas of local concern and frustration that either it or civil society need to address and mitigate if it is going to get involved in the situation.

Even if in the end the Court fails to indict, prosecute, and charge the perpetrators that locals believe are most responsible, as the Court is unlikely and unexpected to be able to do, its efforts to build an in-depth understanding of the situation through its local interactions will help to decrease local sentiments of western indifference to and ignorance of their particular situations. Such an endeavor will also further the work of improving local knowledge of the Court's abilities and constraints and, thus, help to lessen frustrations with and misconceptions of the Court. Though understanding local contexts will not solve everything, the Court should not and cannot continue to operate without the necessary input of the victims it is aiming to serve. Without understanding the particular political and social contexts that surround the situations it investigates, the Court's accountability efforts will prove inevitably problematic, particularly from the standpoint of Africans on the ground.

There is Hope Yet

Though these policy recommendations for the ICC will by no means solve all of its problems with Africa, they nonetheless are a solid foundation for the Court to begin rebuilding its relationship with the continent that so fervently supported it in the beginning. Admittedly, some recommendations are more viable in the short term, and even in the long term, than others. Societal level prescriptions, such as the proposal to expand the ICC's geographical investigative scope and the proposal to expand UNSC membership, face serious political and procedural obstacles that make actual implementation unlikely in the near future and decision-making after implementation potentially cumbersome. Firmly asserting its authority to prosecute sitting head of states, however, is a societal level strategy that the ICC can and must pursue.

Fortunately, the ICC has several state and individual level strategies that it can undertake in its effort to be a more effective institution. Committing to complementarity and fostering domestic capacity building are two state level pursuits that the Court can and already has begun to seek in an effort to strengthen rule of law domestically. Utilizing African civil society, giving more weight to peace considerations, and improving victim outreach and local understanding are related state and individual level solutions that offer the

Court a way forward in providing better justice for people on the ground. Thus, the Court should focus its efforts, at least in the present and near term, on these much more viable state and individual level prescriptions.

Not only are these solutions more realistic in the short, and even long term, but they also aim more directly at the heart of the justice issue. International justice matters because real people are harmed by atrocities which seriously destabilize, and sometimes even take, their lives. Whether impacted directly as a victim or indirectly as a local within the context of a conflict, the people on the ground of these ICC investigations deserve justice that they feel *is justice*. Justice must thus be pursued with the victims and their needs as the priority in mind.

To serve the victims and locals, the Court must take measures to ensure that the countries within which they live respect the rule of law and the principles enshrined within the Rome Statute. Thus, strategies to combat the criticisms of African leaders must be addressed, so as to regain and retain African state support for a Court that will ideally provide justice for its people. Getting the states on board, however, must go hand-in-hand with efforts to directly engage the victims and locals. In doing so, the Court will not only better understand the situations it goes into and offer more substantive justice to the people, but it will also enhance its own legitimacy in their eyes. Such legitimacy in the eyes of African people will go a long way in building support from the ground up for the Court's work and will thus provide the Court with a solid foundation upon which to pursue justice. By focusing on the state and individual levels and addressing the three main criticisms of and subdivisions within selective justice, judicial disconnect from the local communities, and the Court's effect on peace, these reforms push the Court along on its way to bringing Africa back into its fold. This endeavor is crucial, as the Court simply cannot afford to lose the support of a bloc that was so key to its successful establishment.

Nor can the Court afford to let these major concerns go unaddressed, even if such concerns didn't amount to the potential mass-withdrawal of an entire continent from ICC membership. As history and this analysis have shown, these concerns are deep, long-standing, and not limited to Africa. Thus, pursuing such reforms now will not only help the ICC's relationship with Africa, but it will also help the Court in the future as it pursues new investigations. The African backlash against the Court may be the springboard for these

reforms, but the ultimate effect could be an ICC that is more effective, credible, and viable in the long-run and on the global stage. Such an enterprise is well worth pursuing for the sake of international justice and the people it serves.

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