

Engendered Discontent: The International Criminal Court in Africa

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ABSTRACT

Amidst concerns of African Member States exodus from the International Criminal Court, this article analyzes the ICC's investigation and prosecution of the "most serious crimes of concern" and the perception that the Court has disproportionately focused on African countries. The authors evaluate the three main causes for this perception and assess 1) whether the Rome Statute provides Heads of State Immunity, an issue which has been heavily contested, 2) the mechanism and politics of state-referrals, and 3) ICC intervention during on-going conflict and its interplay with traditional resolution mechanisms. The ICC has tended to dismiss claims of bias as an agenda by a few African Governments who wish to escape accountability. However, governments and advocates discontent with the International Criminal Court argue that the ICC's primary focus on Africa demonstrates that the court is a tool for selective justice. The authors explain that these concerns must be addressed, as continuing dismissal of such issues will only hurt the Court's legitimacy and erode its ability to combat impunity. Further, the authors argue for increased cooperation between the ICC and Interpol to improve the investigation and collection of evidence as well as mechanisms for arresting individuals on warrants issued by the ICC. Section one discusses the drafting history of the Rome Statute and its impact on the current temporal, territorial and subject matter jurisdiction of the Court. Section two analyzes the doctrine of Heads of State Immunity, with a particular focus on the ICC indictment of President Bashir and the African Union's recent adoption of an ICC withdrawal strategy for Member States. In Section three, the authors, using Uganda as a case study, consider the role of self-referrals in supporting and obstructing the administration of justice. Section four considers the peace and justice debate. Section five concludes the article with some recommendations to help address the issues between the ICC and African Member States. The authors argue that it is imperative that the ICC: 1) acknowledge that there is a bias and make concerted efforts to expand the jurisdictional scope of the Court beyond Africa, and 2) support regional mechanisms, including the African Court of Justice and Human Rights and 3) work with Interpol to conduct investigations, collect credible evidence and enhance the Prosecutor's investigation of serious crimes of concern committed everywhere.

INTRODUCTION

At the time of its inception, the International Criminal Court was welcomed by many African states as a major breakthrough in the field of international human rights and international humanitarian law.¹ However, in recent years, the relationship between the International Criminal Court (hereafter referred as the Court or ICC) and certain African States has become embittered, with the African Union, scholars and African States including South Africa, Kenya, Ethiopia,

¹ Mary Kimani, "Global Policy Forum, International Criminal Court: Justice or Racial Double Standards," Global Policy Forum, accessed November 16, 2016, <https://www.globalpolicy.org/component/content/article/164-icc/48775-international-criminal-court-justice-or-racial-double-standards-.html>

Zimbabwe, and Rwanda alleging that the Court is biased.² The Court is accused of inappropriately targeting African states³ and shielding powerful states from accountability.⁴ As the Former Chairman of the African Union Jean Ping explains, the Court's focus on Africa signifies that "there are two systems of measurement...the ICC seems to exist solely for judging Africans."⁵

It is easy for the ICC to dismiss the recent attempted withdrawals by South Africa, Gambia and Burundi as an attempt by African Heads of State to escape accountability, as has been alleged in some quarters, particularly, in the case of Burundi whose human rights records have frequently come under scrutiny.⁶ However, the dissents due to ICC's perceived bias have reverberated throughout Africa⁷ and threatens to harm the Court's legitimacy.⁸ The Court has defended its decisions and stated that most investigations, including cases from Uganda, the Democratic Republic of Congo and the Central African Republic were due to self-referrals, while other interventions were mandated by the United Nations Security Council (UNSC).⁹

² Jeffrey Gettleman, "Raising Fears of a Flight from International Criminal Court, Burundi Heads for Exit," New York Times, accessed November 2, 2016, <https://www.nytimes.com/2016/10/13/world/africa/burundi-moves-to-quit-international-criminal-court-raising-fears-of-an-exodus.html>

³ Margaret M. deGuzman, "Is the ICC Targeting Africa Inappropriately? Amoral, Legal and Sociological Assessment," in *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Boston: Brill Nijhoff, 2016), 334.

⁴ Matiangai V.S. Sirleaf, "Regionalism, Regime Complex and the Crisis in International Criminal Justice," *Columbia Journal of Transnational Law* 54(2016): 711, accessed November 2, 2016,

⁵ Jean Ping quoted in Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide* (Cambridge University Press, 2015), 331.

⁶ Kevin Sief, "Gambia is the latest African country deciding to pull out of international criminal court," Washington Post, October 26, 2016, accessed November 4, 2016, https://www.washingtonpost.com/world/gambia-latest-african-country-deciding-to-pull-out-of-international-criminal-court/2016/10/26/7f54d068-c4ca-440f-848f-e211ba29dc34_story.html. [South Africa and the Gambia have since retracted their Notices of withdrawal, as explained later in this Article](#)

⁷ Human Rights Watch, "Burundi: ICC withdrawal a major loss to victims," accessed November 6, 2016, <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>

⁸ Peter J. Stoett, "Justice, Peace, and Windmills: An Analysis of "Live Indictments" by the International Criminal Court," in *Trials and Tribulations of International Prosecution*, ed. Henry F. Carey and Stacey M. Mitchel (United Kingdom: Lexington Books), 122.

⁹ International Criminal Court, "ICC underlines impartiality, reiterates commitment to cooperation with the African Union," accessed November 6, 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=pr908&ln=en>

As we explain below, self-referrals may constitute a majority of the Court’s case docket from Africa, but this does not fully address why the U.N. Security Council referrals and the Prosecutor proprio motu powers have solely focused on Africa.¹⁰ Due to the Court’s underlying structures of inequality and the fact that nine of the ten situations currently under investigation are in Africa,¹¹ it is important that the Court address the complaints and evaluate how it exercises its discretion. By addressing concerns of bias, the Court can reduce the threat of additional withdrawals from African Member States and be better equipped to address atrocities both in Africa and elsewhere. Further, the authors argue for increased cooperation between the ICC and Interpol to improve investigations, particularly the accuracy of the Court’s fact-finding, and the mechanisms for arresting suspects.

I. THE DRAFTING HISTORY OF THE ROME STATUTE

Although, the tensions between the ICC and some African Member States has gained more attention in recent years, to a certain, they have always existed. During the drafting of the Rome State, there was strong disagreement about the type of crimes that should fall within the ICC’s jurisdiction. Before the Court was established, the draft Code of Offenses was debated in the forty-third session of the International Law Commission (ILC) in 1991.¹² The ILC, using government reports and feedback from NGOs, national delegates, and inter-government organizations, created a comprehensive Draft Statute for the International Criminal Court.¹³ They defined the following as crimes: threat of aggression, intervention, colonial domination and other

¹⁰ International Criminal Court, “Situations under investigation,” accessed November 1, 2016, <https://www.icc-cpi.int/pages/situations.aspx>

¹¹ *Id.*

¹² Kamari Maxine Clarke, *Fictions of Justice : The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (New York: Cambridge University Press, 2009), 56.

¹³ Fanny Benedetti Karine Bonneau & John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Boston: Martinus Nijhoff Publishers, 2014), 40.

forms of alien domination; genocide; apartheid; systematic or mass violation of human rights; exceptionally serious war crimes; recruitment, use, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and willful and severe damage to the environment.¹⁴ The draft Statute was presented in 1994 to the UN General Assembly. But in 1995, the Special Rapporteur omitted six of the twelve crimes in the subsequent draft due “to the strong opposition, criticisms or reservations of certain Governments with respect to those crimes.”¹⁵

During the process of revision, the serious crimes that helped explain the roots of violence in the Global South including colonial domination and other forms of alien domination; apartheid; willful and severe damage to the environment; international terrorism; and illicit trafficking in drugs and mercenaries were discarded.¹⁶ Proponents argued that this omission was a necessary compromise to ensure that the Court and the crimes under its jurisdiction would receive universal acceptance.¹⁷ The crimes of colonialism, apartheid, and environmental destruction were deemed too controversial and imprecise to survive the vetting process. More specifically, the crime of colonialism was deemed a relic of the past and no longer relevant in the modern world. However, the issue is very much relevant today. As Sashi Tharoor, the former UN Assistant Secretary-General stated:

those who follow world affairs would not be entirely wise to consign the issue of colonialism to the proverbial dustbin of history. The last decades of the twentieth

¹⁴ Timothy L.H. McCormack and Sue Robertson, “Jurisdictional Aspects of the International of the Rome Statute for the New International Criminal Court,” *Melbourne University Law Review* 25 no. 3(1999), <http://www.austlii.edu.au/au/journals/MelbULawRw/1999/25.html> . See also International Law Commission, “Draft code of crimes against the peace and security of mankind (Part II) — including the draft Statute for an International Criminal Court,” http://legal.un.org/ilc/summaries/7_4.shtml

¹⁵ International Law Commission, “Draft code of crimes against the peace and security of mankind (Part II) — including the draft Statute for an International Criminal Court,” http://legal.un.org/ilc/summaries/7_4.shtml

¹⁶ Clarke, 328; International Law Commission, “Forty-Sixth Session,” 1994, <http://legal.un.org/ilc/sessions/46/docs.shtml>

¹⁷ Kamari Maxine Clarke, “Why Africa,” in *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Boston: Brill Nijhoff, 2016), 329.

ing century suggest that, curiously enough, it remains a relevant factor in understanding the problems and the dangers of the world in which we now live.¹⁸

But when the Statute was adopted in July 2002, only four crimes were included into the final draft. The crimes, detailed under Article 5(1) of the Rome Statute, are: (a) the crime of genocide, (b) crimes against humanity, (c) war crimes and (d) the crime of aggression.¹⁹

The drafting process of the Rome Statute demonstrates how negotiations were critical to building the global justice regime. This history also demonstrates that claims of prejudice raised by African Member States are not without merit.²⁰ It suggests that the process of defining “serious crimes” was politicized and that the Rome Statute’s framework has flaws and limitations.²¹ An analysis of the treaty history also reveals that the bias is partly jurisdictional since the court is unable to prosecute other serious global crimes.²²

II. ICC PROSECUTION OF HEADS OF STATE

Under Article 13 of the Rome Statute, the ICC has jurisdiction if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.²³

¹⁸ Obiora Chinedu Okafor and Uchechukwu Ngwaba, “The International Criminal Court as a ‘Transitional Justice’ Mechanism in Africa: Some Critical Reflections,” *The International Journal of Transitional Justice*, 2015.

¹⁹ Rome Statute, Article 5(1) (2002).

²⁰ Kamari Maxine Clarke, *Fictions of Justice : The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (New York: Cambridge University Press, 2009), 198

²¹ *Id.*

²² Anthony Kariuki, “War crimes and punishment: why is the ICC targeting Africa?” *Brown Political Review*, accessed November 4, 2016, <http://www.brownpoliticalreview.org/2015/03/war-crimes-and-punishment-why-is-the-icc-targeting-africa/>

²³ Rome Statute of the International Criminal Court, Article 13(2002), accessed November 4, https://www.icc-pi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

The Court's jurisdictional powers are broad and include the investigation, prosecution and adjudication of grave human rights violations, as defined under Article 5 of the Rome Statute.

Certain Member States of the African Union have been vocal about how, when and why ICC has jurisdiction. This is reflected partly in the January 30, 2017 resolution adopted by the AU, calling for mass withdrawal from the ICC by its African Members, and the individual threats to withdraw from the ICC by such States as Uganda and Kenya as well as submission of actual notices of withdrawal from the Court by Burundi, South Africa and Gambia.²⁴ Though actual withdrawal is not universally subscribed to by all African ICC member States or civil society, the chorus of discontent is widely expressed in Africa as a protest against what, on the face of it, appears to be ICC's predilection for only investigating cases in the African continent. At the same time, some members of African civil society, including NGOs in South Africa and Kenya have spoken in support of the ICC. They have urged their countries to cooperate with the ICC and reaffirmed the need for the Court in Africa.²⁵ However, as has been raised by others, including Obiora Chinedu Okafor and Uchechukwu Ngwaba "one can support the ICC and still argue that it should not be in a kind of geo-stationary orbit above only Africa."²⁶

Although the tensions between the Court and the African Union are complex, one reason that is often cited as a cause for the discord is whether Heads of State enjoy immunity from arrest on an ICC warrant. South Africa's Executive branch decided to withdraw from the ICC mainly due to the conflicting interpretations of Article 98 of the ICC Statute, and the controversy that

²⁴ As discussed later in the article, South Africa and Gambia have since retracted their notices of withdrawal.

²⁵ Elisa Keppeler, *Managing Setbacks for the International Criminal Court*, *Journal of African Law* 56(1), accessed March 16, 2017, https://www.hrw.org/sites/default/files/related_material/Managing%20Setbacks%20for%20the%20ICC%20in%20Africa%20-%20Journal%20of%20African%20Law.pdf

²⁶ Obiora Chinedu Okafor and Uchechukwu Ngwaba, "The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections," *The International Journal of Transitional Justice*, 2015

arose when it failed to arrest President Al-Bashir while he was in South Africa to attend an AU meeting in 2015. Although, the recent decision by the South African Supreme Court overturned the withdrawal, the causes for the initial withdrawal still warrant consideration. Burundi and the Gambia had also notified the Court of their intent to withdrawal,²⁷ but Gambia's new Head of State has revoked the action of his predecessor and taken steps to reverse Gambia's withdrawal.

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Some anticipate that the withdrawals will have a domino effect and have predicted that Kenya, Namibia and Uganda will be next to leave the court.²⁹ Significantly, at its meeting in January 2017, the AU adopted a strategy calling for a collective withdrawal from the ICC. Most of the AU Member States supported the adoption of the strategy but Nigeria, Senegal, and Cape Verde entered formal reservations while Liberia entered a reservation on the paragraph that adopts the strategy. Four countries including Tanzania, Malawi, Tunisia, and Zambia sought additional time to review it.³⁰ The draft strategy also recommends that African countries strengthen their own judicial mechanisms and expand the jurisdiction of the African Court of Justice and Human Rights, "in order to reduce the deference to the ICC."³¹ While the strategy is non-binding

²⁷ "African leaders plan mass withdrawal from international criminal court," The Guardian, accessed November 5, 2016, <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>

²⁸ "UN: Gambia formally reverses withdrawal from ICC," New York Times, accessed February 14, 2017, <https://www.nytimes.com/aponline/2017/02/14/world/africa/ap-af-gambia-international-criminal-court.html>

²⁹ Jeffrey Gettleman, "Raising fears of a flight from the International Criminal Court, Burundi Heads for Exit," New York Times, October 12, 2016, accessed November 4, 2016.

³⁰ Elise Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye," Human Rights Watch, accessed March 27, 2017, <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye>

³¹ Elias Meseret, "African leaders approve a strategy for mass withdrawal from the ICC," Time, accessed February 14, 2017, <http://time.com/4656211/african-union-withdraw-international-criminal-court/>

and has no timeline,³² the AU strategy to withdrawal from the ICC is a set-back for the ICC and raises serious concerns about the legitimacy of the 14-year old Court.

In its original Instrument of Withdrawal, South Africa's foreign minister affirmed the country's commitment to combatting impunity but announced its intent to withdraw from the ICC because it believes that "peace and justice must be viewed as complementary" in "complex and multifaceted peace negotiations." Furthermore, the government of South Africa contended, that "its obligation with respect to the peaceful resolution of conflicts at times were incompatible with the interpretation given by the International Criminal Court of obligations contained in the Rome Statute."³³ Since the filing of its intention to withdraw from the ICC, the South African Government has informed the Secretary General of the United Nations, as depository of the ICC Statute, that the High Court has ruled the notice to withdraw unconstitutional because the withdrawal notice was submitted without Parliamentary approval.³⁴ Consequent to the High Court ruling, the Government of South Africa withdrew its notice of withdrawal from the ICC, while indicating that the High Court's ruling was procedural and South Africa intended to follow the appropriate procedures to realize its objective.³⁵

In threatening to withdraw from the ICC, South Africa seemed to suggest then that the government did not believe that ICC's strategy in Africa, which almost entirely relies on prosecution to render justice to victims of serious crimes, is compatible with the pursuit of justice through reconciliation. Reconciliation as a transitional justice measure has played a critical role in Africa. For example, In South Africa, the country decided to institute a Peace and Reconcilia-

³² *Id.*

³³ "South Africa to withdraw from war crimes court," BBC, accessed November 4, 2016, <http://www.bbc.com/news/world-africa-37724724>

³⁴ "Court Rules ICC Withdrawal Plan Unconstitutional," Al Jazeera, accessed March 17, 2017, <http://www.aljazeera.com/news/2017/02/court-rules-icc-withdrawal-plan-unconstitutional-170222100708895.html>

³⁵ *Id.*

tion Commission to address the crimes committed during Apartheid and in Rwanda the enormous challenge to prosecute the large number of genocide offenders was addressed through instituting the Gacaca Jurisdictions based on a traditional mechanism having the same name. This belief seems to underlie the reason that the African Union called for the mass withdrawal of its 34 ICC member states.³⁶

When an arrest warrant was issued for al-Bashir for crimes against humanity and war crimes, the African Union, including South Africa, requested that the arrest warrant be suspended to allow peace talks to continue in Darfur.³⁷ When the ICC rejected AU's request to suspend ICC proceedings due to ongoing peace talks, the relationship between the Court and the AU became fractured.³⁸

ICC jurisdiction faces intense scrutiny when cases involve the indictment of heads of state.³⁹ Article 27 of the Rome Statute states: ⁴⁰

Statute shall apply to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative, or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

However, Article 98 of the Statute declares:

³⁶ "African Union Backs Mass Withdrawal from the ICC," BBC, accessed March 15, 2017, <http://www.bbc.com/news/world-africa-38826073>

³⁷ Makau W. Mutua, "Closing the Impunity Gap and the Role of State Support of the ICC," *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Boston: Brill Nijhoff, 2016), 103.

³⁸ Tim Murithi, "Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court," *Africa and the International Criminal Court*, ed. Gerhard Werle, Lovell Fernandez, Moritz Vormbaum, (The Netherlands: Asser Press, 2014), 177.

³⁹ Peter J. Stoett, "Justice, Peace, and Windmills: An Analysis of "Live Indictments" by the International Criminal Court," in *Trials and Tribulations of International Prosecution*, ed. Henry F. Carey and Stacey M. Mitchel (United Kingdom: Lexington Books), 123.

⁴⁰ Rome Statute, Article 27(2) states: Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bear the Court from exercising its jurisdiction over such a person.

would The Court may not proceed with a request for surrender or assistance which require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.⁴¹

It may appear that there is a conflict between the two articles of the Rome Statute, given that Article 27 makes no exceptions for Heads of State immunity while Article 98 recognizes the responsibility of States to respect their international obligations when faced with a request to arrest a person with diplomatic immunity. In fact, there is no conflict between the two Articles. The drafters were careful to distinguish between culpability or responsibility for a crime committed, for which no immunity exists and the legal process to try a person for a crime, for which under international law, recognized and binding on all States, certain persons are immune. It is important not to confuse immunity from the legal process with exoneration. The immunities enjoyed by certain state officials can be lifted and the persons concerned prosecuted for the crime committed while in office and such prosecution may also take place once the immunity ceases.

In the case of al-Bashir, many have argued that South Africa should have arrested him during his visit to South Africa for the African Union Summit because of its obligation under Article 27(2) of the Rome Statute and the Chapter VII referral from the U.N. Security Council⁴² while others countered that Al Bashir's arrest is ultra vires under international law—that international law accrues to Al Bashir personal immunities which must be followed unless Sudan waives such immunities.⁴³ The latter reasoning is in conformity with Article 98(1) which pre-

⁴¹ Rome Statute, Article 98 (2002).

⁴² Juliet Okoth, "Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals," *Africa and the International Criminal Court*, ed. Gerhard Werle, Lovell Fernandez, Moritz Vormbaum, (The Netherlands: Asser Press, 2014), 196.

⁴³ Paola Gaeta, "Head of State Immunity as a Bar to Arrest," in *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Boston: Brill Nijhoff, 2016), 84.

vents the ICC from issuing a request for cooperation, if compliance would be in conflict with obligations under international law.⁴⁴

As articulated in Article 27 of the Rome Statute, Heads of State, like any other individual, must be held responsible for the crimes they commit. But the international rules, including the Rome Statute, which confer immunity from arrest or prosecution while in office unless such immunity is waived by his State, must be respected.⁴⁵ This immunity does not mean that Al Bashir is exonerated for the crimes he has committed while in office. The exercise of immunity is in effect while in office but it does not extinguish the offences committed. Heads of State can be pursued and prosecuted once the individual leaves office. This was the case with the former President of Chad, Mr. Hissène Habré. He was tried, convicted and sentenced to life in prison by the Extraordinary African Chamber in Dakar, Senegal for crimes against humanity, war crimes and torture he committed when he was Head of State of Chad.⁴⁶

III. SELF-REFERRALS AS TRIGGER MECHANISMS FOR ICC JURISDICTION

There are ten situations under investigation by the ICC; all of them, except for the investigation opened in Georgia in January 2016, are in Africa. This is strong evidence that the Court primarily focuses on crimes committed in Africa. Yet, upon further analysis of how ICC obtains jurisdiction (*see table 1 below*), the following becomes evident: five of the situations were due to self-referrals—two of which were in the Central African Republic.⁴⁷

⁴⁴ *Id.*

⁴⁵ *Id.*, 85.

⁴⁶ “Chad’s Ex-Dictator Convicted of Atrocities: In landmark case, Hissène Habré found guilty of rape, war crimes, torture and crimes against humanity,” Human Rights Watch, May 30, 2016, accessed November 12, 2016, <https://www.hrw.org/news/2016/05/30/chads-ex-dictator-convicted-atrocities>

⁴⁷ <https://www.icc-cpi.int/Pages/Situations.aspx>

State referrals have accounted for most of ICC's cases. Although, it was initially envisioned to empower Member States to refer conflicts to the Court, it has been used by Member States to refer conflicts within their own territory.⁴⁸ There have been four referrals by African Member States: Uganda, the Democratic Republic of Congo (DRC), the Central African Republic (CAR sought the assistance from the court in 2007 and 2013), and Mali. The first ICC investigation, which was in Uganda, is discussed in further detail below.

The cases based on self-referrals demonstrate that the claim of partiality does not fully describe the role of the ICC in Africa. In the case of self-referrals, States are requesting the Court's assistance, which may negate the accusations. However, under the other two mechanisms for ICC jurisdiction under Article 13(b) and (c)— the *proprio motu* investigation by the Prosecutor in Kenya and Cote D'Ivoire as well as the United Nations Security Council (UNSC) referral of the situations in Darfur, Sudan and Libya indicate that the Court, when acting on its own volition or at the behest of the UNSC, is predisposed to prosecuting cases arising in Africa.

Under Article 13(b), the United Nations Security Council can even refer non-member states, as it did with Sudan and Libya, if the conflict is considered a threat to international peace and security. Thus, the Security Council has immense power to shape how the international criminal justice operates.⁴⁹ However, the power conferred on the Security Council has sometimes been diminished by its very composition, including the fact that not all members of the Security Council have acceded to the Rome Statute.⁵⁰

⁴⁸ Andreas Müller, "Self-Referrals on Trial: From Panacea to Patient," *Journal of international criminal justice* 9 (2010): 1267-1294.

⁴⁹ Rebecca J. Hamilton, "State-Enabled Crimes," *Yale Journal of International Law* 41(2016): 342.

⁵⁰ *Id.* The most up to date information on the list of State Parties to the Rome Statute is listed on ICC's website, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

Some Security Council members have utilized their veto powers to prevent the ICC from investigating serious violations in places like Syria.⁵¹ The Security Council has also declined to investigate crimes in Venezuela and in Iraq.⁵² This has tended to appear as a double standard that feeds the perception that only certain countries can be held accountable, while countries with great powers and their allies can act with impunity. For instance, Columbia has been under preliminary examination for 12 years while the Court has moved quickly in opening investigations in situations in Africa. Critics contend that the Court did not open a full investigation in Colombia because it was shielded from ICC investigation.⁵³

Table 1⁵⁴

International Criminal Court: Situations under Investigation			
Situations Under Investigation	Triggering Mechanism	Geographic Area	Year investigation opened
Georgia	Prosecutor	Asia	January 27, 2016
Central African Republic	Self-referral	Africa	September 2014
Mali	Self-referral	Africa	January 2013
Cote D'Ivoire	Prosecutor	Africa	October 3, 2011
Libya	UNSC	Africa	March 2011

⁵¹ “Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution,” United Nations, accessed November 5, 2016, <https://www.un.org/press/en/2014/sc11407.doc.htm>

⁵² Margaret M. Deguzman, “Is the ICC targeting African inappropriately? A moral, legal and sociological assessment,” *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Boston: Brill Nijhoff, 2016), 333.

⁵³ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014), 186.

⁵⁴ International Criminal Court, “Situations under investigation,” accessed November 1, 2016, <https://www.icc-cpi.int/pages/situations.aspx>

Kenya	Prosecutor	Africa	March 2010
Sudan	UNSC	Africa	June 2005
Central African Republic	Self-referral	Africa	May 2007
Uganda	Self-referral	Africa	July 2004
Democratic Republic of Congo	Self-referral	Africa	June 2004

A. Uganda

ICC intervention vis-à-vis self-referrals and subsequent prosecution was intended to substitute international judicial redress in countries with weak criminal justice systems in order to hold perpetrators accountable for serious crimes against humanity and provide redress for victims.⁵⁵ Self-referral also demonstrates that the State is willing to cooperate with the Prosecutor on gathering evidence and interviewing witnesses.⁵⁶ Thus, cooperation of the States, the United Nations and other international actors is critical, and one might even argue, a decisive factor, in ICC's willingness to investigate a case.⁵⁷ Most of the referrals are from countries beleaguered by civil strife.

In Uganda, a war was raging in the North when the Government invited the ICC to intervene and issue indictments against the Lord's Resistance Army (LRA). The Pre-Trial Chamber II

⁵⁵ M. Cherif Bassiouni and Douglas Hansen, "The inevitable practice of the office of the prosecutor," in *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Boston: Brill Nijhoff, 2016), 321.

⁵⁶ Annalisa Ciampi, "Legal rules, policy choices and political realities in the functioning of the cooperation regime of the International Criminal Court," *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Boston: Brill - Nijhoff, 2016), 38.

⁵⁷ Ekaterina Trendafilova, "Africa and the International Criminal Court: A Judge's Perspective," *Africa and the International Criminal Court*, ed. Gerhard Werle, Lovell Fernandez, Moritz Vormbaum, (The Netherlands: Asser Press, 2014), 32.

issued arrest warrants for Kony and other LRA commanders in 2005.⁵⁸ The Acholi people of the North have been most affected by the conflict between the Government and the LRA. They have been the main victims of LRA's brutal campaign of terror, including child abduction, child soldiering and sexual slavery. Surprisingly, the ICC indictment of the LRA was met with strong resistance, especially by the Acholi people even though they themselves were victims of LRA atrocities. The Acholi wanted a more comprehensive investigation that not only examined the criminal acts of LRA but of all the actors in the war, including the Government soldiers.⁵⁹ This did not happen. In fact, the Chief Prosecutor at that time, Luis Moreno Ocampo, issued a statement during the investigation, focusing solely on LRA and declared that "the crimes committed by the LRA were more numerous and of much higher gravity."⁶⁰

The Prosecutor's statement illustrates what some advocates have found is a troubling pattern of ICC strategy in cases of self-referral: in all five investigations where the Countries referred situations in their territory, the crimes referred by the government are crimes where the responsibility was attributed to rebel groups or non-government actors to the conflict.⁶¹ This may be due to a failure on the part of the Prosecutor to undertake a thorough investigation, independently of the Government. At the same time, one can also interpret self-referral as a strategy by some governments to escape accountability. Besides, the ICC itself seems to prefer State-referrals as it guarantees Government cooperation in the investigation and prosecution of cases

⁵⁸ Ciampi, 18.

⁵⁹ Stoett, 125

⁶⁰ *Id.*, 125

⁶¹ Müller, 1270.

referred to it—a cooperation which has been impossible to obtain in instances where the matter is referred to the court by the UNSC or in cases initiated by the Prosecutor proprio motu.⁶²

IV. PEACE AND JUSTICE DEBATE

The Court has issued arrest warrants in eight situations, of which six were active civil conflict situations at the time of intervention.⁶³ This approach is different from the Nuremburg model, which sought peace then justice. During the Nuremburg trials, as well as the trials of Argentina's military dictatorship, it was only after the conclusion of violence that justice was pursued.⁶⁴ There is a need for the ICC to consider how and when it should intervene, especially in ongoing conflicts; this is not only a matter of determining priorities (i.e. versus justice) but also evaluating whether the Court's intervention in a war-ravaged country advances the primary goals of achieving a peaceful resolution to the conflict.

Political violence in many of the cases in which the Court intervenes have complex roots. Thus, intervention during ongoing conflict may exacerbate the situation and prolong the war.⁶⁵ The tension between the two equally important goals of peace and justice exists because pursuing justice, as a form of judgment and punishment, during conflict can cause perpetrators to recommit violence and escalate acrimony.⁶⁶

Proponents of prosecution as a form of justice have argued that the indictment of Kony and his most senior commanders in Uganda contributed to bringing Kony and other members of the LRA to the negotiating table in 2005.⁶⁷ It is worth noting, however, that while Kony did

⁶² Ciampi, 38.

⁶³ Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford: Oxford University Press), 8.

⁶⁴ *Id.*

⁶⁵ Kersten 3.

⁶⁶ Stoett, 126.

⁶⁷ *Id.*

agree to abandon his insurgency and negotiate a peace deal in 2005, the peace agreement fell through when the ICC rejected both the Government and LRA request to withdraw the indictments. When the ICC refused, Kony walked away and remains at large.⁶⁸

The long-standing war between the government of Uganda and LRA has been described as a fight between good (the Government) versus evil (the LRA).⁶⁹ When, the Prosecutor Moreno-Ocampo of the Court issued a statement on Kony, he declared:

We have collected evidence showing how he personally manages criminal campaign of the LRA. From his bases in the Sudan, Kony directs all LRA operations. Joseph Kony is the absolute leader of the LRA and controls life and death within the organization. Our investigation has shown that he orders the movement of his forces and dictates the type of military and civilian targets of the LRA attacks.⁷⁰

As is evident from the statement above, the ICC Prosecutor hinges the resolution of the Ugandan conflict on indicting Kony. Although, Kony should and must be held accountable for the crimes he has committed, it is reductive to solely focus on Kony without addressing the root causes of the conflict in Northern Uganda and the needs of the victims⁷¹.

While it is true that people in Uganda have a desire to see justice done, what may not be understood by outside observers is that when one speaks of justice in the African context, this encompasses more than trials and the punishment of offenders. In the case of major political conflicts, such as the fight against Apartheid in South Africa and the Genocide in Rwanda it became necessary to draw on the long-held belief in peaceful coexistence through reconciliation. In South Africa, a Truth and Reconciliation Commission was found to be necessary to bring about

⁶⁸ Stoett, 126

⁶⁹ Kersten, 43.

⁷⁰ "Statement by Chief Prosecutor Luis Moreno-Ocampo," International Criminal Court, accessed November 6, 2016, https://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf

⁷¹ Kersten, 76.

peace in the country.⁷² In Rwanda, following the military end of the Genocide, trials were held in the national courts. The United Nations also set up an International Criminal Tribunal but in order to involve the population in peace efforts, the traditional truth and reconciliation mechanism called the Gacaca was established. The Gacaca courts handled hundreds of pending cases.⁷³ These examples have been put forward as possible solutions to the conflict in Darfur, South Sudan and Central African Republic. A concerted effort needs to be made to develop these mechanisms as a complementary form of rendering justice to prosecutions and trials. Justice must include rebuilding community harmony and trust, reconciliation, and compensation for those most grievously wronged. Justice without peace and recompense, in some instances, is seen as retributory justice intended to satisfy outsiders and an imposition of foreign value systems.⁷⁴

Selective justice is not conducive to “conflict transformation and post-conflict building.”⁷⁵ The underlying reasons for the violence in Northern Uganda cannot be eliminated by the ICC’s indictment of individuals such as Dominic Ongwen, when other perpetrators of genocidal acts remain at large.⁷⁶ Ongwen, who was abducted by the LRA at the age of nine, defected, saying he feared for his life because Kony had multiple attempts to kill him.⁷⁷

⁷² Stephen Oola, “In the shadow of Kwoyelo's trial the ICC and complementarity in Uganda,” *Contested justice: the politics and practice of International Criminal Court interventions*, ed. Christian De Vos, Sara Kendall, and Carsten Stahn (United Kingdom: Cambridge University Press, 2015), 155.

⁷³ Sam Rugege and Aimé M. Karimunda, “Domestic Prosecution of International Crimes: The Case of Rwanda” *Africa and the International Criminal Court*, ed. Gerhard Werle, Lovell Fernandez, Moritz Vormbaum, (The Netherlands: Asser Press, 2014), 80.

⁷⁴ Dana Zartner, “The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies,” *Indiana International & Comparative Law Review* 22(2) (2012), 300.

⁷⁵ Laurence Juma, “Unclogging the Wheels: How the Shift from Politics to Law Affects Africa’s Relationship with the International System,” *Transnational Law & Contemporary Problems* 23(2014): 342.

⁷⁶ Kersten, 42.

⁷⁷ Mark Drumbl, “Victims who Victimise,” *London Review of International Law* (2016): 6, accessed November 17, 2016, <http://iril.oxfordjournals.org/content/early/2016/06/27/iril.lrw015.full.pdf+html>

Some Northern Ugandans have questioned whether Dominic Ongwen's current trial at The Hague is an appropriate way to render justice and accountability.⁷⁸ Mark Drumbl, while examining the role of selective prosecution stated:

It is also lost on some observers why Ongwen should be indicted and prosecuted, rather than other commanders. While selectivity remains an inherent foible of international criminal law, the shadow it casts over the Ongwen proceedings seems to be particularly long.⁷⁹

During the decades long conflict, LRA abducted children, like Ongwen into its ranks, in large part because children could be more easily manipulated and controlled through fear.⁸⁰ Since criminal liability requires showing of mens rea (mental state) and actus rea (criminal act), can mens rea be assigned to Dominic and other former child soldiers given the fact that they have, from an early, lived under the control and influence of a maniacal environment and were indoctrinated by the LRA? While some have argued that this is only a mitigating factor,⁸¹ it does raise serious issues of how criminal liability is apportioned to former child soldiers, especially under the theory of command responsibility. Since criminal law is individualistic, the Prosecutor must prove that Ongwen fit into the requirements of Article 25 on individual responsibility and Article 30 on "mental element." Article 30(1) states "Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." The question to be addressed is whether Ongwen, as a person who was a child when abducted and lived in an environment of

⁷⁸ "Questions and Answers on the LRA Commander Dominic Ongwen and the ICC," Human Rights Watch, December 5, 2016, <https://www.hrw.org/news/2016/12/05/questions-and-answers-lra-commander-dominic-ongwen-and-icc#Q2>.

⁷⁹ Drumbl, 24.

⁸⁰ "Questions and Answers on the LRA Commander Dominic Ongwen and the ICC," Human Rights Watch, December 5, 2016, <https://www.hrw.org/news/2016/12/05/questions-and-answers-lra-commander-dominic-ongwen-and-icc#Q2>.

⁸¹ Jason Burke, "Ex-child soldier Dominic Ongwen denies war crimes at ICC trial," The Guardian, accessed March 29, 2017, <https://www.theguardian.com/world/2016/dec/06/dominic-ongwen-the-hague-trial-war-crimes-lra-uganda>

violence, was capable of distinguishing right and wrong to form the necessary intent to commit the crimes leveled against him.

In attempting to explain Ongwen's role in the LRA, the defense team described the history of violence against children in northern Uganda.⁸² They contended that Ongwen's conduct was "caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person..."⁸³ The defense recounted how Ongwen had 'lived most of his life under duress' and his 'environment of duress never dissipated as Dominic remained in the rebel group. His so-called rank was demonstrative of one thing:

⁸² Sharon Nakandha, "Ongwen Confirmation of Charges Hearing Continues at ICC," International Justice Monitor, January 26, 2016, accessed November 17, 2016, <https://www.ijmonitor.org/2016/01/ongwen-confirmation-of-charges-hearing-continues-at-icc/>

⁸³ International Criminal Court, Charges Hearing, January 18, 2016, accessed December 1, 2016, https://www.icc-cpi.int/CourtRecords/CR2016_03711.PDF Article 31 of the Rome Statute:

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

that he was surviving better than others while under duress.”⁸⁴ This argument was rejected by the Pre-Trial Chamber II.⁸⁵ The Court refused to accept the duress argument and recognize Ongwen as a former child soldier.⁸⁶

The Ongwen trial, the only ICC case to involve a former child soldier, started on December 6, 2016, with much of the Prosecutor’s opening statement focused on the actions of the LRA. Ongwen’s alleged crimes are also discussed as “widespread and systematic.”⁸⁷ What is paradoxical is that Ongwen is accused of committing crimes that he himself suffered when he was abducted into the LRA, including the war crime of cruel treatment, conscription and use as a child soldier, and the crime against humanity of enslavement.⁸⁸ Furthermore, the root causes and consequences of the conflict are reclassified to fit ICC’s four categories of crimes and are interlinked with the actions of the individual before the Court. Thus, many northern Ugandans struggle to make sense of Ongwen’s victim/perpetrator duality. These dilemmas are complex and raise serious questions about criminal liability and mens rea. The situation requires a nuance that the Court does not or perhaps, cannot, recognize.

IV. Recommendations

When the Rome Statute came into force on July 1, 2002, the ICC was heralded as a breakthrough in the global justice system.⁸⁹ This has been undermined by allegations of selective

⁸⁴ Ibid.

⁸⁵ International Criminal Court, “Pre-Trial Brief on behalf of Victims represented by the Common Legal Representative.” No.: ICC-02/04-01/15, September 6, 2016, accessed December 2, 2016, https://www.icc-cpi.int/CourtRecords/CR2016_06500.PDF

⁸⁶ Drumbl, 24.

⁸⁷ International Criminal Court, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen,” December 6, 2016, accessed December 6, 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=2016-12-06-otp-stat-ongwen>

⁸⁸ Drumbl, 6.

⁸⁹ Kamari Maxine Clarke, *Fictions of Justice : The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (New York: Cambridge University Press, 2009), 35.

justice. The argument is not without merit, especially in instances where cases are referred by the U.N. Security Council or initiated through proprio motu power of the Office of the Prosecutor. However, allegations of partiality may not adequately represent the complexity of the situation given the high number of self-referrals.

The authors seek to emphasize the need for Court reform and reiterate its recommendations to: 1) re-assess how, when and whether to intervene in ongoing conflicts; 2) expand the jurisdictional scope beyond Africa; and 3) support regional measures including the African Court of Justice and Human Rights.

A. Expand scope beyond Africa

We recognize that each situation in which the Court chooses to intervene has unique factors and circumstances that require careful consideration, but there is a great need for the ICC to demonstrate, through a more comprehensive and public prosecutorial strategy, the ability to treat all states equally.⁹⁰ The preliminary investigations, most of which are outside of Africa, are promising and signal that the Court is making efforts to expand its focus.⁹¹

A. Re-assess how, when and whether the ICC should intervene in ongoing conflicts

As the cases mentioned above demonstrate, the ICC's role in on-going conflicts are troubling and do not address the accountability dilemmas or the root causes of conflicts. Thus, it is important for the ICC to develop a strategic policy that analyzes the risks, sequencing of actions and the modalities that it uses.⁹² For example, if there is a current peace negotiation, it may not

⁹⁰ CITE

⁹¹ The ICC is currently conducting preliminary examinations outside Africa. Countries include Iraq, United Kingdom, Ukraine, Afghanistan, and Palestine. See International Criminal Court, "Preliminary Examinations," accessed March 17, 2017, <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>

⁹² Kersten, 29. See also Rachel Goodman & Nokukhanya Mncwabe, "International Criminal Justice in Africa: Neo-colonial Agenda or Strengthened Accountability?" accessed November 16, 2016, <http://au.int/en/sites>. See also Tim Murithi, "Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the

be effective for the ICC to intervene since it may disrupt the peace process and make the agreement less likely to happen. Although this assessment must be done on case-by-case basis, the Court must balance the need for peace with the pursuit of justice.⁹³ A case in point here is that of Kenya. The violence in Kenya following a flawed election is deeply rooted in the political structure of Kenya.⁹⁴ This could not be resolved through the selective prosecution of a few targeted leaders, without an independent commission of inquiry into the root causes of the violence and recommendations for remedial action.

B. Improve fact-finding and evidence collection through increased cooperation with Interpol

Investigating genocide, war crimes, crimes against humanity and crimes of aggression requires rigorous fact-finding, research, and exchange of information. This is particularly challenging if the crimes were committed years or even decades ago.⁹⁵ To enhance crime prevention, the Court should collaborate with existing institutions. In Africa, the Court could benefit from working with the well-established African Commission on Human and Peoples' Rights to carry out investigations of cases arising from political conflicts, identify culprits and make recommendations.⁹⁶ The conflict in Eastern DRC and the resulting political stalemate could have benefited from an independent fact finding before embarking on selective prosecutions based on self-referral.

International Criminal Court,” *Africa and the International Criminal Court*, ed. Gerhard Werle, Lovell Fernandez, Moritz Vormbaum, (The Netherlands: Asser Press, 2014), 193.

⁹³ *Id.*

⁹⁴ Njonjo Mue and Judy Gitau, “The justice vanguard : the role of civil society in seeking accountability for Kenya's post-election violence,” *Contested justice: the politics and practice of International Criminal Court interventions*, ed. Christian De Vos, Sara Kendall, and Carsten Stahn (United Kingdom: Cambridge University Press, 2015), 199.

⁹⁵ Nancy Amoury Combs, From Prosecutorial to Reparatory: A valuable post-conflict change of focus. *Michigan Journal of International Law*, 236.

⁹⁶ *Id.*

Another institution that could be co-opted as part of the Court’s Investigatory mechanism is the International Criminal Police Organization (Interpol), an international organization comprised of national police bureaus from 190 member states who work together to combat international crime. It would be useful to conduct fact-finding and improve ICC investigative mechanisms. It would support the Court’s operations, which has limited resources, and reduce ICC over-reliance on the referring State for information and evidence.

Under Article 87 of the Rome Statute, the Court can “ask any intergovernmental organization to provide information or documents.”⁹⁷ More specifically, Article 87(1)(b) states that “requests [for cooperation] may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.”⁹⁸ In 2012, the ICC and Interpol strengthened the partnership by signing a cooperation agreement to exchange information. Under Article 4, Interpol agrees to notify police bureaus of outstanding warrants issued by the ICC, trace missing persons and facilitate the identification of remains.⁹⁹ To date, the ICC has mainly requested Interpol’s assistance to arrest and surrender indicted persons, which has met with little success. However, what has been underutilized and should be strengthened through increased cooperation and collaboration is the use of Interpol in ICC investigations.

C. Support regional measures including the Africa Court of Justice and Human Rights

The ICC and AU relationship is tense and may require, as some have recommended, that the Office of the Prosecutor conduct outreach to African civil society and appoint a senior advisor to liaise with the AU.¹⁰⁰ There is potential for the Court’s and AU’s relationship to improve

⁹⁷ Rome Statute, Article 87(6).

⁹⁸ Rome Statute, Article 87(1)(b).

⁹⁹ Cooperation agreement between the Office of the Prosecutor of the International Criminal Court and the International Criminal Police Organization, accessed February 10, 2017, www.interpol.com

¹⁰⁰ Murithi, 194

based on shared goals, including the commitment to addressing human rights violations in the continent and improving national courts judicial mechanisms.

ICC can also, due to its broad mandate, support the African Union's initiative to improve regional peace mechanisms, provided that such AU initiatives are compatible with international human rights law and promote international criminal justice in Africa. Although the January 2017 AU "Withdrawal Strategy" supports African Member States withdrawal from the ICC, it also recommends the following: 1) amend the Rome Statute, 2) improve and restructure the United Nations Security Council, and 3) increase African representation at the ICC. The Strategy also calls for strengthening and supporting the Statute of the African Court of Justice and Human Rights, as a preferred judicial mechanism to handle African cases.¹⁰¹ Because the ICC is a court of last resort and is complimentary to national judicial mechanisms,¹⁰² there is a great need to support national, regional mechanisms and institutions in their investigation and prosecution of international crimes. Such cooperation is also beneficial to the ICC given the ICC's limited jurisdiction and concerns about the long trial wait in ICC cases and ineffectiveness as a demonstration of justice for victims due to its location outside Africa.¹⁰³

In May 2014, the African Union adopted Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), which is the first ever regional criminal court in the continent.¹⁰⁴ The African Court of Justice and Human Rights has the po-

¹⁰¹ Allan Ngari, "Africa: The AU's (Other) ICC Strategy," accessed March 16, 2017, <http://allafrica.com/stories/201702190148.html>

¹⁰² International Criminal Court, accessed March 16, 2016, <https://www.icc-cpi.int/about>

¹⁰³ The average trial time for an ICC case is about two years. See Alette Smeulers, Barbora Hola and Tom Van Den Berg, "Sixty-Five Years of International Criminal Justice: Facts and Figures," *Realities of International Criminal Justice*, ed. Dawn L. Rothe, James Meernik, and Þórdís Ingadóttir (Boston: Koninklijke Brill NV, 2013), 17.

¹⁰⁴ "Africa: Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court," Amnesty International, January 22, 2016, accessed November 20, 2016, <https://www.amnesty.org/en/documents/afr01/3063/2016/en/>

tential to fill the gaps in prosecution, especially in instances where there is a need to prosecute but domestic courts have failed or are unable to prosecute, and complement the work of the ICC.¹⁰⁵

The Malabo Protocol extends the jurisdiction of the African Court of Justice and Human Rights to cover war crimes, crimes against humanity and genocide but also includes the following quotidian crimes: human trafficking, drugs and hazardous waste, piracy, terrorism, mercenarism, and corruption.¹⁰⁶ This initiative, in combination with the African Commission on Human and Peoples Rights, has the ability to create a regional mechanism that can investigate and punish international crimes that are perpetuated in the continent.¹⁰⁷

The ICC and the African Union should work to support the African Court of Justice and Human Rights.¹⁰⁸ Since the principal of complementarity allows for proactive complementarity and supports States ability to prosecute international crimes,¹⁰⁹ it, by extension, can also support regional criminal justice institutions such as the African Court of Justice and Human Rights.

V. Conclusion

The ICC has a great potential to work with countries to address crimes that “threaten the peace, security, and well-being of the world.”¹¹⁰ This is an opportune time for the ICC to re-evaluate and redefine its role and priorities moving forward. The ICC Member States may wish to re-examine the Rome Statute, with a view to strengthening the investigation role of the Prose-

¹⁰⁵ *Id.*

¹⁰⁶ Matiangai Sirleaf, “The African Justice Cascade and the Malabo Protocol,” *International Journal of Transitional Justice* 11 (2017).

¹⁰⁷ *Id.*

¹⁰⁸ International Politics and Policy Considerations for Inappropriate Targeting of Africa by the ICC OTP, Chief Charles Achaeleke Taku

¹⁰⁹ Rowland J. V Cole, “Africa's Relationship with the International Criminal Court: More Political than Legal,” *Melbourne Journal of International Law* 14(2013): 694.

¹¹⁰ Rome Statute, Preamble.

cutor. The Court should also consider separating prosecution from investigation, as is done in many countries, where investigations are carried out by the police and prosecution by state prosecutors. These policy and structural changes, which the authors have raised throughout this article, are critical to the Court's legitimacy and efficacy.