Rapoport Center Working Paper Series
1/2018

Decolonizing the International Criminal Court: Considering Questions of Bias in the Prosecution of African Leaders

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The Bernard and Audre
RAPOPORT CENTER
For Human Rights and Justice
The University of Texas at Austin
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ISSN 2158-3161

Published in the United States of America
The Bernard and Audre Rapoport Center for Human Rights and Justice
at The University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705
http://www.rapoportcenter.org/

http://blogs.utexas.edu/rapoportcenterwps/

Decolonizing the International Criminal Court: Considering Questions of Bias in the Prosecution of African Leaders

Mihret Getabicha*

ABSTRACT

Although the establishment of the International Criminal Court remains a historic achievement in the field of international criminal law, the court is increasingly subject to criticism by some African leaders and due to the prosecution of African leaders. Understanding the reason for these critiques requires an appreciation of the innovations in international law that led to the court's eventual establishment. This paper provides a brief legal history of international criminal law and uses case studies of two African situations in order to better understand contemporary debates around the prosecution of African Heads of State by international courts. As such, the paper offers useful background information for actors that may be unfamiliar with the trajectory of international criminal law and how historical developments continue to impact the perceived legitimacy of international criminal law in Africa.

Keywords: public international law, international criminal law, ICC, Africa, human rights

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INTRODUCTION

The history of international criminal law (ICL) dates back centuries and draws on several historical developments shaping multiple areas of international law.[1] These historical developments include the evolving theological and secular understandings of "just war"; the prohibition of piracy in the nineteenth century; laws surrounding the slave trade; and emerging human rights norms.[2] However, prior to World War II, ICL norms existed without any consistent codification or corresponding international enforcement mechanisms or bodies such as courts or tribunals.[3] The delay in formalizing international criminal justice as a legal area related to two major concerns.[4] First, under classical international law, States[5] were the primary subjects whereas criminal law usually requires individuals as the primary subjects when apportioning liability and responsibility.[6] Second, States maintained very defensive attitudes regarding their sovereignty.[7] Thus, the development of international criminal tribunals, such as the International Military Tribunal (IMT) at Nuremberg after WWII, was crucial to the understanding of ICL as a means of prosecuting individuals instead of States.[8]

This paper grapples with the question of whether the International Criminal Court (ICC), since its emergence after the Rome Statute entered into force in 2002, disproportionately or selectively investigates situations in African countries in a manner that unfairly targets African leaders.[9] In order to fully appreciate contemporary critiques of the ICC's jurisprudence, the paper begins by providing background information on the field international criminal law. The first section clarifies what the term 'international crime' generally connotes under international criminal law. Even if a particular act qualifies as an international crime, however, a court may entertain prosecution only if it has the proper authority or jurisdiction over the parties and the matter. Thus, the paper goes on to trace the development of universal jurisdiction. The second section discusses the establishment of the first international tribunals and courts and considers some of the legal sources of authority for the adjudication of international crimes generally and by the ICC specifically. Next, the third section of the paper analyzes two somewhat recent ICC prosecutions resulting from situations in Sudan and Kenya. The paper then concludes with the consideration of possible solutions to the apparent biased selectivity of ICC prosecutions and argues for the use of enhanced complementarity and greater support for domestic criminal justice efforts in Africa.

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[1] Beth Van Schaack & Ron Slye, *A Concise History of International Criminal Law* 7 (Santa Clara Law Digital Commons, Faculty Publications, 2007), *available at* http://digitalcommons.law.scu.edu/facpubs/626/, *reprinted in* BETH VAN SCHAACK AND RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW: THE ESSENTIALS 7-48 (2009).

[2] *Id*.

[3] *Id*. at 7 – 8.

[4] GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL LAW 1, (Julia Geneuss, et al. eds., 3rd ed. 2014).

[5] The word 'State' is used in this paper to refer generally to independent countries or sovereign political entities.

[6] WERLE & JESSBERGER, *supra* note 4, at 1.

[7] *Id*.

[8] DOUGLAS GUILFOYLE, INTERNATIONAL CRIMINAL LAW 57 (2014).

[9] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (1998) (last amended 2010) [hereinafter Rome Statute], *available at* http://legal.un.org/icc/statute/romefra.htm.

I. Defining 'International Crimes' Under International Law

The reference to an "international crime" is generally "reserved for offences resulting in the criminal responsibility of individuals."[10] This creates an important distinction between ICL and other forms of international law, such as international humanitarian law (IHL), often described as the law of armed conflict, or international human rights law (IHRL) which deal with States' responsibilities under international law instead of individual responsibility for criminal acts.[11] For example, breaches of IHRL responsibilities, as provided in treaties or under customary international law, do not lead to "criminal responsibility of that individual himself or herself."[12] Rather, that individual's criminal conduct, in violation of guaranteed human rights in the IHRL system, would be attributed to a State actor.[13] Nevertheless, modern ICL shares many goals with contemporary IHRL and IHL.[14] Like IHRL, ICL remains relevant and applicable during both peace-time and war-time and is concerned with human dignity.[15] In addition, breaches of IHL during armed conflicts may lead to individual criminal liability under ICL.[16] An example of this would be the commission of certain war crimes.[17]

Moreover, some scholars define "international crime" in ICL as only those acts generating criminal responsibility of an individual under *international* law, while other scholars also include acts criminalized within an international treaty but only generating *domestic* criminal liability despite prohibition within an international, or multilateral, treaty.[18] Interestingly, efforts of municipal courts to prosecute individuals for international crimes are sometimes viewed as less legitimate than their international counterparts even though the development of truly international courts and tribunals is a relatively recent phenomenon.[19]

Such perceived legitimacy of international courts suggests that there is potential for ICL to provide redress to victims of serious crimes under international law where domestic courts may fail to provide relief. Scholars refer to these crimes are, alternately, as "core crimes," "crimes against the peace and security of mankind," "crimes of international concern," or "transnational crimes."[20] In addition, characteristics of crimes under ICL that differentiate international crime from domestic, or "municipal" crimes, include the "gravity," of the crime the violation of "fundamental values" in the international community, and the "triability" of a crime in an international court.[21] An important question today is whether crimes of this magnitude, when perpetrated within Africa, receive fair and equitable judicial or procedural treatment,

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[10] ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW 49 (2015). O'Keefe notes that States are generally not held criminally responsible under positive international law. *Id*.
[11] *Id*. at 49-50.
[12] *Id*. at 50.
[13] *Id*.
[14] JEFFREY L. DUNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS—A PROBLEM ORIENTED APPROACH 416 (4th ed. 2015).
[15] *Id*.
[16] *Id*.; *see also* O'KEEFE, *supra* note 10, at 50.
[17] O'KEEFE, *supra* note 10, at 50.
[18] *Id.* at 51-52 nn.18-19.
[19] ANDREW NOVAK, THE INTERNATIONAL CRIMINAL COURT: AN INTRODUCTION 17-18 (2015). For example, the author cites municipal courts with international jurisdiction in Iraq, Ethiopia, and Bangladesh as examples of tribunals that lacked international support. *Id*.
[20] O'KEEFE, *supra* note 10, at 66.
[21] *Id.* at 57-60.

within international courts, in comparison with cases from other regions experiencing such crimes.

A. Understanding Universal Jurisdiction

Several developments in the area of substantive international law influenced States to begin considering the establishment of a permanent international criminal tribunal like the ICC. These included innovations in the understanding of universal jurisdiction, individualization of criminal prosecution for international crimes, and the steady codification of international crimes. However, it is important to note that these innovations occurred gradually, over centuries. The road to the acceptance of individual prosecution for international crimes in an international tribunal was a long one, especially given the reluctance of States to limit their sovereignty by subjecting their executive officials to international criminal jurisdiction.[22] In fact, even today the ICC remains "the only extant international criminal court to be established under a multilateral treaty among [S]tates."[23]

At first, there existed only rules prescribing conduct during armed conflict, stemming from the early history of IHL. The theory of "just war," for example, dates back to the time of St. Augustine (C.E. 354-430), and details the limitation of war for just ends only.[24] St. Thomas Aquinas (C.E. 1225-1274) also considered the topic of "just war" in his *Summa Theologica*.[25] This study of *jus ad bellum*, or the necessary preconditions for war, reflects concern with the "morality and justice of going to war."[26] Later, around the sixteenth century, the focus shifted from the morality of war to "regulating the effects of war," or *jus in bello*.[27] This shift from analyzing the morality of war to regulating the "means and methods of warfare" largely reflects the current state of IHL.[28] Today, an abundance of multilateral treaties exist, making IHL a highly codified area of ICL."[29] This section's broad, brushstroke discussion of IHL still centers the States as the primary actors and primarily concerns domestic jurisdictions.

Under public international law, the jurisdiction of States is of primary concern.[30] States are the only bodies vested with international rights or bound by international obligations.[31] Thus, "jurisdiction" usually refers to the authority of State actors "to prescribe, adjudicate on, and enforce legal rules."[32] Within States, the traditionally accepted bases for criminal jurisdiction include territoriality, nationality, or residence.[33] The concept of "universal jurisdiction," on the other hand, refers to the belief that "some international crimes are so serious that any [S]tate may exercise jurisdiction over them."[34] Because certain international crimes violate the interests of

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[22] Schaack & Slye, *supra* note 1, at 8.
[23] O'KEEFE, *supra* note 8, at 529. The ICC remains the "first and only permanent international criminal court." *Id*.
[24] Schaack & Slye, *supra* note 1, at 8.
[25] *Id.*
[26] *Id.* at 7-8.
[27] *Id.* at 9.
[28] *Id.* at 13.
[29] *Id.*
[30] O'KEEFE, *supra* note 8, at 4.
[31] *Id.*
[32] *Id.* at 3.
[33] *Id.* at 9-17.
[34] NOVAK, *supra* note 19, at 41.

the international community as a whole, and thereby implicate universal jurisdiction, any State member of the international community may enforce ICL through prosecution of individuals.[35]

Furthermore, a State's authority to punish an international crime stems directly from the nature of the crime. Its authority is "without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[36] Only a limited number of international crimes may lead to the use of such broad universal jurisdiction, including piracy, war crimes, crimes against humanity, genocide and potentially the crime of aggression.[37] Moreover, universal jurisdiction is permissive and not mandatory.[38] This means that States are not obligated to prosecute perpetrators of such crimes.[39] More plainly, universal jurisdiction confers upon States the authority to prosecute but not a duty.[40]

B. Further Legal Sources of International Criminal Responsibility

ICL derives from the same legal sources as public international law.[41] Many utilize Article 38(1) of the Statute of the International Court of Justice when identifying these sources of international law.[42] These include customary international law, treaty law, and general principles[43] of law.[44] Other sources that shape understandings of ICL include judicial decisions or publicists' writings."[45] Moreover, States must comply with rules of *jus cogens*. According to existing peremptory norms under customary international law known as *jus cogens*, there are rules governing State behavior that create State responsibility regardless of whether States have given consent to be bound through a treaty.[46] For example, genocide, crimes against humanity, and war crimes are all prohibited under customary international law, regardless of the status of those crimes within a State's domestic law.[47] And under the principle of obligations *erga omnes*, States have a positive duty to prevent or stop certain international crimes rising to the level of *jus cogens*.[48]

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[35] WERLE & JESSBERGER, *supra* note 4, at 73.
[36] *Id.* at 74 n.432.
[37] GUILFOYLE, *supra* note 8, at 39. Douglas Guilfoyle contends that these there are arguably the least controversial international crimes subject to universal jurisdiction. He suggests slavery, torture, and terrorism are other international crimes where universal jurisdiction may be applicable but are also more controversial and less clearly established for various reasons. *Id*.
[38] *Id.* at 45.
[39] *Id.* (discussing how some treaties, such as the Convention Against Torture, create a "hierarchy of jurisdiction" by generating a duty to prosecute).
[40] WERLE & JESSBERGER, *supra* note 4, at 81.
[41] *Id.* at 56.
[42] Statute of the International Court of Justice, I.C.J. art. 38 (June 26, 1945), http://www.icj-cij.org/documents/?p1=4&p2=2; WERLE AND JESSBERGER, *supra* note 4, at 56.
[43] GUILFOYLE, *supra* note 8, at 7. An example of a general principle of international law would be "the principle of legality or *nullum crimen sine lege*." *Id*.
[44] WERLE AND JESSBERGER, *supra* note 4, at 56.
[45] GUILFOYLE, *supra* note 8, at 5.
[46] NOVAK, *supra* note 19, at 42.
[47] NOVAK, *supra* note 19, at 42; O'KEEFE, *supra* note 10, at 25.
[48] NOVAK, *supra* note 19, at 42.

Furthermore, the relationship between customary international law and treaty law is interactive and dynamic.[49] Treaty law may legally formalize existing customs or it may itself become an emerging custom.[50] In all cases, the intentions of the State parties must be clear to determine whether there was truly an intention to codify custom.[51] Nevertheless, the codification of international law, and intergovernmental regulation of international legal questions, is a centuries-old practice.[52] According to the International Law Commission (ILC), this practice dates back to the Congress of Vienna (1814-15) where diplomats gathered to discuss the abolition of slavery and ultimately signed the Treaty of Paris of 1814.[53] Today, a great deal of the codification and "progressive development" of international law is carried out by the ILC—a body composed of independent international law experts selected by the UN General Assembly.[54]

II. Antecedents to the First International Courts and Tribunals

Like many of the substantive developments in the areas of IHRL and IHL, prosecution of international crimes under modern ICL finds its roots in the international criminal tribunals developed immediately after WWII.[55] One of the earliest trials in recorded history of an individual dates back to 1305 when a Scottish warrior was convicted of waging "a war against the English 'sparing neither age nor sex, monk or nun.'"[56] The warrior, Sir William Wallace, was tried in an English court.[57] A little over a century later, in 1474, 28 judges from city-States in the region of Burgundy prosecuted the Governor of the Upper Rhine, Peter von Hagenbach, "for his regime of 'arbitrariness and terror.'"[58] Some scholars regard Hagenbach 's trial as "the first genuinely international trial for the perpetration of atrocities."[59] The foray into international trials was short lived, however, as the signing of the 1648 Peace of Westphalia led to the reemergence of State sovereignty and, consequently, to limitation of prosecutions for international law violations.

During the eighteenth and nineteenth centuries, many of the IHL prohibitions discussed in the Hague laws and Geneva Conventions concerned prohibitions on State conduct.[60] In fact, the first international treaty mention of individual criminal responsibility dates back to the Brussels Conference of 1874 where 15 European States drafted and signed (but not ratified) a prohibition on "cruelty and acts of barbarism committed against the enemy."[61] However, it was

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[49] GUILFOYLE, *supra* note 8, at 21.
[50] *Id.*
[51] *Id*.
[52] *About the Commission: Origin and Background—Historical Antecedents*, INTERNATIONAL LAW COMMISSION, http://legal.un.org/ilc/ilcintro.shtml (last visited May 12, 2017).
[53] *Id*.
[54] GUILFOYLE, *supra* note 8, at 7; *see also* International Law Commission, *supra* note 52, at http://legal.un.org/ilc/ilcintro.shtml.
[55] Schaack & Slye, *supra* note 1, at 7.
[56] *Id.* at 19.
[57] *Id.*
[58] GUILFOYLE, *supra* note 8, at 59.
[59] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1 (5th ed. 2017).
[60] GUILFOYLE, *supra* note 8, at 59-60.
[61] Schaack & Slye, *supra* note 1, at 19.

not until after the First World War (1914-1918) that a truly "global effort to address international crimes" took place.[62]

During the Paris Peace Conference in 1919, States engaged in a concerted effort to elaborate on a proposal for international criminal justice.[63] A Commission on Responsibilities of the Authors of War and on Enforcement of Parties met during the Conference in order to discuss war crimes prosecution.[64] The Commission's mandate involved the establishment of responsibility for instigators of the war, determining IHL violations by the Germans, and drafting "proposals for the formation of a tribunal to try those responsible."[65] During the Commission's discussion about individual criminal responsibility for violations of IHL, many objected to the possibility that Heads of State could be held liable.[66] The final report of the Commission recommended the creation of an international high tribunal including representatives from the Allied and Associated Powers to prosecute acts "against the laws and customs of war and of the laws of humanity."[67] Ultimately, the Versailles Treaty was signed on June 28, 1919, and it signaled the near-global acceptance, at least by imperial powers, of the concept of individual criminal responsibility for IHL violations.[68]

The Versailles Treaty discussed penalties in Articles 227-230 but was ultimately less stringent than the tribunal discussed by the Commission.[69] Article 227 called for the future creation of an international tribunal for the public arraignment of the former German Emperor, William II of Hohenzollern, "for a supreme offence against international morality and the sanctity of treaties."[70] This trial was meant to include five judges appointed by the Allied and Associated Powers, including: the U.S., Great Britain, France, Italy and Japan.[71] However, upon the start of the German Revolution in late 1918, the German Emperor had fled to the Netherlands and was granted political asylum.[72]

Furthermore, Germans refused to cooperate in the surrender of wanted war criminals. Thus, the international high tribunal discussed in the Versailles Treaty was never created, and it never formally prosecuted individuals.[73] Instead, trials were held before a domestic tribunal, the

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[62] *Id.* at 20.
[63] WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 1 (Philip Alston and Vaughan Lowe eds., 2nd ed. 2016).
[64] *Id*.
[65] WERLE & JESSBERGER, *supra* note 4, at 3.
[66] Schaack & Slye, *supra* note 1, at 21.
[67] *Id.* at 22.
[68] R. Steenhard, *A Supreme Offence Against International Morality and the sanctity of Treaties: William II of Hohenzollern and the Treaty of Versailles*, PEACE PALACE LIBRARY, (June 27, 2014), https://www.peacepalacelibrary.nl/2014/06/a-supreme-offence-against-international-morality-and-the-sanctity-of-treaties-william-ii-of-hohenzollern-and-the-treaty-of-versailles/.
[69] *Treaty of Peace with Germany (Treaty of Versailles),* art. 227-30, June 28, 1919, LIBRARY OF CONGRESS, *available at* https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf.
[70] Versailles Treaty, *supra* note 69, at art. 227; *see also* Schaack & Slye, *supra* note 1, at 23; SCHABAS, *supra* note 63, at 2.
[71] Versailles Treaty, *supra* note 69, at art. 227; *see also* Schaack & Slye, *supra* note 1, at 23-24; SCHABAS, *supra* note 63, at 2.
[72] R. Steenhard, *supra* note 68; SCHABAS, *supra* note 63, at 2.
[73] WERLE & JESSBERGER, *supra* note 4, at 3.

German Reich Supreme Court in Leipzig.[74] The Allied Powers sought to have hundreds of persons prosecuted but German authorities ultimately commenced only twelve prosecutions in what came to be known as the 'Leipzig Trials.'[75] Another unsuccessful attempt to engage in individual criminal prosecutions came after the signing of the Treaty of Sèvres in 1920.[76] The Allied Powers sought to prosecute those who engaged in massacres in Turkey, but the League of Nations was unable to establish a tribunal competent to facilitate such trials.[77]

A. Post-World War II International Military Tribunals (IMTs)

The post-WWII prosecution of individuals in international tribunals remains a vital chapter in the history of ICL. The eventual establishment of an international tribunal to prosecute war criminals was the fruition of years of research and deliberation by various international legal bodies and organizations.[78] Starting in 1920, an Advisory Committee of Jurists was established by the League of Nations in order to "make proposals for the establishment of an international court of justice."[79] The International Law Association considered the issue in 1922 during its conference in Buenos Aires and drafted proposals for an international criminal court over the next several years.[80] Subsequently, the Inter-Parliamentary Union adopted a resolution in 1924 during a conference in Washington "recommending that the Permanent Court of International Justice be given jurisdiction over international offences and international crimes."[81] The International Association of Penal Law even adopted a draft statute for an international criminal court in 1928.[82]

Further ICL developments took place, mainly in Europe, during WWII. The UN War Crimes Commission, consisting of seventeen Allied Powers, began its work in 1943 in order to identify Germans who could potentially be prosecuted by the Allied Powers.[83] The following Moscow Declaration, signed by President Roosevelt, Prime Minister Churchill, and Premier Stalin, called for punishment and the Allied Powers eventually reached an 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis' (London Agreement) on August 8, 1945.[84] The agreement's appendix included the Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter).[85] Subsequently, in January 1946, U.S. General Douglas McArthur established the International Military Tribunal for the Far East in Tokyo, Japan, through special proclamation.[86] Together, these two IMTs revolutionized global understandings of ICL and functioned as the first internationalized criminal tribunals.[87]

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[74] *Id.* at 4.
[75] GUILFOYLE, *supra* note 8, at 61; WERLE & JESSBERGER, *supra* note 4, at 4.
[76] WERLE & JESSBERGER, *supra* note 4, at 5.
[77] SCHABAS, *supra* note 63, at 3; WERLE & JESSBERGER, *supra* note 4, at 5.
[78] SCHABAS, *supra* note 63, at 3-4.
[79] *Id.* at 3.
[80] *Id.* at 3-4.
[81] *Id.* at 4.
[82] *Id.*
[83] *See* GUILFOYLE, *supra* note 8, at 61; *see also* SCHABAS, *supra* note 63, at 4.
[84] WERLE & JESSBERGER, *supra* note 4, at 5 n.28; Guilfoyle, *supra* note 8, at 62.
[85] WERLE & JESSBERGER, *supra* note 4, at 5.
[86] NOVAK, *supra* note 19, at 7.
[87] *Id.* at 8.

The IMTs at Nuremberg and the Far East generated a number of important innovations in ICL, starting with the prosecution of individuals for international crimes.[88] These IMTs were most concerned with prosecuting those with the highest responsibility and they utilized an adversarial model.[89] At Nuremberg, four judges from each major power and four alternate judges were selected to conduct the trials.[90] The four main crimes that the Nuremberg defendants were charged with included conspiracy, crimes against peace, war crimes, and crimes against humanity.[91] Although twenty-four individuals were indicted, only twenty-one could be brought to trial.[92] Ultimately, twelve individuals were sentenced to death, three received life imprisonment sentences, four received lesser prison terms, and three were acquitted. Four groups were held to be criminal organizations.[93] At the Far East tribunal, eleven judges conducted a trial lasting over two years where twenty-eight defendants were convicted on most counts, raising some questions about the fairness of these proceedings.[94]

B. Road to the Rome Statute

Efforts towards creating the first permanent international criminal court began in earnest after the Nuremberg and Far East Tribunals.[95] The UN General Assembly tasked the ILC with preparing the statute for a permanent court. However, due to the Cold War, the UN postponed this task between 1954 and the 1970s.[96] Instead, international criminal tribunals were established *ad hoc*, for temporary periods. [97] The next ICTs to emerge after Nuremberg and the Far East Courts were the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in response to mass atrocities in the respective countries. The Special Court of Sierra Leone (SCSL) was established after the parliament of that country ratified a proposal in March 2002 for the court to prosecute perpetrators of atrocities and rebels relying on child soldiers, ultimately leading to sixteen convictions out of twenty one persons charged.[98] Similarly, Cambodia established a hybrid tribunal with the assistance of the UN in order to prosecute the senior leaders responsible for the Khmer Rouge's atrocities in the country from 1975 to 1979.[99] Although the request for UN support was in 1997, the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established in 2004 and judges were sworn into office beginning in 2006.[100]

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[88] *Id.* at 8 – 9.
[89] NOVAK, *supra* note 19, at 10; GUILFOYLE, *supra* note 7, at 64.
[90] GUILFOYLE, *supra* note 8, at 62.
[91] NOVAK, *supra* note 19, at 9.
[92] WERLE & JESSBERGER, *supra* note 4, at 7.
[93] WERLE & JESSBERGER, *supra* note 4, at 8.
[94] GUILFOYLE, *supra* note 8, at 71.
[95] SCHABAS, *supra* note 63, at 1.
[96] *Id.* at 1.
[97] David Koller, *The Global as Local: The Limits and Possibilities of Integrating International and Transitional Justice*, *in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 85, 90 (Christian De Vos, Sara Kendall and Carsten Stahns eds. 2015).
[98] NOVAK, *supra* note 19, at 16.
[99] *Id.* at 16.
[100] NOVAK, *supra* note 19, at 16; *see also* AARON FICHTELBERG, HYBRID TRIBUNALS: A COMPARATIVE EXAMINATION 44-45 (2015).

Lastly, the Rome Statute creating of the ICC became "a high-water mark in the development of ICTs *qua* transitional justice mechanisms."[101] In 1991, the ILC drafted a "code of crimes" and began a working group to consider the creation of an international criminal court.[102] Subsequently, in 1998, the Rome Statute of the International Criminal Court was adopted during the "Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court," also known as the Rome Conference.[103] The Rome Statute remains longer and more complex than many existing statutes for ICTs.[104] It establishes a judicial body with three primary sections: "The Office of the Prosecutor, the Judiciary, and the Registry."[105] The most important of these is the Office of the Prosecutor, which was first headed by Luis Moreno Ocampo of Argentina from 2002 to 2012. After him, the prosecutor has been Fatou Bensouda of The Gambia.[106] Individuals may be prosecuted for only those crimes committed after the Rome Statute entered into force on July 1, 2002.[107]

This paper's brief overview of international criminal law's historical development sets the stage for discussing critiques of the ICC's prosecutorial approach with regard to situations in Africa. Much of the historical development and codification of international law, more broadly, centered Western or colonial powers.[108] As international law, and ICL more specifically, continues developing, understanding this historical backdrop allows for a more nuanced discussion about contemporary critiques.

III. Contentious Prosecutions in Africa

In the fall 2016, African leaders' collective frustration with the ICC's targeting of African situations began gaining momentum. Although almost one-third of the ICC's membership comes from African countries, frustration with the court has led to the conceptualization of potential regional alternatives and calls to leave ICC jurisdiction.[109] For example, at least three countries (Burundi, The Gambia, and South Africa) had indicated an intent to leave the ICC in early 2017.[110] However, Gambia has retracted this intent since then.[111] One of the greatest sources of displeasure with the ICC is the fact that it appears to be overly focused on Rome Statute

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[101] Koller, *supra* note 97, at 97.
[102] NOVAK, *supra* note 19, at 18-19.
[103] Schaack & Slye, *supra* note 1, at 45.
[104] NOVAK, *supra* note 19, at 25.
[105] *Id.* at 26.
[106] *Id.*
[107] Rome Statute, *supra* note 8, at art. 11.
[108] Adedokun Ogunfolu and Maria Assim, *Africa and the International Criminal Court*, 18 E. AFRICAN J. OF PEACE & HUM. RTS. 101, 103 (2012) (citing E.A. POSNER, THE PERILS OF GLOBAL LEGALISM 96 (2009)).
[109] Aaron Maasho, *African Leaders Cautiously Back Strategy to Quit Global Court*, REUTERS—AFRICA (Feb. 1, 2017, 11:50am GMT), http://af.reuters.com/article/topNews/idAFKBN15G49S.
[110] *Id*.
[111] Pap Saine and Lamin Jahateh, *Gambia Announces Plans to Stay in International Crimimal Court*, REUTERS: WORLD NEWS (Feb. 13, 2017, 3:36 PM), https://www.reuters.com/article/us-gambia-justice-icc/gambia-announces-plans-to-stay-in-international-criminal-court-idUSKBN15S2HF.

violations in Africa.[112] A change in leadership since then in The Gambia has led to a reversal of that country's decision to withdraw from the ICC.[113]

Nevertheless, the attempts to withdraw from the court reflect a larger continental frustration with the ICC. In fact, the African Union (AU) generated a great deal of attention in early 2017 when it issued a non-binding resolution calling for collective African withdrawal from the ICC.[114] Thus, the AU hopes to generate an African Renaissance in terms of ICL that prioritizes the African continent's political and economic interests.[115] In order to understand how the continent with the largest representation among ICC members could reach this point, it will be beneficial to consider specific African cases before the ICC. These cases will serve as examples that highlight the converging interests in, and frustrations generated by, ICC prosecution for violations of the Rome Statute in Africa.

A. Sudan Case Study: The Darfur Referral and Arrest Warrant for Al Bashir

The government of Sudan signed the Rome Statute in 2000 but did not ratify it.[116] In fact, in 2008, Sudan informed the UN Secretary General that it had no intention of ratifying the Rome Statute.[117] Thus, the ICC only obtained jurisdiction over the situation in Darfur after the UN Security Council referred the matter through Resolution 1953 on March 31, 2005.[118] Despite the fact that Sudan was a non-party, the ICC prosecutor began in investigation in June 2005.

On March 4, 2009, the prosecutor issued an arrest warrant for Sudanese President Omar Al Bashir of Sudan.[119] The Pre-Trial Chamber of the ICC informed all States parties to the Rome Statute and all UN Security Council members that are not States parties to the statute of its request for Al Bashir's arrest.[120] As the first ever arrest warrant issued for an incumbent Head of State of a non-State party to the Rome Statute, the warrant for Al Bashir represented "a crucial

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[112] *See* Rowland J. V. Cole, *Africa's Relationship with the International Criminal Court*, 14 MELB. J. OF INT'L L. 2, 676 (2013), *available at* http://www.austlii.edu.au/au/journals/MelbJIL/2013/21.pdf.

[113] Merrit Kennedy, *Under New Leader, Gambia Cancels Withdrawal from International Criminal Court*, NPR—THE TWO WAY, BREAKING NEWS FROM NPR (Feb. 14, 2017, 5:23 PM ET), http://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court.

[114] Associated Press in Addis Ababa, *African Leaders Plan Mass Withdrawal From International Criminal Court*, THE GUARDIAN (Jan. 31, 2017, 6:18 PM EST), https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court.

[115] Cole, *supra* note 112, at 678-79.

[116] Manisuli Ssenyonjo, *The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders*, 13 INTERNATIONAL CRIMINAL LAW REVIEW 385, 389 (2013), *available at* http://heinonline.org/HOL/LandingPage?handle=hein.journals/intcrimlrb13&div=20&id=&page=.

[117] Ssenyonjo, *supra* note 116, at 389.

[118] *Id.*

[119] *See Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir 8 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF; *see also* Ssenyonjo, *supra* note 116, at 389-90.

[120] Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. OF INT'L CRIM. JUST. 333, 333-34 (2009), http://councilandcourt.org/files/2012/11/Akande-Referrals-Immunities.pdf.

development" in ICL.[121] It requested the arrest of the Sudanese president for his involvement in multiple counts of genocide, crimes against humanity, and war crimes targeting the "Fur, Masalit and Zaghawa peoples of Darfur."[122] A second arrest warrant for Al Bashir was issued by the ICC's Pre-Trial Chamber I on July 12, 2010.[123] This new arrest warrant indicated that Al Bashir was specifically sought for three counts of genocide against the Fur, Masalit, and Zaghawa peoples.[124]

A number of African States reacted negatively to the issuance of arrest warrants for Al Bashir, developing a hostile attitude towards the ICC.[125] Indeed, over time, the attempted prosecution of Al Bashir "has become a leading example of the increasingly fractious relationship between the ICC and the African continent."[126] In 2008, the AU Peace and Security Council requested that the UN Security Council defer proceedings by citing Article 16 of the Rome Statute which allows for ICC jurisdiction to be deferred for a period of twelve months at the request of the UN Security Council.[127] After the UN Security Council failed to respond, the AU in 2009 urged member States to avoid cooperating with the ICC.[128] Thus, in July 2010, Chad became the first country that Al Bashir visited without facing arrest.[129]

The AU's resistance to the ICC's arrest warrants for Al Bashir reflects a number of concerns with both the legality and morality of prosecuting African Heads of State.[130] Frequently, States in Africa refer to Article 98(1) of the Rome Statute when defending the immunity of non-State parties.[131] Article 98(1) states:

> The Court may not proceed with a request for surrender or assistance which would 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.

Thus, African States opposing the arrest warrants for Al Bashir relied on a legal interpretation of "third State" as meaning non-State parties.[132] This was one of the arguments presented by Malawi after it failed to arrest Al Bashir.[133] To clarify the situation, the AU Assembly previously requested that the AU Commission seek an advisory opinion regarding the status of sovereign

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[121] Konstantinos Magliveras and Gino Naldi, *The ICC Addresses Non-Cooperation By States Parties: The* Malawi *Decision*, 6 AFR. J. OF LEGAL STUD. 137, 140 (2013), *available at* http://heinonline.org/HOL/LandingPage?handle=hein.journals/ajls6&div=24&id=&page=.
[122] *Id.* at 140.
[123] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir 9 (July 12, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF; *see also* Ssenyonjo, *supra* note 158, at 390.
[124] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, *supra* note 166, at 8-9.
[125] Magliveras and Naldi, *supra* note 121, at 140-141
[126] *Id.* at 141.
[127] *See* Ssenyonjo, *supra* note 116, at 390; Rome Statute, *supra* note 9, at art. 16.
[128] Ssenyonjo, *supra* note 116, at 390-391.
[129] *Id.* at 391.
[130] Cole, *supra* note 112, at 686-87.
[131] Ssenyonjo, *supra* note 116, at 387; *see* Rome Statute, *supra* note 9, at art. 98(1).
[132] Magliveras and Naldi, *supra* note 121, at 144.
[133] *Id*.

immunity under international law from the International Court of Justice.[134] Meanwhile, the AU relies on the fact that Article 23 of the Constitutive Act of the AU requires that member States of the AU to comply with AU decisions, including the decision to not arrest Al Bashir.[135]

Lastly, the AU remains skeptical of the moral authority of the UN Security Council when referring situations to the ICC.[136] For the union, the fact that some veto-holding permanent members are not member parties to the Rome Statute themselves is telling, and reveals the hypocrisy of the Security Council. Thus, the AU's skepticism aligns with the discontentment of countries in the global South with the dominance of global politics by global North countries.[137] However, this remains a political, and not a legal, critique of the ICC.[138]

B. Kenya Case Study: The ICC's Charging of Kenyatta and Ruto

Kenya is a party to the Rome Statute, having signed the Statute on August 11, 1999, and ratified it on March 15, 2005.[139] In December of 2007, controversial Kenyan presidential elections led to an outbreak of ethnic violence and months of instability that resulted in hundreds of thousands forcibly displaced persons.[140] Subsequently, the two main political parties agreed to establish the Independent Commission of Inquiry on Post-Election Violence known as the Waki Commission. [141] Faced with difficulties implementing the recommendations of the Waki Commission in Kenya, Kofi Annan, who served as a mediator between parties in conflict, handed a sealed envelope to the ICC Chief Prosecutor on July 9, 2009, which included confidential findings of the Commission and a list of suspects.[142]

Due the widespread and systematic nature of the violence that erupted, the ICC Prosecutor described the situation as reflecting crimes against humanity.[143] In November 2009, the ICC Prosecutor sought authorization to initiate an investigation under Article 15 of the Rome Statute and the matter was assigned to the Pre-Trial Chamber II.[144] This became the first time in the history of the ICC that a Prosecutor had applied to the Pre-Trial Chamber in order to exercise the *propio motu* authority under Article 15 of the Rome statute to self-initiate a prosecution.[145] On March 31, 2010, the majority of Pre-Trial Chamber II authorized the "commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court" which may have occurred between 2005 and 2009.[146]

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[134] Ssenyonjo, *supra* note 116, at 388.
[135] *Id.* at 392-93.
[136] Cole, *supra* note 112, at 688.
[137] *Id.* at 677.
[138] *Id.* at 688.
[139] Ssenyonjo, *supra* note 116, at 396.
[140] *See* Ssenyonjo, *supra* note 158, at 396; *see also Ballots to Bullets: Organzied Polticial Violence and Kenya's Crisis of Governance*, HUMAN RIGHTS WATCH (Mar. 16, 2008), https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance.
[141] *See Background: A History of Unresolved Violence*, INT'L CENTER FOR TRANSITIONAL JUST., https://www.ictj.org/our-work/regions-and-countries/kenya (last visited May 12, 2017).
[142] Ssenyonjo, *supra* note 116, at 397.
[143] *See id.* at 396-97.
[144] *See id.* at 397.
[145] *Id.*
[146] *Id.*

The Prosecutor's approach to investigating post-election violence in Kenya raised a number of concerns within Africa regarding the politicization of the ICC and the prosecution of Heads of State—especially after six summonses were issued on March 8, 2011, for individuals working at various levels of the Kenyan government.[147] All six individuals appeared before the Pre-Trial Chamber voluntarily and charges were later confirmed by Pre-Trial Chamber II against Joshua Arap Sang (Head of operations at Kass FM in Nairobi, Kenya) and William Ruto (Former Minister of Higher Education, Science and Technology of Kenya).[148] In another case, charges were confirmed against Francis Muthaura (Former Head of the Public Service and Secretary to the Cabinet of Kenya) and Uhuru Kenyatta (Deputy Prime Minister and former Minister for Finance of the Republic of Kenya).[149] With the support of the AU, on March 4, 2011, the Kenyan government requested a deferral of the ICC's investigation under Article 16 of the Rome Statute.[150] When this strategy failed, Kenya sought support from the East African Court of Justice (EACJ).[151] In a resolution dated April 26, 2012, the EACJ requested that the ICC transfer the case to EACJ in order to "promote reconciliation" locally.[152] The following year, Kenya's Permanent Representative to the UN submitted a "*note verbale* requesting the cases' immediate termination," indicating a desire to pursue a domestic solution.[153] The UN Security Council refused to intervene in the situation, leading the AU to adopt a decision regarding the status of the relationship between the AU and the ICC.[154] The AU also held a summit in September 2013 to discuss "the possibility of a collective African withdrawal from the ICC."[155]

Ultimately, two of the individuals accused of post-election violence in Kenya, Uhuru Kenyatta and William Ruto, joined forces to launch a political campaign for the Kenyan presidency in 2013.[156] Kenyatta and Ruto formed the Jubilee Alliance and framed the ICC as one

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[147] *Id.* at 398.

[148] Ssenyonjo, *supra* note 116, at 398; Njonjo Mue and Judy Gitau, *The Justice Vanguard: The Role of Civil Society in Seeking Accountability for Kenya's Post-Election Violence*, *in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 212 (Christian De Vos, Sara Kendall, and Carsten Stahn eds., 2015).

[149] Ssenyonjo, *supra* note 116, at 398; Mue and Gitau, *supra* note 148, at 212.

[150] Ssenyonjo, *supra* note 116, at 398-99; Laurence R. Helfer & Anne E Showalter, *Opposing International Justice Kenya's Integrated Backlash Strategy Against the ICC*, ICOURTS WORKING PAPER SERIES No. 83, 13 (Jan. 2017), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6404&context=faculty_scholarship.

[151] *See* Ssenyonjo, *supra* note 116, at 400.

[152] *See id.*

[153] Helfer & Showalter, *supra* note 150, at 14.

[154] *See id.* at 14 n.71.

[155] Leslie Vinjamuri, *The International Criminal Court and the Paradox of Authority*, 79.1 LAW AND CONTEMPORARY PROBLEMS 275, 276 (2016), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4774&context=lcp. Soon after, in the first of the decisions following the October 12, 2013, extraordinary session, the AU urged for the expansion of the jurisdiction over international crimes in the African Court on Human and Peoples' Rights due to a concern over the potential politicization of ICC prosecutions. African Union, *Decision on Africa's Relationship With the International Criminal Court (ICC)*, Decision No. Ext/Assembly/AU/Dec.1(Oct.2013), https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf.

[156] Vinjamuri, *supra* note 155, at 283.

of the main issues of the 2013 elections in Kenya.[157] As part of their platform, Kenyatta and Ruto cast the ICC "as a tool of imperialism, bent on illegitimately seeking to influence the outcome of the Kenyan Election at the behest of Western powers."[158] Though some challenged the results, the Supreme Court of Kenya ruled that the election process has been credible.[159] And after being elected President of Kenya on March 9, 2013, Kenyatta used his political platform to further criticize the ICC and mobilize AU opposition to the ICC's jurisdiction.[160]

For many, the cases against Kenyatta and Ruto demonstrated the main criticism brought against the ICC a "microcosm" of the range of criticisms facing the ICC.[161] By prosecuting sitting democratically elected leaders, the AU contended, the ICC disregarded the immunity of sitting Heads of State and politicized the principle of universality.[162] President Kenyatta's trial before the ICC was originally scheduled for December 2013, but several deferrals were requested by the Prosecutor until the case was ultimately withdrawn on December 5, 2014.[163] The trial against Ruto began on September 10, 2013, and was ultimately dismissed on October 26, 2015, due to a lack of evidence and allegations of "witness interference and intolerable political meddling."[164] Many accused the ICC of bias because the announcement of the case against Ruto involved a publicity drive that "led to the media immediately pronouncing his guilt."[165] There were also procedural critiques of the methodology for obtaining witnesses against Ruto.[166] The key witnesses were all selected by NGOs funded by European governments and the majority of the witnesses eventually either recanted or refused to testify.[167] Thus, the AU believed the ICC was unfairly targeting Africa. The ICC Prosecutor, the AU bemoaned, was selectively prosecuting African situations while neglecting atrocities in other areas of the world."[168]

C. Arguments in Favor of ICC Prosecution of African Heads of State

Notwithstanding the tension between African governments' accusations of neocolonialism and bias by the ICC, many staunch defenders of the court contend that the ICC retains the legal and moral authority to continue its operations in Africa. In the Al Bashir case, for example, they insist that the ICC had the legal obligation to act. As Pre-Trial Chamber I stated in its *Malawi* decision, the AU's non-cooperation, and failure of member States to arrest

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[157] Mue and Gitau, *supra* note 148, at 213.
[158] *Id.*
[159] *Id.*
[160] Vinjamuri, *supra* note 155, at 283.
[161] *See* Toby Cadman, *African Leaders and the Bias of International Justice*, AL JAZEERA: OPINION (Dec. 31, 2015), http://www.aljazeera.com/indepth/opinion/2015/12/african-leaders-bias-international-justice-151229100023239.html.
[162] Magliveras and Naldi, *supra* note 121, at 141.
[163] Helfer & Showalter, *supra* note 150, at 10.
[164] *See* Owen Bowcott, *International Criminal Court Abandons Case Against William Ruto*, THE GUARDIAN (Apr. 5, 2016, 2:28 PM EDT), https://www.theguardian.com/world/2016/apr/05/international-criminal-court-william-ruto-kenya-deputy-president-election-violence; *see also* Helfer & Showalter, *supra* note 150, at 10.
[165] Cadman, *supra* note 161.
[166] *Id.*
[167] *Id.*
[168] Magliveras and Naldi, *supra* note 121, at 141 n.22.

Al Bashir, constituted a violation of the Rome Statute.[169] Article 27 of the Vienna Convention on the Law of Treaties, the Chamber emphasized, notes that domestic law cannot be used as a justification for refusing to comply with international legal obligations.[170] Moreover, the *Malawi* decision cited precedent since WWI, where sitting Heads of State could, in fact, be prosecuted for violation of ICL.[171] Even within Africa, the Special Court for Sierra Leone had previously acknowledged the possibility of a sitting Head of State's prosecution in the case *Prosecutor v. Charles Ghankay Taylor*.[172] Lastly, the Trial Chamber in *Malawi* emphasized that in the case of UN Security Council referrals, Malawi was legally bound under Article 25 of the UN Charter to comply with mandatory Security Council resolutions.[173] Thus, it concluded, all States ratifying the UN Charter have similar duties.

In addition, one could view the normative and political critiques of the ICC as overreaching.[174] After all, the ICC referrals may in fact be necessary in areas where the rule of law may be weakened due to internal conflict or humanitarian crises. One scholar suggests that the AU's criticisms "peddle a Utopian vision of Darfur and Libya as places…where domestic courts could adequately enforce the criminal law."[175] The ICC, its defenders point out, employs a balanced and fair Trial Chamber's proceedings that include preliminary hearings, and require proof that a reasonable basis for prosecution exists.[176]

Accusations by the AU and various African leaders that the ICC appears to be a neocolonial tool used by Western countries have been described by some scholars as "nonsensical" given the broad engagement between African and non-African countries to promote peace on the continent.[177] The continued self-referral of cases to the ICC by African countries also points to the fact that some States still respect the ICC and trust it to be impartial.[178] To ignore this, some argue, would be to improperly underestimate the referring States as "hapless dupes of the neo-colonial boogeyman."[179] Thus, African opposition to the ICC appears to be a mainly political distrust of the ICL project.[180] For example, in 2016, Gambian Information Minister Sherrif Bojang derided the ICC as being "the international Caucasian court."[181] This lack of trust risks leaving those responsible for massive human rights,

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[169] *Id.* at 138-39.
[170] *Id.* at 145.
[171] *Id.*
[172] *Id.* at 146 n.50.
[173] *Id.* at 147-148.
[174] Lyal Sunga, *Has The ICC Unfairly Targeted Africa or Has Africa Unfairly Targeted The ICC?*, *in* THE INTERNATIONAL CRIMINAL COURT IN SEARCH OF ITS PURPOSE AND IDENTITY 172 (Tristan Mariniell ed. 2015), *available at* http://nebula.wsimg.com/6238a35251257431bdd969452a8985b2?AccessKeyId=14C280BF0D869023C315&disposition=0&alloworigin=1.
[175] *Id*.
[176] Cole, *supra* note 112, at 689.
[177] Sunga, *supra* note 174, at 172-173.
[178] Cole, *supra* note 112, at 691.
[179] Sunga, *supra* note 174, at 172.
[180] Cole, *supra* note 112, at 697.
[181] Simon Allison, *African Revolt Threatens International Criminal Court's Legacy*, The Guardian (Oct. 27, 2016), https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia.

humanitarian, and ICL violations unpunished.[182] At the same, such mistrust may simply reflect a collective effort by targeted African leaders to attack the legitimacy of ICC prosecutions in order to avoid responsibility for criminal acts under ICL.

CONCLUSION: ALTERNATIVE VISIONS FOR ICL IN AFRICA

Even those critical of the AU's staunch opposition to the ICC acknowledge that the African political consciousness and cultural landscape are marked by "psychic scars" from Western colonialism and "extreme human rights violations."[183] The accusations that African politicians "have unscrupulously exploited the politics of resentment over double standards and African suffering" may be too narrow – after all, there is no set timeline for the healing of such wounds. And despite the fact that staunch AU opposition to the ICC still remains today, the AU has articulated a commitment to combating impunity in Africa.[184] Efforts to strengthen the rule of law and ICL within the African continent should encourage the utilization of African approaches to criminal justice and acknowledge the existing critiques of ICL.

The common criticism of ICL maintains that it only implements the "victor's justice."[185] Scholars have particularly criticized historical ICTs as morally imperialistic and a legal neo-colonial enterprise.[186] The more radical among those critics contend that the ICL project merely "embodies a systemically unfair, selective and illiberal exercise that promotes the interests of powerful actors through 'lawfare' and 'show trials,' while guising itself as a genuine effort."[187] Because the legitimacy of ICTs is essential to their effectiveness and overall success, it is crucial to constantly address these critiques and account for the shortcomings of recent developments in the field of international criminal justice.

One approach to improving the legitimacy of the ICC in Africa would be to accommodate regional criminal justice efforts within the existing complementary regime in the Rome Statute.[188] For example, in February 2013 Senegal opened the Extraordinary African Chambers in the Courts of Senegal in order to prosecute Hissène Habré, Chad's former president.[189] The Agreement between Senegal and the AU establishing the Chambers referenced "international character" of the court, but some scholars contend the court was only formally dependent for its "existence and competence on Senegalese law."[190] Nevertheless, the Chambers in Senegal had jurisdiction to prosecute "crimes against humanity, war crimes, genocide, and torture," committed during the Habré dictatorship from 1982 to 1990.[191] Not only was Habré convicted, but his appeal was also denied.[192] The trial reveals that the African commitment to

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[182] Cole, *supra* note 112, at 697
[183] Sunga, *supra* note 174, at 171.
[184] Cole, *supra* note 112, at 697.
[185] Sergey Vasiliev, *Between International Criminal Justice and Injustice: Theorising Legitimacy*, *in* The Legitimacy of International Tribunals 69 (Nobuo Hayashi and Ceceilia M. Bailliet eds., 2017).
[186] *Id*.
[187] *Id*. at 72.
[188] Cole, *supra* note 112, at 694.
[189] NOVAK, *supra* note 19, at 17.
[190] O'KEEFE, *supra* note 10, at 104.
[191] NOVAK, *supra* note 19, at 17.
[192] Jaime Yaya Barry and Dionne Searcey, *Hissene Habre, Ex-Ruler of Chad, Loses War Crimes Appeal*, THE NEW YORK TIMES (Apr. 27, 2017, 10:32 EDT), https://www.nytimes.com/2017/04/27/world/africa/court-habre-chad.html?_r=0.

combat impunity is likely genuine. It also shows that the ICC can, and should, collaborate with regional efforts to prosecute individuals for ICL violations.

Indeed, enhancing the existing complementarity regime within the Rome Statute to consider regional prosecution efforts could encourage the further development of ICL while reducing political tensions. This means that allowing African prosecutors to hold perpetrators of international crimes accountable within domestic courts may bolster the credibility of international criminal law within Africa while reducing the potential over-concentration of ICL prosecutorial power in the hands of the ICC.[193] The AU is presently attempting to expand the jurisdiction of the African Court on Human and Peoples' Rights.[194] The expanded jurisdiction would include many of the international crimes prosecuted by the ICC, such as genocide, crimes against humanity, and war crimes.[195] However, as of April 2017, only a handful of countries have signed the Malabo Protocol which would establish a new African Court of Justice and Human Rights (ACJHR).[196] Increased use of positive complementary regimes could likely enhance the ICC's existing relationship with African States and repair its damaged reputation within Africa.[197]

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[193] *See* Max du Plessis, Tiyanjana Maluwa, and Annie O'Reilly, *Africa and The International Criminal Court*, CHATHAM HOUSE, July 2013, at 7, https://www.chathamhouse.org/publications/papers/view/193415.
[194] Cole, *supra* note 112, at 694.
[195] *Id.*
[196] Jessica Hatcher-Moore, *Is The World's Highest Court Fit For Purpose*, THE GUARDIAN (Apr. 5, 2017, 6:43 PM EDT), https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose.
[197] Cole, *supra* note 112, at 698.