The Villain Has a Point

Amy Cuzzolino

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Part of the Law Commons

Recommended Citation

Cuzzolino, Amy, "The Villain Has a Point" (2016). Law School Student Scholarship. 674.
https://scholarship.shu.edu/student_scholarship/674
The Villain Has a Point

The most vocal African critics of the International Criminal Court are the same people the Court is trying for heinous crimes. Should we listen to them anyway?
# Table of Contents

Introduction .................................................................................................................... 1

The Establishment of the International Criminal Court ................................................. 2

The Legacy of Colonialism in Africa ............................................................................. 10

Cases Before the International Criminal Court .......................................................... 15

The Self-Referrals ......................................................................................................... 16

The Security Council Referrals .................................................................................... 23

The *Proprio Motu* Cases ............................................................................................ 28

The Future and Alternatives .......................................................................................... 33

Conclusions .................................................................................................................... 35
Introduction

In the twelve years since the International Criminal Court (“ICC” or “Court”) came into force, it has received complaints from persecuted peoples and concerned parties across the globe. The eight “situations” upon which the Court has opened investigations, however, have only come from the African continent. Some have complained that this focus on Africa belies a Western bias in the Court, that the ICC is selective in administering justice and is prolonging the injustice of European colonialism through Western cultural imperialism. The most vocal of these critics are hardly unbiased: they are the very people the ICC is trying for horrific human rights abuses including war crimes, crimes against humanity, and genocide. The detractors include state officials, in two cases heads of state, who believe their status makes them immune from prosecution for any alleged wrongdoing. Perversely, these rulers owe their power to the legacy of colonialism, and are the beneficiaries of the system they claim to stand against. They stand for the very kind of impunity the Court was designed to eradicate.

It is easy therefore to look at these messengers and discount the message. Indeed, there are many good arguments that justify the ICC’s continued intervention in African cases. The issues at hand, however, are more complicated than simply whether the Court’s involvement in Africa is good or bad or whether it should continue or stop. While it may spring from impure motives, the villain has a point. The Court’s involvement in Africa is a problem for a continent that has been immeasurably damaged by its colonial history. To pull itself out from under that

1 A ninth matter, The Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, Case No. ICC-01/13, dealing with alleged attacks on humanitarian aid flotillas, was assigned to a Pre-Trial Chamber on July 13, 2013. However, this has been called a “procedural matter only, and is not the beginning of an investigation.” It was referred to the Court by the Union of Comoros, an African island nation.

2 Omar Al Bashir of Sudan and Uhuru Kenyatta of Kenya.


4 The title of this paper is borrowed from TV Tropes (http://tvtropes.org), a database of commonly recognized storytelling devices.
history, there must be infrastructure to develop the rule of law and provide safety and security for African people. Is the ICC’s presence in Africa helping or hindering the formation of such infrastructure? More than half the situations before the Court were initiated by affected states. What were these countries looking for the ICC to provide, and has the Court given it to them? The focus on Africa has also created problems for the ICC itself that go to the heart of its functionality and purpose. The Court is dependent on the support of its member states for enforcement. Is the ICC—and can it afford to be—alienating the 34 African countries that are parties to the Rome Statute, and the ten more who have signed but not ratified it? Is the Court fulfilling its mission to end impunity? The Court may need to look beyond Africa not only to benefit the continent but to meet its own goals and continue to function in the future.

The Establishment of the International Criminal Court

International tribunals have been set up to try horrendous crimes for hundreds of years. The creation of a permanent international criminal court is a newer idea, in the works since the early 20th century. Following the First World War, the Preliminary Peace Conference of 1919 proposed a tribunal that would try violators of “the customs of war and the laws of humanity.” What it developed instead was a provision in the Treaty of Versailles for a special tribunal to try
only Kaiser Wilhelm II for crimes against "international morality." This tribunal never came into being and further efforts to create a permanent international tribunal stalled until the end of World War II. Then, having experienced the full horror of the Nazi regime, the Allied Powers established the International Military Tribunal at Nuremberg. An International Military Tribunal for the Far East was set up in Tokyo using similar provisions. The IMT Charter established principles that would inform later tribunals and the eventual ICC. It tried and convicted the accused on charges of war crimes, crimes against peace, and crimes against humanity. It also upheld the idea that individuals, not states, should be held responsible for these crimes. Significantly, being the head of a state did not grant an individual protection against prosecution, though the idea was not put to the test at this time. Finally, the tribunal created precedents of international criminal law, something that had been arguably lacking for the Nuremberg court itself.

Following the success of the WWII tribunals, the United Nations established the International Law Commission (ILC) to codify developing international law. The same year, the

---

10 Leila Sadat Wexler, supra note 8 at 670.
12 William A. Scabas, supra note 6 at 7.
13 IMT Charter, Art. 6. The crime of genocide became part of the international criminal lexicon in 1948. Crimes against peace were the forerunners to crimes of aggression.
14 IMT Charter, Art. 8. International law at the time was mostly thought to govern the laws and rights between states, not individuals. One of the early and persisting arguments against the establishment of an international criminal court is that it threatens the sovereignty of states.
15 No heads of state were tried in Nuremberg or Tokyo. The Nazi leader, for obvious reasons, was no longer available, and Emperor Hirohito was famously not charged with war crimes for political reasons.
16 Leila Sadat Wexler, supra note 8 at 726. The most solid legal foundation for the trials at Nuremberg were treaties that Germany had signed at arguably violated. The tribunal did not point to specific laws individuals had violated aside from general international principles.
Genocide Convention was adopted by the General Assembly.\textsuperscript{17} Article VI of the Convention was written in anticipation of an international criminal court, allowing that genocide would be tried by a competent state tribunal or "such international penal tribunal as may have jurisdiction." The General Assembly asked the ILC to study the possibility of establishing such a court.\textsuperscript{18} The ILC was also asked to draft a Code of Crimes against the Peace and Security of Mankind, which it first did in 1954.\textsuperscript{19} Meanwhile, a separate committee drafted a statute for an international criminal court.\textsuperscript{20} Work on the court was halted for decades, however, by the escalation of the Cold War.\textsuperscript{21} As the Cold War was winding down in 1989, a coalition of states led by Trinidad and Tobago proposed a permanent court to deal with drug trafficking and other transnational crimes.\textsuperscript{22} The ILC went to work on a Draft Statute of the court, which it completed in 1994.\textsuperscript{23} Two years later, it prepared a final version of its Code of Crimes.\textsuperscript{24}

As the ILC was making plans for a permanent court, events of the early 1990s brought about the creation of \textit{ad hoc} criminal tribunals to deal with situations in which gross violations of international law had occurred. The first was the International Criminal Tribunal for the former Yugoslavia (ICTY), established in 1993.\textsuperscript{25} The ICTY was to investigate "grave breaches" of the Geneva Conventions and other instruments of international humanitarian law, particularly those

\textsuperscript{18} Study by the Int'l Law Comm. of the Question of an Int'l Crim. Jurisdiction, G.A. Res. 260B(III), U.N. GAOR 6th Comm., 3d Sess., 179th plen. mtg., U.N. Doc. A/810 (1948), at 177. The study ultimately found that a permanent court was both achievable and desired by a number of states.
\textsuperscript{21} William A. Scabas, \textit{supra} note 6 at 9.
\textsuperscript{22} \textit{Id.} at 10.
committed during the conflict in Bosnia. The temporal jurisdiction of the tribunal was to start on
January 1, 1991 and extend indefinitely into the future.\textsuperscript{26} The following year, the International
Criminal Tribunal for Rwanda (ICTR) was established to address the genocide that country had
recently endured.\textsuperscript{27} Its jurisdiction covered crimes committed between January 1 and December
31, 1994. The statutes for both the ICTY and the ICTR relied heavily on the draft Statute and
Code of Crimes that had been developed by the ICL. The two tribunals were also nearly identical
in their governing statutes and their institutional practices.\textsuperscript{28} Some notable achievements of the
tribunals are the recognition that crimes against humanity may occur during times of peace and
the narrowing of focus to superior officers to prevent arbitrary prosecution. The tribunals also
provided a preview for how the eventual permanent court might operate.

In June and July of 1998, the United Nations Diplomatic Conference of Plenipotentiaries
on the Establishment of an International Criminal Court met in Rome. The aim of the conference
was to develop the final statute that would govern the International Criminal Court. Present were
representatives from 159 states, the Holy See, Palestine, governmental organizations including
the European Community and the International Red Cross, and over 100 non-governmental
organizations from around the world.\textsuperscript{29} Details of the Statute were settled by “working groups,”
while major issues were discussed by the executive Bureau overseeing the conference and
decided upon by Committee chair Philippe Kirsch. These key issues included the extent of the
Court’s jurisdiction, the exercise of jurisdiction over non-state parties, the “trigger mechanism”
that would bring cases before the Court, and the role of the Security Council.\textsuperscript{30} The draft Statute

\textsuperscript{26} Id. at ¶ 2.
\textsuperscript{28} William A. Scabas, \textit{supra} note 6 at 13.
\textsuperscript{30} William A. Scabas, \textit{supra} note 6 at 20.
needed a two-thirds majority to be approved, and these particular issues were contentious for many of the states present. A vote was taken on July 17, with 120 states voting in favor, 21 abstaining, and 7 voting against. 25 countries signed the treaty immediately. Among the states that abstained were countries from the Middle East and the Caribbean. The votes against came from Israel, Iraq, Libya, Qatar, Yemen, China, and the United States.

The ICC is composed of four organs: the Presidency, the trial chambers, the Office of the Prosecutor, and the Registry. The Registry, headed by a Registrar, handles the non-judicial administration of the Court. The Presidency consists of a President and two Vice Presidents elected by the judges of the Court. The current President is Song Sang-Hyun of South Korea and the first and second Vice Presidents are Sanji Mmasonono Monageng of Botswana and Cuno Tarfusser of Italy, respectively. The Court has three chambers: the Pre-Trial Division, the Trial Division, and the Appeals Chamber. The judiciary of the Court is currently composed of 21 full-time and ad litem judges. Six of the judges are nationals of Western Europe, three are from Eastern Europe, three are from Asia, four are from Latin America and the Caribbean, and five are nationals of African states. The Office of the Prosecutor consists of the Chief Prosecutor, the Deputy Prosecutor, and Heads of Jurisdiction and Investigation. The first Chief Prosecutor, in office from June 2003 to June 2012, was Luis Moreno-Ocampo of Argentina. The second and current Chief Prosecutor is the former Deputy Prosecutor Fatou Bensouda of the Gambia.

31 Rome Statute, Art. 34.
32 Rome Statute, Art. 43.
33 Rome Statute, Art. 38.
34 Rome Statute, Art. 39.
36 ICC, Structure of the Court – Office of the Prosecutor, available at www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx.
Under the new Rome Statute, the Court was to come into force after 60 states had become parties through ratification or accession.\textsuperscript{37} This happened on April 11, 2002 with the ratification of the treaty by ten new states.\textsuperscript{38} The International Criminal Court officially became operational for 65 state parties on July 1, 2002. For states that have ratified since then, the entry into force of the Court is the first of the month 60 days after the instrument of ratification is deposited with the Registrar.\textsuperscript{39} The Court presently has 122 state parties, with an additional 31 signatories that have yet to ratify.\textsuperscript{40} The Court’s temporal jurisdiction allows it only to investigate and try crimes that have taken place after its entry in force, unless a non-state party has made a prior declaration accepting the Court’s jurisdiction.\textsuperscript{41} In this way, the Court can avoid a criticism that has bedeviled criminal tribunals since the beginning: that they dole out \textit{ex post facto} justice. The downside is that the Court has no power to address a host of crimes that fall outside this absolute jurisdiction. This is a gap that \textit{ad hoc} tribunals may continue to fill. Since the adoption of the Rome Statute, special tribunals have been formed in Sierra Leone, Cambodia, and Lebanon with the help of the United Nations. A tribunal was considered for the Darfur crisis in Sudan until the Security Council opted to refer the situation to the ICC.\textsuperscript{42}

The Court currently has jurisdiction over three crimes: genocide, described by Article 6, crimes against humanity, described by Article 7, and war crimes, outlined in Article 8. A fourth

\textsuperscript{37} Rome Statute, Art. 126(1).
\textsuperscript{38} Bosnia and Herzegovina, Bulgaria, Cambodia, the Democratic Republic of Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia. The instruments of ratification were deposited in a ceremony in which all ten countries submitted to the Registrar simultaneously so each had the honor of becoming the 60th state to ratify.
\textsuperscript{39} Rome Statute, Art. 126(2).
\textsuperscript{40} Some signatories, including the United States, Israel, and Sudan, have made announcements signaling that they no longer intend to ratify the Rome Statute. Palestine, Côte d’Ivoire, and Ukraine have made acceptances of jurisdiction under Art. 12(3).
\textsuperscript{41} Rome Statute, Art. 11.
\textsuperscript{42} U.N. Doc. S/PV.5158 (2005). A tribunal was particularly advocated for by the United States, which has sought to undermine the Court since its inception.
crime, aggression, is mentioned in the Rome Statute but will not come within the Court’s jurisdiction until at least 2017. The Court has adopted many features of predecessor tribunals, including the exercise of jurisdiction over persons rather than states, focus on superior officers, and the denial of immunity for heads of state. For the Court to be able to exercise jurisdiction, the crimes in question must be committed either on a state party’s territory or by a national of a state party. Investigations may be “triggered” in three ways. First, a state party may refer a situation to the Prosecutor. Second, the Prosecutor may opt to initiate an investigation "proprio motu." Unlike a referral by a state party, a "proprio motu" investigation is subject to authorization through a Pre-Trial Chamber. Additionally, any investigation may be deferred for up to a year upon a request from the Security Council. Finally, an investigation may be initiated upon a referral from the Security Council itself. A very important distinction of a Security Council referral is that it may involve crimes that are otherwise not within the Court’s jurisdiction under Article 12. Hence, even states who are not parties to the Rome Statute may become subject to the Court’s jurisdiction at the behest of the Security Council.

The Rome Statute was ultimately a compromise and the ICC still struggles to find balance in certain areas. The jurisdiction of the Court was intended to be complementary to national criminal jurisdictions. This means that an investigation into a situation by a state that has jurisdiction will render that situation inadmissible before the Court unless the state is

---

43 Amendments to the Rome Statute of the International Criminal Court, U.N. Doc. C.N.651.2010.TREATIES-8 (2010). As per the amendments, the Court will have jurisdiction over crimes of aggression starting one year after the amendment has been ratified by 30 states, but in any case not before Jan. 1, 2017. Currently 13 states have ratified the amendments.

44 Rome Statute, Art. 12(2).
46 Rome Statute, Art. 15(3).
47 Rome Statute, Art. 16.
48 Rome Statute, Preamble; Art. 1.
“unwilling or unable” to carry out the investigation “genuinely.”\textsuperscript{49} The function of the ICC as a "court of last resort" was specifically designed to encourage states to prosecute grave crimes on their territories and also to maintain a respect for state sovereignty.\textsuperscript{50} This addressed the concerns of states that were worried that an overzealous Prosecutor would wield too much international power.\textsuperscript{51} Deference to state sovereignty is also found in the Court’s enforcement mechanisms, or lack thereof. The Court has no independent means of arresting suspects or obtaining evidence and must rely on states to carry out these actions. For their own part, state parties are obligated to cooperate with the Court’s investigations: complying with requests to produce documents, delivering suspects for arrest, and protecting victims and witnesses.\textsuperscript{52} This ultimately creates an imbalance between wealthy member states and poorer ones. Problems of enforcement arise because often states that lack the infrastructure or perhaps the will necessary to investigate and prosecute crimes are also not in a position to carry out the enforcement that an ICC investigation requires. Ultimately, the Court may seek the help of powerful countries or international forces to act as “surrogate enforcers.”\textsuperscript{53} This, in turn, diminishes the target state’s exercise of sovereignty. Additionally, the Court is funded by contributions from member states on a scaled basis.\textsuperscript{54} It also receives voluntary contributions from states and other entities.\textsuperscript{55} Between states that finance the Court and states that require its intervention there is little overlap.

\textsuperscript{49} Rome Statute, Art. 17(1)(a).
\textsuperscript{51} \textit{Id.} at 757.
\textsuperscript{52} Rome Statute, Art. 86; 87; 89; 93.
\textsuperscript{54} Rome Statutes, Art. 117.
\textsuperscript{55} Rome Statute, Art. 116.
The Legacy of Colonialism in Africa

The intrusion of Europe into Africa stretches centuries back, starting with the colonization of North Africa by the Greeks in antiquity. Much later, with the discovery of the New World, came the trans-Atlantic slave trade. The slave trade displaced or killed over 200 million people, primarily from West Africa. In modern terms, the slave trade is recognized as a crime against humanity. Following the slave trade came the exploitation of the natural resources of the continent itself in the European “Scramble for Africa” beginning in the mid-1800s. A handful of European powers divided the continent amongst themselves, drawing boundary lines that were irrespective of existing polities and kingdoms. Prior to colonization, a range of societies existed across the continent, from hunter-gatherer groups to sophisticated political states. Each had their own long-established systems of law, culture, and tradition. These societies were all leveled and homogenized under colonial rule. “Tribal” distinctions had not been traditionally important characteristics in most African societies, but the Europeans created and enforced ethnic division in order to organize and manage the local people in a manner most efficient for colonization. Colonization was devastating for Africa, but immensely profitable for Europe: at the cost of millions of lives, Belgium, Great Britain, Germany, Portugal, France,
and others made hundreds of millions of dollars.\textsuperscript{60} Today, this deliberate and systematic destruction of life has been recognized as genocide.\textsuperscript{61}

The colonizing powers neglected to put in place any social or political infrastructure beyond what was needed to appropriate natural resources and export them to Europe.\textsuperscript{62} Colonialism can be blamed for Africa’s failure to take part in the Industrial Revolution and the advances that followed because it decimated manpower and skilled labor and placed the focus of development on Europe’s needs instead of Africa’s.\textsuperscript{63} Into this gap came European civil society and missionaries, “the nineteenth-century equivalent of NGOs and human rights groups.”\textsuperscript{64} While these groups generally condemned colonial abuse and exploitation, their primary purpose was to “civilize” African people through the introduction of Western religion and customs. The commonality between the missionaries and the colonial officials is that both saw African people as inferior and dependent upon European intervention.\textsuperscript{65} A persisting social and economic inequality has stemmed from this way of thinking.\textsuperscript{66} By one estimate, conducted by the African World Reparations and Repatriation Truth Commission, the total damage done to the African continent by slavery and European colonialism is $777 trillion.\textsuperscript{67}

\textsuperscript{60} Id. at 37. One scholar, Jules Marchal, estimates that King Leopold II of Belgium personally made a profit of $1.1 billion, adjusted for inflation, from the Belgian Congo.

\textsuperscript{61} Id. at 38.

\textsuperscript{62} William Pfaff, \textit{supra} note 58 at 4.


\textsuperscript{64} Frederick Cooper, \textit{Networks, moral discourse, and history, INTERVENTION AND TRANSNATIONALISM IN AFRICA, GLOBAL-LOCAL NETWORKS OF POWER}, 33 (Thomas Callaghy, Ronald Kassimir, and Robert Latham, eds., Cam. Univ. Press, 2001).

\textsuperscript{65} William Pfaff, \textit{supra} note 58 at 4.

\textsuperscript{66} Durban Declaration, ¶ 14.

The end of the colonial era started in the late 1940s and continued until all African states were independent of European rule in 1980. Decolonization was hastened by the rise of Pan-Africanism, a movement that started in the African diaspora that envisioned a single, continent-wide community. Kwame Nkrumah, the first president of Ghana and a founding member of the Organisation of African Unity (OAU) famously said that Africa must find “an African solution to our problems.” The OAU, founded in 1963, had as its goals the betterment of life for all African people, defense of the sovereignty of African states, the protection of human rights, and particularly the eradication of colonialism. Unfortunately, both the organization and the movement for African unity became coopted by dictators who took advantage of the power vacuum left by the retreating European powers. Using the tenets of the OAU, they were able to frame repressive and abusive policies as exercises in rejecting Western influence and building African nationalism.

Throughout the 1980s, the primary focus of the OAU was ending apartheid in South Africa. The OAU had done little work on settling disputes between countries or making a positive impact on the economic climate. Once the end of apartheid was accomplished in 1994, the unifying purpose of the organization dissolved. The failure of the OAU may be due in part to its reliance on the idea that the shared trauma of colonialism would inspire cooperation in the continent. Those that wished to reform the OAU chose a model for Africa progress that looked

---

68 On April 18, 1980, Zimbabwe gained independence from the United Kingdom. African states that have formed since then (Eritrea, South Sudan) gained independence from another African state.

69 See, e.g., Bjørn Møller, Pan-Africanism and federalism, PERSPECTIVES ON FEDERALISM, Vol. 2, No. 3 at 58 (2010). Many early Pan-Africanists, such as Marcus Garvey and W.E.B. DuBois, were American.

70 Kwame Nkrumah, I SPEAK OF FREEDOM (1961). The quote is often restyled as “African solutions for African problems.”


72 Bjørn Møller, supra note 69 at 57. Kwame Nkrumah himself was criticized for having dictatorial aspirations.

forward instead of backward. In 1991, while the ILC was drafting a statute for an international criminal court, 34 African leaders met in Abuja, Nigeria to sign the Treaty Establishing the African Economic Community. Its primary goal and purpose was to create a globally competitive, self-sustaining continent. Contained within the treaty were detailed plans for the creation of an African Union. Ten years after the Abuja Treaty, the Constitutive Act of the African Union came into force. One week after the entry into force of the ICC, the African Union (AU) officially came into being on July 9, 2002. African states are members of the Union. The drafting and implementation of the AU were incredibly fast, yet the birth of the organization drew little press or scholarly attention compared to, for example, the European Union.

The AU is composed of nine organs laid out by the Constitutive Act. The General Assembly, made up of the heads of member state governments, meets once a year and has supreme authority in the Union. Many of the Union’s other institutions have yet to come into being. There are provisions for financial institutions, including an African Central Bank, an African Monetary Fund, and an African Investment Bank. There are also extensive plans in place for an African judiciary. The founding documents call for an African Court of Justice.

---

76 Abuja Treaty, Chapt. III.
78 The only African state that is not a member is Morocco, having left the OAU in 1984 after the admittance of the Sahrawi Republic in Western Sahara. Three member states, the Central African Republic, Egypt, and Guinea-Bissau are currently suspended due to their internal conflicts.
79 Corrine A.A. Packer and Donald Rukare, supra note 73 at 365.
81 Constitutive Act, Art. 18, 19; Abuja Treaty, Art. 6(2)(f). The Abuja Treaty calls for the financial institutions to be in place by 2028.
However, these plans were superseded by the creation of the African Court on Human and Peoples’ Rights.\textsuperscript{82} The Court came into being on January 25, 2004 after the 15th state ratified the protocol. Currently, 26 states are parties to this court.\textsuperscript{83} The Court of Human and Peoples’ Rights has jurisdiction over civil disputes brought by individuals against their governments based on the African Charter on Human and Peoples’ Rights and other human rights instruments to which its member states are parties.\textsuperscript{84} The Court has taken on 27 cases since 2008.\textsuperscript{85} In July 2008, a protocol was signed to create a merger of this court and the proposed Court of Justice.\textsuperscript{86} The new court will enter into force when the protocol receives 15 ratifications. Currently, only five states have ratified.\textsuperscript{87} In 2012, the AU adopted the African Charter on Democracy, Elections, and Governance.\textsuperscript{88} The provisions of the Charter state that “unconstitutional changes in government,” encompassing dictatorial takeovers, may be tried before a competent court of the Union.

The proposed expansion of the African Court has caused concern in the international community, particularly regarding the new court’s jurisdictional overlap with that of the ICC.\textsuperscript{89} There is a worry that entities that oppose the ICC, including those guilty of human rights abuses,


\textsuperscript{83} The African Court on Human and Peoples’ Rights, www.au.int/en/organs/cj. All African states are parties to the original Banjul Charter except for Morocco and South Sudan.


\textsuperscript{87} Benin, Burkina Faso, Congo, Libya, and Mali. www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR_0.pdf.


may try to use the conflicting jurisdiction to weaken the ICC. Additionally, the proposed merger would bring the African judiciary into the realm of criminal prosecution of individuals, which will require specialized expertise and a huge outlay of resources. The problems caused by a lack of infrastructure and economic stability still persist as they did in the days of the OAU, meaning that the African Court system will be subject to the same abuses and ineffectiveness.

As the African continent has been attempting to create structure internally, it also has been attempting to enter onto the world stage. The genocide in Rwanda was a stark reminder not only of how grave African problems were but also of how little the outside world was paying attention. The ICTR had only come about as the result of a letter from the Government of Rwanda to the Security Council. In it, Rwanda called out the international community for ignoring the genocide and contributing to the crisis through inaction and ignorant misinformation. The tribunal was authorized within two months. The genocide was also a major factor influencing the widespread embrace of the ICC by African countries. 34 African states are parties to the Rome Statute and ten more are signatories. The appeal for these countries was the possibility that the Court could give them justice for the abuses they’d endured and discourage similar abuse in the future. This was predicated on the notion that African states would be treated the same as all other states.

Cases Before the International Criminal Court

91 Id.
94 An African country, Senegal, was the first country to ratify the Rome Statute.
The Self-Referrals

The first line of defense against assertions that the ICC is purposefully targeting Africa is the fact that most of the situations before the Court are “self-referred”.95 Under the Rome Statute, a state party may make a request for the Prosecutor to begin an investigation of crimes within the jurisdiction of the Court.96 In early 2004, two such referrals, from Uganda and the Democratic Republic of Congo, led to the opening in those countries of the ICC’s first criminal investigations. These self-referrals have usually been characterized as the states inviting the ICC to become involved in their crises. This is something of an oversimplification.

By September 2003, the Court had received no referrals from either state parties or the Security Council. It had, however, received nearly 500 communications regarding crimes from around the world potentially within the Court’s competence.97 Six of these communications concerned the situation in the Ituri district of the Democratic Republic of Congo.98 The current Congolese conflict started in 1996 following the genocide and civil war in neighboring Rwanda. Mobutu Sese Seko, the long-time president of what was then Zaïre, had historically supported the Hutu ethnic group and was seen as a threat by Rwanda’s new Tutsi leadership.99 As Hutu refugees spilled across from the Rwandan border, militant groups from Rwanda and Uganda began attacking villages in Congo.100 Some of these forces eventually allied with domestic rebels led by Laurent-Désiré Kabila. In May of 1997, Kabila deposed Mobutu and declared himself

95 For a discussion of “self-referral,” which is not a separate legal concept under the Rome Statute, see Andreas Th. Müller and Ignaz Stegmiller, Self-Referrals on Trial, 8 J. INT’L CRIM. JUST. 1267, 1269 (2010).
96 Rome Statute, Art. 15.
100 Id. at 102.
president of the Democratic Republic of Congo. Following the coup, Kabila’s forces conflicted with factions backed by Rwanda and Uganda who also sought to seize control of the country. Hostilities between the three groups continued for years. Laurent-Désiré Kabila was assassinated in January 2001 and his son, Joseph Kabila Kabange, took over his reign. The younger Kabila attempted to stop the hostilities and begin a peace process. In August 2002, little over a month after the International Criminal Court became operational, DRC and Rwanda signed a peace accord. A similar peace treaty with Uganda followed in September. These agreements outlined plans for the removal of foreign troops from DRC and the institution of conflict resolution mechanisms.

Despite these efforts, violence in DRC continued. By the time the situation came to the attention of the Court, upwards of four million people had been killed in the conflict. Estimates suggested that around five thousand of the deaths had occurred within the Court’s temporal jurisdiction. In addition to murders, including mass killings and summary executions, there were numerous reported instances of rape, torture, mutilation, kidnapping, looting, and the use of child soldiers. Based on the reports received, Prosecutor Moreno-Ocampo determined that the situation in DRC would be the first “to be closely followed by the Office.” After

---

101 Id. at 110.
105 Kira Hild and Shannon Frank, supra note 102 at 4.
106 Report of the Prosecutor to the ICC, supra note 97 at 2.
107 Id. at 3.
108 Id. at 2.
acknowledging that an internal peace process was underway, Moreno-Ocampo declared his willingness to initiate the Court’s first investigation in DRC using his *proprio motu* powers.\(^{109}\)

Of course, the DRC situation was not initiated this way. In the same report, the Prosecutor publically entreated the government of DRC to refer itself to the Court.\(^{110}\) He proposed a “division of labour” in which the Court would prosecute the most egregious offenders and let national authorities develop the means to deal with others. The most obvious benefit to waiting for a state referral was that it offered some assurance that DRC had the political will to cooperate with investigations.\(^{111}\) Another reason to court state referrals was that it would be a less threatening start for the ICC. At the Rome Conference, a number of powerful states had opposed giving the Prosecutor the power to initiate investigations in the first place. By beginning its investigations with self-referrals, the Court could cast itself as a cooperative assistant to national judicial processes rather than an external force throwing its power around.\(^{112}\)

In December 2003, the ICC received its first state referral, not from the DRC but from neighboring Uganda. Uganda has been in conflict since the exile of Idi Amin in the early 1980s. After a succession of military leaders, Yoweri Museveni, the current president, came into power in 1986. As the leader of the National Resistance Army (NRA), Museveni had participated in numerous human rights violations while fighting against other militant groups.\(^{113}\) With Museveni’s victory, many combatants fled into neighboring DRC, the Central African Republic

\(^{109}\) *Id.* at 4.

\(^{110}\) *Id.*


\(^{112}\) *Id.* at 951.

(CAR), and what is now South Sudan. One group, the Lord’s Resistance Army (LRA) led by Joseph Kony and backed by the support of the Sudanese government, emerged as the primary anti-government antagonists. Since the early 1990s, the LRA has committed numerous atrocities including mass executions and raids on civilians. The group is most notorious for its forced recruitment of child soldiers. In March 2002, four months before the ICC came into force, the Ugandan government struck back at the LRA with “Operation Iron Fist.” While initially successful, the operation ultimately resulted in a backlash by the LRA of increased kidnapings and attacks. Efforts to negotiate a peace between the government and the LRA, including several in 2003, were not honored by either side. The fighting in Uganda continues, with both LRA fighters and government forces committing atrocities against civilians.

In March 2004, after “significant international pressure” overcome the reluctance of President Kabila, DRC referred itself to the ICC. A little over two months later, the Office of theProsecutor opened its first official investigation over the Congolese situation. One month after that, the Court initiated its second investigation in Northern Uganda. In his referral of the situation to the Court, President Museveni had asked that the Prosecutor only look into crimes

---


116 Id.


118 Id. at 2.

119 Id. at 3.

120 Kira Hild and Shannon Frank, *supra* note 102 at 7.


committed by the LRA, and not any committed by the government.\textsuperscript{123} While the Prosecutor must conduct an impartial investigation that considers all parties in a situation\textsuperscript{124}, Moreno-Ocampo also had an interest in securing the cooperation of the state government. The announcement of Uganda's self-referral was made in a joint press conference at which Moreno-Ocampo stood side-by-side with Museveni.\textsuperscript{125} To date, the Court has issued arrest warrants for five individuals in connection with crimes in Northern Uganda. All five are members of the LRA.\textsuperscript{126} Similarly, the six persons indicted in connection with the situation in DRC are members of militia groups in opposition to President Kabila.\textsuperscript{127}

These first investigations illustrate a problem inherent in the Court's reliance on self-referral. For a number of reasons, self-referrals were not anticipated in the discussions leading up to the Rome Statute.\textsuperscript{128} Referrals by state parties under Article 14 were expected to be done by third party states. The drafters of the Statute assumed that a conflict of jurisdictions might ensue wherein both the state government and the ICC would attempt to prosecute the same situation. The self-referrals cultivated by the Prosecutor, however, created circumstances in which states submitted situations to the ICC in lieu of prosecuting the crimes themselves. Additionally, because the early cases of the Court all involved ongoing conflicts, there was a tendency towards "asymmetric referrals" in which the state government sought to bring before the Court the

\textsuperscript{123} ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, Press Release ICC-20040129-44, Jan. 29, 2004.

\textsuperscript{124} Rome Statute, Art. 54.

\textsuperscript{125} Press Release, \textit{supra} note 122.

\textsuperscript{126} Of these, Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen remain at large. The fifth, Raska Lukwiya, was killed in a battle with Uganda military forces on Aug. 12, 2006. There have been reports that Vincent Otti was killed in 2007, but these reports have not been substantiated by the ICC and his case remains open.

\textsuperscript{127} Two of the men, Callixte Mbarushimana and Sylvestre Mudacumura, are Rwandan nationals.

\textsuperscript{128} Andreas Th. Müller and Ignaz Stegmiller, \textit{supra} note 95 at 1269.
actions of its opposition.\textsuperscript{129} This may have helped the Court count on cooperation with enforcement from the state governments and further the narrative of a non-interventionist ICC. However, it has made some civilians skeptical of the brand of justice the Court is offering. Particularly in Uganda, the ICC appeared to be a tool that the government was using to fight the LRA while covering over its own abuses.\textsuperscript{130} Generally, self-referrals may appear to stem from the current government using the ICC to dispose of its opposition.\textsuperscript{131}

The third state to refer itself to the Court followed this unfortunate pattern. Angé-Felix Patassé was elected president of the Central African Republic in 1993 and reelected in 1999. Soon after his reelection, political rivals tried to oust Patassé from power.\textsuperscript{132} After the first attempt at a coup in 2001, Patassé hired Jean-Pierre Bemba Gombo, a wealthy warlord and the former Vice President of DRC, to engage his military forces with the dissidents.\textsuperscript{133} Civilians frequently became the targets of reprisals in clashes between the groups. A particular feature of the CAR conflict has been the widespread use rape and sexual violence, far in excess of other forms of torture or murder.\textsuperscript{134} In March 2003, while Patassé was at a conference in Niger, his former Chief of Staff François Bozizé seized control of CAR and forced Patassé into exile.\textsuperscript{135} This seizure set off the CAR Bush War between Bozizé's forces and several rebel groups. The conflict led to more civilian attacks and large scale displacement of refugees into neighboring

\textsuperscript{129} Id. at 1270, citing B. Broomhall, \textit{The International Criminal Court: A Checklist for National Implementation}, 13 NOUVELLES ÉTUDES PENALÈS 113, 144 (1999).

\textsuperscript{130} Refugee Law Project, \textit{supra} note 114 at 9.


\textsuperscript{135} Marlies Glasius, \textit{supra} note 133 at 500.
countries. This conflict eventually ended, but another against the Séléka rebel group ultimately removed Bozizé from power in 2013. War in CAR continues to the present day.

In January 2005, while preparing for the election that would officially install him as President, Bozizé’s government made a referral to the Prosecutor to investigate crimes committed in CAR since the entry into force of the Court. The referral blamed the violence on former president Patassé and his commander Bemba. When Prosecutor Moreno-Ocampo opened the CAR investigation more than two years later, he noted that he would monitor the ongoing violence in the country, but determined that the “peak of violence and criminality” had occurred in the months of 2002 and 2003. A year later in 2008, an arrest warrant was issued for Jean-Pierre Bemba. Angé-Felix Patassé returned from exile in 2009 to run for reelection. By that point he had seemingly made up with rival Bozizé, to whom he eventually lost in the election. Patassé died of natural causes in April 2011. To date, no other arrests have been made in connection with crimes committed in CAR, though in November 2013, Prosecutor

140 At the time of referral, an investigation was underway in CAR’s Cour de Cassation. The Cour confirmed in April 2006 that it was not equipped to handle crimes of that magnitude and deferred to the ICC. In addition to the national proceedings, the Prosecutor cited the insecurity of the region and the financial burden on the Court of opening a fourth investigation as reasons for the delay.
Bensouda initiated a new case against Bemba and four others for offenses against the administration of justice during Bemba’s first trial.\textsuperscript{143}

**The Security Council Referrals**

Where the first wave of cases may have been overly conciliatory with state governments, the cases that followed shifted tactics and became directly antagonistic with them. The current crisis in Darfur started in February 2003 when rebel movements started protesting the government’s Islamic policies and historic marginalization of the region.\textsuperscript{144} Darfur had once been an independent region that was incorporated into Sudan under British rule. The government, headed by longtime president Omar Al Bashir, conscribed counterinsurgents, including a militia known as the Janjaweed, to fight the rebels. The militias began targeting civilians, committing rape and torture, killing thousands and driving millions more from their homes and across national borders.\textsuperscript{145} The United Nations took a number of steps to address the situation, including establishing a Commission of Inquiry. The Commission found evidence of war crimes and crimes against humanity, but stopped short of calling the crimes genocide.\textsuperscript{146} On March 31, 2005, the Security Council adopted Resolution 1593, referring the situation in Darfur to the ICC.\textsuperscript{147} In the referral, the Security Council included the names of 51 suspects drawn up

\begin{itemize}
  \item \textsuperscript{143} Prosecutor v. Bemba, Kilolo, Mangenda, Babala, Arido, Case No. ICC-01/05-01/13, www.icc-cpi.int/iccdocs/PIDS/publications/Bemba-Musamba-et-al-Eng.pdf. Narcisse Arido is a Central African national. The other three men are, like Bemba, citizens of DRC.
  \item \textsuperscript{145} Id. at 2.
  \item \textsuperscript{146} Id. at 3.
  \item \textsuperscript{147} S.C. Res. 1593, U.N. Doc. S/RES/1593 (2005). The resolution was passed after an abstention by the United States, which had advocate for a new ad hoc tribunal to be run jointly by the African Union and the UN. Sudan is not a party to the Rome Statute.
\end{itemize}
by the Commission.\textsuperscript{148} Most of the names were those of Janjaweed leaders and state officials. The Court opened its investigation into Darfur less than three months later.\textsuperscript{149}

At first, Prosecutor Moreno-Ocampo followed his usual pattern of deference, "look[ing] forward" to receiving cooperation from the state government.\textsuperscript{150} He gave the impression that the investigation would not be relying on the Commission’s list of suspects.\textsuperscript{151} This approach was criticized by human rights activists, who saw it as too similar to diplomatic entreaties to the Sudanese government that had previously failed.\textsuperscript{152} Two years into the investigation, the attitude changed. The diplomatic approach was not producing good results in any of the open situations\textsuperscript{153} and the Sudanese government, particularly President Omar Al Bashir, was openly uncooperative with the Court. With Sudan, however, the Court had the backing of the Security Council and, presumably with it, its legal authority and enforcement powers. Moreno-Ocampo announced the first warrants issued on the situation, against the alleged leader of the state-supported Janjaweed and the Sudanese Minister for the Interior.\textsuperscript{154} Then, in 2008, the Prosecutor stepped up his confrontational stance and requested that a warrant of arrest be issued for President Al Bashir.\textsuperscript{155}

\textsuperscript{148} Mariana Pena, Katherine Scovner, Gideon Copple, and Amitis Khojasteh, \textit{supra} note 144 at 3.


\textsuperscript{151} Victor Peskin, \textit{supra} note 53 at 667.

\textsuperscript{152} \textit{Id.} at 657.

\textsuperscript{153} At the time, nine arrest warrants had been issued across the DRC and Uganda situations and only one person, Thomas Lubanga, had been taken into custody.

\textsuperscript{154} ICC, \textit{Prosecutor Opening Remarks}, Press Release, ICC-OTP-20070227-208, Feb. 27, 2007. The Prosecutor had initially asked the Pre-Trial Chamber to issue summons instead of warrants to go along with his policy of cooperation, but the Chamber declined.

\textsuperscript{155} ICC - ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur, Pressanto Release, ICC-OTP-20080714-PR341, Jul. 14, 2008.
The indictment of Al Bashir drew criticism from the African Union. In July of 2008, the AU formally requested that the Security Council defer the investigation under Article 16 of the Rome Statute.\textsuperscript{156} The primary criticism was that a peace process had been initiated between the Sudanese government and the rebel militias, and that the ICC's involvement threatened to destabilize those efforts for peace. Additionally, the communique suggested that the ICC investigation would hinder the growth of domestic institutions that would encourage the rule of law.\textsuperscript{157} Skeptics have questioned the good faith of the AU leaders.\textsuperscript{158} In a press conference that year, the AU Chairman framed the issue as a choice between justice and peace; peace was the AU's priority. Al Bashir stood next to him as he spoke.\textsuperscript{159} A deferral from the Security Council never came, and the Prosecutor remained steadfast. In July 2008, he attempted to have an airplane carrying Ahmad Haroun diverted so that he could be arrested.\textsuperscript{160} Around the same time, he refused domestic and international requests to withdraw the warrants issued against LRA members in Uganda because of ongoing peace efforts there. Moreno-Ocampo asserted that, in both situations, successful prosecutions would bring about peace.\textsuperscript{161} Four more warrants in the Darfur situation were issued, against the leaders of three rebel militias and against the current Sudanese Defense Minister.\textsuperscript{162} In 2009, Libyan leader Muammar al-Gaddafi became the

\textsuperscript{156} African Union Peace and Security Council Communique, PSC/Min/Comm (CLXII), Jul. 21, 2008.

\textsuperscript{157} Id. at 2.

\textsuperscript{158} Charles Chernor Jalloh, \textit{Africa and the International Criminal Court: Collision Course or Cooperation?}, 34 N.C. CEN. L. REV. 203, 214 (2011-2012).


\textsuperscript{160} Victor Peskin, \textit{supra} note 53 at 658. The attempt was unsuccessful. Haroun remains at large.

\textsuperscript{161} Id. To date, none of the indicted persons in Uganda have been brought before the Court.

\textsuperscript{162} Proceedings against militia leader Saleh Mohammed Jerbo Jamus were ended in 2013 after reports that he had been killed. Charges against Bahar Idriss Abu Garda were dropped. The trial of Abdallah Banda Abakaer Nourain is set to begin in May 2014. Defense Minister Abdel Raheem Muhammad Hussein remains free.
Chairman of the AU. In a General Assembly meeting that year, AU member states were instructed not to enforce the warrant against Bashir nor to assist the ICC in its investigation.163

In 2011, the Security Council referred its second case to the ICC: Libya. The situation in Libya is distinguished by its rapid development. In February, in the midst of the Arab Spring, protestors gathered outside the city of Benghazi in opposition to Gaddafi’s long totalitarian rule. Gaddafi moved quickly in response, hiring foreign militias to violently crack down on protests.164 On February 25, Gaddafi ordered his security forces to initiate air raids against the largely unarmed protestors.165 The next day, the Security Council adopted Resolution 1970 referring the situation to the ICC.166 The investigation was opened by the Court five days later.167 In June, three warrants were issued: for Gaddafi, his son Saif Al-Islam Gaddafi, and head of Libyan Intelligence Abdullah Al-Senussi.168 The referral was a political move by the Security Council which hoped to end the conflict and remove Gaddafi from power.169 The move, however, was in stark contrast to how the Security Council had dealt with the contemporaneous struggle going on in Syria. At the time of the Libya referral, protests against Syria’s president Bashar al-Assad had been going on for 11 months. The violent government reprisals had left

169 Anna F. Triponel and Paul R. Williams, supra note 164 at 800.
more than ten thousand dead. The difference seemingly lay in Syria’s alliance with Russia. Russia and China, both permanent members of the Security Council, opposed using the Court in Syria but were neutral and accepting of its employment in Libya.

The discrepancy in the handling of Libya and Syria has led to a push to depoliticize referrals to the Court. At the end of 2011, the Assembly of State Parties proposed to adopt a set of transparent and consistent criteria that would establish when a situation should be referred. At the same time, Libya’s transitional government announced that it would refuse to hand over Saif Gaddafi because the government intended to have him tried in a national court. Some powerful international actors, like the United Kingdom, have voiced their support for this option. In early 2012, Libya asked that the Court postpone its request for the surrender of Saif Gaddafi. The Court refused. Soon after the Court proposed a compromise in which Gaddafi could be tried within Libya, but under the supervision of the ICC. The Libyan government responded with a challenge to the admissibility of the case, declaring that the state was neither

---

170 Id. at 802.
171 Id. at 804.
unwilling nor unable to carry out a prosecution and thus the ICC had no jurisdiction. The Libyan government continues to fight with the Court over who should try the accused.

The *Proprio Motu* Cases

To date, the Prosecutor’s power to initiate investigations *proprio motu* has been exercised twice. The second instance, the situation in Côte d’Ivoire, follows a pattern similar to the Court’s early self-referred cases. In early 2003 Côte d’Ivoire, not a state party to the Court, made a declaration accepting the jurisdiction of the Court concerning events in the country that had happened since September 19, 2002. On that day, mutinying national soldiers and rebels from the Patriotic Movement of Côte d’Ivoire attempted to overthrow the government of President Laurent Gbagbo. The rebels took over the north of the country, killing many including the Minister of the Interior and former President Robert Guéï. President Gbagbo, who had been out of the country, returned and engaged the national military and hired militias against the rebels. Both sides of the conflict carried out atrocities against civilians. Human Rights Watch published a report detailing murder, including summary executions, sexual assault, and the use of

---


178 Anna F. Triponel and Paul R. Williams, *supra* note 164 at 831.


181 Id. at 3.
child soldiers. In the report, they called upon the Prosecutor to open an investigation into the situation in Côte d’Ivoire.\textsuperscript{182}

No investigation was initiated at this time. Prosecutor Moreno-Ocampo was at that time still cultivating a culture of self-referral. As a non-state party, Côte d’Ivoire could not choose the preferred channel of referring itself.\textsuperscript{183} A proprio motu investigation was initiated, however, after a renewal of violence following the elections of November 28, 2010. In the presidential election, Laurent Gbagbo lost to longtime rival and former Prime Minister Alassane Ouattara. Gbagbo refused to concede the election and declared himself the winner. Fearing reprisals, thousands of Ouattara’s supporters fled into neighboring countries.\textsuperscript{184} In the months that followed, Gbagbo “launched a reign of terror” on the opposition, sending out military squads who murdered, raped, and tortured civilians.\textsuperscript{185} Alassane Ouattara, recognized by the international community as the legitimate president, renewed his country’s acceptance of jurisdiction in a letter to the Court.\textsuperscript{186} The Prosecutor announced his intention to open an investigation, which was approved by Pre-Trial Chambers in February 2012.\textsuperscript{187} Though the Prosecutor had initially only sought to include crimes since the 2010 election in the investigation, the Pre-Trial Chamber expanded the scope to include all crimes since the authorization of jurisdiction in 2002. Three warrants have so far been

\begin{itemize}
\item \textsuperscript{183} Andreas Th. Müller and Ignaz Stegmiller, \textit{supra} note 95 at 1285. Côte d’Ivoire became a party to the Rome Statute on May 1, 2013.
\end{itemize}
issued, all dealing with post-2010 events, for Laurent Gbagbo, his wife Simone Gbagbo, and Ivorian army recruiter Charles Blé Goudé.  

The Prosecutor’s first *proprio motu* investigation is arguably the Court’s most contentious. Under the Rome Statute, the Prosecutor may receive communications concerning crimes within the Court’s jurisdiction and make determinations on whether or not to open an official investigation. These preliminary examinations determine whether there is jurisdiction and admissibility to proceed. The Court has opened 11 preliminary examinations that have not led to the opening of an official investigation. Three of the preliminaries have been closed. The situation in Iraq, alleging war crimes committed by soldiers from the United States and United Kingdom, was closed for lack of jurisdiction over the parties. The case of Palestine was closed because, despite having received a declaration from the Palestinian National Authority accepting the jurisdiction of the Court, Palestine is not considered a “state” as understood by the Rome Statute. Venezuela, which is a party to the Rome Statute, was deemed not to have experienced crimes of sufficient gravity to fall within the jurisdiction of the Court.  

Of the preliminary examinations that remain open, four are being assessed for subject matter jurisdiction and four for admissibility. The examination of Colombia has been ongoing since 2005. Significant evidence shows that war crimes and crimes against humanity have been

---

188 Simone Gbagbo is the first and only woman to be indicted by the ICC.

189 Rome Statute, Art. 15.


191 *Id.* at #Palestine.

192 *Id.* at #Venezuela.

committed in the ongoing conflict between government forces and rebel militias. The case remains in limbo as the Office of the Prosecutor monitors continuing national proceedings, assessing whether they are genuine and whether the accused are being tried for crimes of sufficient gravity. The situation in Georgia, initiated in 2008, has generated nearly four thousand communications to the Prosecutor regarding the forced relocation, murder, and torture of thousands of civilians in the conflict in South Ossetia. “According to the information available at this stage,” national investigations are proceeding in both Georgia and Russia. The Prosecutor has requested to receive updates on the status of these investigations. Two African countries are also under examination. The case in Guinea revolves around the massacre that occurred at Conakry Stadium on September 28, 2009 in which 150 people were killed and many others assaulted. A national investigation has been ongoing since February 2010. The case in Nigeria was initiated in November 2010 and concerns crimes allegedly committed by the Boko Haram jihadist group. The government of Nigeria has presented “a significant body of information” on its ongoing national investigation, which the Court continues to monitor.

Kenya came to the Court’s attention in 2008, when violent protests took place throughout the country after the presidential reelection of Mwai Kibaki in December of the previous year. Kibaki’s opponent Raila Odinga alleged that the election was fraudulent and supporters of the two candidates clashed over political and ethnic grievances. Violence continued in the country for three months, at which point a peace deal was brokered between the two rivals. By then, over

194 Id. at 31.
195 Id. at 40.
196 Id. at 44. According to the report, the government of Guinea is trying the same suspects for the same crimes as would the ICC. The Prosecutor is still monitoring the situation to determine if the government is “unwilling or unable” to carry out the prosecutions.
197 Id. at 50.
thirteen hundred people had been killed and hundreds of thousands were displaced. The Kenya National Commission of Human Rights investigated the violence and determined that it had been carried out with deliberation and had been instigated by political leaders. A Commission of Inquiry on Post-Election Violence recommended the establishment of a special tribunal to investigate the crimes. The Kenyan government agreed to refer the situation to the ICC if a national process could not be initiated. Efforts to establish a special tribunal could not come together and the ICC officially opened its investigation into Kenya on March 31, 2010. The Kenyan government was initially supportive of the investigation, but things changed when the Court announced its list of suspects that included mostly government officials. In March of 2011, the Court issued summons for six of them, including Deputy Prime Minister and Minister of Finance Uhuru Kenyatta, to appear and answer to charges of crimes against humanity.

---


204 Charles Chernor Jalloh, *supra* note 158 at 207.

205 Charges against two were eventually dropped for lack of evidence, and the case against Francis Muthaura dissolved when witnesses recanted and refused to testify. Proceedings against Uhuru Kenyatta, William Ruto, and Joshua Sang continued.
Kenya quickly filed an application challenging the Court’s jurisdiction, citing their own ongoing investigation.\(^{206}\)

Things were complicated further when Kenyatta ran for the presidency in March 2013 and, with William Ruto as his running mate, won.\(^{207}\) Supporters claimed his victory was in protest to the “Western powers” controlling the ICC. Others criticized the Court for not going after Kibaki and Odinga.\(^{208}\) With two African leaders now facing trials before the ICC, the African Union began to openly oppose the Court. At a summit to discuss the Court in October 2013, AU leaders unanimously agreed that heads of state should be immune from prosecution.\(^{209}\) Officials discussed the possibility of calling for a mass withdrawal of African states from the ICC, though so far no such action has been taken.\(^{210}\) Meanwhile, the ongoing trials have suffered from a lack cooperation from the Kenyan government and the alleged bribery and intimidation of witnesses.\(^{211}\) The start of Kenyatta’s trial has been moved back twice to allow the Office of the Prosecutor time to collect more evidence. It is currently scheduled to begin on October 7, 2014.\(^{212}\)

The Future and Alternatives


\(^{208}\) Id.


\(^{210}\) Id.


The controversy over the Kenyan trials underscores the role that international perception of the Court plays in its functioning. The image of the ICC as a Western court focused on Africa gives ammunition to the powerful leaders it seeks to try. Combatting this image is critical for the outcome of these cases and the Court’s future in general. One thing that may help change the perception is the appointment of an African Chief Prosecutor, Fatou Bensouda, who took office on June 15, 2012. Bensouda has denied that the Court is targeting African leaders by famously pointing out that “all the victims are African victims.” It is unclear at this time whether Bensouda’s tenure will bring about a change in the direction of prosecutions since most of her work to date has involved the situations inherited from her predecessor. There is no strong evidence that Bensouda, who was Deputy Prosecutor under Moreno-Ocampo for eight years, will shift the focus of the Court away from Africa.

The current crisis in Mali started in January 2012 following the civil war in neighboring Libya. Tuareg nationalists launched a campaign against the government for the independence of the Azawad region in northern Mali. In March, the rebels ousted President Amadou Toumani Touré and suspended the Constitution. Members of the international community, including the United Nations and the African Union, condemned the coup. The offensive continued as rebels took several major northern cities. On June 13, 2012, the Malian government referred the situation to the ICC, detailing alleged abuses by rebel fighters including summary executions, massacres, rape, and torture. In October, the Security Council organized an international


military coalition to aid Malian government forces. In January 2013, the French government deployed troops to the country not, it said, to aid the government but to fight global terrorism. Days later, Prosecutor Bensouda initiated her first investigation into the situation in Mali.

Another possibility for change may come from the Security Council. Human rights activists have pushed for the Council to refer the situation in Syria to the Court. In February of 2014 a United Nations Human Rights Commission called for the Security Council to refer the situation in North Korea, stating that the crimes that have been committed there do not "have any parallel in the contemporary world." To do this, however, the Security Council would need to sway the allies of those countries, particularly Russia and China. Referrals from the Security Council are a double-edged sword. On one hand, they carry with them the authority of the UN and have the ability to act on states that are otherwise not parties to the Rome Statute. On the other hand, the Security Council is a political body that does not have a strong mandate for impartiality as the Court does.

Conclusions


219 ICC, ICC Prosecutor Opens Investigation into War Crimes in Mali: "The legal requirements have been met. We will investigate.", Press Release ICC-20130116-PR869, Jan. 16, 2013.


Despite assertions to the contrary, the International Criminal Court has focused its attention on African states from the beginning. Each category of cases presents a unique problem. For situations that are self-referred, the Court forges a relationship with the state that hinders impartial investigation in order to engender cooperation. The Court must conciliate state governments or risk being cut off from evidence and witnesses. Additionally, the reliance on the Court by these states precludes the possibility of developing national or regional institutions that could handle such cases on their own. The ICC has more resources and support than any state court system or the African Union’s proposed Court of Justice and Human Rights. Accordingly, the ICC is and will continue to be a forum of first resort for many African states. While it may not be the intention of the Court, Africa’s reliance on external forces continues the culture of continental dependence that was created by colonialism. For situations referred by the Security Council, the Court must deal with the sort of political dealings the Rome Statute tried to eliminate. States with powerful allies are shielded from the Court’s jurisdiction, and African states are typically without powerful allies. This is not, as some African leaders would have it, unfair to Africa. The Court’s jurisdiction covers the worst possible crimes and the inability to bring justice to some countries does not mean it should be denied to others. It is, however, unequal. The perception that other parts of the world can “get away” with committing such crimes reinforces Africa’s position as inferior. It is also directly contrary to the Court’s mission to end impunity. Proprio motu investigations are also not without political consideration. What constitutes “unwillingness” on the part of a state’s judiciary is subjectively determined by the Prosecutor. The internal judicial processes of some states receive more deference than others.

The Court should not abandon Africa or stop pursuing justice in African cases. The Court should, however, make the reach of its justice global by pursuing cases outside Africa as well.
Doing this will help the continent be a partner in global justice rather than a target. It will also help the Court maintain the good will and support it needs to carry out its mission to end impunity.