

# **Between Tunnel Vision and a Sliding Scale: Power, Normativity and Justice in the Praxis of the International Criminal Court**

By

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## **I. Introduction:**

That power (be it of the military, economic, political, social or ideational kind) can markedly affect the nature and orientation of international norms and praxis is so well accepted a proposition that an attempt to adumbrate and justify it should not detain us here.<sup>1</sup> What can often require explanation are the specific ways in which this phenomenon actually plays out in the various possible contexts. For example, in what ways and to what extent do global/domestic power matrices affect the character and behavior of international criminal justice norms, including our sense and sensibility of what the ideal, standard or model approach(es) to international criminal justice ought to be (either in general or in specific socio-political contexts)? More specifically, in what ways and to what extent do these global/domestic power matrices affect our sense of the appropriateness/desirability (or otherwise) of deploying the international criminal court (the ICC) in an effort to redress the incidence of gross human rights abuses – and thus to presumably “do justice” – in one part of the world or the other? As importantly, are these global/domestic power matrices responsible to any significant extent for the apparent “crowding out” and displacement by ICC prosecutions of alternative criminal justice approaches to the gross human rights violations that have occurred on the African continent?<sup>2</sup> And as important as the deployment of the ICC clearly is to the overall effort to end impunity for gross human rights abuses around the world (in general) and in

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<sup>1</sup> This proposition is accepted by virtually every “school” of international relations, from realism (which emphasizes it) through liberalism (which does not emphasize it as much) to constructivism (which emphasizes it the least among these three schools). For a summary of all of these approaches and their relationship to the theories of human rights institutions, see for e.g., O.C. Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007).

<sup>2</sup> As is now well known, the ICC and the prosecutorial/punitive international criminal justice approach that it exemplifies has now become the preferred way (indeed the major way) of addressing the incidence of gross human rights abuses (that constitute international crimes) in Africa. This is so despite the failure of the ICC to launch even a single prosecution anywhere else in the world. For e.g., see Dire Tiladi, “The African Union and International Criminal Court: The Battle for the Soul of International Law” (2009) 34 *South African Yearbook of International Law* 57; and Elise Keppler, “Managing Setbacks for the International Criminal Court in Africa” (2012) 56 *Journal of African Law* 1.

Africa (in particular), to what extent is that court's increasingly central role on the African continent (to the total exclusion of all other continents) more a function of the play of power (domestic or global) than of the manifest or immanent/intrinsic/inherent appropriateness of that approach or posture? It is to these more specific questions that we turn most of our analytical attention in this short paper.

To this end, the paper is divided into five sections, this introduction included. In section II, the pros and cons of the increasing deployment of the ICC as the principal way of addressing the incidence of gross human rights abuses in Africa are examined. Section III considers the question of the existence, nature and character of a (two-dimensional) sliding scale of international criminal justice; one that adjusts itself from continent to continent and place to place. In section IV, the relationships among global/domestic power matrices (on the one hand) and the tendency to dispatch the ICC to deal with gross human rights abuses in Africa, and in Africa alone (on the other hand) is analyzed. The paper ends in section V with a summary of its arguments and some concluding comments.

## **II. On the Pros and Cons of ICC Deployment on the African Continent:<sup>3</sup>**

### **(i) On the Positive (or Good) Implications**

If we consider the categories of persons (in terms of their level of power and the extent of their responsibility for the conflict) who have either been successfully brought before the ICC to answer for their crimes or have ICC warrants of arrest pending against them, it becomes quite easy to appreciate how some good could result from the engagements of the ICC in parts of the African continent, especially in relation to the important effort to stem the culture of impunity which prevails in all-too-many places, not just in Africa but around the world as well. For instance, without the ICC's intervention in the Sudan, there would have been even less hope than there currently is today of bringing the most powerful elements within that country to justice. This is not to suggest, of course, that the Sudan is even close to being the only place where a culture of impunity of the sort that ICC intervention may help stem exists. For, after all, aside from a few of the usual suspects, who has been brought to justice for the many international crimes allegedly committed in Iraq, Afghanistan and Chechnya?

A closely related point is the fact that the ICC now serves as a significant (though invariably quite modest) alternative judicial framework to weaker domestic judicial institutions that are confronted with the relatively enormous challenge of mediating the process of transition from a period of conflict or the gross violation of human rights toward a more peaceable and democratic epoch that is more firmly premised on accountability for past and contemporary acts of criminality and human rights violations. For example, it is doubtful that an immediately post-conflict Syria, Afghanistan or Libya will have the kind of strong judicial institution needed to bring the most powerful elements within those countries to account for their possible gross human rights violations and international crimes. The ICC can serve as a modest (if clearly partial) alternative to the weaker judicial institutions which would exist in these types of situations. Although it must, of course, be kept in mind that, as is well known, global power matrices function all-too-often in ways that ensure that the criminal justice systems

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<sup>3</sup> This section of the paper is based on our as yet unpublished paper entitled: "The International Criminal Court as a "Transitional Justice" Mechanism in Africa: The Good, the Bad, and the Ugly".

of the more powerful states, which are sometimes visibly weak in the knees in the face of the commission of serious international crimes by soldiers or leaders from such states, are hardly ever categorized as functionally “weak”; at least not to the point of necessitating ICC intervention.

Although there are some who, on reasonable grounds, doubt the viability of the deterrence argument,<sup>4</sup> to the extent that criminal trials and punishment can ever deter future criminal behaviour, the ICC and the relatively stronger prospect of eventual punishment that it offers in certain contexts, should exert some measure of deterrence on at least some persons in positions of authority in at least some places.<sup>5</sup> However, as this question of the deterrent effects, if any, of criminal trials and punishments has been the subject of an enormous amount of scholarly literature, a detailed discussion of that issue should not detain us here.

#### (ii) On the Negative (or the Bad/Ugly) Implications

The first negative consequence that is discussed here is somewhat ideational and conceptual. It is that the relatively very invasive involvement of the ICC in Africa (especially as compared to other continents or places) has masked much more than it has revealed about the character, imperatives, and high politics of transitional justice praxis itself, and has in the result tended to leave all-too-many of us with the decidedly wrong impressions. Both in and of itself, and as the most prominent “representative” of international criminal justice today, the ICC’s apparent “geo-stationary orbit” over Africa (i.e. its near-total focus on that continent) has wittingly or unwittingly masked (to a significant extent) the enormity and vast extent of the incidence of international criminality in all-too-many other parts of the globe. Given their notoriety, it is hardly necessary to name all of these other places, but the names Chechnya, Iraq, Afghanistan, and Colombia (where by conservative estimates tens of thousands have been slaughtered in a manner that suggests international criminal conduct) may ring a bell in this respect.<sup>6</sup>

As importantly in this connection, this relatively very invasive involvement of the ICC in Africa may appear to suggest to the inattentive mind that only one viable approach to international criminal justice exists or is suitable for the broad African context, when in fact this is not the case. International criminal justice theory and praxis is hardly a monolithic, settled and tightly coherent discipline. Thus, the second negative implication of the centrality that the ICC is increasingly assuming in Africa that is discussed here is that it can and does produce significant displacement effects on competing or alternative (or even more nuanced) international criminal justice approaches, despite the fact that these alternatives may in some cases even have a better chance of meeting the justice of the particular circumstances at issue. For instance, while a “truth and reconciliation” approach (which ensured that virtually no one was ever punished for the particularly egregious crimes committed against that country’s black population by its white apartheid regimes) was adopted in the South Africa case and although that version of international criminal justice was widely praised around the

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<sup>4</sup> See J. Brierly, “Do We Need an International Criminal Court?” (1927) 8 Yearbook of International Law 81.

<sup>5</sup> See for example C. Jalloh, “Special Court for Sierra Leone: Achieving Justice?” (2010) 32 Michigan Journal of International Law 395, at 448-450.

<sup>6</sup> For instance, see the Daily Mail online, 13 May 2014.

world, this kind of alternative approach has hardly, if ever, been allowed to play nearly as central a role in any other African state (even though the alleged crimes committed in some of these places have been comparatively much less gross or egregious than in the South African case).<sup>7</sup>

The third adverse effect which is likely to result (if it has not already resulted) from the centrality that the ICC is increasingly assuming in Africa (especially against the background of its failure to intervene in even a single non-African context), is that this phenomenon tends to function to denude that court of a significant degree of its bulwark of popular legitimacy (especially within the weaker targeted states). Paradoxically, this then functions to arm certain domestic political actors who have been or could be targeted by the court with a more or less powerful argument for gaining or retaining domestic political power/influence. There is significant worry, even among strong supporters of the ICC, that the court (especially because of the behaviour of its first prosecutor) has wittingly or unwittingly laid itself way too wide open to the charge that it is has become an instrument for the subordination of the weaker African states, at the very same time as it seems to be exhibiting a glaring impotence in the face of global power.<sup>8</sup> The point here is less about the accuracy of this charge, and more about the *perceived* legitimacy of the court and its activities.<sup>9</sup> For instance, whether or not one agrees with him, the charge famously levied by the then Sudanese Ambassador to the UN against the ICC's first prosecutor, when he referred to the latter as "a screwdriver in the workshop of double standards,"<sup>10</sup> resonated among a significant percentage of observers on the African continent, and not just within the ranks of cynical leaders (as commentators such as Elise Keppler have argued).<sup>11</sup> This charge is connected to a deeply-held and historically

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<sup>7</sup> On the "truth and reconciliation" approach to transitional justice an aspects of the South African instantiation of this approach, see K. Avruch and B. Vejarano, "Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography" (2001) 2 *Social Justice: Anthropology, Peace and Human Rights* 47.

<sup>8</sup> The court may be taking steps to dilute this perception. It has recently announced an investigation of alleged international crimes committed by British forces in Iraq. See the Daily Mail online, 13 May 2014.

<sup>9</sup> See O.C. Okafor, "Is there a legitimacy Deficit in International Legal Scholarship and Practice?" (1997) 13 *International Insights* 91, at 101-105.

<sup>10</sup> S. Tisdall, "Technicians in the Workshop of Double Standard", the Guardian, 29 July 2008.

<sup>11</sup> She has noted, quite correctly, that "meanwhile, African civil society has firmly and consistently raised its voice in response to attacks on the court. More than 160 organizations based in more than 30 African countries have spoken out about the ICC's importance for Africa, and the need for the court to receive adequate cooperation from states in response to the AU call for non-cooperation. Civil society organizations have repeatedly collaborated on letters, analyses and meetings with officials of African ICC states to convey the need for strong African government support for the ICC." See E. Keppler, *supra* note 2, at 6. However, what Keppler fails to appreciate though is that one can support the ICC and still argue that it should not be in a kind of geo-stationary orbit above *only* Africa. One need not always ask for *less* prosecutions by the ICC, but can ask for *more* such trials (much more from other places and much more of other kinds of alleged international criminals). In any case, the fact that many analysts have attributed the victory of Uhuru Kenyatta and William Ruto in the last Kenyan presidential and vice-presidential polls, respectively, to their being dragged before the ICC and their mobilization of public antipathy for the seeming total focus of that court on targeting Africans, should give scholars much pause before toeing Keppler's rather simplistic line. See the BBC, 11 March 2013, online: <http://www.bbc.com/news/world-africa-21739347> (visited 13 June 2014). Again, it should be remembered that civil society groups in Africa, especially those of the ilk that Keppler relies on, are not always deeply rooted among their own people and do not always reflect the popular perspective in whole or even in significant part. See for e.g. O.C. Okafor, *Legitimizing Human Rights NGOs: Lessons from Nigeria* (Trenton, NJ: African World Press, 2007); and



otherwise seriously abused opponents and ordinary citizens. The prospect of a humiliating trial at The Hague and spending one's last days locked up in a jail can concentrate the mind, albeit not always in a positive way. Thus, wherever this sort of incentive structure is produced, it usually contributes significantly to the exacerbation or augmentation of domestic tensions, repression, conflict and violence there. This impedes, rather than advances, the search for a just and lasting peace in that country. For example, there is a good argument to be made that the prospect of being hauled before the ICC or some such fora could have helped shape Robert Mugabe's insistence on hanging on to power at any cost, despite his grand old age. This is also likely the case with Sudan's El-Bashir. In both cases, repression, conflict and/or violence were accentuated in the result.<sup>17</sup> There is a good argument to be made as well, that were the ICC not to have been assigned as prominent a role in redressing gross human rights abuses Africa, were it not to appear as poised and anxious as is seemingly the case to fill its docket with each and every African case it can get its hands on, and had alternative international or domestic criminal justice approaches been considered more seriously in the African context, we would have seen many more agreements of the type brokered by Nigeria in relation to Liberia (which were designed to prevent, and did prevent, millions from being killed in an all out assault by the then rebels on the capital, Monrovia). That agreement famously secured the voluntary consent of Charles Taylor, the then *elected* president of Liberia to abdicate from power and leave the country in return for the rebels to stand down from their siege on Monrovia. It can be argued that this was a much more humanitarian and even far more just outcome than would have been the case had Charles Taylor not been coaxed out of power with a promise of amnesty in which case the rebels would have been forced to storm Monrovia resulting in millions of civilian lives been lost. This is a type of approach that (whatever its limits from an idealist human rights perspective) does tend to reduce, rather than augment, conflict and violence in certain contexts.

The overarching point here is thus that the deployment of the ICC to help address gross human rights abuses on the African continent has its pros and cons, but that its deployment to play as central a role as it currently does in that geo-political region is quite fraught. As such, it should be realized that just as not every deployment of the ICC to Africa is a cynical or imperialist exercise (for after all it was victorious or sitting African heads of state in the Democratic Republic of the Congo, Uganda, and Cote d'Ivoire who called in the ICC), not every objection or opposition to such ICC deployment is ill-motivated or anti-human rights. As we have seen above, legitimate (and indeed powerful) objections may be raised to the liberal, frequent and central utilization of the ICC in the African context. The strength of these legitimate objections is reinforced by the existence in the *living* international criminal law/policy of a sliding

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<sup>17</sup> In Zimbabwe an upsurge in violence and repression greeted the seeming prospect that the opposition would unseat Robert Mugabe in the 2008 elections. See Amnesty International, 18 April 2008, online: <http://www.amnesty.org/en/news-and-updates/news/post-election-violence-increases-zimbabwe-20080418> (visited 23<sup>rd</sup> June 2014). This repression continues to this day, although it is no longer as violent. Violence became less necessary since the opposition has been largely defeated politically and otherwise caged by Mr. Mugabe. See Human Rights Watch, *World Report 2014: Zimbabwe*, online: <http://www.hrw.org/world-report/2014/country-chapters/zimbabwe?page=2> (visited 23<sup>rd</sup> June 2014). In the Sudan, El-Bashir's repression has ebbed and flowed all through his tenure, but has continued at a high intensity since his indictment in 2009 by the ICC. See Bashir-Watch, *The Case against Bashir*, online: <http://bashirwatch.org> (visited 23<sup>rd</sup> June 2014).

scale; i.e. by the realization that there is a sense in which international criminal law/policy as it is actually practiced and experienced by real living people may in fact be defined by such a sliding scale. It is to the actuality, nature and certain implications of this sliding scale that our attention now turns.

### **III. On the Existence of a “Sliding Scale” in the living International Criminal Justice Praxis**

And so the point that is sought to be made in this section is that Africa and the world are not faced with some type of a “Faust-like bargain”<sup>18</sup> in which we must either relentlessly deploy the ICC (or some other high agent of international criminal justice) to redress each and every single incidence of gross human rights violations in Africa (or elsewhere), or effectively surrender our moral integrity at the feet of power and/or in pursuit of success (at a purely pragmatic form of reconciliation and peace-building). In other words, it is clearly not a choice between ICC-style prosecutions/trials or nothing.

In this connection, it is fair to state that even at a very basic legal and textual level, every scholar of international criminal law/policy would know that this very idea that it is not “either the ICC or nothing” is (however insufficiently) built into the Rome Statute, the constitutional framework that guides and gives life-sap both to the ICC and to much contemporary international criminal justice praxis.<sup>19</sup> The term which has come to describe this idea’s iteration in the Rome Statute is “complementarity.”<sup>20</sup> And although it is nowhere defined in the Rome Statute itself, the term denotes the basic idea in Article 17 of that treaty that the ICC is not designed to be, and is not generally expected to become, the primary site for redressing, or even trying people criminally for, those gross violations of human rights that amount to international crimes. Instead, the domestic criminal justice systems of the relevant countries are meant to play the more central role in such endeavors – but only as long as they are willing and able to do so. Here, unwillingness is mostly a function of political will and the domestic power calculus and inability is more a function of physical and/or institutional incapacity.

And so, one important feature of even the design of the ICC regime (though not necessarily of its real-life workings in relation to Africa) is the built-in recognition that its deployment is hardly the only available or even reasonable step to take in each and every circumstance in which gross human rights abuses have been committed. It is not inexorable in each and every case. Thus, the recognition here is that other viable approaches can be available and that some of these may even be reasonable (or even more reasonable) options depending on the context at issue. This is one argument in support of the existence on paper at least (and even in the praxis of the ICC in relation to situations outside Africa) of the type of sliding scale of international criminal justice that was referred to earlier on in this section; *a sliding scale of geographical weighting*. It is also a vertical kind of scale. Some indication of the nature of that scale is also evident from this discussion – the general weighting of that scale in favor of domestic criminal

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<sup>18</sup> See J.M. van der Laan and A. Weeks, eds., *The Faustian Century: German Literature and Culture in the Age of Luther and Faustus* (Rochester, NY: Camden House, 2013)

<sup>19</sup> See the *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, (1998) 37 I.L.M. 999.

<sup>20</sup> See L. Yang, “On the Principle of Complementarity in the Rome Statute of the International Criminal Court” (2005) 4 Chinese Journal of International Law 121.

justice; although, in practice, this weighting seems to have been completely turned upside down in relation to the African continent.

What is more, it is clear that even in the face of weaker or more incapacitated domestic criminal justice institutions, or of recalcitrant/resistant but powerful domestic political forces, there is a lot of space to be played with between outright impunity (and the total surrender of our moral integrity at the feet of power and in unprincipled pursuit of success at reconciliation and peace-building) and the inexorable and relentless deployment of the ICC (or some other high agent of international criminal justice) to redress each and every single incidence of gross human rights violations in Africa. From the constructive impunity that effectively resulted from post-apartheid South Africa's rather peculiar sort of "truth and reconciliation" process,<sup>21</sup> through variations of that process (that were adopted in places like Argentina, Uruguay, Bolivia, Nigeria, and East Timor),<sup>22</sup> through general amnesties, limited amnesties, limited/mass domestic prosecutions, and mixed international/domestic courts (as in Sierra Leone<sup>23</sup> and now Senegal as regards Hissen Habre's case<sup>24</sup>), to the proposed African Court of Justice, Human Rights and Crime,<sup>25</sup> there is a large field that lies in-between outright impunity (on the one hand) and fully international or ICC-style prosecutions/trials (on the other hand). The ICC option has never been inflexibly applied around the world, and many of the non-prosecutorial options outlined above have been applied in respect of gross violations that have, at the very least, been every inch as egregious as the ones that have attracted the ICC to its current African orbit. For example, the violations committed in Cote D'Ivoire were, at the very least, no more brutal than those so far committed in Syria).<sup>26</sup> These alternatives to either outright impunity or the inflexible deployment of the ICC are each part of a range of reasonable options that are available to be selected from (depending on the context) by those who would achieve reconciliation and/or build peace in other ways. They have been adopted either singly or in combination with one or more options, again depending on the context. Thus, at the very least, in this one sense of the availability of a range of reasonable options and the fact of their contextually variable utilization around the world, a sliding scale clearly exists in the living international criminal justice system and in ICC praxis. This may be described as a *sliding scale of remedial options*, and is also a horizontal type of scale.

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<sup>21</sup> On the "truth and reconciliation" approach to transitional justice and aspects of the South African instantiation of this approach, see K. Avruch and B. Vejarano, "Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography" (2001) 2 *Social Justice: Anthropology, Peace and Human Rights* 47.

<sup>22</sup> *Ibid.*

<sup>23</sup> On the Special Court for Sierra Leone, see C. Jalloh, *supra* note 5.

<sup>24</sup> See R. Adjovi, "Introductory Note on the Agreement on the Establishment of the Extraordinary African Chamber within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and Statute of the Chambers" (2013) 52 *I.L.M.* 1020; and S. Williams, "The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?" (2013) 11 *Journal of International Criminal Justice* 1139.

<sup>25</sup> See <http://www.african-court.org/en/index.php/about-the-court-jurisdiction> (visited 23rd June 2014).

<sup>26</sup> Over 160,000 persons have thus far been killed in Syria. See <http://www.huffingtonpost.com/news/syria-death-toll/> (visited 23rd June 2014). By contrast, the number for Cote D'Ivoire is estimated at 3000 (i.e. less than 2.5% of the Syrian death toll thus far). See <http://www.genocidewatch.org/cotedivoire.html> (visited 23rd June 2014).

A concomitant realization from a combined reading of the discussion in this section and the one that preceded it is that it is simply not true to allege or imply, as all-too-many commentators seem to have done, that were the ICC not to play as central a role as it currently does in the African context, and were it not to engage in every one of the prosecutions it has undertaken in that region, then the heavens of justice would collapse.<sup>27</sup> Clearly, given the broad range of different options that have been applied more or less effectively in different situations around the world to deal with similarly egregious abuses of human rights, almost all of which did not include ICC-type trials (e.g. in South Africa, El Salvador, Nigeria, Argentina, and East Timor), any such suggestion does not have much merit. What is more, the heavens of justice did not also not fall when the international crimes allegedly committed by great powers and powerful domestic elements in places like apartheid-era South Africa, Chechnya and Iraq were met with outright or constructive impunity.

In concluding this section of the paper, it bears emphasis that the overarching point that is being made here is that when it comes to redressing the gross human rights abuses that are committed on the African continent (as elsewhere), it is clearly not a case of the ICC or nothing at all. A range of other reasonable options exist to be selected from in the repertoire of international criminal law and policy. In practice, the choice to deploy one or more of the available remedial options (be it the ICC, truth and reconciliation, an amnesty, or something else) does tend to be adjusted to the peculiarities of each situation at issue. Thus, when judged by its behavior on a global scale (as opposed to assessing it based on its approach to Africa), it becomes quite clear that international criminal justice does tend to be characterized, oriented and defined by a particular, more or less two-dimensional, kind of sliding scale.

#### **IV. International Criminal Justice Norms and Praxis in the Crucible of Power**

If this is so, why then has international criminal justice increasingly tended to take one particular, generally inflexible and seemingly monolithic, form in its encounters with situations in which gross human rights abuses have been committed in Africa? In the face of the occurrence of many similarly egregious (if not more disturbing) abuses of human rights in many other places around the globe, why has the ICC focused its prosecutorial lenses almost exclusively on the African continent; and why is that presumably “global” court playing a far more central role in Africa today than it has ever done anywhere else in the world?<sup>28</sup>

Clearly, if the intensity and frequency of such abuses in Africa are at the very least not all that higher than on some other continents, and are in some respects even lower, then this tendency of the ICC to fly in a kind of geo-stationary orbit over only Africa<sup>29</sup> cannot be explained simply by stating the obvious fact that such abuses do occur all-too-often in that region. And so, some other factor(s) must also be at play in the production of such a biased outcome. And that factor or those factors must be playing a

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<sup>27</sup> See E. Keppler, *supra* note 2.

<sup>28</sup> The University of Uppsala, Sweden’s “Uppsala Conflict Data Program” has produced a telling 2013 graph that justifies this position. This map shows, for instance that there has been a much higher incidence of such abuses in Asia than in Africa. See [http://www.pcr.uu.se/digitalAssets/66/66314\\_1conflict\\_region\\_2012.pdf](http://www.pcr.uu.se/digitalAssets/66/66314_1conflict_region_2012.pdf) (visited 23rd June 2014).

<sup>29</sup> There is no disagreement whatsoever that the ICC has (at least thus far) focused virtually all of its attention on the African continent. See E. Keppler, *supra* note 2.

more important, if not more critical, role in circulating the punishing winds of ICC justice only toward African skies.

One of the main suggestions that will be developed in this section of the paper is that one of these more important (if not pivotal) factors is the play of *global* power matrices (where power includes not just military, political and economic power, but also social and ideational power).<sup>30</sup> As it turns out, and not all that surprisingly, these global power matrices (including ideational power environments) exert a strong influence on how, and to where, international criminal normativity circulates, and on how ICC praxis plays out. It will be impossible in a short paper such as the present one to completely work out and explain all the ways in which this plays out, but a number of examples will suffice to support and illustrate this argument. For example, certain great powers (such as Russia, China, and the USA) have opted out of the international criminal court's jurisdiction and reach,<sup>31</sup> and have generally been able to remain immune from its grasp (i.e. in actual praxis), largely because of the net effects of the economic, political, social and ideational power and influence which they tend to wield on the world stage.<sup>32</sup> In effect, the status of some of these great powers as permanent members of the UN Security Council, and the consequential veto power they exercise over that body's decision-making, has meant that the Council (the only body that can refer a person/situation to the ICC when the targeted state has otherwise completely opted out of the ICC system),<sup>33</sup> is almost totally incapable of forcing them into the ICC's orbit via a reference to that allegedly "global" court. Of course, some much weaker states which are not permanent members of the Security Council (such as Rwanda, Libya and the Sudan) have (on paper at least) also opted out of the ICC's reach,<sup>34</sup> yet their weak influence in international relations has meant that, in reality, they have far less chances of avoiding being pushed into the ICC's orbit or of even evading the ICC's grip. This has certainly been the case with Libya and the Sudan (at least as in relation to some of its citizen's).<sup>35</sup>

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<sup>30</sup> On this point I draw on and agree with constructivist international law/relations scholars (broadly defined). See O.C. Okafor, "Activist Forces", supra note 1.

<sup>31</sup> See States parties to the Rome Statute, online: [http://www.icc-cpi.int/en\\_menus/asp/](http://www.icc-cpi.int/en_menus/asp/) (visited 23<sup>rd</sup> June 2014).

<sup>32</sup> In the case of the USA, at least, it has – so far successfully – gone to great lengths to conclude bi-lateral treaties with a host of countries to ensure that its citizens would never be hauled before the ICC. See <http://www.iccnw.org/?mod=bja> (visited 23<sup>rd</sup> June 2014).

<sup>33</sup> See Article 13b, Rome Statute.

<sup>34</sup> See States parties to the Rome Statute, online: [http://www.icc-cpi.int/en\\_menus/asp/](http://www.icc-cpi.int/en_menus/asp/) (visited 23<sup>rd</sup> June 2014).

<sup>35</sup> On 26 February 2011, the UN Security Council decided unanimously to refer the situation in Libya since 15 February 2011 to the Office of the Prosecutor (OTP) at the ICC. On 3 March 2011, the OTP announced his decision to open investigations into the situation in Libya, which was assigned by the ICC presidency to Pre-Trial Chamber I. On 27 June 2011, Pre-Trial Chamber I issued three warrants of arrest respectively for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya from 15 until at least 28 February 2011, through the State Apparatus and Security Forces. On 22 November 2011, Pre-Trial Chamber I formally terminated the case against Muammar Gaddafi following his death. The other two suspects are not in the custody of the Court. See [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) retrieved 3 June 2014. Regarding the Sudan, five cases have arisen in the ICC out of the situation in Darfur, Sudan. See ICC website, "Situations and Cases", online: <http://www.icc->

As importantly, the strongest states (especially the five permanent members of the security council) have generally been able to throw their massive weights around in order to protect their protégée states from security council sanctions (e.g. Russia viz-viz Syria and the USA viz-a-viz Israel).<sup>36</sup> As such, it is only reasonable to suggest that neither Syria nor Israel is likely to be ever pushed into the ICC's orbit by the Security Council. Even more importantly for present purposes, as is entailed by the preceding discussion, the weakest states (i.e. economically, militarily, politically, socially and ideationally), most of whom are in Africa, are all-too-often left almost completely exposed to the possibility of ICC intervention, and as such are the paths of least resistance, the weakest links, that a new global court like the ICC that finds itself operating in a world of power politics and which in the beginning is without a single case in its docket ICC, with none likely to come to it easily, can focus and depend on to build its docket, find some work for its teeming staff, and generally justify its existence and operational cost.

Another of the more important (if not pivotal) factors that appear to have driven the ICC's virtually exclusive concentration on prosecuting Africans is the interplay play of domestic *power* matrices within the relevant African countries themselves. These domestic power matrices can also exert a more or less strong influence on how, and to where, international criminal normativity circulates, and on how ICC praxis plays out. Here again, although space limitations do not allow a full adumbration of all the various ways in which this plays out, a couple of examples will suffice to substantiate and illustrate the argument. First, domestic leaders who wield sufficient influence locally or even internationally can become (at least partially) immune to ICC action when they either stay out of the system completely (for e.g. Rwanda) or choose to align closely with a veto power-wielding country which is prepared to block any Security Council referrals of its situation/citizens to the ICC (for e.g. Syria). And more importantly for present purposes, such domestic powers can and do sometimes "self-refer" their own local rivals and enemies to the ICC (although of course the vice versa is hardly ever possible). Of the eight situations currently before the ICC, four of them arose from (African) state party referrals. Uganda, Congo DRC, the Central African Republic (CAR), and Mali self-referred situations occurring on their territories to the ICC.<sup>37</sup> Thus, as such "self-referrals" are one of the important reasons why many of the African cases before the ICC got there in the first place, the responsibility of some members of the governing elite in some African states for exercising their domestic power in ways that have contributed to pushing the ICC into its current geo-stationary orbit above Africa, and which has in turn led to the significant displacement from the continent of alternative international criminal justice approaches to gross human rights abuses, is palpable.

A skeptic may, of course, counter that some other factors other than military, political, economic, social and ideational power could have contributed to the seeming excess of the ICC's virtually exclusive focus on African countries. One such factor that comes readily to mind is the nature of the agreed legal framework that helps shape ICC-

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[http://www.icc.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) retrieved 3 June 2014.

<sup>36</sup> See The Guardian, 22May 2014.

<sup>37</sup> See ICC website, "Situations and Cases", online: [http://www.icc-int.org/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-int.org/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) retrieved 3 June 2014.

related praxis, which is in this case a treaty referred to as the Rome Statute. The plausible and even unassailable points could be made that it is this treaty that provided for highly politicized processes such as Security Council referral to the ICC; allows domestic leaders to refer their local rivals and enemies to the ICC without referring themselves (even though the relevant atrocities are almost always committed by both sides); and provides for the discretion of the Prosecutor of the ICC to allow this kind of bias to obtain. Yet, it should still be remembered that it is military, political, economic, social and ideational pressures in a world of grossly unequal power that shaped and defined the very contents of the Rome Statute itself and that such pressures do continue to shape and orient ICC praxis regardless of the contents of the text of the Rome Statute.

Overall, the key point here is that international criminal justice has increasingly tended to take one particular, generally inflexible, *ICC-heavy*, form in its encounters with gross human rights abuses in Africa, and only in that region, largely because of the interplay of domestic and global power matrices. The fact that the ICC is now playing a far more central (nay near-exclusive) role in Africa and eschews such a role anywhere else in the world is not simply due to the fact that all-too-many egregious abuses of human rights have occurred on that continent, but is better explained by the interplay of such domestic and global power matrices. This interplay is pivotal in shaping international criminal texts, normativity and justice, as well as actual ICC praxis, and does so in a way that produces the peculiar sort of “afro-centrism” that the ICC has thus far exhibited.

## **V. Conclusion:**

In conclusion, the paper has argued, *inter alia*, that although there are pros and cons to the deployment of the ICC to play a central role in the effort to redress gross human rights abuses in Africa and achieve healing and a sustainable/just peace in every relevant situation on the continent, the frequency and near tunnel vision with which that court is being deployed in almost every possible situation on the continent, as if it that were the only possible posture to take or stance to adopt, is fraught. Secondly, the paper suggests that the nature of the choice before us is clearly not a case of the ICC or nothing at all. A range of other reasonable options exist to be selected from in the repertoire of international criminal law and policy. In the living international criminal law, the choice to deploy one or more of the available remedial options (be it the ICC, truth and reconciliation, an amnesty, or something else) tends to be adjusted to the peculiarities of each country or situation at issue. Thus, in spite of the tunnel vision with which the ICC option now tends to be selected, actual international criminal justice praxis is in fact defined by a particular, more or less two-dimensional, kind of sliding scale. The most pivotal explanation (among many possibilities) for this type of tunnel vision (i.e. the *ICC-heavy* form that international criminal justice praxis tends to take in its encounters with gross human rights abuses in Africa), and the partial eclipsing over only African skies of the sliding scale that otherwise defines international criminal justice, is the interplay of domestic and global power matrices (where power is understood not merely in military, economic, and political terms, but also in social and ideational senses).

Finally, to be clear, no outright opposition to the deployment of the ICC in Africa is articulated or even suggested in this paper. The background point that is being made is that reasonable and viable alternatives to ICC deployment clearly exist, and may in some

cases even be better suited to the particular context at issue. The knee-jerk, inexorable deployment of the ICC, which in any case has tended to be over-determined by power, ought to be eschewed. Just because we have the ICC hammer does not mean that every gross human rights abuse problem is a nail.