

# BETWEEN TUNNEL VISION AND A SLIDING SCALE: POWER, NORMATIVITY AND JUSTICE IN THE PRAXIS OF THE INTERNATIONAL CRIMINAL COURT

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## I. INTRODUCTION

That power (military, economic, political, social or ideational) 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 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 (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> The deployment of the ICC is clearly important to the

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1. 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 generally OBIORA CHINEDU OKAFOR, *THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES AND INTERNATIONAL INSTITUTIONS* 13–61 (2007).

2. See Dire Tiladi, *The African Union and International Criminal Court: The Battle for the Soul of International Law*, 34 SAYIL 57, 58 (2009) (explaining that the African Union chose not to cooperate with the ICC because it is seen as a new form of Western Imperialism since it only prosecutes African subjects); see also Elise Keppler, *Managing Setbacks for the International Criminal Court in Africa*, 56 J. AFR. L. 1, 4, 6–7 (2012) (exploring the accusation of some

overall effort to end impunity for gross human rights abuses around the world (in general) and in Africa (in particular). But 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 the manifest or immanent/intrinsic/inherent appropriateness of the Court's 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. 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 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 not only in Africa, but around the world as well. For instance, without the ICC's intervention in 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 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, 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 alternative judicial framework to weaker domestic judicial institutions. These domestic institutions are confronted with the challenge of mediating the process of

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northern African nations that the ICC's uneven application of international justice against African nations is a new form of imperialism, contrasted with the strong support the ICC enjoys across the African continent).

3. Obiora Chinedu Okafor & Uchechukwu Ngwaba, *The International Criminal Court as a Transitional Justice Mechanism in Africa: Some Critical Reflections*, 9 INT'L J. TRANSIT. JUST. 90 (2015).

transition from a period of conflict toward a more peaceable epoch. This more democratic era is then 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 institutions 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. However, global power matrices function in ways that ensure that the criminal justice systems of the more powerful states, which are sometimes visibly weak 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.<sup>4</sup>

Although there are some who, on reasonable grounds, doubt the viability of the deterrence argument,<sup>5</sup> to the extent that criminal trials and punishment can ever deter future criminal behavior, 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>6</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 too many of us with 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 the enormity and vast extent of the incidence of international criminality in too many other parts of the globe.<sup>7</sup> Given their notoriety, it is hardly necessary to name all of these other places. However,

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4. See Michael Ignatieff, *Is the International Community Abandoning the Fight Against Impunity?*, INT’L CTR. FOR TRANSIT. JUST. (Feb. 9, 2015), <https://www.ictj.org/debate/article/justice-interests-of-powerful-states> (listing examples of human rights violations committed by many different countries).

5. See J.L. Brierly, *Do We Need an International Criminal Court?*, 8 BRIT. Y.B. INT’L L. 81, 84 (1927) (explaining that it is unlikely that a war criminal will consider possibly having to account to an international court in the future).

6. See Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT’L L. 395, 451–53 (2010) (arguing that although not empirically proven, the court likely served as a deterrent).

7. See, e.g., Ignatieff, *supra* note 4.

the names Chechnya, Iraq, Afghanistan, and Colombia—whereby conservative estimates cite that tens of thousands have been slaughtered in a manner that suggests international criminal conduct—may ring a bell in this respect.<sup>8</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 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 have a better chance of meeting the justice of the particular circumstances at issue. For instance, 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)<sup>9</sup> was adopted in the South Africa case.<sup>10</sup> Although that version of international criminal justice was widely praised around the 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>11</sup>

The third adverse effect which is likely to result 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 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 powerful argument for gaining or retaining domestic political power and influence. There is significant worry, even among strong supporters of the ICC, that the Court has wittingly or unwittingly laid itself wide open to the charge that it has become an instrument for the subordination of the weaker African states at the very same time it seems to be exhibiting a glaring

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8. Jill Reilly, *British Soldiers to be Investigated by International Crimes Court Over Claims They Committed War Crimes in Iraq*, DAILY MAIL.COM (May 13, 2014, 11:38 AM), <http://www.dailymail.co.uk/news/article-2627228/BREAKING-NEWS-British-soldiers-investigated-International-Criminal-Court-claims-committed-war-crimes-Iraq.html>.

9. See Nguyen Vu Lan, *Law, Justice, Truth, and Forgiveness? A Case Study of South Africa*, 6 SING. L. R.1, 1–2 (2014–15) (exploring the criticisms against the “truth and reconciliation” approach).

10. See Desmond Tutu, *Truth and Reconciliation Commission, South Africa*, in ENCYC. BRITANNICA (2014) (summarizing the “truth and reconciliation” approach).

11. See Kevin Avruch & Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 2 SOC. JUST.: ANTHROPOLOGY, PEACE AND HUM. RTS. 47, 49–56 (2001) (discussing the “truth and reconciliation” approach to transitional justice and aspects of the South African instantiation of this approach).

impotence in the face of global power.<sup>12</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>13</sup> For instance, whether or not one agrees with him, the charge famously levied by the then Sudanese Ambassador to the United Nations (U.N.), Abdalmahmoud Abdalhaleem, against the ICC's first prosecutor, Luis Moreno-Ocampo, when he referred to the latter as "a screwdriver in the workshop of double standards,"<sup>14</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>15</sup> This charge is connected to a deeply-held and historically understandable aversion among many on the continent to imperialism, foreign subjugation, and racially discriminatory conduct.<sup>16</sup> This aversion remains widespread within and beyond the continent even to this day.<sup>17</sup> As Shashi Tharoor, a former U.N. Assistant Secretary General once wrote while in office:

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

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12. 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 Reilly, *supra* note 8 (discussing a preliminary investigation of British troops for abuses of Iraqi prisoners in response to allegations of beatings and sexual assault).

13. See Obiora Okafor, *Is there a Legitimacy Deficit in International Legal Scholarship and Practice?*, 13 INT'L INSIGHTS 91, 101–05 (1997) (indicating that African nations' nationalism results from colonial rule and from their lack of power in international relations as compared to the global north).

14. Simon Tisdall, *Technicians in the Workshop of Double Standard*, THE GUARDIAN (July 28, 2008), <https://www.theguardian.com/commentisfree/2008/jul/29/sudan.warcrimes>.

15. Keppler, *supra* note 2, at 8. However, what Keppler fails to appreciate 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 line. *Did the ICC Help Uhuru Kenyatta Win Kenyan Election?*, BBC NEWS, (Mar. 11, 2013), <http://www.bbc.com/news/world-africa-21739347>. 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 generally OBIORA OKAFOR, LEGITIMIZING HUMAN RIGHTS NGOS: LESSONS FROM NIGERIA (2007); see Makau Mutua, *The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa*, 17 MICH. J. INT'L L. 591, 601 (1996) (indicating that NGOs are sometimes government organized as opposed to organized by the people).

16. See Okafor, *supra* note 13 (explaining that African leaders and citizens are especially sensitive to discrimination and power imbalances because of Africa's colonial subjugation by the nations of the current global north).

17. See Shashi Tharoor, *The Messy Afterlife of Colonialism*, 8 GLOBAL GOVERNANCE 1, 1 (2002) (explaining that colonialism has been used by African leaders as blame their countries' failures and that past colonialism is instructive on understanding the world's problems today, including in Africa).

last decades of the twentieth century suggest that, curiously enough, it remains a relevant factor in understanding the problems and the dangers of the world in which we now live.<sup>18</sup>

It was no wonder then that this issue of ICC double standards gained so much currency that the Chairman of the African Union (AU), on his part, openly complained that while the AU was “not against international [criminal] justice” it seems that “Africa [had] become the laboratory to test the new international law.”<sup>19</sup> If this is so, then it should not surprise us that the central place that has been assigned to the ICC in transitional justice praxis on the African continent can (against the background of its *perceived* anti-African partiality) indirectly arm certain domestic leaders and actors with a more or less powerful argument for gaining, retaining or augmenting popular support, and therefore political power and influence. With its perceived popular legitimacy denuded in significant measure by its apparent geo-stationary orbit over Africa and the active (and sometimes cynical) mobilization of that fact by political agents and leaders on the continent, certain political leaders who have been targeted by the court may paradoxically gain in popularity in some of these places in part because of their perceived “victimization” (in terms of being singled out) by the court, or their perceived “resistance” to that court. Indeed, as has been noted already, many keen and knowledgeable observers of Kenya have testified that this was precisely the case during the last Kenyan presidential elections.<sup>20</sup>

The last negative implication of the centrality that the ICC is increasingly assuming in transitional justice praxis in Africa is that, somewhat paradoxically, this approach can—in certain contexts—lead to the exacerbation or augmentation of domestic repression, conflict and/or violence. Sitting officials of a targeted country generally expect to be hauled before the ICC and be subsequently tried, convicted, and jailed, should they ever leave office. That expectation combined with the protection that sitting tight in office usually affords most of them results in the incentive structure that is increasingly being produced by the rather frequent and liberal deployment of the ICC in Africa. The incentive tends to encourage highly repressive and violent leaders to do all that is possible to remain in office as long as they possibly can to avoid arrest and prosecution by the ICC. This is especially so when the relevant leaders are not all that favored by the relevant global power matrices. And the road to their continued stay in office is not surprisingly lined with the bodies of killed, tortured, or otherwise seriously abused

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18. *Id.*

19. *Vow to Pursue Sudan over Crimes*, BBC NEWS (Sept. 27, 2008) <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/7639046.stm>; *see also Rwandan President says ICC Targeting African Countries*, SUDAN TRIBUNE (July 31, 2008) <http://www.sudantribune.com/spip.php?article28103> (quoting the Rwandan president’s dismissal of the ICC because of colonialism). *See African Union Accuses ICC Prosecutor of Bias*, REUTERS (Jan. 29, 2011) <http://www.reuters.com/article/ozatp-africa-icc-idAFJ0E70T01R20110130> (indicating that the AU president accused the ignoring crimes in other parts of the world such as Iraq and Argentina and focusing on Africa).

20. *See Did the ICC Help Uhuru Kenyatta Win Kenyan Election?*, *supra* note 15 (indicating that Mr. Kenyatta’s indictment by the ICC helped him win his election).

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. 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.<sup>21</sup> This is also likely the case with Sudan's El-Bashir.<sup>22</sup>

In both cases, repression, conflict and/or violence were accentuated in the result.<sup>23</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 in Africa, it would not 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. Furthermore, 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.<sup>24</sup> 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.<sup>25</sup> Arguably this was a much more

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21. *Mugabe Fears ICC Prosecution*, ZIMBABWE DAILY (June 11, 2012), <http://www.thezimbabwedaily.com/news/12157-mugabe-fears-icc-prosecution.html>; John Cassim, *Mugabe Fights Age, Wife and more Dissenting Voices as Zimbabwe Burns*, OKAYAFRICA (July 22, 2016), <http://www.okayafrika.com/in-brief/robert-mugabe-war-veterans-election-2018/>.

22. *See Sudan's Omar al-Bashir 'To Step Down in 2020'*, BBC NEWS (Apr. 7, 2016), <http://www.bbc.com/news/world-africa-35983518> (noting Sudanese president al-Bashir ICC indictment and subsequent resignation announcement).

23. In Zimbabwe, an upsurge in violence and repression greeted the seeming prospect that the opposition would unseat Robert Mugabe in the 2008 elections. *Post-Election Violence Increase in Zimbabwe*, AMNESTY INT'L (April 18, 2008), <http://www.amnesty.org/en/news-and-updates/news/post-election-violence-increases-zimbabwe-20080418>. This repression continues to this day, although it is no longer as violent. Dewa Mavhinga, *Zimbabwe Returns to Ugly Past*, HUMAN RIGHTS WATCH (Sept. 12, 2016), <https://www.hrw.org/news/2016/09/12/zimbabwe-returns-its-ugly-past>. Violence became less necessary since the opposition has been largely defeated politically and otherwise caged by Mr. Mugabe. *World Report 2014: Zimbabwe*, HUMAN RIGHTS WATCH, <http://www.hrw.org/world-report/2014/country-chapters/zimbabwe?page=2> (last visited Feb. 10, 2017). In the Sudan, al-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. *The Case Against Bashir*, BASHIRWATCH, <http://bashirwatch.org> (last visited Feb. 10, 2017).

24. These agreements were designed to prevent, and did prevent, millions from being killed in an all-out assault by the then rebels on the capital, Monrovia. *See Nigerian Agreement to Hand Over Taylor*, HUMAN RIGHTS WATCH (Mar. 26, 2006), <https://www.hrw.org/news/2006/03/26/nigeria-agreement-hand-over-taylor> (explaining how Nigeria secured a resignation agreement with Liberian president Charles Taylor and agreed to transport Taylor to a special court in Sierra Leone to face an indictment alleging human rights violations after the Liberia civil war).

25. *Id.*

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 such a case, the rebels would have been forced to storm Monrovia, resulting in millions of civilian lives being 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 that the deployment of the ICC to help address gross human rights abuses on the African continent has its pros and cons. However, its deployment to play as central a role as it currently does in that geopolitical 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 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 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. THE EXISTENCE OF A “SLIDING SCALE” IN THE LIVING INTERNATIONAL CRIMINAL JUSTICE PRAXIS

Africa and the world are not faced with some type of a “Faust-like bargain”<sup>26</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. 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, which gives life-sap both to the ICC and to much contemporary international criminal justice praxis.<sup>27</sup> The term which has come to describe this idea's iteration in the Rome Statute is “complementarity.”<sup>28</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

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26. THE FAUSTIAN CENTURY: GERMAN LITERATURE AND CULTURE IN THE AGE OF LUTHER AND FAUSTUS 30–33 (J.M. van der Laan & A. Weeks eds., 2013).

27. See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (establishing the perimeters of International Criminal Court).

28. Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CHINESE J. INT'L L. 121 (2005).



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.<sup>29</sup> 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 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 is the general weighting of that scale in favor of domestic criminal justice; though, 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 inexorable and relentless deployment of the ICC to redress each and every single incidence of gross human rights violations in Africa. Thus, much space exists between the total surrender of our moral integrity at the feet of power and in the unprincipled pursuit of success at reconciliation and peace-building and a total lack of action. This field of play starts with the kind of constructive impunity that effectively resulted from post-apartheid South Africa's rather peculiar sort of "truth and reconciliation" process.<sup>30</sup> It extends through variations of that process that were adopted in places like Argentina, Uruguay, Bolivia, Nigeria, and East Timor.<sup>31</sup> It continues through general amnesties, limited amnesties, limited/mass domestic prosecutions, and mixed international/domestic courts (as in Sierra Leone<sup>32</sup> and now in Senegal in regards to former President of Chad's Hissen Habre's case<sup>33</sup>). And it ends with institutions such as the proposed African Court of

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29. Rome Statute of the International Criminal Court, *supra* note 27, art. 17.

30. On the "truth and reconciliation" approach to transitional justice and aspects of the South African instantiation of this approach, see Avruch & Vejarano, *supra* note 11.

31. *Id.* at 37.

32. See Jalloh, *supra* note 6, at 398 (describing the cooperation between the United Nations and Sierra Leone government to form the Special Court for Sierra Leone).

33. Roland Adjovi, *Introductory Note on the Agreement on the Establishment of the*

Justice, Human Rights and Crime.<sup>34</sup>

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 to gross violations that have 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 no more brutal than those so far committed in Syria.<sup>35</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, 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.

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 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>36</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 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.

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*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*, 52 I.L.M. 1020 (2013); see Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?*, 11 J. INT'L CRIMINAL JUST. 1139 (2013) (describing the international judiciary effort to prosecute former President of Chad, Hissen Habre, in the Senegalese Courts).

34. *Welcome to the African Court*, AFR. COURT OF HUM. & PEOPLE'S RTS., <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court> (last visited Feb. 10, 2017).

35. *See Syria's Death Toll Now Exceeds 140,000: Activist Group*, THE HUFFINGTON POST (Feb. 15, 2014), [http://www.huffingtonpost.com/2014/02/15/syria-death-toll\\_n\\_4794010.html](http://www.huffingtonpost.com/2014/02/15/syria-death-toll_n_4794010.html) (stating the death toll from the Syrian Civil War was over 140,000 in April 2014). In contrast, the death toll of the Cote D'Ivoire post-election crisis is 3,000, or less than 2.5% of the Syrian cost of life. *Cote d'Ivoire/Ivory Coast*, GENOCIDE WATCH, <http://www.genocidewatch.org/cotedivoire.ht> ml (last updated July 31, 2013).

36. *See* Kepler, *supra* note 2, at 6 (noting that while it is true that all situations under ICC investigation are currently based in Africa, the majority of these investigations are the result of voluntary referrals by the African governments of states where the crimes were committed).

In concluding this section of the paper, it bears emphasis that when it comes to redressing the gross human rights abuses that are committed on the African continent and 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

Why, then, has international criminal justice increasingly tended to take one particular 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>37</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>38</sup> cannot be explained simply by stating the obvious fact that such abuses do occur all too often in that region. 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 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>39</sup> As it turns out, and not all that

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37. 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 Uppsala Conflict Data Program, Armed Conflict by Region, 1946–2012*, UPPSALA U., [http://www.pcr.uu.se/digitalAssets/66/66314\\_1conflict\\_region\\_2012.pdf](http://www.pcr.uu.se/digitalAssets/66/66314_1conflict_region_2012.pdf) (last visited Feb. 10, 2014) (discussing the rate of abuses across varying regions).

38. There is no disagreement whatsoever that the ICC has (at least thus far) focused virtually all of its attention on the African continent. *See* Keppler, *supra* note 2, at 6.

39. On this point I agree with constructivist international law and international relations scholars. *See, e.g.*, Obiora Chinedu Okafor and Uchechukwu Ngwaba, *Between Tunnel Vision and a Sliding Scale: Power Normativity and Justice in the Praxis of the International Criminal*

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 the 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 U.S.) have opted out of the ICC's jurisdiction and reach,<sup>40</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>41</sup> In effect, the status of some of these great powers as permanent members of the U.N. Security Council, and the consequential veto power they exercise over Security Council decision-making, has meant that the Security 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>42</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 have also opted out of the ICC's reach,<sup>43</sup> yet their weak influence in international relations has meant that, in reality, they have far fewer chances of avoiding being pushed into the ICC's orbit, or evading the ICC's grip. This has certainly been the case with Libya and Sudan, at least as in relation to some of its citizens.<sup>44</sup> As importantly, the strongest states,

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*Court*, 40 AFR. DEV. 55, no. 2 (2015).

40. See *The States Parties to the Rome Statute*, INT'L CRIMINAL COURT, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx/](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx/) (last visited Feb. 10, 2017) ("124 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States . . .").

41. In the case of the U.S., at least, it has—so far successfully—gone to great lengths to conclude bilateral treaties with a host of countries to ensure that its citizens would never be hauled before the ICC. See *Bilateral Immunity Agreements*, INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=bia> (last visited Feb. 10, 2017) (listing Bilateral Immunity Agreements between the United States and the ICC).

42. See Rome Statute, *supra* note 27, art. 13(b) (permitting the Security Council to refer cases to the Prosecutor via authority granted by Chapter VII of the U.N. Charter).

43. See *The States Parties to the Rome Statute*, *supra* note 40 (reflecting that Rwanda, Libya and Sudan are not parties to the Rome Statute).

44. On February 26, 2011, the U.N. Security Council unanimously voted to refer the situation in Libya to the Office of the Prosecutor (OTP) at the ICC. S.C. Res. 1970, ¶ 4 (Feb. 26, 2011). On March 3, 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 June 27, 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 through the State Apparatus and Security Forces from February 15–28, 2011. On November 22, 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. *Situation in Libya*, INT'L CRIMINAL COURT., <https://www.icc-cpi.int/libya> (last visited Feb. 10, 2017). Five cases have arisen in the ICC out of the situation in Darfur, Sudan. *Situation in Darfur*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/darfur> (last visited Feb. 10, 2017).

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 vis-à-vis Syria and the U.S. vis-à-vis Israel).<sup>45</sup> As such, it is only reasonable to suggest that neither Syria nor Israel is likely to ever be pushed into the ICC's orbit by the Security Council. Even more important 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. These states are prime targets for a new global court like the ICC that finds itself operating in a world of power politics and which, in the beginning, was without a single case in its docket, with none likely to come to it easily. The ICC can focus and depend on these weaker states to build its docket, find some work for its teeming staff, and generally justify its existence and operational cost.<sup>46</sup>

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 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 immune to ICC action when they either stay out of the system completely (i.e., 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 (i.e., Russia vis-à-vis Syria). 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 opposite is hardly ever possible). Of the ten situations currently before the ICC, five of them arose from African state party referrals.<sup>47</sup> Uganda,

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45. See Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, THE GUARDIAN (May 22, 2014, 11:07 AM), <https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court> (reporting the fourth time that Russia blocked a U.N. Security Council resolution on Syria, a resolution that the U.S. supported after ensuring protection for Israel, which currently occupies the Syrian Golan Heights).

46. Simon Allison, *African Revolt Threatens International Criminal Court's Legitimacy*, THE GUARDIAN (Oct. 27, 2016, 10:32 AM), <https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia>; Adam Taylor, *Why So Many African Leaders Hate the International Criminal Court*, WASH. POST (June 15, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?utm\\_term=.6bc3f8377394](https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?utm_term=.6bc3f8377394).

47. See *Situations Under Investigation*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/pages/situations.aspx> (last visited Jan. 21, 2017) (summarizing all ten Situations under

Democratic Republic of the Congo, Mali, and twice the Central African Republic (CAR), self-referred situations occurring in their territories to the ICC.<sup>48</sup> Thus such “self-referrals” are one of the important reasons why many of the African cases before the ICC got there in the first place.<sup>49</sup> It is evident that some members of the governing elite in some African states are responsible for exercising their domestic power in ways that have contributed to pushing the ICC into its current geo-stationary orbit above Africa. Thus, these members are also responsible for the significant displacement of alternative international criminal justice approaches to gross human rights abuses on the continent.

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 the ICC-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. It 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).<sup>50</sup> Finally, it provides for the discretion of the Prosecutor of the ICC to allow this kind of bias to obtain.<sup>51</sup> 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 which continue to shape 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 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,<sup>52</sup> is not simply due to the fact that egregious abuse of human rights occurred on that continent, but is better explained by the interplay of domestic and global power matrices. This interplay is

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ICC investigation).

48. *Id.*

49. Solomon Dersso, *The International Criminal Court’s Africa Problem*, AL JAZEERA ENGLISH (June 11, 2013), <http://www.aljazeera.com/indepth/opinion/2013/06/201369851918549.html>.

50. *Id.*

51. See Carsten Stahn, *How fair are Criticisms of the ICC?*, OUPBLOG (Nov. 23, 2015), <http://blog.oup.com/2015/11/criticisms-international-criminal-court/> (highlighting the tension of the ICC using “thematic” investigations for specific human rights violations, which alone may not address all of the issues that feed into the overall conflict situation).

52. See Richard Todwong, *Africa: International Criminal Court – Africa Is a Target, Not Participant*, ALLAFRICA (May 20, 2016), <http://allafrica.com/stories/201605200850.html> (questioning why the ICC had not gone after other states outside of Africa, including Iraq, Afghanistan, Israel-Palestine, Mexico, Colombia, and Syria).

pivotal in shaping international criminal texts, normativity, and justice, as well as actual ICC praxis. It does so in a way that produces the peculiar sort of “afro-centrism” that the ICC has thus far exhibited.

## V. CONCLUSION

In conclusion, 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. However, 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. 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.<sup>53</sup> 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 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).

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53. See Krista Larson, *AP Interview: New Gambia Leader to Set up Truth Commission*, ASSOCIATED PRESS (Jan. 21, 2017, 1:44 PM), [http://hosted.ap.org/dynamic/stories/A/AF\\_GAMBIA\\_NEW\\_PRESIDENT?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT](http://hosted.ap.org/dynamic/stories/A/AF_GAMBIA_NEW_PRESIDENT?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT) (reporting that newly elected Gambian President, Adama Barrow, announced that he will launch a Truth & Reconciliation Commission to explore alleged human rights abuses by outgoing President Yahya Jammeh). *But see*, *The Gambia 'Missing Millions after Jammeh Flies into Exile*, BBC NEWS (Jan. 23, 2017, 7:22AM), <http://www.bbc.com/news/world-africa-38714007> (reporting that former President Jammeh may have escaped the country with more than \$11 million from government accounts).