



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

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Abstract

This article examines the relatively extensive, liberal and increasing deployment of the International Criminal Court (ICC) as the central mechanism for redressing gross human rights abuses in Africa. It shines the spotlight on how global and domestic power matrices affect the character and behaviour of international criminal justice norms and institutions, including our sense of what the model approach to international criminal justice ought to be in Africa and elsewhere. Three inter-related arguments are advanced as follows: first, the deployment of the ICC to help redress gross human rights abuses on the African continent has its pros and cons, but its deployment to play a central role as it currently does is fraught with suspicion as regards the true intention; second, when it comes to redressing the gross human rights abuses that are committed on the African continent, as elsewhere, the ICC is not the only viable and available option – there are a range of other reasonable options in the repertoire of international criminal law and policy; and third, it is largely because of the interplay of domestic and global power matrices (and not in the main because of some immanent sense of morality or logic) 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.

Résumé

Cet article examine le déploiement relativement large, libéral et croissant de la Cour pénal international (CPI) en tant que mécanisme central pour réparer les violations graves des droits de l'homme en Afrique. Il fait briller les

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projecteurs sur la manière dont les matrices de pouvoir mondiaux et domestiques affectent le caractère et le comportement des normes et institutions de la justice internationale, y compris notre sens de ce que l'approche modèle de la justice pénale internationale devrait être en Afrique et ailleurs. Trois arguments étroitement liés sont avancés tel qu'il suit : premièrement, le déploiement de la CPI pour aider à réparer les violations graves aux droits humains sur le continent a ses avantages et ses inconvénients, mais son déploiement pour jouer un rôle central comme il le fait actuellement est très questionnable ; deuxièmement, lorsqu'il s'agit de réparer des violations graves des droits humains qui sont commis sur le continent, comme ailleurs, la CPI n'est pas la seule option viable et disponible – il existe une gamme d'autres options raisonnables dans le répertoire de la loi et de la politique pénale internationale ; et troisièmement, c'est largement à cause de l'interaction des matrices de pouvoir domestiques et globales (et certainement pas à cause de quelques sens de moralité immanente ou de logique) que la justice pénale internationale eu de plus en plus tendance à adopter une forme particulièrement, généralement inflexible, forme de CPI dans sa rencontre avec les violations graves des droits humains en Afrique.

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.¹ 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 and domestic power matrices affect the character and behaviour of international criminal justice norms, including our sense and sensibility of what the ideal, standard, or model approach 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 and domestic power matrices affect our sense of the appropriateness or 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 another? As important, are these global and domestic power matrices responsible to any significant extent for the apparent 'crowding out' and displacement of alternative criminal justice approaches to the gross human rights violations that have occurred on the African continent owing to ICC prosecutions?² As important as the deployment of the ICC is to the overall effort to end impunity for gross human rights abuses around the world and in Africa in particular, to what extent is the 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 than of the manifest or intrinsic appropriateness of that approach or posture? It is to these more specific questions that we turn most of our analytical attention in this article.

As such, this article attempts to explore in more depth the causes, effects and implications of the Court's near-total focus on Africa, and whilst showing that a plethora of other reasonable options are available to be deployed, in conjunction with an appropriately reduced usage of the ICC, to effectively work towards international criminal justice in Africa – hence debunking the 'ICC-or-nothing' myth. To this end, the article is divided into five sections. In the second section, 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 three 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 four, the relationships among global and domestic power matrices on the one hand, and the tendency to dispatch the ICC to deal with gross human rights abuses in Africa, and Africa alone, on the other hand, are analysed. In section five, a summary of the arguments and some concluding comments are presented.

The Pros and Cons of ICC Deployment on the African Continent³

The Positive 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 too many places. 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 exists of the kind that an ICC intervention may help. 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 gross violation of human rights towards 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 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 existing in these types of situations. However it must be kept in mind that global power matrices often 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.

Although there are some who, on reasonable grounds, doubt the viability of the deterrence argument 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 state signatories to the Rome Statute (Brierly 1927; Jalloh 2010). For these purposes however, as the question of the possible deterrent effects 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.

The Negative Implications

A first negative consequence is somewhat ideational and conceptual; that the relatively 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. As a result, this has left many 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 – its near-total focus on that continent – has wittingly or unwittingly significantly masked the enormity and vast extent of the incidence of international criminality in many other parts of the globe. Given their notoriety, it is hardly necessary to name all of these other places, but Chechnya, Iraq, Afghanistan and Colombia (where by conservative estimates tens of thousands have been slaughtered in a manner that suggests international criminal conduct) come to mind in this respect.⁴

Additionally, this 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 are hardly monolithic, settled or representative of a 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 more nuanced international criminal justice approaches, despite the fact that these alternatives may in some cases 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 case of South Africa, and 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 – despite the alleged crimes committed in some of these places being comparatively much less egregious than in the South African case.⁵

The third adverse effect which is likely to result, if it has not already done so, from the centrality that the ICC is increasingly assuming in Africa, 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, especially because of the behaviour of its first prosecutor, has wittingly or unwittingly laid itself wide open to the charge that it is has become an instrument for the subordination of weaker African states, at the same time as it seems to be exhibiting a glaring impotence in the face of global power.⁶ The point here is less about the accuracy of this charge, and more about the *perceived* legitimacy of the Court and its activities (Okafor 1997). 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 – referring to him as 'a screwdriver in the workshop of double standards' – resonated among a significant percentage of observers on the African continent, and not just within the ranks of cynical leaders (Tisdall 2008).⁷ This charge is connected, for many on the continent, with a deeply-held and historically understandable aversion to imperialism, foreign subjugation and racially

discriminatory conduct – an aversion that remains widespread within and beyond the continent to this day (Okafor 1997; Tharoor 2002). As former UN Assistant Secretary General Sashi Tharoor 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 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 (Tharoor 2002:1).

It was no wonder then that this issue of ICC double-standards has gained so much currency that the former chair of the AU, for 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’ (BBC News 2008). 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, 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 many knowledgeable observers of Kenya have testified, this was precisely the case during the last Kenyan presidential elections (BBC News 2013).

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. Here the point is that given the expectation of certain serving officials, including sitting presidents, of a targeted country of being hauled before the ICC and subsequently tried, convicted and jailed, should they ever leave office; and given the concomitant fact of the protection that sitting tight in office usually affords most of them; the incentive structure that is increasingly being produced by the frequent and liberal deployment of the ICC in Africa tends to encourage highly repressive and violent leaders to do all that is possible to remain in office as long as they possibly can, so as to avoid arrest and prosecution by the ICC. This is especially so when the relevant leaders are not particularly favoured by the relevant global power matrices. Moreover, the road to their continued

stay in office is unsurprisingly lined with the bodies of killed, tortured or 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. This paradoxically impedes the search for a just and lasting peace in the country at stake. For example, there is a good argument to be made that the prospect of being hauled before the ICC or similar 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 al-Bashir. In both cases, repression, conflict and/or violence were accentuated as a result.⁸ There is a good argument to be made that were the ICC not to have been assigned as prominent a role in redressing gross human rights abuses in 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 standing down from their siege on Monrovia. It can be argued that this was a more humanitarian and even 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 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 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 this geo-political region is 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 Congo, Uganda and Côte 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 or policy of a sliding scale; that is, by the realization that there is a sense in which international criminal law and policy, as it is actually practised and experienced by real living people, may in fact be defined by such a sliding scale. It is to the actuality, nature, and implications of this sliding scale that our attention now turns.

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’ in which we must either relentlessly deploy the ICC, or some other high agent of international criminal justice, to redress every single incidence of gross human rights violations in Africa or elsewhere, or else effectively surrender our moral integrity at the feet of power 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 and trials or nothing (van der Laan and Weeks 2013).

Even at a very basic legal and textual level, it seems fair to state that every scholar of international criminal law and policy would know that this idea – that it is not ‘either the ICC or nothing’ – is, however insufficiently, built into the Rome Statute.⁹ The term which has come to describe this idea’s iteration in the Rome Statute is ‘complementarity’ (Yang 2005). Although it is nowhere defined in the Rome Statute itself, the term denotes the basic idea (Rome Statute: Article 17) that the ICC is not designed to be, and is not generally expected to become, the primary site for redressing, or trying people criminally for, gross violations of human rights that amount to international crimes. Instead, domestic criminal justice systems of the relevant countries are meant to play the more central role in such endeavours – but only as long as they are willing and able to do so. Here, unwillingness is mostly a function of political will and domestic power calculus, and inability is more a function of physical and/or institutional incapacity.

One important feature of 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. Other viable approaches are available, and some of these may 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

above; *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 favour of domestic criminal justice; although, in practice, this weighting seems to have been turned upside down in relation to the African continent.

What is more, it is clear that even in the face of weaker or incapacitated domestic criminal justice institutions, or of recalcitrant and resistant but powerful domestic political forces, there is a lot of space 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; through variations of that process that were adopted elsewhere (Avruch and Vejarano 2002); through general amnesties, limited amnesties, limited or mass domestic prosecutions, and mixed international and domestic courts (Jalloh 2010; Adjovi 2013; Williams 2013); to the proposed African Court of Justice, Human Rights and Crime;¹⁰ there is a large field that lies in between outright impunity on the one hand and fully international or ICC-style prosecutions and 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 been at least as egregious as the ones that have attracted the ICC to its current African orbit. For example, the violations committed in Côte d'Ivoire were no more brutal than those so far committed in Syria.¹¹ These alternatives between either outright impunity or the inflexible deployment of the ICC are each part of a range of reasonable available options to be selected 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 the 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 the foregoing discussion is that it is simply not true to allege or imply, as too many commentators 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 (Keppler 2012). 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 open when the international crimes allegedly committed by the great powers and powerful domestic elements in places such as apartheid-era South Africa, Chechnya and Iraq were met with outright or constructive impunity.

The overarching point being that when it comes to redressing gross human rights abuses that are committed on the African continent (as elsewhere), it is not a case of the ICC or nothing at all. A range of other reasonable options exist 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 behaviour on a global scale, as opposed to assessing it based on its approach to Africa, it becomes 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.

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 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 this ‘global’ court playing a far more central role in Africa today than it has ever done anywhere else in the world?¹²

Clearly, if the intensity and frequency of such abuses in Africa are not much higher (and are in some respects lower) than on some other continents, this tendency of the ICC to fly in a kind of geo-stationary orbit over only Africa cannot be explained by simply stating the obvious fact that such abuses do occur too often in that region.¹³ As such, some other factors must also be at play in the production of such a biased outcome, which is 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 developed here 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.¹⁴ As it turns out, and not all that surprisingly, these global power matrices exert a strong influence on how, and in which direction, international criminal normativity circulates, and on how ICC praxis plays out. It is impossible to completely work out and explain all the ways in which this plays out, but a number of examples suffice to support and illustrate the argument. For example, certain great powers (such as Russia, China and the US) have opted out of the ICC's jurisdiction and reach,¹⁵ and have generally been able to remain immune from its grasp 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.¹⁶ 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 or situation to the ICC when the targeted state has otherwise completely opted out of the ICC system), is almost totally incapable of forcing them into the ICC's orbit via a reference to that alleged 'global' court. Of course, some much weaker states which are not permanent members of the Security Council (such as Rwanda, Libya and Sudan) have, on paper at least, also opted out of the ICC's reach, yet their weak influence in international relations has meant that in reality they have far less chance of avoiding being pushed into the ICC's orbit or of evading the ICC's grip. This has certainly been the case with Libya and Sudan – at least in relation to some of its citizens.¹⁷ As importantly, the strongest states, especially the five permanent members of the Security Council, have generally been able to throw their considerable weight around in order to protect their protégé states from Security Council sanctions: an example being Russia vis-à-vis Syria and the US vis-à-vis Israel (Black 2014). As such, it is reasonable to suggest that neither Syria nor Israel are likely to be pushed into the ICC's orbit by the Security Council. Even more importantly for present purposes, the weakest states economically, militarily, politically, socially and ideationally, most of which are in Africa, are often left almost completely exposed to the possibility of ICC intervention. As such, they become the paths of least resistance, or the weakest links, which a new global court like the ICC (operating in a world of power politics and which was in the beginning without a single case in its docket, with none likely to come to it easily) can focus and depend on to build its docket, use to find some work for its teeming staff and generally justify its existence and operational costs.

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 exert a stronger or weaker 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 occurs in practice, a couple of examples 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 (in the case of Rwanda) or choose to align themselves closely with a veto power-wielding country which is prepared to block any Security Council referrals of its situation or citizens to the ICC (for example Syria and Israel). 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 before the ICC at the time of writing, four of them arose from (African) state party referrals. Uganda, the DRC, the Central African Republic (CAR), and Mali self-referred situations occurring in their territories to the International Criminal Court (ICC: 'Situations and Cases'). 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 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.

Of course, a sceptic may 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-related praxis, the treaty referred to as the Rome Statute. The plausible and even unassailable point could be made that it is this treaty that provided for highly politicized processes such as Security Council referrals to the ICC, and 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 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 continue to shape and orient ICC praxis, regardless of the contents of the text of the Rome Statute.

Overall, the key point 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 nearly exclusively in the case of the African continent, largely because of the interplay of domestic and global power matrices. The fact that the ICC is now playing a 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 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.

Conclusion

This article has argued, *inter alia*, that although there are pros and cons of the deployment of the ICC playing a central role in the effort to redress gross human rights abuses in Africa to achieve healing and a sustainable and 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 with questions. Secondly, the article suggests that the nature of the choice before us is not a case of the ICC or nothing at all. A range of other reasonable options exist to be selected from the repertoire of international criminal law and policy. In 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 article. The background point is that reasonable and viable alternatives to ICC deployment do exist, and may in some cases 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.

Notes

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 Okafor 2007b.
2. As is now well known, the ICC and the prosecutorial/punitive international criminal justice approach that it exemplifies has 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. E.g. see Tiladi 2009; and Keppler 2012.
3. This section of the paper is based on our article entitled 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections' (2015) 9 (1) *International Journal of Transitional Justice* 90 – 108.
4. For an example pertaining to British forces, see Reilly and Drury 2014.
5. On the 'truth and reconciliation' approach to transitional justice and aspects of the South African instantiation of this approach, see Avruch and Vejarano 2002.
6. 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 and Drury 2014: n5.
7. For example, see Keppler (2012: 6n2), who has noted, 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 thirty 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'. 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 *fewer* prosecutions by the ICC, but can ask for *more* such trials from other places and of other kinds of alleged international criminals. 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 pause before toeing Keppler's line. For more information, see BBC News 2013. 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 Okafor 2007a; Mutua 1996.

8. In Zimbabwe an upsurge in violence and repression greeted the prospect that the opposition would unseat Robert Mugabe in the 2008 elections. See Amnesty International 2008. 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 Mugabe. See Human Rights Watch 2014. In Sudan, al-Bashir's repression has ebbed and flowed through his tenure, but has continued at a high intensity since his indictment in 2009 by the ICC. See Bashir-Watch n.d.
9. The Rome Statute is the constitutional framework that guides and gives life-sap both to the ICC and to much contemporary international criminal justice praxis. See the *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, (1998) 37 I.L.M. 999 [Rome Statute].
10. This Court appears to be the AU's response to the perceived shortcomings of the ICC and their perceived need for a more balanced transitional justice mechanism in Africa.
11. Over 160,000 persons have thus far been killed in Syria. See Huffington Post 2015. By contrast, the number for Côte d'Ivoire is estimated at 3,000 (i.e. less than 2.5 per cent of the Syrian death toll thus far). See Wells 2013.
12. 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', available at http://www.pcr.uu.se/digitalAssets/66/66314_1conflict_region_2012.pdf.
13. There is no disagreement that the ICC has thus far focused virtually all of its attention on the African continent. See Keppler 2012.
14. On this point we draw on and agree with constructivist international law and IR scholars (broadly defined). See Okafor 2007a: n.1.
15. For a comprehensive list, see *International Criminal Court*, 'States parties to the Rome Statute', available at http://www.icc-cpi.int/en_menus/asp/.

- 16 In the US case, 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 *Coalition for the International Criminal Court*, ‘A Universal Court with Global Support; USA and the ICC, Bilateral Immunity Agreements’, available at <http://www.iccnw.org/?mod=bia>.
17. 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 *International Criminal Court*, ‘Situations and Cases’, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx. Regarding Sudan, the situation in Darfur has given rise to five cases in the ICC.

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