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The Office of the Prosecutor: Seeking Justice or Serving Global Imperialism?

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Abstract

The international criminal courts and tribunals, especially the ICC, have been strongly criticized for their susceptibility to political influence. Some have argued that the ICC has a distinctly Western bias and is participating in a new kind of imperialism in Africa. Others argue that history and the complicity of the West should disqualify the international community from demanding the prosecution of individuals participating in conflicts resulting directly from colonialism. Many have focused on the nature of the creation of the judicial bodies and the inherent political nature of judicial decisions regarding whom to prosecute. In this article, I offer a normative defense of the ICC, in which I acknowledge the ICC's structural protections against impermissible political influence, along with the vulnerabilities of the Chief Prosecutor to claims of distributive and substantive injustice.

Keywords

International Criminal Court (ICC) – international criminal justice – Office of the Prosecutor (OTP) – political bias

Introduction[1]

The international criminal courts and tribunals have been criticized as institutions through which powerful states can prosecute the citizens of weak states.

1 A much earlier version of this article is contained in the book by Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense* (Cambridge University Press, Cambridge, 2017).

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These judicial bodies were constituted as a way to hold individuals accountable for mass atrocities. Yet the value of these prosecutions has been called into question by some who argue that the prosecutions, thus far, have been unduly influenced by politics. The demographic breakdown of these prosecutions has done little to dispel the notion that, as Mark Osiel writes, 'if power is seriously skewed, the powerful will prosecute the powerless. And when power is evenly split, no one will be prosecuted at all. All else is commentary'.[2]

There are certainly power concerns with respect to the prosecution of Africans. Some critics have argued that the International Criminal Court (ICC) has a distinctly Western bias and is participating in neo-colonialism or global imperialism in Africa. Other critics argue that the history and the complicity of the West should lead us to question whether it is appropriate for the international community to demand prosecution of those individuals participating in conflicts resulting directly from colonialism. Many criticisms have focused on the inherently political nature of decisions made by the ICC regarding prosecutorial selection. I offer a normative defence of the ICC, in which I acknowledge the ICC's structural protections against impermissible political influence, along with the vulnerabilities of the Office of the Prosecutor (OTP) to claims of distributive and substantive injustice.

I begin by introducing the role of the OTP in selecting situations and cases for investigation and prosecution. I then discuss the relationship between what is political and what is legal in nature, and I argue that the inseparability of two realms is inevitable but does not necessarily lead to injustice. In the third section, I examine the relationship between current political leaders in Africa and the past colonial powers. In the fourth section, I address the issue that has instigated much of the criticism of the ICC: the overwhelming proportion of the investigations and prosecutions have been in Africa. I then turn to the contention that colonial history alone is a strike against prosecuting individuals for international crimes in Africa. In the sixth section, I assess more concrete claims of global imperialism within the international criminal justice system. The seventh and eighth sections explore the political nature of the ICC's principle of complementarity and other aspects of political discretion. I ultimately conclude that despite the criticisms levelled against the ICC for failing to avoid political influences, the OTP and the Court can avoid the kinds of unfairness that would constitute impermissible political influence.

2 Mark Osiel, 'The Demise of International Criminal Law', *Humanity*, 16 November 2013, <humanityjournal.org/blog/2013/11/demise-international-criminal-court>, 16 October 2016.

1 The ICC Office of the Prosecutor

The OTP is charged with selecting situations for investigation, and then selecting individual cases for prosecution.[3] These selection decisions must not be 'based on impermissible motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin'.[4] Thus the Prosecutor is required to investigate without favour or bias toward any person or groups.[5] In order to maintain the legitimacy of the ICC, the OTP must avoid the stigma of victor's justice, which has been attached to international criminal justice since the Nuremberg and Tokyo tribunals.[6]

Apart from these constraints, the discretion exercised by the OTP during the preliminary examinations phase is significant. The ICC can only prosecute a few of many potential cases, so each decision made by the OTP carries great weight. Thus, any possible influence of political considerations generates concerns about fairness, and corresponding concerns about the ICC's legitimacy as a criminal justice institution.

2 Politics and International Criminal Law

Historically, the relationship between politics and the law had to be understood in terms of domestic systems. Law in general, and criminal law in particular, was promulgated by the political institution. International political

3 Regulations of the Office of the Prosecutor, 23 April 2009, Regulations 34–5; Alette Smeulers, Maartje Weerdesteijn and Barbora Holá, 'The Selection of Situations by the ICC – An Empirically Based Evaluation of the OTP's Performance', 15(1) *International Criminal Law Review* (2015) 1–39, 3; *see also* Kai Ambos and Stefanie Bock, 'Procedural Regimes', in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors* (Oxford University Press, Oxford, 2012), pp. 488–541, 532, 541.

4 *Prosecutor* v. *Delalić et al.*, 20 February 2001, ICTY, Appeals Chamber, Judgment, IT-96-21-A, para. 605; *see also Prosecutor* v. *Bizimungu et al.*, 24 September 2004, ICTR, Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial, including Reasons in Support of the Chamber's Oral Ruling delivered on Monday 20 September, ICTR-2000-56-T, para. 26.

5 Luc Côté, 'Independence and Impartiality', in Reydams et al. (eds.), *supra* note 3, pp. 319–415, 370; Margaret M. deGuzman and William A. Schabas, 'Initiation of Investigations and Selection of Cases', in Göran Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (Oxford University Press, Oxford, 2013), pp. 131–170, 167; *see also* Frédéric Mégret, 'Accountability and Ethics', in Reydams et al. (eds.) *ibid.*, pp. 416–487, 439.

6 Côté, *supra* note 5, p. 370; *see also* Ambos and Bock, *supra* note 3, pp. 491–2, 497–8.

arrangements were not historically based on legal mechanisms. In fact, most discussions of international obligations referred to non-legal norms. In certain areas of international relations, this remains the case. But in the realm of international criminal law, a sea change has occurred over the last century.

Carl Schmitt defined the political in terms of the distinction between friend and enemy.[7] This recognizes the political as necessarily involving a struggle. A state must understand its own internal and external enemies to maintain order or function as a state.[8] The political entity that is forged from the ever-present possibility of war is something unlike other associations, and if this political entity were to 'disappear, even if only potentially, then the political itself would disappear'.[9]

Hans Morgenthau developed a more plausible understanding of international law and politics. Morgenthau recognized that while formal mechanisms would allow it, States would refuse to bring their disputes to a third party for settlement when the disputes dealt with their vital national interests.[10] He argued that this showed the difficulty of separating the political and the legal.[11] The idea of something being "political" should be seen as a quality of that entity, and to 'say that something was "political" was to describe it in terms of the degree of intensity with which that entity was linked to the State'.[12] Morgenthau thought that '[a]nything might be, and nothing was necessarily political, including any question over which a court might possess jurisdiction', and thus the relationship between the political and the legal could not be symmetrical.[13]

I now turn to two modern camps of views about the relationship between the political and the legal in terms of international criminal justice. On the one hand are those who argue that the legal and political realms must remain completely separate, and on the other hand are those who recognize that all law is political, but the important task is to identify what is impermissibly political in the legal realm.

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7 Carl Schmitt, *The Concept of the Political: Expanded Edition* (University of Chicago Press, Chicago, 2008), p. 26.

8 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, vol. 14 (Cambridge University Press, Cambridge, 2001), p. 431.

9 Schmitt, *supra* note 7, p. 45.

10 Koskenniemi, *supra* note 8, p. 441.

11 *Ibid.*

12 *Ibid.*, citing Hans Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Noske, Leipzig, 1929), pp. 70, 105–107, 119 *et seq.*

13 Koskenniemi, *supra* note 8, p. 441, citing Morgenthau, *supra* note 12, pp. 62–72.

In the first camp, 'law and politics must be kept apart as much as possible in theory no less than in practice'.[14] Schmitt is able to separate the two by definition when he identifies politics with having the power to defeat an enemy.[15] Not only are law and politics to be kept separate, but politics are often seen as inferior to law.[16] According to Judith Shklar's critique, for those who believe in the autonomy of politics, '[l]aw aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies'.[17] Thus politics, as the realm 'in which power and its norms, the rules of prudence and expediency, operate',[18] must be overcome through the superior nature of the law. Martti Koskenniemi does not think international law can be kept separate from politics, but he does note that '[t]he fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires, passions, prejudices and leading into an international anarchy'.[19]

Carving out an independent rule of law seems to be a worthy endeavour. But on this first understanding of international criminal law, courts are either purely political actors, or they must be held out as immune to political pressures and interests. These views are too limiting, as becomes clear when we turn to the second type of view.

In the second camp, law and politics do not inhabit two separate spheres. Law is 'not an answer to politics, neither is it isolated from political purposes and struggles'.[20] On this view, even a limited conception of the political cannot be completely excluded from the legal domain. Legislatures make decisions about how courts should function, even overruling court decisions. That we have an international court that is untethered from a legislature should not make us think that politics narrowly understood can be kept out of judicial decision-making.

The international criminal legal system only came about as a result of political consensus among states. Modern international criminal law emerged in response to the atrocities committed during and after World War II. The Nuremberg Charter, which established the Nuremberg Tribunals to prosecute

14 Judith Shklar, *Legalism* (Harvard University Press, Cambridge, 1964), p. 111.

15 *Ibid.*, p. 125.

16 *Ibid.*, p. 111.

17 *Ibid.*

18 *Ibid.*, p. 126.

19 Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, Portland, 2011), p. 36.

20 Shklar, *supra* note 14, p. 143.

major war criminals, was created through a political agreement between France, the United States, the Soviet Union, and the United Kingdom, and was subsequently ratified by 19 other Allied States.[21] The ICTY and ICTR ad hoc tribunals were created through political agreement in the United Nations (UN) Security Council. The ICC came into existence through a large multilateral treaty. The international criminal legal system has grown in large part due to 'its promise to make the world a better place',[22] but this growth has occurred through the promulgation of political agreements.

Sarah Nouwen and Wouter Werner argue that the ICC acts politically in the sense of Schmitt's concept of the political, because it is in the practice of making the distinction between friend and enemy.[23] They argue that the ICC 'adjudicates crimes which are frequently related to politics, and it depends on a mysterious and seemingly magical "political will" for the enforcement of its decisions'.[24] Frédéric Mégret has argued that while international criminal justice has tried to distance itself from any 'blatantly political decision', the project of international criminal justice 'cannot come about without some political power'.[25]

If we recognize that politics will continue to play some role in international criminal law, our legitimate concern is that even narrow political considerations could play too large a role in judicial decisions. The question is what 'too large' means. Once we acknowledge that, despite rhetoric from lawyers, politics and law always intersect, the hard question is whether a given political influence on a court is inappropriate.

Given the foundations of international criminal law, as well as its function, it is best to view international criminal courts and tribunals as both political and legal entities, at least to some extent. Separating legitimate from illegitimate political influence on courts seems possible. So my response to the

21 *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London,* 8 August 1945.

22 *See* John H. Barton and Barry E. Carter, 'International Law and Institutions for a New Age', 81 *Georgetown Law Journal* (1992–93) 535–562, 535, 536; *see also* Laurence Juma, 'Unclogging the Wheels: How the Shift from Politics to Law Affects Africa's Relationship with the International System', 23 *Transnational Law and Contemporary Problems* (2014) 305–365, 309.

23 *See* Sarah M.H. Nouwen and Wouter G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *European Journal of International Law* (2010) 941–965, 942.

24 *Ibid.*, p. 943.

25 Frédéric Mégret, 'The Anxieties of International Criminal Justice', 29(1) *Leiden Journal of International Law* (2016) 197–221, 201.

charge that the ICC is a political organ is that it would be surprising if this were not so, at least on an expanded understanding of what politics means in the way the term politics is typically used in these critiques. Law and politics cannot be disconnected from each other. When lawyers talk about keeping politics from intruding into the domain of law, what they typically mean is preventing judicial decisions from being made by political leaders who are not judicial officers. Political leaders are not expected to make decisions without bias for the interests of their own people (or perhaps themselves). However, we expect judicial officers to render *fair* decisions.

Accordingly, I rely on this concept of fairness in order to answer the question of what constitutes an impermissible political influence at the ICC. As Mégret notes, the goal of international criminal law is to 'bring the guilty to justice', and the aim of giving a fair trial to each accused party is 'merely a means, albeit conceivably a cardinal and central one'.[26] So while fairness may not be sufficient for international criminal justice, I will argue that it is necessary, and thus political influence is impermissible when it introduces certain kinds of unfairness into judicial decision-making. Mégret contends that we cannot easily determine if the concept of fairness in international criminal law is meant to be procedural, substantive, or distributive.[27] I argue that we should care about all three types of fairness, despite the fact that they will sometimes be at odds with one another.

Procedural fairness is assessed on the basis of a system's rules.[28] Rights that are guaranteed by procedures 'allow for a system of law to emerge out of a set of substantive rules and ... minimize arbitrariness'.[29] A system can be said to be procedurally fair, regardless of outcomes, if the same rules are applied to all parties without bias. Substantive fairness involves the protection of substantive rights, such as the right to bodily autonomy, liberty from confinement, and a trial that does not result in a mistaken conviction.[30] This type of fairness ensures that trials do not result in absurd or intuitively immoral outcomes.[31]

26 *Ibid.*, p. 209.

27 *Ibid.*, p. 210.

28 *See e.g., ibid.*; Yvonne McDermott, *Fairness in International Trials* (Oxford University Press, New York, 2016).

29 Larry May, *Global Justice and Due Process* (Cambridge University Press, Cambridge, 2011) p. 52.

30 *See, e.g.*, Larry Alexander, 'Are Procedural Rights Derivative Substantive Rights?', 17(1) *Law and Philosophy* (1998) 19–42, 19.

31 *See* Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press, New York, 1995); *see also* Lon L. Fuller, *The Morality of Law* (Yale University Press, New Haven, 1964).

Distributive fairness in a criminal justice system involves who is actually tried for crimes, out of the group of all potential defendants.[32] A criminal justice system might be seen as fair with respect to distribution if it is willing and able to try all parties who deserve to be tried.

Again, we should care about all three types of fairness, but here I will argue that clear violations of procedural justice constitute impermissible political influence on the ICC. Like most criminal justice institutions, the ICC cannot be structured to completely avoid substantive[33] and distributive injustice. Thus there may be *permissible* political influences that should nonetheless be avoided in order to maintain the perception and existence of substantive and distributive justice, and the corresponding perception and existence of the legitimacy of the ICC.

In the next section, I use this understanding of fairness and the relationship between the political and legal to begin to address the charges that the ICC is fatally biased against Africa.

3 Western European Expansion and Politics in Africa

Before we can understand the political concerns levelled by critics against the ICC in terms of how they have treated African conflicts and African individuals, we must look at the progression from colonialism to neocolonialism to global imperialism in Africa. I adopt the terminology used by B.S. Chimni, who identifies 'neo-colonialism' as the 'continuing exploitation of newly independent countries by foreign capital in the postcolonial period', and 'global imperialism' as the 'the new imperial social, legal, and political formations' of powerful Western states in the era of globalization.[34] As Matthew Craven points out, during the last three decades of the 19th century:

> the visible enthusiasm for colonial acquisitions had led to an estimated 4.5 million square miles and 66 million inhabitants being incorporated within the British Empire; France gained 3.5 million square miles and 26 million people; Germany 1 million square miles and 26 million people,

32 Mégret, *supra* note 25, p. 211.

33 The ICC cannot guarantee perfectly accurate results, but it can ensure that the dignity of all prisoners is respected during their confinement and trial process.

34 B.S. Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century', 14 *Oregon Review of International Law* (2012) 17–45, 20, 27.

and Belgium, through Leopold's Congo Free State, 900,000 square miles and a population of 8.5 million.[35]

Craven concludes: 'Understood as pure jurisdiction, empire knew no boundaries'.[36] In the early 20th century, after much of the land on the African continent had been divvyed up between Western states, private investment became the 'prime mover of imperialist developments', which Hannah Arendt argues was much less dangerous than the than the version of imperialism that exists today.[37] When former colonies gradually gained independence after World War II and began to participate in the international legal system as agents, the influence of Western states shifted to foreign aid.[38] Foreign investment is now 'political by nature precisely because it is not motivated by the search for profits', and thus 'only the very rich and very powerful countries can afford to take the huge losses involved in imperialism'.[39] Arendt's main concern with the postcolonial world order is not the order itself, but that it would force some people to live 'outside the common world'.[40] When we take equality and political rights as a given, while there are still peoples without political protection, some groups 'may find themselves outside the sphere of civic, political, and economic equality'.[41]

The great promise of international institutions is that they could bring all peoples under the rule of law where rights are protected regardless of where one comes from. In this ideal, no state or peoples would be 'outside the common world'. Yet contemporary critics of the ICC have argued, as we will see, that a new form of imperialism goes hand in hand with the actual manifestations of these international institutions today.

It can be challenging to understand the continuing impact of the European colonial projects on political violence on the continent today. The first African wars for independence took place after World War II. The Organization of African Unity was launched in 1963 by 32 newly independent African States, with the express goals of promoting solidarity and cooperation in pursuit of

35 Matthew Craven, 'Colonialism and Domination', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012), pp. 862–889, 879.

36 *Ibid.*, p. 888.

37 Hannah Arendt, *Imperialism* (part II of *The Origins of Totalitarianism*) (Harcourt, Brace & Company, New York, 1973), p. xix.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*, p. 302.

41 *Ibid.*, p. 82.

establishing peace and security while avoiding neocolonialism.[42] Independent African states successfully pushed for human rights in their early years of involvement with the UN, calling for the end of racial discrimination and the vestiges of colonialism.[43]

But the Cold War and its associated arms trade soon began to fuel conflict zones in Africa, where rebel groups were vying for regional power and control over resources.[44] During the Cold War, 'the expectation of violence and the massive military build-up by each side generated a general sense of anxiety', while the African states were largely relegated to sites of proxy wars and national liberation wars.[45] Ultimately, the Cold War undermined participation in the international legal system for the newly independent African states. African leaders, once champions of independence and individual rights and freedoms, 'turned authoritarian and completely demolished all the institutions of governance that had upheld democratic and human rights values'.[46] Multiparty politics was squashed and its proponents and leaders were killed or otherwise silenced.[47] African leaders then took to using international law to back their political legitimacy, rather than as a source of human rights values, and this dependence on international support gave rise to neocolonialism.[48]

The regional and internal conflicts that followed the end of the Cold War are thus intimately related to the global economy, but also to 'struggles over the management of Africa's violence through a complex moral sphere to protect the "victim"', which are 'driven by the quest for justice made possible through donor capitalism'.[49] The global imperialism of today involves the relationship between Europe's 'declining colonial power' and the competition between

42 Organization of African Unity (OAU), Charter of the Organization of African Unity, 25 May 1963.

43 *See* Juma, *supra* note 22, pp. 317–18; *see also* David A. Kay, 'The Impact of African States on the United Nations', 23 *International Organizations* (1969) 20–47, 26.

44 *See* Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, Cambridge, 2009), p. 45.

45 Juma, *supra* note 22, pp. 318–19.

46 *Ibid.*, p. 319; *see also* Richard L. Sklar, 'Democracy in Africa', 26 *African Studies Review* (1983) 11–24, 11.

47 Juma, *supra* note 22, p. 319.

48 *See, e.g.*, Mark Robinson, 'Aid, Democracy and Political Conditionality in Sub-Saharan Africa', 5 *European Journal of Development Research* (1993) 85–99; *see also* Bruce J. Berman, 'Clientelism and Neocolonialism: Center-Periphery Relations and Political Development in African States', 9 *Studies in Comparative International Development* (1974) 3–25.

49 Clarke, *supra* note 44, p. 46.

American and Asian states for capitalist control over African resources.[50] One cannot draw a line separating independent African states from the influence of European colonial powers, or from the influence of capitalism and the global economy today. The same infrastructures that allowed for colonial appropriation of resources on the African continent continue to influence current struggles against authoritarian leaders for control over resources.[51]

I now turn to the criticism facing the ICC and its handling of African conflicts with an understanding of the political vacuum that still exists in parts of Africa today, and the global events that have persisted in supporting the legitimacy of authoritarian political regimes.

4 International Criminal Prosecutions in Africa

Many criticisms of the ICC[52] have been related to the fact that nearly all of the prosecutions and investigations have been of African individuals.[53] Some have argued that the skewed nature of the courts is evidence that the OTP has inappropriately targeted Africa in determining which individuals should be the focus of investigation and prosecution. In this section, I provide some background on the source of these criticisms, before responding to the claim that international criminal prosecutions have unfairly targeted Africans.

There have been international criminal tribunals or special courts established by or with the assistance of the United Nations to handle criminal prosecutions related to conflicts in Cambodia, East Timor, Lebanon, Rwanda, Sierra Leone, and Yugoslavia. This list seems, on its face, unobjectionable. Only two of the six ad hoc tribunals or special courts are in Africa. But when we turn to the ICC, the statistics are quite different.

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50 *Ibid.*

51 *Ibid.*, p. 47.

52 *See, e.g.*, Chikeziri Sam Igwe, 'The ICC's Favourite Customer: Africa and International Criminal Law', 41 *Comparative and International Law Journal of Southern Africa* (2008) 294–323, 297; AU Assembly, Decision on Africa's Relationship with the ICC, Ext/Assembly/AU/Dec.1(Oct. 2013), 11–12 October 2013, para. 4; Max du Plessis, 'The International Criminal Court that Africa Wants' (Institute for Security Studies, Pretoria 2010); Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice*, (Cambridge University Press, Cambridge, 2016); Clarke, *supra* note 44.

53 For other strands of critique, *see, e.g.*, Tor Krever, 'International Law: An Ideology Critique', 26(3) *Leiden Journal of International Law* (2013); Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, Cambridge, 2007).

At one time, and notably at a time when many legal commentators were reflecting on the initial success or failure of the ICC, all of the situations and cases under investigation or prosecution by the ICC were in Africa.[54] As of this writing, it remains the case that only African nationals have been prosecuted by the ICC. Currently, the OTP has brought 25 cases from situations in the following areas: the Central African Republic, the Democratic Republic of the Congo, Darfur/Sudan, Ivory Coast, Kenya, Libya, Mali, and Uganda.[55] Given that the ICC's mandate gives it 'jurisdiction over the most serious crimes of concern to the international community *as a whole*',[56] it makes sense that we ask why the ICC has only prosecuted serious crimes that have occurred in Africa.

The first response to this argument is empirical. It is true that in the early years of the ICC's operation, it seemed that only situations in African states were appropriate subjects of investigation by the OTP. And it remains true that the ICC has yet to prosecute any non-Africans. Yet the OTP has conducted or is currently conducting preliminary examinations in many parts of the world, including in Afghanistan, Burundi, Colombia, Comoros, Georgia, Honduras, Iraq (regarding war crimes committed by UK nationals), Nigeria, Palestine, the Republic of Korea, Ukraine, and Venezuela.[57] The OTP also investigated a situation in Cambodia in 2013 but determined that it did not meet the legal criteria for ICC prosecution.[58] Additionally, Gambian lawyer Fatou Bensouda took over as Chief Prosecutor in 2012. While the nationality of the Chief Prosecutor should not make any difference in his or her decision-making, the birthplace of the Chief Prosecutor should, at minimum, force us to provide more evidence than the list of prosecutions to claim that the OTP is biased against African nations. So it appears there is less evidence than even a few years ago to suggest that the focus of the ICC is and will be on Africa and Africa alone.

Moreover, now turning to a normative response, the empirical evidence alone cannot support an argument that the ICC has inappropriately targeted Africa. There are several reasons why the initial cases were heavily drawn from

54 There is now an ongoing investigation in Georgia. At the preliminary examinations stage, the OTP considered situations in Honduras, the Republic of Korea, and Venezuela, and is considering situations in Afghanistan, Colombia, Comoros, Iraq, and Ukraine. *See* International Criminal Court, *Preliminary Examinations*, www.icc-cpi.int/Pages/Preliminary-Examinations.aspx, accessed 16 September 2017.

55 *See* International Criminal Court, *Cases*, www.icc-cpi.int/Pages/cases.aspx, accessed 16 September 2017.

56 U.N. General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Preamble (emphasis added).

57 *Preliminary Examinations*, *supra* note 54.

58 *Ibid.*

Africa, and it should be noted that most prosecutions were not initiated by the OTP. First, the ICC's jurisdiction is limited, both temporally and geographically. The ICC cannot prosecute crimes committed before July 2002.[59] This takes many conflicts in recent memory off the table for prosecution. Additionally, the ICC can establish jurisdiction over a situation in one of only three ways: (1) referral by a state party; (2) referral by the Security Council using its Chapter VII powers;[60] or (3) a *proprio motu* investigation by the Prosecutor.[61] This means that the ICC can only prosecute individuals who have been accused of committing crimes as a national of a state party, or in the territory of a state party, or where the situation has been referred by the Security Council, *and* where national investigations or prosecutions are not taking place. Finally, the gravity of the crimes (i.e., number of victims) could play into the fact that the situations in Africa have been prosecuted and not others.

As for the ICC's initial prosecutions, four were initiated by self-referrals. The Central African Republic, the Democratic Republic of the Congo, Mali, and Uganda all referred situations to the ICC on the basis that they were unable to prosecute the individuals accused of international crimes. This is not the whole story of each prosecution, as Uganda eventually wanted to take back the responsibility of prosecuting the leaders of the LRA, but it does show that these cases were not initially sought out by the OTP. Two other situations, those in Libya and Darfur, were the result of referrals from the UN Security Council. These situations could have been referred for political reasons belonging to members of the UN Security Council, but they were not discretionary investigations once they reached the OTP. The final two situations in the initial group of prosecutions, those in the Ivory Coast and Kenya, were the result of *proprio motu* investigation by the OTP. However, each of these two cases had features of self-referral cases: the Ivory Coast recognized the jurisdiction of the ICC during the outbreak of civil war, while Kenya failed in implementing domestic accountability mechanisms for election-related violence. Thus not one of the initial prosecutions appears, on its face, to be the result of political bias on the part of the OTP at the ICC.

The list of investigations now underway suggests a move toward investigating conflicts outside of Africa. This is not due to a change in the structure of the OTP. The Rome Statute remains the same. It may reflect new policies, or it may be the result of a targeted public relations campaign to demonstrate the global

59 Rome Statute, *supra* note 56.

60 *See* United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Chapter VII.

61 Rome Statute, *supra* note 56, Art. 13(c).

focus of the ICC, or it may simply reflect the situations worthy of investigation based on the information the ICC has received in recent months and years. We cannot know without accessing information beyond a mere list of countries and individuals.

The ideological critique must be distinguished from a critique based on distributive justice concerns. It is true that the ICC sits in The Hague and has mainly drawn its cases from Africa so far. This may indeed be unfair, in that certain non-Africans who have committed crimes have not been prosecuted, but more is needed to show that distributive injustice is pervasive and connected to bias. Those who argue that there is a deep political agenda or ideological bias in the ICC have not made out their case. No matter what the docket looks like in terms of the nationality of its members, the numbers alone cannot prove a discriminatory or unfair policy of the ICC or OTP. We can now turn to some of the arguments that the international criminal courts are inappropriately targeting Africans, but which do not rely solely on statistics.

5 Effects of Colonialism

The first hurdle to overcome in responding to compelling criticisms related to the proportion of international criminal cases and investigations in Africa is to identify why the international community should be involved in criminal justice in Africa at all. The number of armed conflicts in Africa is high,[62] and the West has played a large role in creating the conditions that fostered the current conditions of conflict. Some critics have argued that the West's complicity in generating these conflicts should cause us to rethink the focus on individual criminal accountability in international criminal law. Accordingly, these critics claim, any attempt to enforce international justice in Africa must also look at the role played by the West in generating and aggravating conflict.[63]

Antony Anghie and B.S. Chimni claim that the history of colonialism makes 'Third World peoples acutely sensitive to power relations among states and to

62 Ifeonu Eberechi, 'Armed Conflicts in Africa and Western Complicity: A Disincentive for African Union's Cooperation with the ICC', 3(1) *African Journal of Legal Studies* (2009) 53–76. He notes that '[a]ccording to the United Nations, since 1970, well over 30 wars have been fought in Africa, most of which have been internal, as opposed to between states'. *See Report of the Secretary-General to the UN Security Council: The causes of conflict and the promotion of durable peace and sustainable development in Africa*, (A/52/871-S/1998/318), April 1998, at para. 4.

63 Eberechi, *supra* note 62, p. 54.

the ways in which any proposed international rule or institution will actually affect the distribution of power between states and peoples'.[64] Since the foundation of modern international law is European international law, it is worth recalling the subjugating and oppressive effects of colonial international law. European international law 'legitimised conquest as legal, and decreed that lands inhabited by people regarded as inferior and backward were *terra nullius*'.[65] Anghie and Chimni note that nineteenth-century law also 'excluded non-European states from the realm of sovereignty' and 'upheld the legality of unequal treaties between European powers and non-European powers'.[66] Given this history, it makes sense why non-European states might resist the imposition of international law. Some scholars have argued that 'the Third World should dispense with international law altogether',[67] and while Anghie sees this as impossible, he does argue that international law must develop a better understanding of the ongoing impacts of colonialism.[68]

One such impact is the influence of colonialism on current conflicts. Ifeonu Eberechi claims that:

> [i]t is almost impossible to come across an armed conflict in Africa without a colonial component, as most wars have highlighted the ethnic composition of the African societies – a socio-political mess that white colonialism created.[69]

He notes that there were very few conflicts between communities prior to colonialism, but once ethnic tensions were stoked by the colonialists, and different ethnic groups were forced to join together in a political unit constructed by the colonialists, the political systems that eventually gained their independence were precarious at best.[70] Even the United States has contributed to the instability on the continent by encouraging African leaders and governments to participate in its 'war on terror', requesting military and legislative actions that have led to increased tensions between Muslims and Christians and political

64 Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts,' 2 *Chinese Journal of International Law* (2003) 77–103, 78.

65 Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', 27(5) *Third World Quarterly* (2006) 739–753, 745.

66 Anghie and Chimni, *supra* note 64, p. 80.

67 Anghie, *supra* note 65, p. 752.

68 *Ibid.*

69 Eberechi, *supra* note 62, pp. 56–57.

70 *Ibid.*, pp. 57–58.

instability.[71] Eberechi sums up the situation thusly: 'Armed conflicts in Africa ... represent an expression of frustration by a people against their colonial history, corrupt and despotic leaders, as well as the struggle for resource control, boundary adjustments and good governance'.[72]

Eberechi joins with Anghie, Chimni, and others in claiming that the international community's insistence on ensuring that individual leaders are subject to international criminal justice is unfair, given the complex nature of the armed conflicts and the positions of the leaders.[73] Eberechi concludes that responsibility for grave crimes in Africa should also fall on the shoulders of the international actors who contributed to the conditions of conflict, and the ICC's model of individual responsibility fails to apportion responsibility in this way.[74] Kamari Clarke notes that 'where there are mass struggles over management of resources and their control, reassigning guilt neither ends violence nor captures the complicity of multiple agents involved in the making of war'.[75] She asks how it is possible for us to understand the imposition of individual criminal responsibility when 'the causes of violence are rooted in histories of colonial subject formation, contested governance and resource ownership – all features contributing to the ongoing conflict in so many of the recent African wars'.[76]

The complicity of the West in causing the overwhelming conflict in parts of Africa cannot be denied, nor should it be ignored. It might in fact be the case that the imperialist underpinnings of international law render the power imbalance between Western and African states impossible to overcome. It might be the case that international law is necessarily unjust, in terms of procedure, substance, and distribution, and thus African states should be wary of participating in the enterprise at all. But as Anghie says, completely opting out of the system of international law is impossible. International law operates 'at every level: international and national; economic, political, and social; private and public'.[77] Not only would opting out of international legal institutions prevent African states from participating in the global community on each of these fronts, it would also leave the imperial forces in place rather than addressing

71 *Ibid.*, p. 72.

72 *Ibid.*, p. 75.

73 *Ibid.*, p. 76; *see also* Anghie and Chimni, *supra* note 64.

74 Eberechi, *supra* note 62, p. 76.

75 Kamari Clarke, 'Rethinking Africa through Its Exclusions: The Politics of Naming Criminal Responsibility', 83(3) *Anthropological Quarterly* (2010) 625–651, 628.

76 *Ibid.*

77 Anghie, *supra* note 65, p. 752.

'questions of violation, injury, [and] legitimacy'.[78] Even if African states have a good reason not to participate in international law, most have chosen to participate nonetheless. Specifically, many have chosen to sign on to the Rome Statute and accept the jurisdiction of the ICC. So the claim that African states should not participate in international legal institutions at all is weak.

A stronger argument is that the ICC is failing on the distributive justice front because it is prosecuting African individuals, but not colonial powers. This too seems plausible as a reason why an African state might not want to participate in international criminal justice institutions designed largely by Western states. But when states have chosen to accept the jurisdiction of the ICC, with an understanding of the ICC's mandate, the distributive unfairness cannot come as a surprise. Western complicity in colonial and postcolonial violence does not absolve the individuals who are committing atrocities from individual responsibility for their actions, and it should not prevent the individuals from being held accountable for their crimes. That one is rightly held legally accountable for one's actions, while another is not, does not change the fact that one has been rightly held legally accountable for one's actions. Because its mandate only concerns events that have taken place since 2002, the ICC does not have jurisdiction over colonialists, nor does it have jurisdiction over certain crimes, such as creating ethnic tensions, that are outside the scope of its mandate. The ICC can prosecute individuals who have overseen mass killing in their own nations, and because that is what the ICC can rightly do, that is what it should do. This does not mean that we should not use other methods to properly recognize the bad acts of the West. But the West's contribution to violent situations in African nations should not release individuals of their own responsibility for creating violence. Nor should the ICC's attempt to hold these individuals responsible reflect an impermissible political influence of the West.

I now turn to a related, but likely stronger criticism, that the West is currently engaging in practices of global imperialism through the ICC.

6 Neocolonialism and Global Imperialism

While the West's participation in colonizing African countries is probably not sufficient to justify leaving individual members of African nations out of international criminal prosecutions, the ICC has also been accused of having a Western bias and of supporting hegemony, neocolonialism, and global

78 *Ibid.*

imperialism. The ICC and other institutions, critics claim, are using more modern tools to control and oppress African peoples. These modern tools include the 'the dominance of international finance capital',[79] the 'adoption of laws for the creation and protection of *international* property rights'[80] (i.e. capitalism), the pre-eminence of the free trade doctrine,[81] 'accumulation [of property] by dispossession',[82] the 'weakening of labor rights through, among other things, the erosion of international labor law',[83] 'hurdles to both voluntary and forced migration',[84] the 'relocation of crucial aspects of the economic sovereignty of states to a network of international institutions',[85] and the use of force to advance an imperial agenda rather than to protect.[86] Globalization and capitalism are key factors in this critique. The system of international law generally, and international criminal law in particular, is said to be aimed at furthering the forcible westernization of all the other states of the world.[87]

One way to run the critique of forcible westernization is through criticism of the rhetoric of human rights. Koskenniemi says that human rights rhetoric 'has historically had a positive and liberating effect on societies', but these rights 'lose their transformative effect' once they have been institutionalized.[88] The Rawlsian principle of the 'priority of the right over the good'[89] can colonize a political culture and prevent space for a community to articulate its own conception of the good.[90] Western principles and values, critics claim, should not be exported at will. With respect to international criminal law, this criticism focuses on the fact that the ICC is held up as the 'civilized' way to account for mass atrocities, through assessing individual responsibility and sentencing to prison time. The whole aim of international criminal law is to address impunity, and some proponents of the ICC argue that this can only be done through criminal trials. State parties to the Rome Statute cannot offer blanket amnesty in lieu of pursuing a criminal trial, even if they make use of alternative forms of justice like truth and reconciliation commissions. This looks suspicious, like

79 Chimni, *supra* note 34, p. 28.
80 *Ibid.*, p. 29.
81 *Ibid.*
82 *Ibid.*, p. 30.
83 *Ibid.*
84 *Ibid.*, p. 31.
85 *Ibid.*
86 *Ibid.*
87 *See* Krever, *supra* note 53.
88 Koskenniemi, *supra* note 19, p. 133.
89 John Rawls, *A Theory of Justice* (Clarendon Press, Oxford, 1971), p. 31.
90 Koskenniemi, *supra* note 19, p. 133.

the populations of the state parties are being forced to have a particular kind of justice served on their behalf.

With respect to this criticism, I agree that the method of forcing individuals and states to be free[91] is objectionable. All states and even local communities should be in a position to construct their own view of what makes a life good. This includes making choices about what to do while and after a country suffers from mass atrocity, especially if we think that justice should involve determining how a community can move forward in the aftermath of neighbour killing neighbour. Some argue that the project of balancing state sovereignty with the need to punish those who commit mass atrocities should result in a system of international criminal law which 'complement[s] national criminal jurisdictions, and in deserving cases, political and diplomatic settlement of conflicts'.[92] We know that standalone determinations of individual criminal responsibility are not always useful with respect to transitional justice.

Yet there are certain universal principles that establish basic human rights for all individuals across the globe. As Koskenniemi puts it:

> although international law, too, in this way is a hegemonic politics, 'it is nonetheless a form of politics that has some particular virtues' ... it is possible to see the expanding practice of making political claims in legal language by an increasing number of international actors in the human rights field, in trade and environment bodies, in regional and universal tribunals and organizations and, not least, in the struggles over the meaning and direction of globalization, as parts of a process of construction of a universal political community.[93]

There is no reason to think that the independent African states and populations in question would not agree with those principles, particularly in light of the actions taken immediately following their independence and prior to the negative influence of the Cold War. Attempts to globalize human rights should be limited in scope, and global values should in general not be imposed upon sovereign states.

The charge of global imperialism has been made against the ICC with respect to several African conflicts. Take, for instance, the case of Darfur and the ICC's indictment of Omar al-Bashir. In 2008, the OTP applied for an arrest

91 *See* Jean-Jacques Rousseau, *The Social Contract, or, Principles of Political Right* (George Allen & Unwin, London, 1895).

92 Igwe, *supra* note 52, p. 296.

93 Koskenniemi, *supra* note 19, p. 239.

warrant for al-Bashir, the sitting president of Sudan, on charges of genocide, crimes against humanity, and war crimes.[94] The Pre-Trial Chamber authorized the issuance of arrest warrants for al-Bashir in 2009 for crimes against humanity and war crimes, and in 2010 for genocide.[95] These arrest warrants give rise to an obligation on the part of states to 'comply with requests for arrest and surrender'.[96]

Critics have argued that this attempt to prosecute al-Bashir (that has failed, thus far, as he is still at large) 'sheds light on the politics of the "new humanitarian order"', as critics have dubbed the practice of deciding who needs saving and when.[97] It has been claimed that in applying for an arrest warrant, the OTP took one side of a conflict that began as a civil war without fully understanding the conflict.[98] The African Union (AU) took the step of requesting a delay in the ICC charges based on its assessment that 'attempts to arrest Mr. Bashir could further destabilize the situation in Darfur'.[99] Thus a dilemma arises for African states as to whether to abide by the obligations set forth by the ICC and arrest al-Bashir, or to avoid appearing to betray the AU and its members.

In line with the AU's opinion, several African states have failed to cooperate with their duty to arrest and surrender al-Bashir to the ICC, including Chad, the Democratic Republic of the Congo, Djibouti, Kenya, and Malawi.[100] Most notably, however, was South Africa's failure to arrest al-Bashir. In June 2015, al-Bashir travelled to South Africa, a signatory of the Rome Statute, for an AU summit. An agreement between the AU and South Africa regarding the AU summit provided that the South African government must accord 'immunity from personal arrest or detention' to all representatives of AU Member States.[101] The North Gauteng High Court ruled that the ICC obligations must

94 Mahmood Mamdani, 'Darfur, ICC and the New Humanitarian Order', 25 *The Zeleza Post* (2008).

95 *See* Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009; *see also* Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 July 2010.

96 Rome Statute, *supra* note 56, art. 89(1).

97 Mamdani, *supra* note 94.

98 *Ibid.*

99 'Mbeki Named to Heal Bashir Rift', *BBC News* (6 March 2009), news.bbc.co.uk/2/hi/africa/7927706.stm.

100 Dire Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law – A Perspective from International Law', 13 *Journal of International Criminal Justice* (2015) 1027–1047, 1028–1029.

101 *See ibid.*, pp. 1031–32; *see also* General Convention on the Privileges and Immunities of the Organisation of African Unity (OAU), Sect. C, Art. V(1).

be fulfilled nonetheless, and ordered the South African government to 'take all reasonable steps to arrest President Al-Bashir'.[102] The South African government, however, stood by the agreement with the AU and permitted al-Bashir to leave the country rather than arresting and detaining him. In March 2016, South Africa's Supreme Court of Appeal ruled that South Africa's failure to arrest and detain al-Bashir in 2015 violated both domestic and international law.[103] In July 2017, the ICC agreed.[104]

While it seems to the Western world (and many in Africa) that al-Bashir is worthy of prosecution, which may be true, it bears noting that the OTP should attempt to understand, although not necessarily be responsive to, the complex political dimensions of conflicts, instead of merely obtaining evidence of atrocities. While the ICC cannot prosecute every single person who has been accused of the same sorts of crimes as al-Bashir, in service of distributive justice, the OTP must be more aware of *perceived* distributive injustice, as well as substantive justice concerns based on information obtained from the home country of the accused. The challenge presented by the *al-Bashir* case mirrors the human rights critique at the beginning of this section. It may be obvious to some that al-Bashir must be held accountable in criminal court for his participation in mass atrocities, while others claim that the ICC impermissibly inserted itself into an internal conflict. Since al-Bashir remains a sitting head of state, however, we know that there will not be internal judicial processes against him.

Here we can see why the human rights critique fails; it collapses into moral relativism. If we cannot say that victims of mass atrocity should have a right to justice, we will be hard-pressed to make any universal moral claims at all. States should be in a position to make choices about the form of transitional justice they wish to seek. But I do adopt the universal claim that mass atrocities are wrong, and victims of atrocities should be entitled to some kind of recognition of the wrongdoing. International criminal law does not rely on the natural law tradition in the same way as international trade agreements or border disputes, but as criminal law, it still relies on moral norms. Its mere existence

102 *Southern African Litigation Centre* v. *Minister of Justice and Constitutional Development and Others* (27740/2015), High Court of South Africa, Gauteng Division, Pretoria, 24 June 2015, § 2.

103 *See The Minister of Justice and Constitutional Development* v. *The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

104 *See* Decision under Article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (ICC-02/05-01/09-302), Pre-Trial Chamber II, 6 July 2017, available at www.icc-cpi.int/CourtRecords/CR2017_04402.PDF.

is evidence of a global commitment to condemning mass atrocity and holding very bad actors accountable. As previously noted, I reject the idea that African states (and individuals) would not agree with this minimalist universal claim. Accordingly, the claim of structural global imperialism fails, since the crimes listed in the Rome Statute are tied to 'very bad actors', not 'Africans'. The potential for impermissible bias is thus tied to policies of the OTP, rather than the text of the Rome Statute.

In the next two sections, I turn to the key scenarios in which the OTP is afforded discretion, and consider when this discretion leads to impermissible (i.e. unfair) political decision-making.

7 Complementarity

The principle of complementarity has been hailed as a crucial feature of the Rome Statute that forces the international criminal legal system to respect the sovereign authority of states and defer to domestic prosecutions of criminals. This principle is supposed to make the ICC the court of last resort, when domestic options for prosecution have failed. However, some critics have argued that the ICC's principle of complementarity actually makes it harder for the Court to avoid political influence over its decision-making.

The preamble and Article 17 of the Rome Statute confirm the status of the ICC as a court of last resort. The preamble specifically identifies the complementary nature of the ICC with respect to national criminal jurisdictions.[105] Under Article 17, a case 'being investigated or prosecuted by a State which has jurisdiction over it' is inadmissible 'unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'.[106] If a state has already investigated a case and has decided not to prosecute an individual, the result must stand 'unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute'.[107] Finally, where a 'person concerned has already been tried for conduct which is the subject of [a] complaint', the case is not permissible unless the proceedings in the other court aimed to shield the individual from criminal responsibility, or

> [o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and

105 Rome Statute, *supra* note 56, Preamble.

106 *Ibid.*, Art. 17(1)(a).

107 *Ibid.*, Art. 17(1)(b).

> were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[108]

The OTP is tasked with determining whether potential cases are admissible, in terms of complementarity and gravity, during the preliminary examinations phase. Assuming that the jurisdictional requirements have been met, the discretion afforded to the OTP at this point is with respect to an assessment of ongoing domestic investigations or prosecutions. If there are no domestic proceedings, the potential cases are admissible. But if there are domestic proceedings, the OTP must assess whether the proceedings reflect a genuine attempt by the State at prosecution, and whether they have been conducted in accordance with due process norms.

Alexander Greenawalt and others argue that the ICC's complementarity principle does not lead to a balance between international justice and domestic sovereignty, but that it puts the ICC in the position of having to make political decisions.[109] According to Kevin Jon Heller, not only do states have the advantage of a 'permanent in-country investigative presence that the ICC does not', but the investigators will also have a much more comprehensive understanding of the local situation.[110] ICC investigators, on the other hand, will necessarily be forced to assess the political situation and make a political decision about whether or not to prosecute.[111] Some have argued outright that the ICC should have a 'fairly high tolerance for violations of the right to a fair trial under the admissibility framework', in part because the preference for state trials avoids actual or perceived political bias.[112]

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108 *Ibid.*, Arts. 17(1)(c), 20(3).

109 Alexander K. A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court', 50 *Virginia Journal of International Law* (2009) 108–162. *See also* Daniel Nsereko, 'The ICC and Complementarity in Principle', 26(2) *Leiden Journal of International Law* (2013) 426–447; *see also* Thomas Obel Hansen, 'A Critical Review of the ICC's Practice Concerning Admissibility Challenges and Complementarity', 13 *Melbourne Journal of International Law* (June 2012) 217–234.

110 Kevin Jon Heller, 'Radical Complementarity', 14(3) *Journal of International Criminal Justice* (2016) 637–665, 652.

111 *Ibid.*; *see also* Vladmir Tochilovsky, 'Post-Conflict Criminal Justice: Practical and Policy Considerations', in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (2nd ed., Torkel Opsahl Academic Publisher, Brussels, 2010), pp. 237–240, 238.

112 *See* Frédéric Mégret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya the Case for Tolerating Flawed Domestic Trials', 11(3) *Journal of International Criminal Justice* (2013) 571–589.

Yet the OTP's determination that a case or potential case is admissible is subject to review at several points, arguably dampening the potential for purely political decisions to be made by the OTP. Under Article 19, the admissibility of a case can be challenged by an accused person (or one for whom a warrant has been issued),[113] a State with jurisdiction over the case,[114] a State which must accept jurisdiction under Article 12,[115] or the Court itself.[116] Thus the ICC retains significant opportunities for overturning an OTP determination that a case is admissible.

The situation in Uganda has been held out by Greenawalt as one in which the discretion afforded the OTP with respect to complementarity should be challenged. It was originally a self-referral to the ICC, but as peace talks between the Ugandan government and the Lord's Resistance Army (LRA) progressed, the government indicated that it might seek withdrawal of the ICC warrants and pursue traditional justice mechanisms, or a combination of traditional justice mechanisms and domestic criminal justice mechanisms. The Pre-Trial Chamber then sought to determine whether or not the cases remained admissible in light of the Ugandan government's peace efforts,[117] but the Ugandan government conceded that the cases remained admissible given that the peace agreements had not been executed.[118]

Greenawalt argues that this critical decision and others were 'not guided by legal criteria' and hence asks whether 'the Rome Statute delegated authority to the wrong actors' for these critical decisions.[119] He claims that complementarity takes these decisions out of the hands of a state like Uganda, but places the decision into hands that are not qualified to assess what is best for the peace process in a war-torn state.[120] However, it seems that the Rome Statute actually provided an opportunity for the OTP's decision to be challenged by the Pre-Trial Chamber and Uganda. Neither the Pre-Trial Chamber nor Uganda determined that the OTP's admissibility decision should be overturned. So it is not

113 Rome Statute, *supra* note 56, Art. 19(2)(a).

114 *Ibid.*, Art. 19(2)(b).

115 *Ibid.*, Art. 19(2)(c).

116 *Ibid.*, Art. 19(1).

117 *Prosecutor* v. *Kony*, 21 October 2008, ICC, Decision Initiating Proceedings under Article 19, Requesting Observations and Appointing Counsel for the Defence, ICC-02/04-01/05, www.icc-cpi.int/iccdocs/doc/doc578326.pdf.

118 *See Prosecutor* v. *Kony*, Case No. ICC-02/04-01/05, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ¶ 9 (10 Mar. 2009), *available at* www.icc-cpi.int/iccdocs/doc/doc641259.pdf; *see also* Greenawalt, *supra* note 109, p. 152.

119 Greenawalt, *supra* note 109, p. 111.

120 *Ibid.*, p. 121.

clear why the OTP's limited access to information about the situation on the ground in Uganda prevented the Court from making a fair assessment based on the complementarity principle.

It is true that a state will often be in a better position to establish the genuineness of its domestic criminal investigations or proceedings. But states will also have political interests when they attempt to demonstrate the adequacy of these domestic practices. In some cases, such as when a case is self-referred, or the state's judicial system is non-functional, the OTP will be better suited to fairly assess the willingness or ability of a state to pursue justice. Procedural and substantive justice considerations will then require that the OTP establish the admissibility of a case, though it will require political questions, but even then the decision can be challenged. Therefore, the potential for political influence is not substantial.

8 Prosecutorial Discretion

The claim that prosecutorial discretion will always involve bias or political influence is one of the most challenging criticisms. The ICC was formed by a large group of states that generally (with France and the UK being notable exceptions) do not have much power, opposed by powerful states (led by the US, Russia and China) that have not ratified the Rome Statute, and are very unlikely to do so in the near future. Critics have argued that these power relations create a problem with respect to the ICC's ability to act impartially. There are aspects of the way the ICC has functioned in the past that may have been worrying, particularly in terms of distributive justice. But I maintain that the discretion afforded to the OTP has the potential to serve as a check on politically motivated referrals and prosecutions.

Some critics have alleged that both large and small states are able to manipulate the ICC in order to gain power in relation to other states.[121] The most powerful states in the world have not ratified the Rome Statute, and hence remain outside the jurisdiction of the court. The states that have ratified the Rome Statute can trade 'self-referrals' for understandings that those who are currently ruling will not be prosecuted, or they can use the indictments of insurgent groups in their states as a public relations event that supposedly shows that the world has sided against these insurgents.

Reliance on the neutrality of the Security Council to ensure that appropriate referrals are made may be precarious. There have been and will likely continue

121 *See, e.g.*, Osiel, *supra* note 2.

to be instances in which cases should be referred to the ICC but are not, due to the power relations between the states on the Security Council. For instance, in 2014, Russia and China blocked the Security Council from adopting a draft resolution that would have referred the conflict in Syria to the ICC for investigation.[122] This could be viewed as a permissible political influence on the Security Council, ensuring that it reaches a substantively just decision, but it is more likely that the two permanent Security Council members voted no on the basis of their relationships with Syrian president Bashar al-Assad. Yet while it played a role in the outcome, the influence came from outside the ICC. Should the ICC be faced with a politically or ideologically motivated referral (rather than the absence of one), the OTP would maintain discretion in whether or not to move forward with the case.

The OTP is required, under Article 53, to consider whether it has a 'reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed',[123] whether a case or potential case is admissible,[124] and whether there are 'substantial reasons to believe that an investigation would not serve the interests of justice'.[125] This final aspect of the preliminary examination phase affords the OTP an opportunity to take political features of a situation into account, including concerns about perceptions of substantive and distributive fairness, and decide not to pursue an investigation. But it also gives the OTP the opportunity to discontinue an investigation that was initiated outside of the OTP for suspect political reasons.

As mentioned earlier, Nouwen and Werner have argued that despite its best efforts, the ICC cannot claim that it is not a political entity.[126] They are particularly critical of the way the ICC has utilized such categories as 'enemies of mankind' to set up a dichotomy between the ICC and its enemies and critics, which they argue is clearly political in a way that undermines the objective status of the ICC. In its starkest terms, critics claim the ICC acts politically by choosing its cases with a view to who it sees as the side of a controversy that is its friend. The ICC, they argue, needs to stop picking sides in various internal political matters in states that are in crisis, such as Uganda and Sudan.

122 Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Doc. SC/11407 (22 May 2014).

123 Rome Statute, *supra* note 56, Art. 53(1)(a).

124 *Ibid.*, Art. 53(1)(b).

125 *Ibid.*, *supra* note 56, Art. 53(1)(c).

126 *See* Nouwen and Werner, *supra* note 23.

These opportunities for political influence are troubling, and the situations that the ICC has pursued thus far certainly reflect distributive injustice. If power relations between countries play a role in making decisions about prosecutions, then there are also concerns about procedural justice. These may be instances of failure on the part of the international criminal justice regime, and reflect real concerns about the influence of the Security Council and powerful non-member states. But they are not indicative of systematic failure, nor are they indicative of impermissible political influences on the ICC itself or on OTP discretion. The ICC's structure can prevent the procedural unfairness that I have argued constitutes impermissible political influence, while the OTP has the obligation to use its discretion to strive for substantive and distributive justice, in fact and in terms of perception, to support the legitimacy of the Court.

The aim of this article has been to show that the ICC cannot avoid the influence of politics, but this influence does not have to lead to unfairness. Political influences and ideologies that result in procedural injustice are clearly impermissible, but the Rome Statute can do a lot of the work of avoiding this type of injustice. Distributive and substantive injustice, on the other hand, will sometimes involve permissible political influence. The OTP must recognize the impact of substantive and distributive injustice on perceptions of fairness, especially on the African continent, as the efficacy of the ICC remains susceptible to criticisms of the ICC as the product of colonialism or a participant in global imperialism. The ICC will not always be able to avoid political questions, but the structure of the ICC and the diligence of the OTP can help avoid injustice and perceptions thereof.