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Essay

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INTRODUCTION

The year 2011 has been a banner year for the International Criminal Court (ICC or Court). In August, the Court heard closing statements in its first opened case.¹ In the same month, an effort by the Kenyan government to protect some of its top politicians from prosecution by the Court failed.² This year, the U.N. Security Council took the unprecedented step of unanimously referring the Libya crisis to the ICC under the authority of the ICC's Rome Statute Article 13(b). This is despite Libya's status as a nonstate party to the Rome Statute and with all five permanent Security Council members — including China and the United States, two high-profile nonsignatories — voting in favor of referral.³ Observers have

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1. Press Release, International Criminal Court, Trial Chamber I to Deliberate on the Case Against Thomas Lubanga Dyilo, ICC-CPI-20110826-PR714 (Aug. 26, 2011), <http://tinyurl.com/75segaw>.

2. In August, the ICC Appeals Chamber upheld the trial chamber's earlier finding that the case was admissible before the ICC because Kenya did not provide evidence that it was already investigating the alleged crimes. Prosecutor v. Francis Kirimi Muthaura, Case No. ICC-01/09-02/11 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II on 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," ¶ 61–69 (Aug. 30, 2011), <http://tinyurl.com/d2mn6mo>.

3. S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011), *available at* <http://tinyurl.com/4rpfvug>.

lauded the Libya episode as a watershed moment in the Court's developing legitimacy.

Indeed, the ICC appears to be evolving into a truly global institution. China and the United States, two titans who had stubbornly opposed the Court, now at least tacitly acknowledge its importance. Meanwhile, states are contributing resources to the difficult work of locating and capturing international criminal suspects on the ground. The Democratic Republic of the Congo (DRC), France, and Belgium have released suspects to the ICC, and the United States has recently assisted African governments in their efforts to track down the leaders of the Lord's Resistance Army (LRA), a rebel group that continues to terrorize civilian communities in Uganda, South Sudan, the Central African Republic (CAR), and the DRC, in order to send its leadership to the ICC.⁴ These indications of state support are important because the ICC lacks its own law enforcement apparatus and must rely on police and security personnel from the international community to execute its arrest warrants.

However, the increasing influence of the ICC reflects a deepening commitment among many Western states despite greater reservations among the African countries whose enthusiasm had originally buoyed the Court.⁵ While U.S. policy on the ICC moves "from hostility to positive engagement,"⁶ African support is gradually faltering. Comprising a majority of members in the ICC's Assembly of State Parties (ASP), thirty-three of the African Union's (AU) fifty-four member states are parties to the Court's governing Rome Statute, self-obligated to submit to the Court's jurisdiction and execute its arrest warrants.⁷ Eleven more AU member states have signed, but not yet ratified, the Rome Statute.⁸ Signatories are prohibited from taking steps that would defeat the object and purpose of the treaty. However, the AU has now resolved three times among its member states to refuse cooperation with ICC operations.⁹

4. *The International Criminal Court Bares its Teeth*, *ECONOMIST* (May 12, 2011), <http://tinyurl.com/63jjfl>.

5. For a brief history of African support for international criminal justice, see Charles C. Jalloh, Dapo Akande & Max du Plessis, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court*, 4 *AFR. J. LEGAL STUD.* 5, 13–15 (2011).

6. *ECONOMIST*, *supra* note 4.

7. This includes North African AU member state Tunisia. See *ICC – State Parties: African States*, INT'L CRIMINAL COURT, <http://tinyurl.com/cpxofco> (last visited Dec. 2, 2011).

8. This includes North African AU member states Egypt and Algeria, as well as Sudan, which has declared that it no longer intends to become a state party and therefore has no legal obligation to uphold the treaty. See *Factsheet: The Rome Statute in the World: 119 States Parties, 32 Signatories, 44 Non Signatories (195)*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, 2–3 (Nov. 10, 2011), <http://tinyurl.com/c6wts23>.

9. African Union [AU], Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC), ¶ 10, O.A.U. Doc.

Moreover, in 2010, the AU rebuffed the Court's request to open a liaison office in Addis Ababa, the AU base.¹⁰

As the ICC looks to the future, it is clear that improved relations with African citizens and state governments should be a priority for strengthening its international work. So far the Court has focused on prosecuting crimes committed in African countries, and as it deepens its work in Africa, active state cooperation in the arrest of suspects and in situation referral is crucial for the Court's success. Yet nearly ten years after the Rome Statute came into force, the ICC stands at a crossroads. In December 2011, the ASP will select a new chief prosecutor for the Court by consensus (or otherwise turn to secret ballot),¹¹ and one of the frontrunners is Fatou Bensouda, the current deputy prosecutor and the sole candidate endorsed by the AU.¹² There is a case to be made that the selection of an African prosecutor with Ms. Bensouda's pedigree — that of a formerly high-ranking legal officer of an AU member state¹³ — could positively impact the Court's African relations. While predictions on the impact of such an election are necessarily speculative, the potential benefits of a prosecutor from the continent have been largely unexamined. Indeed, the symbolism of an African prosecutor serving as chief legal officer and representative for the Court would send a powerful message about the legitimacy of the Court's activity in Africa. The individual may

Assembly/AU/13(XIII) (July 1–3, 2009); AU, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), ¶ 5, O.A.U. Doc. Assembly/AU/10(XV) (July 25–27, 2010) [hereinafter Progress Report of the Commission]; AU, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, ¶ 6, O.A.U. Doc. EX.CL/670(XIX) (June 30–July 1, 2011) [hereinafter Assembly Decisions on the International Criminal Court].

10. The AU reached this decision despite support for the liaison office among African members of the Court's ASP. See Jalloh, Akande & du Plessis, *supra* note 5, at 48 (referring to Progress Report of the Commission, *supra* note 9, ¶ 8).

11. Procedure for the Nomination and Election of Judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, ¶¶ 25, 29–30, ICC-ASP/1/Res.2 (Sept. 9, 2002).

12. AU, Decision on African Candidatures for the Posts Within the International System, ¶ 1, O.A.U. Doc. EX.CL/673(XIX) (2011) [hereinafter African Candidatures]. In addition to Bensouda, Mohamed Chande Othman, Chief Justice of Tanzania, has been included in the shortlist of nominees provided by the ASP's search committee. The other candidates on the shortlist are Robert Petit from Canada and Andrew Cayley from the United Kingdom. Search Comm. for the Position of the Prosecutor of the Int'l Criminal Court, Rep. of the Search Comm. for the Position of the Prosecutor of the Int'l Criminal Court, ¶ 34, ICC-ASP/2011/117 (Oct. 22, 2011) [hereinafter Search Comm.].

13. Bensouda served as Solicitor-General and Legal Secretary and then as Attorney-General and Minister of Justice in The Gambia before becoming a legal adviser and trial attorney at the International Criminal Tribunal for Rwanda. Search Comm., *supra* note 12, ¶ 34.

also amplify voices of African communities whose support for the ICC has been drowned out by the Court's protracted interaction with the AU.

I. IMPLICATIONS OF AFRICAN LEADERSHIP

At its first summit of 2011, the AU explicitly encouraged its member states to support a prosecutor who was an African national, a preference that has raised alarms among monitoring groups.¹⁴ Watchdog organizations fear endorsement according to geography could lead to political quid pro quos that would be detrimental to the fundamental work of the ICC. For example, endorsing states and regional blocs might base their support for a candidate on the assumption that, should that candidate become prosecutor, he or she would show partiality to endorsing governments when considering whether to pursue investigations in their countries. Or, states might agree to vote for a particular candidate based less on that candidate's credentials and more on the hope of gaining support and good will from fellow endorsing countries in other politicized intergovernmental fora.¹⁵

There is indeed a risk that geographic considerations would taint the prosecutor's office in the long term, setting a precedent that turns one of the few legal and independent international posts into a political and potentially less effective one. However, this risk is often overstated. The Rome Statute specifically endorses the consideration of gender, geographic, and legal system representation in the selection of judges,¹⁶ so representational considerations are not in themselves controversial within the policy of the institution. If diversity is a desirable trait for ICC judges, one could further argue that it is at least as important, if not more so, to consider gender and geographic origin in the selection of the chief prosecutor, whose discretion not to investigate or to prosecute "in the interests of justice"¹⁷ and whose judgment about which cases to pursue with limited resources¹⁸ also help determine the cases that form the

14. AU, Decision on the Implementation of the Decisions on the International Criminal Court, ¶ 9, O.A.U. Doc. EX.CL/639(XVIII) (January 30–31, 2011) [hereinafter Implementation of the Decisions]. A few months later, the AU endorsed Bensouda's candidacy. See African Candidatures, *supra* note 12, ¶ 1.

15. See Robbie Corey-Boulet, *New Leadership for the ICC*, INTER PRESS SERVICE (May 27, 2011), <http://tinyurl.com/3ses4oh>; Mark Kersten, *The ICC's Next Top Prosecutor*, JUSTICE IN CONFLICT BLOG (May 23, 2011), <http://tinyurl.com/dxnpe6v>.

16. See Corey-Boulet, *supra* note 15 (referring to Rome Statute of the International Criminal Court art. 36, para. 8, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute]).

17. Rome Statute, *supra* note 16, art. 53, para. 1.

18. In its first year of operation alone, the ICC Office of the Prosecutor received nearly 500 communications identifying potential cases in 66 states. M. R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 76 (2004).

Court's docket. To have a female as chief prosecutor for the ICC lends even more credence to the institution, as many of its cases examine gender-based crimes committed against African and female victims. Moreover, it is appropriate to consider qualities above and beyond legal credentials in weighing candidates because the position of prosecutor has evolved into more than a strictly legal one. The Court's first prosecutor, Luis Moreno-Ocampo, who became the main figurehead and personality associated with the ICC for nearly a decade, was scrutinized nearly as much for his diplomacy and communication skills as for his independence and legal qualifications.¹⁹

Selection of an African chief prosecutor would also be appropriate given the growing pool of African legal practitioners qualified for the job.²⁰ According to the Rome Statute, to be qualified the chief prosecutor must be fluent in one of the Court's working languages, "of high moral character, [and] [h]ighly competent in and have extensive practical experience in the prosecution or trial of criminal cases."²¹ Many commentators agree that Fatou Bensouda's credentials are well suited to the position,²² so debates over the possible election of a prosecutor lacking essential legal merits may be moot. Implicit in reservations about politicization is the assumption that an African prosecutor would reverse the trend of investigating sensitive situations in African countries, but the converse is also possible. Bolstered by the Rome Statute's implied duty to prosecute the most serious crimes under international law,²³ and with years of experience prosecuting domestic or international crimes in a complex regional context, an African prosecutor would likely pursue additional difficult cases on the continent and could prosecute them effectively. In

19. Interestingly, African leaders have singled out their negative opinion of Moreno-Ocampo, rather than their perception of the Court as a whole, as a primary reason for their refusal to cooperate with the ICC. *See, e.g.,* Richard Lough, *African Union Accuses ICC of Bias*, REUTERS (Jan. 30, 2011, 8:59 AM), <http://tinyurl.com/6tsolv5> (quoting Jean Ping, AU Chairman) ("We Africans and the African Union are not against the International Criminal Court. That should be clear . . . We are against Ocampo who is rendering justice with double standards.").

20. Before the Selection Committee published its shortlist, the names of several African legal practitioners had also been raised as viable candidates for the post. *See* Michael Vandy, *Two Sierra Leoneans Vying for ICC Prosecutor Job*, SIERRA EXPRESS MEDIA (June 3, 2011), <http://tinyurl.com/6cpedmz>; Mark Kersten, *The ICC's Next Top Prosecutor: The Candidates*, JUSTICE IN CONFLICT BLOG (June 3, 2011), <http://tinyurl.com/6rc9qdj>.

21. Rome Statute, *supra* note 16, art. 2, para. 3.

22. For example, William Pace, the convener of the Coalition for the International Criminal Court (a global civil society alliance supporting the ICC), deemed Bensouda "definitely a frontrunner candidate" and some of the potential African endorsees, including Bensouda "very highly qualified." Corey-Boulet, *supra* note 15. *See also* Search Comm., *supra* note 12, ¶ 19 ("The Search Committee considers that each of the shortlisted candidates meets these Rome Statute eligibility criteria.").

23. *See* Kenneth A. Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, 22 LEIDEN J. INT'L L. 99, 102–103 (2009).

addition, overarching ethical standards of the legal profession, which call for conduct grounded in law and in the pursuit of justice, should serve as safeguards against bias.

Certainly the election of an African prosecutor would help counter the critique that the leadership of the ICC is at best unrepresentative and at worst imperialist. Leaders at the January AU Summit noted that they would support the election of an African prosecutor in part because the African continent hosts the most state parties to the Rome Statute, yet none of the institution's four main organs is led by an African.²⁴ In addition, since its establishment, all of the ICC's cases and situations have been in Africa, addressing war crimes and crimes against humanity in the DRC, northern Uganda, the Darfur region of Sudan, the CAR, Kenya, and most recently, in Côte d'Ivoire and Libya.²⁵ Critics argue that this distinct geographic imbalance demonstrates Western paternalism.²⁶

Behind suspicions about the African concentration of cases is a more fundamental question regarding the prosecutor's discretionary choices, especially concerning possible tradeoffs between peace and justice. Lauded by supporters as brave and characterized by critics as brazen, Moreno-Ocampo became increasingly controversial over the course of his eight-year term in office. Scholars have carefully scrutinized the ICC prosecutor's timing and selection of arrest warrants, delegation of charges, and identification of suspects. Some have called for greater deference to transitional justice mechanisms, peace negotiations, and head-of-state immunities due to ongoing security concerns in the Court's focus countries. Uganda is often referenced as a case study to support greater deference. In Uganda, the Office of the Prosecutor (OTP) unsealed an arrest warrant against LRA leader Joseph Kony despite requests from the victimized Acholi community that the warrant not be issued while a

24. See Corey-Boulet, *supra* note 15.

25. See *ICC – All Cases*, INTERNATIONAL CRIMINAL COURT, <http://tinyurl.com/6oqs9d6> (last visited Dec. 2, 2011); *ICC – All Situations*, INTERNATIONAL CRIMINAL COURT, <http://tinyurl.com/7srx2hv> (last visited Dec. 2, 2011). This does not account for situations under preliminary examination, including those in Afghanistan, Colombia, Palestine, Georgia, Honduras, and the Republic of Korea. See *ICC – Communications, Referrals, and Preliminary Examinations*, INTERNATIONAL CRIMINAL COURT, <http://tinyurl.com/cukgq53> (last visited Dec. 2, 2011).

26. For example, the Libyan government criticized the Court's pursuit of its leader, Moammar Gadhafi, by characterizing the ICC as "a baby of the European Union" focused solely on prosecuting African leaders. *Libya: ICC Prosecutor Seeks Warrant for Gaddafi*, BBC NEWS, May 16, 2011, <http://tinyurl.com/5sp2s77>. See also Lough, *supra* note 19. Even international criticism of the AU's pro-Africa stance on the prosecutorial election has been called into question. See, e.g., Corey-Boulet, *supra* note 15 (quoting Brigid Inder, executive director of Women's Initiative for Gender Justice) ("The issue isn't if the AU endorses a candidate. The issue is why others are working hard to prevent the AU from endorsing a candidate and therefore ensuring there isn't a strong African candidate who could viably contest the election for the next chief prosecutor of the ICC.").

former Ugandan minister attempted peace talks.²⁷ Another oft-cited case is Sudan, where the OTP unsealed an arrest warrant against sitting head-of-state Omar Al Bashir and added the charge of genocide to a standing list of allegations, despite an AU request that the Security Council move to suspend for a year the Court's proceedings in order to facilitate peace in Darfur's difficult security climate.²⁸ When the arrest warrant proceeded apace, the Sudanese government expelled humanitarian organizations in the country, causing some observers to argue that the warrant indirectly harmed the very vulnerable communities it ought to have protected.²⁹ Even in the post-Moreno-Ocampo era, the ICC will have to make difficult choices about where, when, and whom to prosecute, and whether to take into account the potential for further insecurity when issuing arrest warrants in fragile contexts. It is not guaranteed that Bensouda, who has served in the OTP under Moreno-Ocampo for six years, would chart a different course in this area, especially as the Rome Statute seems to place peace and security considerations outside the prosecutor's purview.³⁰ However, the appointment of a prosecutor endorsed by the AU might quiet complaints that the ICC prosecutor is unfairly targeting African actors and insensitive to the humanitarian ramifications of his or her prosecutorial decisions in African states. Further, the election of the AU's endorsee would weaken the argument that African governments have had little say and thus maintain a minor stake in the development and direction of the Court.

The appointment of an African prosecutor like Bensouda — who personifies a counter-narrative to the storied antagonism between the ICC and Africa — could also magnify the voice of African communities whose stance on the ICC differs from the policy of the AU. In her public outreach on behalf of the Court, Bensouda has highlighted the need for

27. See Rodman, *supra* note 23, at 104. See also Harvey M. Weinstein, Laurel E. Fletcher, Patrick Vinck & Phuong N. Pham, *Stay the Hand of Justice: Whose Priorities Take Priority?*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 27–48, 39–41 (Rosalind Shaw & Lars Waldorf, with Pierre Hazan eds., 2010). For an extended discussion of the Ugandan situation at the time of these arrest warrants and the involvement of the ICC, see Alexander K.A. Greenawalt, *Complementary in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 111–13 (2009).

28. This would be permitted under Article 16 of the Rome Statute, which grants the Security Council exclusive authority to defer ICC investigations under its Chapter VII Charter powers. See Jalloh, Akande & du Plessis, *supra* note 5, at 7–8.

29. See Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 336 (2009).

30. The Rome Statute grants the Security Council the sole authority to defer investigations in the interests of peace and security. See Jalloh, Akande & du Plessis, *supra* note 5, at 11. In addition, a 2007 ICC policy paper implies that even the prosecutor's discretion not to investigate “in the interests of justice” under Article 53 does not encompass broad peace and security calculations. See Rodman, *supra* note 23, at 122.

the ICC to address the concerns not only of African governments but also of African citizens, civil society, and victims of gross human rights abuses, especially vulnerable groups, like women and children, whose interests are the Court's priority.³¹ Such statements will become more necessary as accounts of divergence between African citizens and their governments emerge. In Kenya, the government reversed its support of ICC investigations into its 2007–2008 post-election violence when Moreno-Ocampo charged a bipartisan group of political elites now nicknamed the 'Ocampo Six' with instigating and financing the violence. As a response, the Kenyan Parliament called for withdrawal from the Rome Statute and its vice president endorsed an ICC deferral so that a domestic tribunal could exercise jurisdiction instead of the ICC.³² However, the government's position did not reflect the will of the populace. As it turned out, a majority of Kenyan citizens still supported ICC activity due to their government's failure to pursue justice for the atrocities that occurred.³³

As the ICC has targeted high-level government officials, resistance among leaders fearful of finding themselves in the Court's crosshairs has followed. It is not clear that this resistance is shared among citizens, who — as in the case of Kenya — might appreciate that the ICC is investigating grave crimes committed in their communities that have otherwise gone unaddressed. An African ICC prosecutor would have not only a platform to emphasize similar distinctions between the political will of government officials and the wishes of the wider African public but also the ability to lead a coalition of the willing among Africans. As a chief spokesperson and figurehead for the Court, the newly elected prosecutor could also increase support for the ICC among African citizens by personally participating in outreach and public education programs reaching African community leaders.³⁴ Continued mobilization of civil

31. See Fatou Bensouda, Deputy Prosecutor, Int'l Criminal Court, Luncheon Dialogue at the 105th ASIL Annual Meeting: Harmony and Dissonance in International Law (March 25, 2011); Scott Stearns, *African Union Says ICC Prosecutions are Discriminatory*, VOICE OF AMERICA (July 5, 2011), <http://tinyurl.com/czdhroy> (quoting Bensouda) ("We say that the ICC is targeting Africans, but all of the victims in our cases in Africa are African victims [T]hey are the ones who are suffering these crimes.").

32. See Christopher Gevers & Max Du Plessis, *Another Stormy Year for the International Criminal Court and its Work in Africa* 14 (Apr. 22, 2011) (unpublished manuscript), available at <http://tinyurl.com/cmnp5vm>; *The ICC and Africa: Dim Prospects*, ECONOMIST (Feb. 17, 2011), <http://tinyurl.com/4t3bt6q>.

33. Reportedly, seventy-three percent of Kenyans still supported the ICC. ECONOMIST, *supra* note 32.

34. Outreach and public education activities include town hall meetings; the screening of trial proceedings; the production of audio, video, and printed educational materials; and seminars and workshops for media, civil society, legal, and academic communities. These tasks are carried out in close coordination with the functions of the Office of the Prosecutor and other organs of the Court. See Assembly of States Parties, *Strategic Plan for Outreach of the Int'l Criminal Court*, 5th sess., Nov.

society support on a wide scale could in turn put pressure on governments to engage more proactively with the Court.³⁵

Finally, by further legitimizing the ICC among African leaders, Bensouda — or another qualified African candidate — could help highlight the ICC as a necessary adjudicator of international criminal charges and delegitimize diversions to inadequate judicial institutions in African countries. Because the ICC is a court of last resort prosecuting only in situations where domestic judiciaries have proven unable or unwilling to launch genuine investigations, African governments that have grown wary of the ICC have attempted to point to existing local justice mechanisms to preempt the Court's work. However, complacency and corruption raise doubts about the abilities of domestic institutions. For example, Sudan established a Special Criminal Court on the Events in Darfur (SCCED) one day after the ICC announced its Sudan investigations.³⁶ However, in focusing on ordinary domestic rather than international crimes and in failing to prosecute high-level perpetrators, the SCCED proved an inadequate substitute for the ICC.³⁷ This year, the AU empowered the African Court of Justice and Human Rights (ACJHR) to try genocide, crimes against humanity, and war crimes in addition to the civil litigation already within its jurisdiction, possibly to reclaim sovereignty from the ICC.³⁸ The results of this augmented mandate remain to be seen.

The case of Hissene Habré, Chad's former president, stands as perhaps the most emblematic illustration of how inadequate domestic judicial processes perpetuate impunity in Africa, even though the atrocities allegedly committed by Habré occurred before the Rome Statute came into force and are thus beyond the reach of the ICC. The current Chadian government tried Habré *in absentia* in politicized proceedings that trial monitors say did not meet international standards of fairness. In addition,

23–Dec. 1, 2006, ¶¶ 49–61, 63–65, ICC-ASP/5/12 (Sept. 29, 2006); Office of the Prosecutor, Prosecutorial Strategy 2009–2012, ¶¶ 59–77 (Feb. 1, 2010), <http://tinyurl.com/647j4p6>.

35. For example, Marlies Glasius identifies CAR civil society as the impetus behind the Central African Republic's state referral to the ICC. *See generally* Marlies Glasius, *We Ourselves, We Are Part of the Functioning: The ICC, Victims, and Civil Society in the Central African Republic*, 108 AFR. AFF. 49 (2009).

36. HUMAN RIGHTS WATCH, LACK OF CONVICTION: THE SPECIAL CRIMINAL COURT ON THE EVENTS IN DARFUR 1 (2006); Manisuli Ssenyonjo, *The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan*, 59 INT'L & COMP. L.Q. 205, 223 (2010).

37. For a detailed analysis of the SCCED's shortcomings, see generally HUMAN RIGHTS WATCH, *supra* note 36.

38. *See* Assembly Decisions on the International Criminal Court, *supra* note 9, ¶ 8. One commentator has noted that empowering the ACJHR would probably have little effect on the authority of the ICC to exercise jurisdiction under the complementarity principle because Article 17 of the Rome Statute provides for deferral to national criminal investigations and prosecutions, not regional ones. *See* ECONOMIST, *supra* note 4.

the AU has pressured Senegal, where Habré has lived for the past twenty years without being brought to justice, to prosecute him for crimes against humanity on the AU's behalf. Senegal refused to prosecute, so neither effort yielded his detention.³⁹ This year, Kenya appeared to follow its own diversionary strategy by championing the Kenyan judiciary as empowered by its recently overhauled constitution to prosecute crimes associated with its post-electoral violence closer to home.⁴⁰ Such moves have not camouflaged three years of conspicuous judicial inactivity in the country.⁴¹

If the appointment of an African prosecutor enhances the profile of the Court in Africa, it could further demonstrate that, for now, many of the continent's current justice options pale in comparison. Currently, only a tiny fraction of African countries have a legal framework in place to try crimes under international law domestically or to extradite those accused of such crimes to a country willing and able to prosecute them on behalf of the international community. This is not to speak of severe deficiencies in national justice sectors and a vast shortage of lawyers practicing in domestic judicial systems with a background in international criminal law.⁴² Ironically, it is these very inadequacies and the lacking resources and political will to remedy them that have given the Court motive to

39. Belgium has also sought to try Habré under its universal jurisdiction provisions, but Senegal refused to extradite him, first seeking guidance from the AU on how to proceed, then refusing to prosecute at the AU's request. *See Senegal: Chad Asks for the Extradition of Hissène Habré to Belgium*, HUMAN RIGHTS WATCH (July 22, 2011), <http://tinyurl.com/cmtoreg>.

40. *See* Gevers & du Plessis, *supra* note 32, at 11. The African Union endorsed Kenya's efforts to seek a Security Council deferral of its ICC investigation. *See Implementation of the Decisions*, *supra* note 14, ¶ 6.

41. The Kenyan parliament had rejected a bill that would have established a special tribunal to try alleged crimes against humanity associated with the post-election violence, and domestic proceedings focused only on low-level accused and minor crimes. Charles C. Jalloh, *Situation in the Republic of Kenya*, 105 AM. J. INT'L L. 540, 543 (2011).

42. In a survey of state practice regarding universal jurisdiction undertaken by the AU and the European Union, African states' lack of capacity to prosecute crimes under international law domestically was listed as a key point of concern. Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, ¶ 33, 8672/1/09 REV1 (Apr. 16, 2009) ("[T]here are national legal and institutional constraints on the capacity of many African states to address these crimes and to prosecute perpetrators of them. Consideration should be given to building the national legal capacity of African states to combat genocide, crimes against humanity, war crimes, and torture."). Constraints on African states' ability to prosecute crimes under international law include: lack of national legislation incorporating international crimes in order to enable domestic prosecution, vast shortages of legal practitioners and very limited domestic knowledge of international criminal law, poor training for court investigators, lack of witness and victim protections, inadequate or nonexistent court management and records systems, lack of independence in judiciaries and an unwillingness to prosecute sensitive cases, neglect and lack of resources in the justice sector, and limited ability to conduct outreach to community members, media, and victims. *See generally* ERIC A. WITTE, OPEN SOCIETY FOUNDATIONS, *PUTTING COMPLEMENTARITY INTO PRACTICE: DOMESTIC JUSTICE FOR INTERNATIONAL CRIMES IN DRC, UGANDA, AND KENYA* (2011).

prosecute African cases in the first place. Still, an infamous accountability gap persists where — despite some national prosecutions, two internationalized tribunals, and an Africa-focused ICC — only a small fraction of perpetrators have been brought to justice on the continent, even though millions of Africans have been victimized by genocide, crimes against humanity, and war crimes on a widespread and systematic scale. Thus, the election of an African prosecutor would greatly advance the ICC’s primary objective⁴³ if it raises awareness among other members of the African bar that international legal practice, international procedural standards, and substantive international criminal law should be domesticated into national justice systems, which will have ultimate responsibility to try the bulk of crimes under international law in their own jurisdictions.

CONCLUSION

It is clear that the selection of an African prosecutor will not end the conflicts between African countries and the ICC. A number of arguably more difficult disputes will endure, including debates about how to handle head-of-state claims to immunity and controversial choices between pursuing arrest warrants against mass murders versus postponing them for peace negotiations to end atrocities. With African states challenging the Security Council’s sole authority to defer ICC investigations in the interests of peace and security,⁴⁴ we are also likely to see *realpolitik* inquiries into the geographic imbalance of power in the Security Council. The Security Council remains the only body able to grant deferral of ICC prosecutions despite the fact that no African state has veto power or permanent membership to the body.⁴⁵ Given these continuing relational hurdles, the AU endorsement for ICC prosecutor, where the frontrunner is a highly qualified candidate with a demonstrated commitment to international criminal justice, could do more to strengthen the Court’s work than expected.

43. Rome Statute, *supra* note 16, pmb1. (stating that “[T]he most serious crimes of concern to the international community as a whole must not go unpunished and [t]heir effective prosecution must be ensured taking measures at the national level and by enhancing international cooperation”).

44. *See* Jalloh, Akande & du Plessis, *supra* note 5.

45. Under its Chapter VII authority, the Security Council is also the only entity able to refer a situation to the Office of the Prosecutor when the alleged crime was not committed in the territory or by a national of a state party. *See* Rome Statute, *supra* note 16, art. 13(b).