

# Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts

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## ABSTRACT

*Kenya's 2007 presidential elections inflamed deep-seeded ethnic tensions in the country, sparking violence that left thousands dead and more than half-a-million civilians displaced. After the bloodshed, Kenya failed to investigate, prosecute, and punish those responsible for the atrocities. The Prosecutor for the International Criminal Court (ICC) launched an investigation into the Kenyan situation, acting under his statutory authority, and eventually brought charges against six high-ranking Kenyans, including President Kenyatta. After years of investigations, the Prosecutor ultimately withdrew the case against the Kenyan President—a potentially fatal failure heralded by some as the death knell of the ICC.*

*During the course of the ICC proceedings, Kenyatta lobbied to expand the jurisdiction of the regional East African Court of Justice (EACJ) in order to try the accused more locally. Kenya's move to transfer the cases to the regional court has been largely overlooked in the commentary on the situation in Kenya. Nevertheless, Kenya's strategy raises important questions about the role of regional courts in the ICC's efforts to combat impunity that have gone too long unanswered: What criteria should be used to determine when a regional court provides a better forum than the ICC? Can the ICC support the efforts of these regional courts? Should it? In considering these questions, this Article argues that, if the ICC is to fulfill its promise, its role in ending impunity should not be limited solely to pursuing*

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*cases. Instead, the ICC should defer to regional courts where such courts are supported by transnational social movements— networks of civil society groups, legal and political activists, and local human rights activists. Regional courts supported by such movements are better equipped to further the ICC’s goals by promoting compliance with international law at home and domesticating international human rights principles so that they resonate locally.*

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## I. INTRODUCTION

When Mwai Kibaki, a Kikuyu, was declared victor over Raila Odinga, a Luo, on October 30, 2007, in Kenya's presidential election, the announcement stoked long-standing ethnic tensions and ignited a firestorm.<sup>1</sup> Election brutality was nothing new in Kenya—violence has been associated with Kenyan elections since the restoration of a multi-party political system in 1991. But, the 2007 post-election bloodshed was different; it was more deadly, more destructive, and more widespread.<sup>2</sup> When the violence at last abated, more than 1,000

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1. See Jeffrey Gettleman, *Disputed Vote Plunges Kenya into Bloodshed*, N.Y. TIMES (Dec. 31, 2007), <http://www.nytimes.com/2007/12/31/world/africa/31kenya.html> [<http://perma.cc/JX9A-V6JZ>] (archived Oct. 4, 2015).

2. COMMISSION OF INQUIRY INTO POST ELECTION VIOLENCE, REPORT OF THE COMMISSION OF INQUIRY INTO POST ELECTION VIOLENCE vii (2008) [hereinafter CIPEV REPORT]; see also Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. L.J. 205, 206 (2011) (noting that the violence following the 2007 Kenyan elections “was more deadly and destructive than ever before”).

people were dead, and more than half a million civilians had been displaced.<sup>3</sup>

External intervention came swiftly.<sup>4</sup> Efforts to resolve the conflict peacefully began in the first week of January 2008.<sup>5</sup> On February 28, 2008, Former UN Secretary-General Kofi Annan, together with the African Union Panel of Eminent Personalities, brokered a power-sharing agreement and established the Commission of Inquiry on Post-Election Violence (CIPEV or Waki Commission).<sup>6</sup> The CIPEV recommended the creation of a special tribunal to try those most responsible for the post-election violence.<sup>7</sup> In the event that the government failed to create such a tribunal, the Waki Commission recommended that the names of those most responsible be handed over to the International Criminal Court (ICC) for prosecution.<sup>8</sup>

After three bills to create the special tribunal failed in the Kenyan Parliament, the Waki Commission sent the names of the six individuals believed to be most responsible for the post-election violence to the ICC.<sup>9</sup> The ICC Prosecutor, Louis Moreno-Ocampo, sought a summons for the six individuals named on December 15, 2008.<sup>10</sup> On November 26, 2009, Moreno-Ocampo filed a request for an investigation.<sup>11</sup> Almost a year later, the Prosecutor issued summonses for six high-ranking Kenyan officials—known as the “Ocampo Six”—to appear before the Court.<sup>12</sup> In January 2012, the

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3. AFRICAN UNION, OFFICE OF THE AU PANEL OF EMINENT AFRICAN PERSONALITIES, BACK FROM THE BRINK: THE 2008 MEDIATION PROCESS AND REFORMS IN KENYA 19 (2014) [hereinafter BACK FROM THE BRINK].

4. *Id.* at 20 (“Recognizing the gravity of the situation . . . [the] Chair of the African Union[] immediately called an emergency meeting of the AU Commission and consulted African heads of state and the United Nations (UN).”).

5. *See id.* at 21–22 (noting that the international community is frequently criticized for failing to take action promptly to end conflicts, and contrasting the immediate response to the Kenyan situation owing to the political support within Africa of the responsibility to protect the human rights of individuals in other states).

6. *See* Thomas Obel Hansen, *Kenya’s Power-Sharing Arrangement and Its Implications for Transitional Justice*, 17 INT’L J. HUM. RTS. 307, 310 (2013) [hereinafter Hansen, *Power-Sharing*].

7. CIPEV REPORT, *supra* note 2, at ix, 472.

8. *Id.* at 18, 473.

9. *The Crisis in Kenya*, INT’L COALITION FOR THE RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-kenya> [http://perma.cc/SD8S-HSBL] (archived Oct. 4, 2015) [hereinafter *Crisis in Kenya*].

10. *Id.*

11. Pre-Trial Chamber II, ICC–01/09–19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 2, 17 (Mar. 31, 2010) [hereinafter Decision Pursuant to Article 15], <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> [http://perma.cc/ZAM9-Z6N9] (archived Oct. 15, 2015).

12. On March 8, 2011, the Pre-Trial Chamber summoned Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali to appear before the Court. *Id.* at ¶ 5. The same day, the Chamber also issued summonses to William Samoei

Pre-Trial Chamber confirmed charges against four of the Ocampo Six—including President Kenyatta and Vice President Uhuru—to bring these cases to trial.<sup>13</sup> After years of frustrating investigations, the Prosecutor’s case against the Kenyan President ultimately unraveled.<sup>14</sup> The high-profile misadventure prompted questions about the legitimacy and efficacy of the International Criminal Court, exposing an institution crippled by its inability to compel cooperation with its proceedings.<sup>15</sup>

Far from bringing closure, the Prosecutor’s actions raised an entirely new set of issues: the case marked the first exercise of the prosecutor’s *proprio motu* power<sup>16</sup> to commence an investigation at his own initiative,<sup>17</sup> a highly contentious authority conferred only after “extensive debates and division of views” among the states who established the ICC.<sup>18</sup> The dispute turned on whether the Prosecutor should have the authority to trigger the jurisdiction of the court on his own motion, absent any referral from either a State Party or the UN Security Council.<sup>19</sup> Such independent prosecutorial authority was

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Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Prosecutor v. Ruto, ICC–01/09–01/11–101, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 3 (Jan. 23, 2012), <http://www.iccpi.int/iccdocs/doc/doc1314535.pdf> [<https://perma.cc/C936-D6VP?type=source>] (archived Oct. 4, 2015).

13. The Pre-Trial Chamber confirmed charges brought against Ruto and Sang but dismissed charges against Kosgey for lack of evidence on January 23, 2012. Prosecutor v. Ruto, ICC–01/09–01/11–101, ¶¶ 293, 299, 366. That same day, the Pre-Trial Chamber confirmed separate charges against Muthaura and Kenyatta, and dismissed charges against Ali, likewise due to a dearth of evidence showing that he had committed any crime. Prosecutor v. Muthaura, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC–01/09–02/11–382, ¶¶ 429–30 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> [<https://perma.cc/4NUN-S4SS?type=source>] (archived Oct. 4, 2015).

14. Prosecutor v. Kenyatta, ICC–01/09–02/11–983, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta, ¶ 2 (Dec. 5, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf> [<https://perma.cc/AU3U-68MR>] (archived Oct. 4, 2015). The Prosecutor laid the blame for the withdrawal at Kenya’s feet, stating that the Kenyan Government had failed to “cooperate fully and effectively” with the investigation or provide requested materials. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta (Dec. 5, 2014) [hereinafter Statement of the Prosecutor], [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx) [<https://perma.cc/G8BV-YD8N>] (archived Oct. 4, 2015).

15. See Eugene Kontorovich, *A Court’s Collapse*, NAT’L REV. (Sept. 15, 2014, 4:00 AM), <http://www.nationalreview.com/article/387935/courts-collapse-eugene-kontorovich> [<https://perma.cc/9UXH-PA6D>] (archived Oct. 4, 2015).

16. Rome Statute of the International Criminal Court, art. 15, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

17. Thomas Obel Hansen, *The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and Their Implications for the Future of International Justice*, 18 AUSTRALIAN J. HUM. RTS. 187, 188 (2012) [hereinafter Hansen, *Three Defining Features*].

18. Decision Pursuant to Article 15, *supra* note 11, ¶ 17.

19. *Id.*

(and remains) controversial, as it risked “politicizing the Court and thereby undermining its credibility.”<sup>20</sup>

The tensions between the African states and the ICC heightened the risk of politicizing the court. Once the ICC’s most strident supporters, the African states now accuse the ICC of improper political motivations and inappropriate targeting of African leaders for investigation while neglecting atrocities committed by more powerful Western figures.<sup>21</sup> In addition to the concerns raised by the African states, commentators have questioned whether the atrocities committed in the wake of Kenya’s 2007 election were sufficiently grave to merit the ICC’s attention.<sup>22</sup> For his part, Kenya’s president lobbied for the removal of the cases before the ICC<sup>23</sup> and sought to expand the East African Court of Justice’s jurisdiction to try the accused more locally.<sup>24</sup>

Kenya’s move to transfer the cases to the EACJ raises important questions about the role of regional courts in achieving the ICC’s goals: Do regional courts provide an appropriate forum for trying those accused of international crimes? What criteria should be used to determine when a regional court provides a better forum than the ICC for such prosecutions? Does the ICC have the authority to support the nascent efforts of such localized courts? Should it do so?

Scant attention has been paid to the role that the EACJ can play either in fighting impunity and guaranteeing human rights in East Africa or in the potential relationship between the ICC and the EACJ and other regional courts.<sup>25</sup> But in light of the recent collapse of the

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20. *Id.* ¶ 18.

21. Scott Stearns, *African Union Says ICC Prosecutions Are Discriminatory*, VOICE OF AM. (July 4, 2011, 8:00 PM), <http://www.voanews.com/content/article--african-union-says-icc-prosecutions-are-discriminatory-125012734/158424.html> [https://perma.cc/L4GV-GW4B] (archived Oct. 4, 2015).

22. Hansen, *Three Defining Features*, *supra* note 17, at 194–96.

23. *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC (Oct. 12, 2013), <http://www.bbc.com/news/world-africa-24506006> [https://perma.cc/V878-6JUG] (archived Oct. 4, 2015) (quoting President Kenyatta in an address to the African Union accusing the ICC of “bias and ‘race-hunting,’” and calling the court “a painfully farcical pantomime, a travesty that adds insult to the injury of victims,” and “the toy of declining imperial powers”); *see also* Simon Allison, *ICC Should Drop Charges Against Kenyatta—For Now*, GUARDIAN (July 17, 2014), <http://www.theguardian.com/world/2014/jul/17/icc-uhuru-kenyatta-kenya> [https://perma.cc/9AK8-32KF] (archived Oct. 4, 2015).

24. Argaw Ashine, *AU Moves to Take Over Hague Cases*, DAILY NATION (May 9, 2012), <http://www.nation.co.ke/News/politics/AU-moves-to-take-over-Hague-cases/-/1064/1402884/-/xqolwr/-/index.html> [https://perma.cc/278D-ZGL7] (archived Oct. 4, 2015).

25. In *Mission Creep or a Search for Relevance: The East African Court of Justice’s Human Rights Strategy*, James Gathii describes how the EACJ assumed jurisdiction over human rights cases, despite the inconsistent views of the East African Community’s member states. James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice’s Human Rights Strategy* 6–7 (Loyola Univ. Chicago Sch. of Law, Working Paper No. 19, 2012), <http://ssrn.com/abstract=2178756> [http://perma.cc/B6FR-T92Q] (archived Oct. 15, 2015). Gathii notes that despite the

high-profile Kenyatta case, and in the face of ongoing efforts to try international criminals regionally, the time has come for the Prosecutor to reevaluate the ICC's relationship with sister regional international institutions.

This Article argues that the ICC Prosecutor should defer to and support regional court proceedings when these courts are supported by Transnational Social Movements (TSMs), because TSMs are predictive of compliance with court rulings and increase the likelihood of domestication of international rules. Particularly in light of the ICC's insufficient enforcement powers, a path to securing compliance with proceedings and rulings is necessary to achieve the ICC's goals of securing compliance with international law, domesticating international human rights principles, and ending impunity.

This Article proceeds in four parts. Part I describes the role of the ICC in the international criminal justice system, elaborates on the importance of the principle of complementarity to the goals of the institution, and surveys critiques that have been levied against the Court. Part II demonstrates how TSMs can serve as reliable barometers for compliance with international law both pursuant to compliance theories and in the practice of two regional courts: the

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lack of "historical and cultural underpinning that gives courts and law legitimacy and authority to rule," the EACJ is nonetheless "heralding the recent arrival of political accountability through judicial review," due to the mobilization efforts of local lawyers and law groups. *Id.* at 10. However, unlike this Article, Gathii's piece does not tie these mobilization efforts to larger social mobilization and compliance theories to determine when the Court is likely to achieve compliance, nor does he discuss the potential relationship between the ICC and the EACJ. Jenia Iontcheva Turner reconceives of the ICC as a "roving mixed court," working hand-in-hand with local authorities to prosecute international crimes. Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 2-3 (2005). Turner's argument derives from her characterization of the ICC as it currently operates as essentially "universalist," and therefore unlikely to accommodate diverse perspectives or achieve post-conflict reconciliation. *Id.* at 16-17. However, Turner's article does not discuss the potential partnerships between regional courts and the ICC, nor does she develop a framework for determining when the ICC should partner with more localized authorities, and when the ICC should pursue prosecutions alone. In reviewing the literature on international criminal law and cultural diversity, Fabián O. Raimondo noted the lack of scholarship addressing the relationship between cultural diversity and international criminal law. Fabián O. Raimondo, *For Further Research on the Relationship Between Cultural Diversity and International Criminal Law*, 11 INT'L CRIM. L. REV. 299, 302 (2011). Raimondo acknowledged that "[t]he impact of cultural diversity on proceedings before the ICC has not been studied so far." *Id.* at 318. Kenneth S. Gallant addresses the potential role for regional courts in an international criminal justice system dominated by the ICC. *See generally* Kenneth S. Gallant, *Africa and Beyond: Should the International Criminal Court Be the Sole International Organ of Criminal Justice?* 6 (UALR Bowen Sch. of Law, Working Paper No. 12-03, 2012), <http://ssrn.com/abstract=2044876> [<http://perma.cc/5BWK-62GX>] (archived Oct. 15, 2015). Gallant identifies potential models for regional courts, which focus on filling the gaps in the ICC's jurisdiction by addressing "non-core international crimes," or focusing on issues of "great regional impact," such as drug trafficking in the Americas. *Id.* at 5-6. While worth pursuing, the models identified by Gallant do not look at how and when the ICC should defer to regional court prosecutions of crimes *within* the ICC's jurisdiction.

Inter-American Court of Human Rights (IACtHR) and the Community Court of Justice for the Economic Community of West African States (ECCJ). Part III provides context for the post-election violence that ravaged Kenya and the responses to the ICC proceedings both within Kenya and among the Partner States of the African Union (AU), demonstrating that the ICC proceedings may have been counterproductive, and assesses the legitimacy and competence of the East African Court of Justice (EACJ). Part V describes the factors that the ICC Prosecutor should weigh when evaluating whether or not to defer to regional court proceedings, building off transnational social mobilization theories and the lessons learned from sister internationalized institutions.

## II. THE ICC IN THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

The ICC occupies a special place in the center of the nascent international criminal justice system.<sup>26</sup> Once heralded as “the last great international institution of the Twentieth Century,”<sup>27</sup> the Court’s early years have been marked by “a period of rather

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26. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 61 (4th ed. 2011) [hereinafter SCHABAS, INTRODUCTION].

27. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000); see also SCHABAS, INTRODUCTION, *supra* note 26, at 61 (“The [ICC] is perhaps the most innovative and exciting development in international law since the creation of the United Nations.”). The court itself was created with an “unprecedented” level of civil society participation and marks a “fundamental step towards removing the power to punish from the sole domain of governments.” Marlies Glasius, *Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court*, in GLOBAL CIVIL SOCIETY YEARBOOK 137, 137, 164 (Marlies Glasius et al. eds., 2002). The court has jurisdiction over the most egregious international crimes: genocide, aggression, crimes against humanity, and war crimes, which are frequently committed by or with the approval of the state. Thus, the ICC is vested with the authority to determine the lawfulness of actions undertaken by high state officials, irrespective of “how lofty the accused’s position or undisputed the legality of those acts under domestic law.” Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 510 (2003). The court is thus “a revolutionary institution that intrudes into state sovereignty by subjecting states’ nationals to an international criminal jurisdiction.” Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT’L L. 144, 145 (1999). In this sense, the ICC represents a morally impressive triumph over lawlessness. Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 205 (2000). The Court builds on hopes that the global community can eradicate impunity, not only through prosecutions and investigations but also “by inspiring, encouraging or even pressuring domestic justice systems to do the same.” SARAH M. H. NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN 8 (2013).

lackluster and somewhat disappointing performance” that threatens to undermine the institution.<sup>28</sup>

The ultimate withdrawal of the ICC’s highest-profile case against a sitting head of state in the face of Kenya’s obstructionism may be the “biggest setback since [the Court’s] establishment.”<sup>29</sup> The time is thus ripe for a reevaluation of the ways in which the Court seeks to implement its goals. This Part begins by describing the articulated goals motivating the establishment of the ICC. It then analyzes two particularly controversial and especially critical operating principles—the principle of complementarity and the Prosecutor’s *proprio motu* authority—before turning to a discussion of the criticisms that have been levied at the Court.

#### A. *Ending Impunity for Perpetrators of Egregious Human Rights Abuses*

The ICC was established to “put an end to impunity” for the perpetrators of “atrocities that deeply shock the conscience of humanity.”<sup>30</sup> The creation of the court marked a species of “constitutional moment”—a conscious decision to reshape international law.<sup>31</sup> The Rome revolution inheres in the transformation of jurisdictional principles, which have been redefined from rules governing which state has authority over which cases to norms “establishing the circumstances under which the international community may prescribe rules of international criminal law and may punish those who breach those rules.”<sup>32</sup> In so doing, the Court

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28. NOUWEN, *supra* note 27, at xii.

29. Kontorovich, *supra* note 15.

30. Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 90.

31. Sadat & Carden, *supra* note 27, at 395. Bruce Ackerman defines “constitutional moments” in the American domestic context as transformational periods that, after sustained debate and civil society mobilization, lead to the creation of higher law enacted with broad public support. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (developing a dualist theory of American constitutionalism, and explaining that constitutional transformations occur when, after sustained debate and reform efforts, the public mobilizes to vest leaders with the authority to enact “higher laws” that must be protected by the U.S. courts). In a like manner, the ICC was established by the majority of UN member states after decades of sustained pressure from international civil society and intensive debates among UN member states and legal experts. *See generally* Glasius, *supra* note 27, at 137 (describing the role of international civil society organizations in creating the ICC and determining its mandate).

32. Sadat & Carden, *supra* note 27, at 389. Historically, international law recognized limits on state exercise of jurisdiction drawn from “formal criteria supposedly derived from concepts of state sovereignty and power.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 1, subch. A, introductory cmt. (1987). As a result, the first accepted jurisdictional principles provided that the state could exercise jurisdiction within its territory or over its

aspires to influence—and even constrain—state behavior.<sup>33</sup> Accordingly, the Rome Statute is intended to provide jurisprudential fodder for national courts and inspire local judicial actors to respond swiftly and effectively to serious human rights violations domestically.<sup>34</sup>

At the same time, the ICC is handicapped by institutional constraints. Perhaps most significantly, the ICC lacks any enforcement power and is dependent on the good will and support of states to undertake investigations and successful prosecutions.<sup>35</sup> The enforcement feebleness of the ICC vests states with considerable power to manipulate the Prosecutor and makes the institution de facto accountable to states.<sup>36</sup> As a result, the efficacy of ICC prosecutions depends on state cooperation to uphold ICC orders and decisions,<sup>37</sup> and states, in turn, can hamstring ICC proceedings. The case of Kenya is illustrative in this regard. In withdrawing charges against President Kenyatta, the ICC Prosecutor emphasized “severe challenges” encountered in the course of her investigation, particularly Kenya’s noncompliance, which “compromised the

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nationals abroad. *Id.* “Territoriality and nationality remain the principal bases of jurisdiction to prescribe,” but the criteria governing these principles have been relaxed, to provide the flexibility needed to “accommodate overlapping or conflicting interests of states.” *Id.* Currently, states recognize several bases for exercising jurisdiction: (1) the “territorial principle,” which authorizes states to enact laws applicable to persons and property within their territory; (2) the “nationality principle,” which recognizes the state’s authority to exercise jurisdiction over its own nationals, even when abroad; (3) the “protective principle,” which entitles states to regulate activities of non-nationals that threaten the state’s security, or other important interests; and (4) the “passive personality principle,” which authorizes a state to apply its laws, particularly its criminal laws, to acts committed abroad by non-nationals when one of the state’s nationals is a victim. *See* INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 332–48 (Jeffrey L. Dunoff et al. eds., 3d ed. 2010) [hereinafter Dunoff]. A more recent jurisdictional innovation, the principle of universal jurisdiction, recognizes that certain acts are so heinous and universally condemned that they are of serious concern to the international community, and thus all states have the right to exercise jurisdiction over those responsible for such egregious crimes. *Id.* at 349. The Rome Statute extended the principle of universal jurisdiction “to a theory of *universal international jurisdiction* which would permit the international community as a whole . . . to supplement, or even displace, ordinary national laws of territorial application with international laws that are universal in their thrust and unbounded in their geographical scope.” Sadat & Carden, *supra* note 27, at 407.

33. *See generally* Sadat & Carden, *supra* note 27.

34. *See* Bjork & Goebertus, *supra* note 2, at 210–12.

35. *See* INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, STRATEGIC PLAN: JUNE 2012–2015, at 5 (Oct. 11, 2013) [hereinafter ICC STRATEGIC PLAN] (“The Office [of the Prosecutor] is investigating increasingly complex organisational structures that do not fit the model of traditional, hierarchical organisations. It is doing so with more limited investigative tools than are at the disposal of national law enforcement agencies. *It can only do so if there is full cooperation from States.*”) (emphasis added); *id.* (“Cooperation becomes more than ever before a critical success factor if the Office is to produce positive results.”).

36. Danner, *supra* note 27, at 530.

37. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 92 (2003).

Prosecution's ability to thoroughly investigate the charges."<sup>38</sup> The ICC also suffers from a lack of sufficient financial and human resources.<sup>39</sup> In recognition of these institutional limitations, the ICC Prosecutor has stressed the importance of partnering more closely with civil society organizations and the core role of civil society in ensuring compliance and institutional legitimacy in the face of recalcitrant states.<sup>40</sup> Accordingly, she has pledged to increase her office's field presence, as well as to "evaluate the role that the NGO-community has played in its investigations, and to explore how new forms of cooperation would allow the Office to directly access . . . evidence that has been identified by [NGO and citizen] first responders."<sup>41</sup>

### B. *The Complementarity Paradox*

#### 1. The Legal and Rhetorical Meanings of Complementarity

One of the ICC's foundational principles—complementarity—works to promote compliance, foster the domestication of international law, and preserve state sovereignty.<sup>42</sup> As a legal matter, complementarity contemplates national and international criminal justice regimes working in a subsidiary manner to address international crimes. In this sense, it accords national criminal justice systems the first bite at the prosecutorial apple. When national mechanisms fail, international regimes can intervene.<sup>43</sup> Hypothetically, at least, complementarity works to safeguard the ICC's authority over recalcitrant states that refuse to prosecute the

38. Statement of the Prosecutor, *supra* note 14.

39. See ICC STRATEGIC PLAN, *supra* note 35, at 12 ("[T]he Office is presently not able to sustain such high intensity [monitoring and investigative] efforts due to a lack of resources."); see also William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 54 (2010) ("[T]he Court's own internal predictions and the current level of funding from the Assembly of States Parties . . . anticipate a maximum of two to three trials per year.").

40. In this regard, the Prosecutor emphasized in her 2012–2015 Strategic Plan that, "in order to increase its impact, a sustained, intense monitoring of and interaction with the State and other relevant stakeholders, in particular civil society, respecting situations under preliminary investigation, is a critical success factor." ICC STRATEGIC PLAN, *supra* note 35, at 20.

41. *Id.* at 23–24.

42. See NOUWEN, *supra* note 27, at 8–9.; see also Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 896–97 (2002) ("The Complementarity principle is intended to preserve the ICC's power over irresponsible States that refuse to prosecute those who commit heinous international crimes. It balances that supranational power against the sovereign right of States to prosecute their own nationals without external interference.").

43. El Zeidy, *supra* note 42, at 870.

perpetrators of egregious international abuses, while also buttressing the primary duty of states to prevent and prosecute international crimes.<sup>44</sup>

Rhetorically, an array of international actors—including non-governmental organizations (NGOs) and the United Nations—have expanded the meaning of complementarity to encompass domestic judicial reforms necessary for states to successfully prosecute international crimes.<sup>45</sup> In this sense, complementarity works to entrench international law in domestic jurisdictions and, in so doing, addresses relativist concerns that purely international tribunals do too little to restore flawed judicial systems and promote economic and democratic developments.<sup>46</sup>

Complementarity thus envisions both domestic prosecutions and any necessary concurrent legal reforms and, as such, works to end impunity by entrenching international law in domestic jurisdictions. The ICC Prosecutor recognized as much in a policy paper emphasizing that the efficacy of the Court should be measured not solely by the number of cases pursued, but “[o]n the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.”<sup>47</sup>

At the same time, the principle of complementarity works to preserve state sovereignty—even in instances where the state fails to prosecute those responsible for international crimes.<sup>48</sup> The state

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44. *Id.* at 870, 896–97, 968.

45. See NOUWEN, *supra* note 27, at 10–11.

46. See Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transnational Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 194–66 (2006) (describing shortcomings of international legal systems that fail to engage with domestic legal systems, and the importance of building local judicial capacity to end impunity and promote compliance with the rule of law).

47. INT’L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 4 (Sept. 2003), [http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf) [<http://perma.cc/6A7E-6A33>] (archived Oct. 15, 2015).

48. See El Zeidy, *supra* note 42, at 870–79 (noting that complementarity protects state sovereignty from the primacy of international tribunals by requiring international courts to defer to local proceedings and that, pursuant to the complementarity principle, international tribunals have deferred to national courts even when such national prosecutions did not go far enough to punish war criminals); see also Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT’L L. 383, 389 (1998) (“An ICC based on complementary jurisdiction that lacks a reliable mechanism for evaluating national justice systems and sufficient freedom from jurisdictional restraints would sacrifice the enforcement of international norms on the altar of state sovereignty.”). Other international courts have operated on the principle of the primacy of international tribunals over national courts. The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, provides that “[t]he International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal.” Updated Statute of the International

sovereignty argument was the primary rationale for enshrining the principle of complementarity in the Rome Statute.<sup>49</sup> The principle thus reflects a compromise and in the Rome Statute codifies the idea of “respectful abstention from interfering in the domestic jurisdiction of sovereign states.”<sup>50</sup>

## 2. Complementarity in the Rome Statute

Under Article 17 of the Rome Statute, which governs admissibility of cases before the Court, the ICC may only exercise jurisdiction if (1) national courts are unwilling or unable to do so, (2) the crime or crimes at issue are of sufficient gravity, and (3) the person charged has not already been tried for the conduct that forms the basis of the complaint.<sup>51</sup> Article 18 further promotes the primary responsibility of the state to combat impunity, by providing that the Prosecutor may defer to a state’s investigation and review the deferral after six months or in the event of a significant change of circumstances in the state’s ability to carry out the investigation.<sup>52</sup>

The provisions of Articles 17 and 18 also create a “prudential” component to the complementarity principle, as certain policy choices are contemplated in deciding what kinds of cases should be conducted under the auspices of the ICC, rather than through national judicial systems.<sup>53</sup> The prudential aspects of complementarity were the cause of concern among states during the drafting of the Rome Statute.<sup>54</sup> In particular, certain states feared that the Court might not pay

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Criminal Tribunal for the Former Yugoslavia art. 9(2) (as amended July, 7 2009). However, because primacy encroaches so deeply on state sovereignty, it was unpalatable to the drafters of the Rome Statute. Brown, *supra*, at 386.

49. NOUWEN, *supra* note 27, at 16; *see also* Federica Gioia, *State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN J. INT’L L. 1095, 1101 (2006).

50. Gioia, *supra* note 49, at 1101.

51. Rome Statute, *supra* note 16, art. 17; *see also* Sadat & Carden, *supra* note 27, at 414.

52. Rome Statute, *supra* note 16, art. 18.

53. Sadat & Carden, *supra* note 27, at 414–15.

54. The United Nations first recognized the need for an international criminal court in 1948, inviting the International Law Commission (ILC) “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred.” G.A. Res. 260(III), at 177 (Dec. 9, 1948). The ILC subsequently completed a draft statute in 1951, which was revised in 1953. However, the General Assembly decided to defer consideration of these statutes. U.N., ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OVERVIEW (1999), <http://legal.un.org/icc/general/overview.htm> [<http://perma.cc/VH5T-2T3T>] (archived Oct. 15, 2015). After the conflict in the former Yugoslavia in 1993, the United Nations again turned to the question of an international criminal court with jurisdiction over individual perpetrators of international crimes. *Id.* The ILC finalized a draft statute establishing an international criminal court for the UN General Assembly’s consideration in 1994. The General Assembly created a Preparatory Committee, which from 1996 to 1998 completed a draft text. *Id.* The text was then finalized and adopted by the General Assembly after a diplomatic conference in Rome from June 15 to 17, 1998. *Id.*

adequate heed to “alternative methods of accountability,” such as the South African “Truth and Reconciliation Commission.”<sup>55</sup> Under Article 17, such proceedings could be “dismissed as evidence of a State’s unwillingness to prosecute,”<sup>56</sup> rather than respected as valid domestic measures to achieve internal peace and stability.<sup>57</sup> These critics feared that formal prosecutions could contribute to political and social upheaval instead of providing a sense of closure and hope for future stability.<sup>58</sup> Consequently, the Rome Statute was deliberately drafted to preserve a “creative ambiguity” that would enable the ICC Prosecutor and judges to defer to truth commissions and other restorative justice mechanisms.<sup>59</sup>

The debates about what types of local proceedings should prevent admissibility<sup>60</sup> and to what extent state sovereignty should

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55. See SCHABAS, INTRODUCTION, *supra* note 26, at 198. Such accountability mechanisms focus on “restorative justice,” a “process whereby victims and offenders work collaboratively” to achieve the needs of local populations. Margaret M. de Guzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 309–10 (2012).

56. See SCHABAS, INTRODUCTION, *supra* note 26, at 198.

57. See Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68, 70 (Robert I. Rotburg & Dennis Thompson eds., 2000) (“Truth commissions generate authoritative historical accounts, issue recommendations for institutional change, and direct a national morality play that places victims of injustice on center stage. They combine investigative, judicial, political, educational, therapeutic, and even spiritual functions.”).

58. See, e.g., Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 481, 482 (2003) (describing debate over the “sensitive and controversial question of the relationship between the ICC and national reconciliation measures such as truth commissions”); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 521 (1999) (“During the Rome Statute negotiations, the United States and a few other delegations expressed concern that the International Criminal Court would hamper efforts to halt human rights violations and restore peace and democracy in places like Haiti and South Africa.”); Villa-Vicencio, *supra* note 27, at 205–07. Proponents of truth commissions and other “restorative justice” mechanisms prioritize “restoration, or repairing the harm done by the crime and criminal to the greatest extent possible” in lieu of the retributive justice proffered by traditional prosecution and punishment. Note, *An International “Truth Commission”: Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT’L L. 209, 212 (2003).

59. See Danner, *supra* note 27, at 544 (“The Rome Statute does not refer to either amnesties or truth commissions. The negotiators decided not to address these issues directly in the Statute, leaving it up to the Prosecutor to consider them in the context of factors such as ‘the interests of justice.’”); Scharf, *supra* note 58, at 522, 526–27 (“[T]he provisions that were adopted reflect ‘creative ambiguity’ which could potentially allow the prosecutor and judges of the International Criminal Court to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court,” and asserting that the ICC should only consider amnesties related to mechanisms for “providing accountability and redress” in making prosecutorial decisions).

60. The debate about when local proceedings bar ICC investigations or prosecutions under the principle of complementarity requires the Prosecutor “to

be preserved<sup>61</sup> provide two distinct rationales for favoring domestic prosecutions. The latter militates against interference with matters of national concern, whereas the former focuses on the need to ensure that judicial processes and outcomes resonate locally. The discretionary aspects of complementarity allow the ICC to defer to domestic proceedings for either reason and also to recognize that the Court should not hear every case falling within its prescriptive jurisdiction.<sup>62</sup> Where it would be unreasonable to use an international legal instrument to adjudicate, the Court may decline to exercise its jurisdiction.<sup>63</sup>

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grapple with issues concerning its appropriate role and responsibilities, and the proper weights it should attach to the claims of peace, pluralism, and punishment when they conflict”—questions the drafters of the Rome Treaty could not resolve and thus left to the ICC to answer over time. Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 803–04 (2006).

61. The Rome Treaty drafters attempted to resolve the debate about preserving state sovereignty by balancing the powers of the independent prosecutor and the sovereign rights of states, with the Independent Prosecutor operating as a “counterweight to state power.” Danner, *supra* note 27, at 518. But at the same time, the ICC is almost entirely dependent on state support to fulfill its mandate. *Id.* It falls to the Prosecutor to reconcile the inherent conflict thereby created, in part through the exercise of her prosecutorial discretion. *Id.* In practice, the Prosecutor has sought to calibrate the tension between state rights and prosecutorial authority by focusing on cases where the likelihood of state compliance is highest, to wit, self-referrals. See Andreas Th. Müller & Ignaz Stegmüller, *Self-Referrals on Trial: From Panacea to Patient*, 8 J. INT'L CRIM. JUST. 1267, 1269 (“In the light of fears of excessive powers for the independent Prosecutor and of politicizing the ICC, articulated by a number of states during the Rome Conference, [the Prosecutor] favoured voluntary referrals by states and expressly endorsed the sovereignty-friendly policy of encouraging self-referrals in the first phase of the Court’s existence.”) The reliance on self-referrals, while assuaging state sovereignty anxieties, does little to alleviate the inherently political nature of prosecutorial discretion. See William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 753 (2008) (describing self-referral as a political trap for the ICC Prosecutor, and noting that “[p]rosecutions of only one side in the conflict seem to be the price of the self-referral strategy of the Office of the Prosecutor”).

62. See, e.g. Danner, *supra* note 27, at 519 (noting that resource constraints “limit the ICC Prosecutor’s ability to pursue all meritorious cases” and that the past experiences of international tribunals has borne out that “owing to their length and complexity, international prosecutions cannot be undertaken for all crimes associated with a particular conflict” as a practical matter); William A. Schabas, *Victor’s Justice: Selecting “Situations” at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 541 (2010) [hereinafter Schabas, *Victor’s Justice*] (“[T]he authority for the selection of situations lies, for all intents and purposes, with the Prosecutor of the Court.”). Since the Rome Statute provides scant guidance on the criteria the Prosecutor should use in exercising his discretion to pursue or ignore situations, it falls to the Prosecutor to clarify the factors that will be considered. *Id.* at 544.

63. Former UN Secretary-General Kofi Annan emphasized this point, noting that it would be “inconceivable that . . . the Court would seek to substitute its judgement [sic] for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.” UN Secretary-General Kofi Annan, U.N. Sec. Gen. Address on Receiving the Honorary Doctorate of Law from the University of Witwatersrand, Johannesburg (Sept. 1, 1998) (transcript available in Press Release SG/SM/6686, United Nations), <http://www.un.org/press/en/1998/>

### 3. Complementarity in the Practice of the ICC

In practice, the principle of complementarity has proven largely ineffective at either ending impunity or promoting the domestication of international legal rules. The ICC cases concerning the situations in Sudan and Uganda are illustrative in this regard. In both countries, complementarity sparked limited domestic reforms: Both Uganda and Sudan incorporated crimes within the ICC's jurisdiction into national law.<sup>64</sup> Both countries created courts specializing in international crimes and revived traditional justice practices to address impunity. Even rebel groups sought accountability in lieu of amnesty.<sup>65</sup> International standards "became a fetish" within both societies.<sup>66</sup>

Perversely, however, the ICC investigations in Uganda and Sudan simultaneously eroded the notion of the primary accountability of states for international crimes, underpinning the principle of complementarity.<sup>67</sup> In effect, Uganda and Sudan "outsourced the responsibility for investigations and prosecutions to the ICC."<sup>68</sup> More fundamentally, neither state has initiated genuine investigations or prosecutions of international crimes.<sup>69</sup>

The situation in Uganda raises even more troubling questions about the efficacy of complementarity as a tool for domestic international law to end impunity for international crimes. For the past two decades, the Lord's Resistance Army (LRA) has inflicted unspeakable horrors on the Acholi community in northern Uganda through a "continuous campaign[] of murder, mutilation, rape, looting, destruction of property, and abduction—mainly of children—as a method of forced conscription to replenish its ranks."<sup>70</sup> The conflict has pitted LRA forces against the Ugandan army and government-backed local militias.<sup>71</sup> Like the LRA, Ugandan government forces have perpetrated crimes within the ICC

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19980901.sgsm6686.html [http://perma.cc/6D6P-VZ94] (archived Oct. 15, 2015). Other commentators have likewise argued that the ICC should defer to amnesties and truth commissions, but only if their "primary purpose is addressing and resolving a conflict rather than shielding a perpetrator from criminal responsibility." H. Abigail Moy, *The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity*, 19 HARV. HUM. RTS. J. 267, 273 (2006).

64. NOUWEN, *supra* note 27, at 10.

65. *Id.*

66. *Id.*

67. *See id.*

68. *Id.*

69. *Id.* at 10–11.

70. Moy, *supra* note 63, at 267. For more background on the situation in Uganda, see Kasaija Phillip Apuuli, *The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda*, 15 CRIM. L.F. 391 (2005).

71. Apuuli, *supra* note 70, at 395–96.

jurisdiction.<sup>72</sup> In 2004, Ugandan President Museveni referred the situation to the ICC for investigation and prosecution.<sup>73</sup> Within a year, the ICC Pre-Trial Chamber issued arrest warrants for five LRA leaders.<sup>74</sup>

Uganda's referral—the first self-referral to come to the ICC<sup>75</sup>—was controversial both because the legal basis for such self-referrals was murky and because of concerns that Uganda was manipulating the ICC for political gain.<sup>76</sup> The legal controversy focused on whether a state could eschew its primary responsibility to investigate and prosecute in favor of the ICC under a complementarity regime.<sup>77</sup> Amongst other concerns, critics feared that self-referrals would erode the emphasis placed by the Rome Statute on state participation in ending impunity for international crimes and thereby “reliev[e] governments of the pressure to develop and expand their national judicial systems to process the crimes enumerated in the Statute.”<sup>78</sup> For his part, the ICC Prosecutor supported self-referrals, primarily on the grounds that there would be greater compliance with proceedings stemming from a self-referral.<sup>79</sup>

72. *Id.* at 398.

73. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44 (Jan. 29, 2004), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord\\_s%20resistance%20army%20\\_lra\\_%20to%20the%20icc.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx) [http://perma.cc/J5FH-AVRY] (archived Oct. 15, 2015).

74. Initially, the arrest warrants were issued on July 8, 2005, under seal in order to ensure the safety of witnesses and victims. The Pre-Trial Chamber unsealed the arrest warrants three months later, on October 13. Press Release, Int'l Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders, ICC-CPI-20051014-110 (Oct. 14, 2005), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2005/Pages/warrant%20of%20arrest%20unsealed%20against%20five%20lra%20commanders.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/warrant%20of%20arrest%20unsealed%20against%20five%20lra%20commanders.aspx) [http://perma.cc/SZN5-HRQ2] (archived Oct. 15, 2015).

75. Luis Moreno-Ocampo, Chief Prosecutor, Statement (Oct. 14, 2005), [http://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda\\_LMO\\_Speech\\_141020091.pdf](http://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf) [http://perma.cc/6D6P-VZ94] (archived Oct. 15, 2015).

76. See Matthew Happold, *The International Criminal Court and the Lord's Resistance Army*, 8 MELBOURNE J. INT'L L. 159, 161 (2007) (“The legality of self-referrals in general has been questioned; whilst the form of the referral itself led to suspicions that the Ugandan Government was using the Court as a weapon in its conflict with the LRA.”); Moy, *supra* note 63, at 273.

77. See Moy, *supra* note 63, at 273.

78. Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 390 (2005).

79. The Prosecutor noted that:

Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that that State has the political will to provide his Office with all the cooperation within the country that is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor

The prudential controversy over the Ugandan situation centered on concerns that President Museveni was using the ICC as a political tool to rally support from the international community and increase his chances of containing the LRA.<sup>80</sup> These fears intensified when the Prosecutor failed to file charges against any members of the Ugandan army, despite documented abuses committed by the latter and calls from human rights organizations to prosecute both sides of the conflict.<sup>81</sup> Thus, both the legal and prudential issues raised by Uganda's self-referral and the subsequent ICC prosecution go to whether complementarity, as wielded by the ICC, can successfully preserve the Court's legitimacy and ensure the successful domestication of international law.

As of yet, such success has proved largely elusive. In part, this is because the ICC has been Janus-faced in how it has used complementarity, paradoxically pursuing investigations and prosecutions in the cases where complementarity is most likely to catalyze genuine national efforts to bring the perpetrators of international crimes to justice.<sup>82</sup> But the Court's use of complementarity has also been disappointing because, as a practical matter, domestic reforms and prosecutions are usually prompted by "norm-entrepreneurs"—activists and other NGO workers—who strive to adapt international norms to the domestic level, and not ICC-state interaction.<sup>83</sup> The time is thus ripe for the ICC to revisit the criteria for determining when complementarity requires prosecutorial abstention or action, ideally in a manner that explicitly requires the Prosecutor to look to and work with norm-entrepreneurs and local judicial actors.

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can be confident that the national authorities will assist the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.

WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 309 (2010) (quoting Annex to the *Paper on Some Policy Issues before the Office of the Prosecutor: Referrals and Communications*, September 2003).

80. Moy, *supra* note 63, at 273; Burke-White, *supra* note 39, at 62, 103.

81. See Happold, *supra* note 76, at 170; Moy, *supra* note 63, at 269, 273. Ugandan national forces had bombed and burned down villages, committed numerous rapes and sexual assaults against women, and killed civilians outside internal displacement camps. Moy, *supra* note 63, at 269, 273. Human Rights Watch called on the ICC to "operate independently . . . and look at all ICC crimes committed in Uganda," and "not ignore the crimes that Ugandan government troops allegedly committed." Press Release, Human Rights Watch, ICC: Investigate All Sides in Uganda (Feb. 5, 2004), <http://www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda> [<http://perma.cc/SQ8R-DXAN>] (archived Oct. 15, 2015).

82. NOUWEN, *supra* note 27, at 13–14.

83. *Id.* at 22–23.

### C. Critics of the ICC

Despite the promise of the ICC to reshape the field of international criminal law and end impunity for the perpetrators of egregious human rights abuses, the institution has detractors.<sup>84</sup> For the purposes of this Article, these can be divided into two groups: The first comprises those who contest the universalist assumption undergirding the ICC that one standard accountability mechanism can be effective across a variety of cultures and contexts.<sup>85</sup> The second group includes those who question the way ICC actors, including the prosecutors and judges, have exercised their discretion in initiating investigations and conducting proceedings.<sup>86</sup> Both sets of detractors thus address concerns about the legitimacy of the Court and its ability to both secure compliance with and entrench international laws domestically.

#### 1. The Call for a More Culturally-Attuned ICC

The ICC plays a symbolic, norm-reinforcing role, expressing the legitimacy, enforceability, and universality of international law. By centralizing international criminal law in a strong ICC, advocates of the institution believe that the Court can create a “more coherent jurisprudence” and more effectively enforce humanitarian and human right law.<sup>87</sup> This baseline assumption that a uniform, universal system of justice can be applied to dramatically diverse cultural contexts situates the ICC in a larger debate taking place in international human rights law. This debate pits universalists, who contend “that human rights must be the same worldwide,” against

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84. See, e.g., Kirsten Ainley, *The International Criminal Court on Trial*, 24 CAMBRIDGE REV. INT'L AFF. 309, 310 (2011) (“Critics of the institution see the ICC as deeply political, and all the worse for it.”); Goldsmith, *supra* note 37, at 89 (arguing that, because the ICC lacks U.S. political, military, and financial support, it is doomed to failure and may ultimately discourage human rights interventions); David Kaye, *Who's Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set It Straight*, 90 FOREIGN AFF. 118, 123, 126 (2011) (noting the failed efforts of the ICC to bring a single trial to fruition, the frustrations of investor states and victims, the smug attitude of indicted leaders, and the institution's questionable global reputation); Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 557 (2010) (noting that many critics decry the ICC's almost exclusive focus on Africa, lending support to the theory that “the Prosecutor is biased against developing countries”); Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 50 (2010) (arguing that the ICC procedures do not pay enough heed to local cultural contexts, leading to potential rejection of the Court's rulings).

85. Ramji-Nogales, *supra* note 84, at 67–72.

86. James A. Goldston, *More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUST. 383, 384 (2010).

87. Turner, *supra* note 25, at 15–16.

relativists, who argue that human rights must be culturally contingent.<sup>88</sup>

For the relativists, the ICC as currently conceived is doomed to fail, as it is too culturally distant from its intended beneficiaries.<sup>89</sup> This lack of proximity creates numerous barriers to the ICC effectively promoting justice, because it results in a lack of understanding of and alienation from the very communities it is intended to serve.<sup>90</sup> An isolated and remote ICC is unlikely to produce judgments “informed by diverse perspectives” and unable to “promote post-conflict reconciliation or the rebuilding of the rule of law.”<sup>91</sup> Thus, for the relativists, the ICC’s physical and psychological distance from diverse local perspectives delegitimizes the institution itself, and the “top-down” development of a centralized body of international criminal law ignores the importance of “deliberation, inclusiveness, autonomy, and democratic accountability” to entrenching international values locally.<sup>92</sup> Moreover, the ICC’s isolation from the communities that it serves can reinforce a monomaniacal focus on prosecution over transnational justice and “long-term economic, social and legal development,” which may be equally, or more, critical to preventing international crimes.<sup>93</sup>

Yet these critics pay too little heed to the symbolic value and norm-reinforcing potential of a truly international and universal criminal court.<sup>94</sup> The normative force of an international criminal

88. Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38, 40 (2006).

89. See Raimondo, *supra* note 25, at 302.

90. See *id.*; see also Lipscomb, *supra* note 46, at 193 (“Prosecutions based entirely in the Hague, conducted by international actors who are detached from the political and cultural realities of the victims, are replete with shortcomings.”)

91. Turner, *supra* note 25, at 17; see also Lipscomb, *supra* note 46, at 194.

92. Turner, *supra* note 25, at 17; see also Patricia Lundy & Mark McGovern, *The Role of Community in Participatory Transitional Justice*, in TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 99, 100 (Kieran McEvoy & Lorna McGregor eds., 2008) (“[T]he tendency to exclude local communities as active participants in transitional justice measures is a primary flaw raising fundamental questions of legitimacy, local ownership and participation.”).

93. Blumenson, *supra* note 60, at 809. The ICC’s prosecution of LRA leaders provides an example of how these concerns play out in practice. In that case, critics of the ICC prosecution assert that the international proceedings are less likely than the Achioli’s traditional conflict resolution method, *mato oput*, which focuses on “forgiveness, reconciliation, and reintegration of offenders.” *Id.* In response to concerns that traditional *mato oput* may not lead to either truth or reconciliation, the Achioli have implemented reforms to the process. *Id.* at 810. This process appears to be more favored by the majority of the Achioli people—who are both victims and perpetrators in the war with the LRA. *Id.*

94. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 183 (2013) (“The symbolic significance of individual accountability for particularly egregious, systemic violations of human rights is undoubtedly great.”); Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INT’L AFF. 693, 693–94 (2002) (describing the ways in which the ICC “strengthens and consolidates” the principle of universality and the movement of

court is particularly necessary to safeguard human rights.<sup>95</sup> A universal standard is justifiable because it is precisely the universal nature of human rights that works to ensure “the dignity of every person and makes human cooperation possible.”<sup>96</sup> Such a standard also “provides universal legitimacy to all those who oppose tyrannies, oppression, and the violation of human rights.”<sup>97</sup> In the international criminal law context, the ICC provides universal legitimacy to human rights advocates by codifying an international criminal law that can be used to charge individual defendants.<sup>98</sup> The relativist detractors of the ICC, by decrying the universal nature of the institution, risk divesting human rights of the normative and rhetorical force that inheres in the universal character of human rights principles.

## 2. The Call for Clarity in Prosecutorial Decisions

A second group of critics accepts the universalist assumptions of the ICC but questions the manner in which the ICC Prosecutor and judges have exercised their authority. For the most part, this group of critics charges that the ICC is “improperly motivated by political

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the international community “towards common action at the state level against” international crimes).

95. Members of the International Law Commission, tasked with drafting the Rome Statute, spoke of this when determining the relationship between the future ICC and the United Nations, noting that the Court “is intended as an expression of the concern about and desire of the organized international community to suppress certain most serious crimes.” *Draft Statute for an International Criminal Court*, 2 Y.B. Int’l L. Comm’n 28 (1994). The principle of complementarity goes directly to this norm-reinforcing role, because “as envisioned, the ICC will set national standards . . . defining what criminal justice should look like for adjudicating crimes against humanity, genocide, and war crimes.” Blumenson, *supra* note 60, at 805.

96. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 10 (2013) (explaining that human rights are “universal rights, in the sense that today we consider all members of the species *Homo sapiens* “human beings” and thus holders of human rights.”); WIKTOR OSIATYNSKI, HUMAN RIGHTS AND THEIR LIMITS 144 (2009). Fundamentally, the universality of human rights reflects that “rights belong to every human being at all times and in all situations.” OSIATYNSKI, *supra*.

97. OSIATYNSKI, *supra* note 96, at 144.

98. Sadat & Carden, *supra* note 27, at 406. The Rome Statute accomplishes this by epitomizing *jus cogens* norms “as a matter of substantive criminal law.” *Id.*, at 406–07. *Jus cogens* norms are those that are so fundamental to the international legal structure that no derogation is permitted, even by explicit treaty agreement. In contrast, states can agree by treaty to modify other international law norms. See Dunoff, *supra* note 32, at 57–59; M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 199, 217 (1998) (defining *jus cogens* norms of international law as those that “rise to a higher level of acceptance and which reflect a universal sense of opprobrium”). In other words, the prohibitions on these acts are justified precisely by the universal opprobrium they provoke. War crimes, crimes against humanity, and genocide—all crimes within the ICC’s jurisdiction—have become part of *jus cogens*. Bassiouni, *supra*, at 217. The ICC and *jus cogens* norms thus operate in a mutually reinforcing loop, with the universal character of the crimes within the ICC jurisdiction legitimizing the Court’s prosecution of such crimes and the Court’s prosecutions buttressing the universal character of the crimes within its jurisdiction.

considerations.”<sup>99</sup> These charges stem from the ICC’s “core selectivity problem,” arising from the lack of any coherent goals.<sup>100</sup>

Fundamentally, the problem identified by these critics inheres in the tacitly administrative authority conferred upon the Court by the Rome Statute.<sup>101</sup> The Court’s administrative authority arises as a byproduct of the discretion afforded by the Rome Statute to the Court’s officers in determining “how far states recovering from mass violence should be required to go in pursuit of criminal justice.”<sup>102</sup> In other words, there is an “inherently political dimension” to the Prosecutor’s statutory discretion, and thus the Prosecutor must make political decisions.<sup>103</sup> Even accepting the apolitical universal presumption that the enforcement of international criminal justice is a purely legal matter, best undertaken by legal professionals applying neutral legal principles, the international legal rules governing state responsibility in the wake of mass atrocity remain ambiguous.<sup>104</sup> Thus, the ICC must act not only as a court but also as a regulatory agency tasked with assessing the various transitional justice mechanisms used by states to address crimes within the Court’s jurisdiction.<sup>105</sup>

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99. de Guzman, *supra* note 55, at 266; *see also, e.g.*, Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT’L L. 73, 74 (2010) (“The ICC already is said to have encountered difficulties in reviewing the Prosecutor’s exercise of discretion in a few highly politicized international conflicts.”); Richard John Galvin, *The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT’L & COMP. L. REV. 1, 3 (2005) (describing U.S. fears that the ICC Prosecutor would use his independent authority to open politically motivated investigations into U.S. military actions); Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, 9 INT’L CRIM. L. REV. 445, 462–63 (2009) (outlining criticisms from African leaders that the ICC has developed a “politicized justice” by targeting only African situations for investigations and prosecutions); Schabas, *Victor’s Justice*, *supra* note 62, at 548–49 (“The Prosecutor regularly insists that his actions and decisions are based on judicial and not political factors. But if this is really the case, then we need a better explanation for the current choice of situations.”).

100. de Guzman, *supra* note 55, at 267; *see also* Schabas, *Victor’s Justice*, *supra* note 62, at 544 (“The Rome Statute offers no real guidance on the criteria that the Prosecutor is to apply in making determinations about which situations to pursue and which ones to ignore.”).

101. *See* Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT’L L. 107, 111 (2009) (arguing that the Court has broad administrative authority to evaluate transitional justice mechanisms implemented by states in order to combat crimes falling under the Court’s purview, and that the administrative problem “goes to the very heart of the Court’s legitimacy as a supranational institution authorized to override the efforts of states, to whose populations the Court is not democratically accountable”).

102. *Id.* at 110.

103. Schabas, *Victor’s Justice*, *supra* note 62, at 549; *see also* Kaye, *supra* note 84, at 119 (“[T]he chief prosecutor has a critical job: choosing which situations to investigate, which senior officials to indict, and which charges to bring—all sensitive decisions with major political implications.”).

104. Kaye, *supra* note 84, at 134, 135.

105. *Id.* at 135.

African leaders, who were formerly “the most supportive constituenc[y] of the ICC, have begun to object to the ICC’s exclusive focus on prosecuting African defendants.”<sup>106</sup> African countries, under the aegis of the African Union, adopted a common position on the ICC cases pending against African leaders in order to “enable Africa to deal with its own legal issues without contradicting international norms.”<sup>107</sup> As part of these efforts, the AU expanded the jurisdiction of the African Court of Justice and Human and People’s Rights (African Court) to include individual criminal responsibility for genocide, crimes against humanity, and war crimes, in large part to ensure that the African Court can take over ICC cases pending against African leaders.<sup>108</sup>

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106. de Guzman, *supra* note 55, at 271. The Commissioner for the African Union, Jean Ping, labeled the ICC “discriminatory” for only pursuing cases concerning African leaders, while neglecting crimes committed by more powerful Western States in Iraq, Afghanistan, and Pakistan. *African Union Opposes Warrant for Qaddafi*, N.Y. TIMES (July 2, 2011), [http://www.nytimes.com/2011/07/03/world/africa/03african.html?\\_r=0](http://www.nytimes.com/2011/07/03/world/africa/03african.html?_r=0) [<http://perma.cc/GQP3-3X6L>] (archived Oct. 15, 2015); Stearns, *supra* note 21. As a result of the perceived discrimination by the ICC, the African Union (AU) asked the UN Security Council to suspend ongoing ICC investigations in Kenya and Sudan and instructed member states not to cooperate with the ICC investigation into Colonel Qaddafi’s war crimes in Libya. African Union, *Decision on the Implementation of the Assembly Decisions on the International Criminal Court*, Assembly, Seventeenth Ordinary Session, ¶¶ 3–4, Doc. EX.CL/670(XIX) (June 30–July 1, 2011) [hereinafter African Union, Doc. EX.CL/670(XIX)], [http://www.au.int/en/sites/default/files/Assembly\\_AU\\_Dec\\_363-390\\_%28XVII%29\\_E.pdf](http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_%28XVII%29_E.pdf) [<https://perma.cc/7ZNR-6S2D>] (archived Oct. 3, 2015); African Union, *Decision on the Implementation of the Assembly Decisions on the International Criminal Court*, Assembly, Nineteenth Ordinary Session, ¶¶ 4, 6, EX.CL/731(XXI) (July 16, 2012), [http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20%28XIX%29%20\\_E\\_Final.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20%28XIX%29%20_E_Final.pdf) [<https://perma.cc/X4VP-Y2M5?type=source>] (archived Oct. 3, 2015); African Union, *Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)*, Assembly, Twenty–First Ordinary Session, ¶¶ 5, 7–8, Doc. Assembly/AU/13(XXI) (May 27, 2013), [http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20474-489%20%28XXI%29%20\\_E.pdf](http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20474-489%20%28XXI%29%20_E.pdf) [<http://perma.cc/JGK6-GWXY>] (archived Oct. 15, 2015). Even Uganda’s President Museveni, who once requested ICC intervention in his own country, now perceives the institution as a “tool for ‘oppressing Africa,’” and has called for African States to withdraw from the Rome Statute, stating, “I want all of us to get out of that court of the West. Let them (Westerners) stay with their court.” Duncan Miriri, *Uganda’s Museveni Calls on African Nations to Quit the ICC*, REUTERS (Dec. 12, 2014, 8:52 AM), <http://www.reuters.com/article/2014/12/12/us-africa-icc-idUSKBN0JQ1DO20141212> [<http://perma.cc/6HJL-RHZY>] (archived Oct. 3, 2015); see also Jalloh, *supra* note 99, at 453.

107. Ashine, *supra* note 24.

108. Oliver Mathenge & Argaw Ashine, *ICC Chamber Ready for Trial of Kenyans*, DAILY NATION (May 9, 2012) <http://www.nation.co.ke/News/politics/ICC-chamber-ready-for-trial-of-Kenyans/-/1064/1402978/-/rpxgabz/-/index.html> [<http://perma.cc/AFQ8-DE7D>] (archived Oct. 3, 2015); African Union, Doc. EX.CL/670(XIX), *supra* note 121, ¶ 8 (calling for the implementation of the expanded jurisdiction of the African Court “to try serious international crimes committed on African soil” in Africa); see also African Union, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, art. 46B (May 15, 2014) [hereinafter *AU Draft Protocol*] (providing that “[a] person who commits an offence under this Statute shall be held individually responsible for the Crime.”). But see *AU Draft*

To be sure, the response of the African states to the ICC's docket illustrates how the broad prosecutorial discretion conferred by the Rome Statute contributes to the perceived political nature of the Court to the detriment of the institution's legitimacy. At the same time, the response extends a unique opportunity to the ICC Prosecutor. The decision by the AU to expand the jurisdiction of its judicial arm ensures that victims of mass atrocities will have more avenues to find redress. It also represents the type of "domestication" or "internalization" of international criminal legal principles envisioned by the principle of complementarity, which seeks to promote the ultimate responsibility of states to end impunity. This does not mean that the ICC must always defer to regional courts or to political pressure from states feeling besieged by discriminatory prosecutions. Instead, the ICC Prosecutor should apply criteria drawn from social mobilization theory to identify when regional courts are better positioned to domesticate international legal principles and secure compliance with international laws. By working for, rather than against, such efforts, the ICC can better position itself at the heart of the international criminal justice regime and can increase its legitimacy among diverse audiences and beneficiaries.

### III. ENFORCING INTERNATIONAL LAW

Particularly in light of the Court's enforcement problems, building legitimacy and support for the Court's work is vital to ensuring compliance with court proceedings. Without "an incentive towards compliance, resources devoted to the creation and maintenance of international legal structures are wasted."<sup>109</sup> Transnational social movements (TSMs)—"socially mobilized groups

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*Protocol, supra*, art. 46*Abis* (amending the Statute to preserve the immunity of sitting heads of state for international crimes, providing that "[n]o charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office"). The African Court will be the first regional human rights court with individual criminal jurisdiction over genocide, war crimes, and crimes against humanity once the amendments to its statute enter into force. At the same time, the immunity provisions have caused concerns among human rights advocates that cases against sitting officials will be blocked, creating "a real step backward in international policy and practice with respect to holding perpetrators of serious crimes to account." Press Release, Human Rights Watch, Statement Regarding Immunity for Sitting Officials Before the Expanded African Court of Justice and Human Rights (Nov. 13, 2014), <http://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and-hu> [<https://per.ma.cc/FH2R-YM5J>] (archived Oct. 3, 2015). The erosion of the Africa-ICC relationship thus demonstrates how the ICC's failure to adequately respond to local concerns can lead to compliance and legitimacy problems and also frustrate attempts to inculcate international laws domestically.

109. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1830 (2002).

with constituents in at least two states, engaged in at least two states, engaged in sustained contentious interactions with power holders in at least one state other than their own, or against an international actor, or a multinational economic actor”<sup>110</sup>—are an effective barometer for determining the likelihood of compliance. By determining whether a regional court is supported by a TSM, the ICC Prosecutor can more accurately predict the likelihood of compliance with that court’s proceedings—and by extension, the likelihood that a court will be able to effectively combat impunity and domesticate international rules.

### A. Compliance Theories

For centuries, international law scholars have grappled with the issue of compliance.<sup>111</sup> Different scholars have divided and analyzed the vast body of compliance literature resulting from this centuries-long study in various ways.<sup>112</sup> For the purposes of this Article, I look at how TSMs predict compliance pursuant to three strands of compliance theory: (1) the Rationalist strand, which argues that nations only obey international law when it is in their interests to do so; (2) the Liberal, or Kantian, strand, which contends that nations generally obey international law because of moral imperatives “derived from considerations of natural law and justice”; and finally, (3) process-based strands, which link a nation’s compliance with international law to the “encouragement and prodding” of other nations.<sup>113</sup> At the outset, it is important to note that these explanations do not operate independent of each other. Rather, they work together “as complementary conceptual lenses to give a richer explanation of why compliance with international law does, or does not, occur in particular cases.”<sup>114</sup>

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110. Jamie Rowen, *Mobilizing Truth: Agenda Setting in a Transnational Social Movement*, 37 L. & SOC. INQUIRY 686, 687 (2012).

111. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2600 (1997) [hereinafter Koh, *Why Do Nations Obey*].

112. See, e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 625–28 (2004) (describing three possible mechanisms for influencing state behavior: coercion, persuasion, and acculturation); Guzman, *supra* note 109, at 1830–40 (describing three models of compliance as the enforcement model, the managerial model, and the consent model, as well as several theories of compliance including the liberal theory, institutionalist theory, and legitimacy theory); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345, 348–49 (1998) (dividing compliance theory broadly into rule-based and process-based theories).

113. Koh, *Why Do Nations Obey*, *supra* note 111, at 2611.

114. Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1406 (1999) [hereinafter Koh, *Law Enforced*].

## 1. The Rationalists

According to rationalists, compliance occurs by mere happenstance, whenever the content of international law coincides with the “self-interest of nations.”<sup>115</sup> The rationalists perceive international law as little more than an epiphenomenon.<sup>116</sup> Pursuant to this theory, TSMs are likely to promote compliance because they provide a mechanism for pressuring states to comply. In other words, they help align state interest with international law.

Take, for example, the case of South Africa. TSMs played a pivotal role in ending South Africa’s apartheid regime. Movements across Sweden, Britain, the United States, Canada, Holland, Australia, and New Zealand raised awareness about the apartheid regime.<sup>117</sup> Concurrently, this transnational movement altered international policies regarding South Africa by pressuring the UN Security Council to impose sanctions to end apartheid at last.<sup>118</sup> The movement was likewise the driving force in the creation of the first international treaty with a monitoring body to ensure compliance:<sup>119</sup> the Convention on the Elimination of Racial Discrimination.<sup>120</sup>

## 2. The Liberal (Kantian) Strand

In contrast to the rationalist focus on state actors in the international sphere, the liberal theorists assume that individuals and subnational entities are the driving forces in international relations.<sup>121</sup> For the liberal theorists, compliance is a response to moral imperatives arising in “natural law and justice.”<sup>122</sup> These

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115. Guzman, *supra* note 109, at 1837.

116. *Id.*

117. Kiyoteru Tsutsui et al., *International Human Rights Law and Social Movements: States’ Resistance and Civil Society’s Insistence*, 8 ANN. REV. L. & SOC. SCI. 367, 372 (2012).

118. *Id.*

119. *Id.*; see also Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2323 (2013) (reviewing KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012)) (noting a link between “basic grassroots efforts” of civil society to the creation of the Convention).

120. See generally G.A. Res. 2106 (XX), annex, International Convention on the Elimination of All Forms of Racial Discrimination (Jan. 4, 1969). Article 8 provides for the creation of a Committee to oversee enforcement and implementation of the Convention. Articles 11 through 15 authorize the Committee to receive individual and state petitions alleging violations of the Convention and provide recommendations and opinions on these petitions.

121. Guzman, *supra* note 109, at 1838–39.

122. Koh, *Why Do Nations Obey*, *supra* note 111, at 2611.

moral imperatives give rise to “a consciousness” that the international legal order is required to achieve common goals.<sup>123</sup>

Essentially, liberal theory merges relativist and universalist claim: On the relativist hand, liberal theory asserts that international laws and institutions must resonate locally. The liberal theorists recognize that states are more likely to comply when they see their own democratic institutions and values reflected back at the international level,<sup>124</sup> and the rule-legitimacy theorists note that international rules must make sense locally to be perceived as legitimate. On the universalist hand, the liberal theorists acknowledge the importance of a coherent body of international rules—one that conforms to recognizable primary and secondary rules.<sup>125</sup>

Pursuant to liberal compliance theories, TSMs are effective predictors of compliance because they provide a forum for participation in international lawmaking and enforcement.<sup>126</sup> As activists come together to “work collectively to improve rights protections” and “invoke legal protections and remedy grievances,” they help to inculcate international norms domestically.<sup>127</sup> By engaging with international legal regimes, activists compel the states in which they advocate to “adopt[] the beliefs and behavioral patterns” of the larger international legal culture.<sup>128</sup> TSMs have also played critical roles in lobbying states for international human rights instruments and overcoming weak enforcement mechanisms.<sup>129</sup> By the same token, international efforts to promote justice that exclude the active participation of local communities will be inherently flawed, “raising fundamental questions of legitimacy, local ownership and participation.”<sup>130</sup>

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123. Stanley Hoffman, *International Systems and International Law*, in *JANUS AND MINERVA: ESSAYS IN THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS* 149, 171 (1987).

124. See Koh, *Law Enforced*, *supra* note 114, at 1404 (arguing that compliance is contingent upon the extent to which a state’s political identity—at the national level—“is based on liberal democracy”); Koh, *Why Do Nations Obey*, *supra* note 111, at 2633 (noting that states possessing “a form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law” are more likely to participate in the international legal system).

125. See Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT’L L.* 705, 735–43 (1988) (describing how rules that demonstrate determinacy, symbolic validation, coherence, and adherence are indicia of compliance). In particular, this strain of compliance theory asserts that rules that are coherently applied and adhere to a “hierarchical rule structure” composed of a “primary rule of obligation” and secondary rules of interpretation and application, promote compliance. *Id.* at 735–36, 751–52.

126. Tsutsui et al., *supra* note 117, at 368.

127. *Id.*

128. *Id.*

129. *Id.*

130. Lundy & McGovern, *supra* note 92, at 100.

### 3. Process-Based Theories.

The legal process tradition can be broken down into three strands: (1) the International Legal Process School, (2) the New Haven School, and (3) Professor Koh's transnational legal process theory. The International Legal Process scholars argue that states comply with international laws largely due to rational, utilitarian principles: nations observe international law when the costs of violation outweigh the costs of compliance.<sup>131</sup> Participation in international legal process works to constrain the policy choices made by states.<sup>132</sup> The New Haven School, in contrast, perceives policy as a justification: international law is "a decisionmaking process dedicated to a set of normative values."<sup>133</sup>

More recently, Professor Harold Hongju Koh has developed the transnational legal process theory of compliance. Building off of the work of the legal process school, transnational legal process theory asserts that human rights norms are enforced through a three-phase transnational legal process of interaction, interpretation, and internalization.<sup>134</sup> During the first phase, institutions *interact* to debate global international human rights norms. In the second phase, these norms are *interpreted*, before finally becoming *internalized* by domestic legal systems in the final stage.<sup>135</sup> The goal of institutions concerned with human rights, such as regional human rights courts, is to "develop and nurture" this process, in recognition of the fact that "[t]he most effective form of law enforcement is not the imposition of external sanction, but the inculcation of internal obedience."<sup>136</sup>

Ultimately, legal process strands—whether the International Legal Process School, the New Haven School, or the Transnational Legal Process theory—all recognize the tremendous importance of participation in promoting the international legal regime. The emphasis on participation resonates with two mechanisms for influencing state behavior identified by Ryan Goodman and Derek Jinks: persuasion and acculturation.<sup>137</sup> Persuasion contemplates "the active, often strategic, inculcation of norms."<sup>138</sup> Actors are persuaded when they become "convinced of the truth, validity, or appropriateness of a norm, belief, or practice" by "actively assess[ing] the *content* of a particular message."<sup>139</sup> Acculturation describes "the general process of adopting the beliefs and behavioral patterns of the

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131. Koh, *Why Do Nations Obey*, *supra* note 111, at 2621.

132. *See id.* at 2621–22.

133. *Id.* at 2623.

134. Koh, *Law Enforced*, *supra* note 114, at 1399.

135. *Id.*

136. *Id.* at 1399, 1401.

137. *See* Goodman & Jinks, *supra* note 112, at 635–42.

138. *Id.* at 635.

139. *Id.*

surrounding culture.”<sup>140</sup> Identification generates “varying degrees of *cognitive* and *social pressures* . . . to conform.”<sup>141</sup> Acculturation processes work to “mobilize internal and external pressures,” which lead actors “to adopt socially legitimated attitudes, beliefs and behaviors.”<sup>142</sup>

Under this theory, TSMs are predictors of compliance. Activists in TSMs function much like institutions in Transnational Legal Process theory: interacting to debate global international human rights norms; insisting on interpretations of these norms that will serve to promote and protect human rights in their communities; and working to internalize international rules by fostering—and even demanding—compliance by domestic legal regimes.<sup>143</sup> In this sense, TSMs are critical to understanding the global dispersion of human rights law, despite the potential of international law to undermine state sovereignty.<sup>144</sup> Indeed, the ICC itself is largely the product of just such a Transnational Social Movement: more than 800 NGOs were involved in the promotion and creation of the Court in Rome.<sup>145</sup> Lawyers, human rights groups, women’s groups, global good governance groups, peace groups, and religious groups from around the world participated in the drafting of the Rome Statute.<sup>146</sup> These groups actively targeted the media, seeking their support and notice regionally and locally, and engaged in street action designed to promote the Court directly to the public.<sup>147</sup> NGOs also successfully countermanded efforts by the United States to exempt any prosecutions of individuals before the Court without the consent of the individual’s state.<sup>148</sup>

TSMs straddle the transnational and the local, encompassing both transnational organizations operating under international laws and principles, as well as local needs, rules, and norms.<sup>149</sup> The interplay between international law and TSMs facilitates the goals of complementarity as it domesticates international rules, strengthens reform movements, reestablishes the rule of law, and promotes compliance with international law—all of which work to end

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140. *Id.* at 638.

141. *Id.* at 639.

142. *Id.* at 642.

143. See Koh, *Law Enforced*, *supra* note 114, at 1399 (describing the three-step process of institutional interaction, interpretation and internalization that fosters domestic compliance with international law).

144. Tsutsui et al., *supra* note 117, at 368.

145. Glasius, *supra* note 27, at 147.

146. *Id.* at 140–44.

147. *Id.* at 150–52.

148. *Id.* at 141.

149. See Rowen, *supra* note 110, at 690; see also Merry, *supra* note 88, at 39 (describing the critical role of local human rights activists in “refashion[ing] global rights agendas for local contexts and reframe[ing] local grievances in terms of global human rights principles and activities”).

impunity. The existence of, or the potential for, a vibrant and engaged TSM thus serves as a reliable barometer for determining the likelihood of compliance with ICC rulings and the ultimate success of the institution.

### B. Regional Courts and TSMs

The experiences of regional courts<sup>150</sup> underscore the importance of strong links between international legal institutions and organized social movements. These internationalized courts have proven most effective at implementing and enforcing international law when TSMs have been able to assist in the process of interaction, interpretation, and internalization necessary to promote compliance with international principles. In contrast, where internationalized courts have operated in a vacuum, apart from any organized social movement, both their institutional legitimacy and their ability to foment compliance with international law have suffered.

Lessons gleaned from human rights tribunals are applicable to the ICC for at least four reasons. First, international criminal law focuses predominantly on human rights violations. Second, principles governing international criminal proceedings enshrine basic human rights, such as the presumption of innocence and the right to an impartial trial.<sup>151</sup> Third, like the ICC, regional courts typically lack effective enforcement mechanisms to ensure compliance with their rulings and thus depend on the willingness of states to obey.<sup>152</sup> Finally, as with the ICC, these regional courts are tasked with promoting human rights in recalcitrant states plagued by endemic, large-scale human rights violations.<sup>153</sup> As a result, regional courts presiding over states where the rule of law rests on shaky ground should ensure compliance with their rulings as a means of forging “a

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150. Regional human rights courts generally serve “geographic areas or units marked by relatively high socioeconomic, cultural, political, and juridical commonalities.” Burns H. Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANS. L. 585, 589 (1987).

151. Raimondo, *supra* note 25, at 301.

152. For example, the Inter-American Court of Human Rights has, since its inception, contended “with explicit challenges to its authority, widespread noncompliance with certain elements of its decisions, and a shortage of political support from its parent organization, the Organization of American States.” James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 774 (2008); see also Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT’L L. & INT’L REL. 35, 38–39 (2010) (noting that states within both the European and Inter-American human rights systems typically comply only partially with court rulings “despite repeated efforts by international institutions to bring them to full compliance and despite the fact that their prior behaviour suggests that they would prefer non-compliance”).

153. Cavallaro & Brewer, *supra* note 152, at 769.

rule-of-law practice and culture.”<sup>154</sup> Analyzing when and how regional courts have achieved compliance by working with social movements can thus assist in establishing criteria that the ICC can use to decide whether to pursue a case or defer to regional initiatives.

### 1. The Case of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACtHR) has managed to promote greater respect for human rights in Latin America by crafting judgments capable of incorporation “into domestic actors’ broader strategies to promote positive change on the underlying issues.”<sup>155</sup> Take, for example, the cases of *Loayza Tamayo v. Peru*<sup>156</sup> and *Castillo Petruzzi v. Peru*.<sup>157</sup> The *Loayza Tamayo* case concerned the 1993 detention of Professor Loayza Tamayo, who was accused of associating with an insurgent group.<sup>158</sup> She was subsequently detained, abused, and ultimately sentenced by a faceless tribunal to twenty years in jail on terrorism charges.<sup>159</sup> The IACtHR ruled that Peru had violated Professor Loayza Tamayo’s rights to personal liberty, humane treatment, and judicial guarantees, and ordered her release.<sup>160</sup> Peru complied within a month.<sup>161</sup> The court’s ruling, however, was by no means the sole impetus for Peru’s compliance. Professor Loayza Tamayo’s arrest and subsequent detention engendered widespread support and attention from the media and the broader public within and beyond Peru.<sup>162</sup>

The victims in *Castillo Petruzzi* had no such public support, even though the facts of the case were similar to those in *Loayza Tamayo*. In *Castillo Petruzzi*, four Chilean nationals had—like Professor Loayza Tomayo—been sentenced to life imprisonment by a faceless tribunal in Peru.<sup>163</sup> Again, the IACtHR found a violation of the victims’ rights and ordered their retrial with full due process guarantees.<sup>164</sup> This time, however, the lack of public or media support proved fatal to the implementation of the order. Peru refused to

154. Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights*, 44 CORNELL INT’L L.J. 493, 506 (2011).

155. Cavallaro & Brewer, *supra* note 152, at 770.

156. *See generally* Loayza–Tamayo v. Peru, Merits, Judgment, Inter–Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997).

157. *See generally* Castillo Petruzzi v. Peru, Inter–Am. Ct. H.R. (ser. C) No. 52 (May 30, 1999).

158. Loayza–Tamayo, (ser. C) No. 33, ¶¶ 3, 46.

159. *Id.*

160. *Id.* at pt. XVIII.

161. Loayza–Tamayo v. Peru, Reparations, Inter–Am. Ct. H.R. (ser. C) No. 42, ¶ 4 (Nov. 27, 1998).

162. Cavallaro & Brewer, *supra* note 152, at 789.

163. Castillo Petruzzi, (ser. C) No. 52, ¶¶ 1, 86.

164. *Id.* at pt. XVII.

comply with the judgment, asserting that it was an impermissible intrusion on its sovereign rights, and the Peruvian Congress approved a resolution to rescind Peru's acceptance of the IACtHR's jurisdiction.<sup>165</sup> Thus, advances in human rights in many Latin American societies stem not from the IACtHR's orders but from "the ability of social movements and human rights advocates on the ground to exert pressure on authorities to implement change."<sup>166</sup>

The experience of the IACtHR teaches that "impact matters, and should matter, to regional rights bodies,"<sup>167</sup> since "international rights courts are most effective when their work contributes to efforts deployed by domestic activists as part of their broader human rights campaigns."<sup>168</sup> Thus, courts tasked with hearing human rights cases must understand factors, including "the prevailing social and political climate in countries subject to its jurisdiction; the strategies of relevant national, regional, and international human rights campaigns; existing or planned government projects aimed at addressing human rights problems; and the shape of domestic public opinion on human rights issues," in order to promote lasting change.<sup>169</sup>

## 2. The Experience of the Community Court of Justice for the Economic Community of West African States

Similarly, the ECCJ's experience demonstrates the salience of both international law enforcement theories and transnational social mobilization efforts. The ECCJ was originally conceived as a mechanism to resolve economic disputes arising between member states of the Economic Community of West African States (ECOWAS).<sup>170</sup> In 2005, the ECCJ acquired jurisdiction over human rights claims and since that time has become a "bold adjudicator of human rights," issuing "path-breaking" judgments to hold states accountable for violations of basic human rights.<sup>171</sup> This is particularly remarkable, as the ECOWAS states, who expanded the ECCJ's human rights jurisdiction, have consistently remained

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165. Resolución Legislativa No. 27152 (July 8, 1999) (Peru); Letter from Fernando de Trazegnies Granda, Minister of Foreign Affairs, Peru, to César Gaviria, Sec'y Gen., Org. of Am. States (July 8, 1999), <http://www.umn.edu/humanrts/iachr/Annuals/app16-99.html> [<http://perma.cc/F3NM-2XJC>] (archived Oct. 5, 2015).

166. Cavallaro & Brewer, *supra* note 152, at 788.

167. *Id.* at 777.

168. *Id.* at 775.

169. *Id.* at 770.

170. See Karen J. Alter et al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 108 AM. J. INT'L L. 737, 738-41 (2013).

171. *Id.* at 736.

reluctant to submit to supranational judicial enforcement by the African Court of Human and Peoples Rights.<sup>172</sup>

The ECCJ's success is in large part attributable to the efforts of ECOWAS officials, civil society representatives, and ECCJ judges, who joined forces to call for an expansion of the court's jurisdiction, standing rules, and remedial authority.<sup>173</sup> The ECCJ's judges undertook "an extra-judicial campaign to redesign the Court," venturing across West Africa "on outreach missions and speaking engagements to build support among local bar associations, human rights groups, and government officials."<sup>174</sup>

The "institutional adaptation and redeployment of non-state actors" resulted in "changes that, over time, [were] more significant than 'big decisions' made by governments in response to exogenous shocks."<sup>175</sup> This does not mean that states have been relegated to the sidelines in the region; rather, states remain the driving force behind ECOWAS. Nevertheless, for the ECCJ, the "impetus for change came from a coalition of civil society groups, . . . officials, and ECOWAS judges," facilitated by "the new [ECOWAS] Community zeitgeist of openness to civil society,"<sup>176</sup> which resulted in "the decision by states to redeploy an international court in a way that foreseeably constrains national sovereignty."<sup>177</sup>

In particular, "social mobilization theory . . . help[s] to explain why the court reform campaign succeeded and the particular form that it took."<sup>178</sup> Human rights lawyers and NGOs partnered in the 1990s to overcome "domestic blockages by organizing at the regional level."<sup>179</sup> The new organizations that they formed "lobbied ECOWAS officials to expand the Community's human rights mandate."<sup>180</sup> These groups "framed their appeals for court reform using the more nebulous and less threatening language of access to justice. They also left the ECCJ's new human rights mandate undefined, allowing different observers to read in their preferred conceptions of rights."<sup>181</sup> This framing appealed to ECOWAS judges and officials, as well as to "transnational NGOs such as the Open Society Justice Initiative and Interights."<sup>182</sup>

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172. *See id.* at 738–39.

173. *See id.* at 738.

174. Laurence R. Heifer et al., A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice 3 (2012) (manuscript), <http://ssrn.com/abstract=2107427> [<http://perma.cc/KQV7-RFX4>] (archived Oct. 15, 2015).

175. *Id.* at 39.

176. *Id.* at 40.

177. *Id.*

178. *Id.*

179. *Id.* at 41.

180. *Id.*

181. *Id.* at 42.

182. *Id.*

The success of this transnational social mobilization effort further illustrates how TSMs function as part of the process of interaction, interpretation, and internalization that creates compliance with international law. Like the IACtHR, the ECCJ lacks the power necessary to compel compliance with its rulings and requests, and thus, as with the IACtHR, the ECCJ has compelled compliance through persuasion and acculturation. The massive mobilization campaign undertaken by West African civil society groups and legal actors served to inculcate international norms. These actors shared an active role in “assess[ing] the *content*” of the ECCJ’s message.<sup>183</sup> The mobilization campaign also exerted “internal and external pressures” necessary to convince states parties to comply with ECCJ decisions—and even extend the scope of the ECCJ’s authority.<sup>184</sup>

By working with local and regional advocacy groups, the ECCJ created the “opportunities for collective deliberation and dialogue” that serve to “enmesh” the state parties in a “regularized communicative process[.]”<sup>185</sup> Thus, the ECCJ’s partnership with social movements prevented state parties from ignoring the rulings of the court. Rather, the states were compelled to work within the ECCJ’s structure and thereby came to play an active role in making, interpreting, and shaping the law.<sup>186</sup>

The ECCJ’s experience also illustrates the importance of domestic political actors on compliance with international law. West African civil society groups and legal actors helped to ensure that the “values of the international society,” as articulated by the regional court, resonated locally. The domestic groups fostered compliance with international law, vividly demonstrating that, when it comes to international law, states may not be the only, nor the most important, actors. Instead, the ECCJ appealed to and worked with domestic networks of political and legal activists, and these actors, in turn, induced national decision makers to comply with international law.<sup>187</sup> In the case of the ECCJ, rules were negotiated not between nations, but among legal and political actors within the relevant states, and the Court then contributed to integrating these rules from the international level into domestic legal structures.

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183. See Goodman & Jinks, *supra* note 112, at 635.

184. See *id.* at 642.

185. See *id.* at 666.

186. See *supra* notes 132–110 and accompanying text.

187. See *supra* note 149 and accompanying text.

## IV. THE ILL-FATED ICC PROSECUTIONS OF KENYAN OFFICIALS

As the experience of the regional courts in West Africa and Latin and South America illustrates, successful supranational tribunals must work closely with networks of activists and advocates to achieve compliance with international law. Drawing from these lessons, the ICC should be wary of imposing its authority on Kenya. Without a TSM dedicated to interacting, interpreting, and internalizing the ICC's rulings on the ground, any ruling the ICC issues on the situation in Kenya is unlikely to take root locally.

A. *Background on the Situation in Kenya*

The 2007 Kenyan presidential election was widely perceived as a test of Kenya's fledgling democracy.<sup>188</sup> It was a test that Kenya failed spectacularly. The race pitted Mwai Kibaki, a Kikuyu, against Raila Odinga, a Luo, in a country deeply divided along ethnic lines.<sup>189</sup> Initial results showed Odinga sweeping to victory with a lead of more than one million votes.<sup>190</sup> Overnight, Odinga's advantage evaporated.<sup>191</sup> The rapid reversal of fortune aroused suspicions, with observers accusing the government of rigging the election.<sup>192</sup> After Kibaki was declared the winner, violence erupted.<sup>193</sup> The opposition vowed to inaugurate Odinga.<sup>194</sup> Riots spread unchecked across the country. In response, the government declared martial law and banned live media broadcasts.<sup>195</sup>

Attackers "targeted business premises and residential areas . . . burnt down entire houses, as well as places where people sought refuge."<sup>196</sup> Police brutally targeted unarmed women, the elderly, children, and teachers.<sup>197</sup> The crimes were "organized, enticed and/or financed" by leaders in both Kibaki and Odinga's parties.<sup>198</sup> The violence "was not a mere accumulation of spontaneous or isolated acts[,] but "planned, directed or organized by . . . local leaders, businessmen, and politicians."<sup>199</sup> The bloodshed continued throughout 2008, with hundreds of people reportedly killed in the context of a government campaign.<sup>200</sup>

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188. Gettleman, *supra* note 1.

189. *See id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Decision Pursuant to Article 15, *supra* note 11, ¶ 109.

197. *Id.*

198. *See id.* ¶ 116.

199. *Id.* ¶ 117.

200. *See id.* ¶ 134.

The post-election violence was just one incident in a long line of tragic episodes that have mired Kenya “in a trend of institutionalization of violence” since the 1990s.<sup>201</sup> This pattern set the stage for the horrific outburst in 2007–2008: armed militias established during the ethnic clashes of the 1990s had never demobilized, providing business and political leaders with the might to manipulate the electoral results by force.<sup>202</sup> Rampant poverty and unemployment made the prospect of joining militia groups appealing to destitute youths.<sup>203</sup> Additionally, the ability of an omnipotent president to confer special benefits on members of the president’s ethnic group encouraged factions to resort to force in order to gain and retain the presidential office and all its attendant privileges.<sup>204</sup> Finally, Kenya’s failure to prosecute or punish those responsible for electoral and ethnic violence, or reign in a potentate president, created a society in which impunity was “the order of the day.”<sup>205</sup> In short, after decades of electoral violence, ethnic clashes, unequal resource distribution, and a culture of impunity, Kenya was a powder keg.

### 1. Domestic Responses to the Violence

In the wake of the election crisis, it became obvious that Kenyan civil society and human rights groups would play a pivotal role in pushing through the political and institutional reforms necessary to prevent future clashes.<sup>206</sup> Kenyan civil society previously played a crucial part in restoring a multi-party system to the country after years of authoritarian rule under Daniel Arap Moi.<sup>207</sup> Backed by U.S. funds, civil society confronted the state, demanding political and constitutional change.<sup>208</sup> The authoritarian government shrewdly conceded to civil society demands. The constitutional amendments pushed through by civil society set the stage for the eventual ouster of Moi’s regime.<sup>209</sup>

After the restoration of a democratic state, civil society organizations pushed for a new constitution and collaborated with the

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201. CIPEV REPORT, *supra* note 2, at viii.

202. *Id.*

203. Waruguru Kaguongo & Godfrey M. Musila, *Introduction*, in 8 JUDICIARY WATCH REPORT: ADDRESSING IMPUNITY AND OPTIONS FOR JUSTICE IN KENYA 3 (Waruguru Kaguongo & Godfrey M. Musila eds., 2009).

204. *Id.*

205. CIPEV REPORT, *supra* note 2, at 16.

206. Matilda Lasseko, *Role of Civil Society in Transitional Justice Process: The Evolving Kenyan Experience*, in 8 JUDICIARY WATCH REPORT: ADDRESSING IMPUNITY AND OPTIONS FOR JUSTICE IN KENYA 195, 196–97 (Waruguru Kaguongo & Godfrey M. Musila eds., 2009).

207. *Id.* at 202–03.

208. *Id.*

209. *Id.*

new government to improve education, child welfare, environmental protections, land security, gender equality, and a host of other issues.<sup>210</sup> These past civil society successes illustrate the vitality of Kenyan civil society, suggesting that it is capable of taking up the cause of justice and reconciliation.<sup>211</sup>

Perhaps in light of these past achievements, many in Kenya viewed the post-election violence as a “line-in-the-sand moment.”<sup>212</sup> Kenya’s vice president called the post-election violence a “constitutional moment,” and the Assistant Minister for Defence emphasized to Parliament that “the issue of impunity must die with this new beginning.”<sup>213</sup> Kenyan leaders felt that they had been “put in place specifically to pursue reforms.”<sup>214</sup> The Kenyan population—united above partisan and ethnic divides—further spurred reform efforts, exerting strident pressure on the government to enact constitutional changes.<sup>215</sup> This pressure was exacerbated by the fiscal consequences of the post-election violence, which slowed economic growth and led several international donors to withhold financial support.<sup>216</sup> In response, “many . . . reforms were passed with reference to the post-election violence.”<sup>217</sup> Ultimately, civil society’s efforts to secure constitutional change were influential,<sup>218</sup> and Kenya adopted a new constitution in 2010.<sup>219</sup> Nevertheless, the Kenyan authorities repeatedly failed to deal with the perpetrators of the post-election violence internally, leading some Kenyan human rights organizations to conclude that external intervention was necessary to achieve justice.<sup>220</sup>

## 2. International Responses to the Violence

The international community responded rapidly to the violence in Kenya. Efforts to find a peaceful solution to the conflict began in

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210. *Id.* at 204.

211. *Id.* at 205–06; *see also* Bjork & Goebertus, *supra* note 2, at 215 (“In the case of Kenya, NGOs have historically been known for their capacity to enable political and institutional reform.”).

212. LIONEL NICHOLS, *THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA* 199 (Olivera Simic ed., 2015).

213. *Id.*

214. *Id.*

215. *Id.* at 204.

216. *Id.* at 200.

217. *Id.* at 199.

218. *Id.* at 204.

219. *Id.* at 195. Although this constitutional reform occurred concurrent with the ICC investigation into the situation in Kenya, it would be a mistake to attribute the new constitution to the ICC proceedings. Rather, the passage of the new constitution marked the “culmination of a movement that had commenced even before the ICC’s establishment in 2002.” *Id.*

220. Bjork & Goebertus, *supra* note 2, at 217–18.

the first week of January 2008.<sup>221</sup> On February 28, 2008, Kofi Annan and the African Union Panel of Eminent Personalities negotiated a power-sharing agreement, which established Kibaki as President and Odinga as Prime Minister.<sup>222</sup> The deal ended the election violence and pulled Kenya back from the brink of civil war.<sup>223</sup> The agreement also established three commissions to further investigate and respond to the crisis: (1) the Waki Commission; (2) the Truth Justice and Reconciliation Commission; and (3) the Independent Review Commission on General Elections.<sup>224</sup> The Waki Commission was tasked with investigating “the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these . . . matters.”<sup>225</sup> These recommendations included the recommendation that Kenya create the “Special Tribunal for Kenya,”<sup>226</sup> which would sit within Kenyan territory and “seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity,” committed during the post-election violence.<sup>227</sup> The success of these efforts to establish transitional justice mechanisms within Kenya was due, in large part, to a TSM: the international community took on a “massive and relatively coherent role” in the peace process and exerted pressure on the Kenyan government to respond to the violence.<sup>228</sup> Civil society groups likewise pressured the Kenyan government to accept “accountability, truth-seeking and reform measures.”<sup>229</sup> Some civil society organizations were even established specifically to respond to the post-election crisis.<sup>230</sup>

Initially, it seemed that these external pressures on the Kenyan authorities would suffice to push Kenya to create a special court to investigate and prosecute those responsible for the post-election violence. But after three thwarted attempts to pass legislation establishing such a tribunal,<sup>231</sup> Kenya ceased internal efforts to prosecute the crimes. To the ICC Prosecutor, these repeated failures indicated inactivity on the part of the Kenyan authorities to bring those responsible for the atrocities to justice.<sup>232</sup>

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221. *Crisis in Kenya*, *supra* note 9.

222. *Id.*

223. Bjork & Goebertus, *supra* note 2, at 206.

224. Hansen, *Power-Sharing*, *supra* note 6, at 310.

225. CIPEV REPORT, *supra* note 2, at vii.

226. *Id.* at 472.

227. *Id.*

228. Hansen, *Power-Sharing*, *supra* note 6, at 312.

229. *Id.* at 313. Kenyan civil society organizations were similarly instrumental in the Waki Commission’s efforts to investigate the post-election violence and assess the role of the State Security Agencies in their response to it. *See* CIPEV REPORT, *supra* note 2, at 5–6.

230. Hansen, *Power-Sharing*, *supra* note 6, at 313.

231. BACK FROM THE BRINK, *supra* note 3, at 74.

232. *See* Pre-Trial Chamber II, ICC-01/09-19, ¶¶ 183, 185.

### 3. The ICC Proceedings Against Kenyan Officials

On November 26, 2009, the Prosecutor requested authorization from the ICC's Pre-Trial Chamber to open an investigation into the post-election violence in Kenya, pursuant to the Prosecutor's *proprio motu* powers under Article 15 of the Rome Statute.<sup>233</sup> The Pre-Trial Chamber authorized the investigation on March 31, 2010.<sup>234</sup> Almost a year later, the Prosecutor issued summonses for six high-ranking Kenyan officials—known as the “Ocampo Six”—to appear before the court.<sup>235</sup> In response, Kenya lodged an application with the Pre-Trial Chamber requesting that the cases against the Ocampo Six be deemed inadmissible.<sup>236</sup> In the application, Kenya argued that it was both capable and willing to respond to the post-election violence domestically in light of recently enacted “fundamental and far-reaching constitutional and judicial reforms” and investigations currently underway.<sup>237</sup>

The Pre-Trial Chamber rejected Kenya's request, reasoning that Kenya had provided insufficient detail to confirm the existence of an investigation into the activities of the Ocampo Six, and thus “there remain[ed] a situation of inactivity.”<sup>238</sup> The ICC's Appellate Chamber affirmed the Pre-Trial Chamber's decision on August 30, 2011.<sup>239</sup> Less than six months later, in January 2012, the Pre-Trial Chamber confirmed charges against four of the Ocampo Six—including President Kenyatta and Vice President Ruto—to bring these cases to trial.<sup>240</sup> Three years later, President Kenyatta and his government

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233. *Id.* ¶ 2.

234. Prosecutor v. Ruto, ICC–01/09–02/11–307, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 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”, ¶ 4 (Aug. 30, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1223118.pdf#search=ICC%2D01%2F09%2D02%2F11%2D307> [<http://perma.cc/5FWN-F2PS>] (archived Oct. 4, 2015).

235. On March 8, 2011, the Pre-Trial Chamber summoned Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali to appear before the court. Pre-Trial Chamber II, ICC–01/09–19, ¶ 5. The same day, the Chamber also issued summons to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang. Prosecutor v. Ruto, ICC–01/09–02/11–307, ¶ 5.

236. Prosecutor v. Ruto & Prosecutor v. Muthaura, ICC–01/09–01/11–19, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ¶ 80 (Mar. 31, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf> [<http://perma.cc/M597-5SND>] (archived Oct. 4, 2015).

237. *Id.* ¶ 2.

238. Prosecutor v. Ruto, ICC–01/09–01/11–101, ¶¶ 68–70.

239. Prosecutor v. Ruto, ICC–01/09–01/11–307, ¶ 125.

240. The Pre-Trial Chamber confirmed charges brought against Ruto and Sang, but dismissed charges against Kosgey for lack of evidence on January 23, 2012. Prosecutor v. Ruto, ICC–01/09–01/11–373, ¶¶ 293, 299, 366. That same day, the Pre-Trial Chamber confirmed separate charges against Muthaura and Kenyatta, and dismissed charges against Ali, likewise due to a dearth of evidence showing that he had committed any crime. Prosecutor v. Muthaura, ICC–01/09–02/11–382, Decision on the

scored a major victory over the ICC when the Prosecutor was forced to withdraw charges against him due to difficulties in obtaining evidence of his involvement in the post-election violence.<sup>241</sup> The Prosecutor laid the blame for the withdrawal at Kenya's feet, stating that the Kenyan Government had failed to "cooperate fully and effectively" with the investigation or provide requested materials.<sup>242</sup> Kenya, in turn, "did what undefeated countries can do: It cleverly slow-walked its cooperation with the international community" until the Prosecutor's case at last crumbled.<sup>243</sup>

### B. Responses to the ICC's Proceedings

#### 1. Kenyan and African Union Resistance to the Proceedings

From the start, Kenya devoted significant government resources to opposing the ICC proceedings against six high-profile members of its government.<sup>244</sup> Soon after the ICC Prosecutor's request to issue summonses to the Ocampo Six, the Kenyan parliament passed a motion to withdraw from the ICC's jurisdiction.<sup>245</sup> This motion was ultimately never implemented,<sup>246</sup> and Kenya instead focused on diplomatic strategies designed to persuade other governments of the wisdom of deferring the Kenyan cases.<sup>247</sup>

The AU quickly sided with Kenya,<sup>248</sup> actively joining Kenya's lobbying efforts to terminate the cases at the ICC. The AU requested that the ICC refer the cases back to local courts, arguing that the 2010 Kenyan constitutional reforms would ensure effective national mechanisms to investigate and prosecute the alleged perpetrators domestically.<sup>249</sup> When the ICC refused, the AU convened an emergency summit to discuss a Kenyan motion for the mass withdrawal of the African states from the Rome Statute.<sup>250</sup> In an opening statement before the summit, Kenyatta stated that the ICC "has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims," and asserted that the institution

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Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 429–30 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> [<http://perma.cc/857K-BGFV>] (archived Oct. 4, 2015).

241. Prosecutor v. Muthaura, ICC-01/09-02/11-983, ¶ 2.

242. Statement of the Prosecutor, *supra* note 14.

243. Kontorovich, *supra* note 15.

244. Hansen, *Power-Sharing*, *supra* note 6, at 318–20.

245. *Id.* at 318.

246. *Id.*

247. *Id.* at 319.

248. *Id.*

249. See Abdullahi Bora Halakhe, *Does the ICC Have an Africa Problem?*, AL JAZEERA AM. (Feb. 7, 2014, 9:30 AM), <http://america.aljazeera.com/opinions/2014/2/kenya-trials-keytoiccafiricarelations.html> [<http://perma.cc/WQG2-3VQY>] (archived Oct. 12, 2015).

250. *Id.*

“stopped being the home of justice the day it became the toy of declining imperial powers.”<sup>251</sup> Uganda’s President Museveni, who had earlier requested ICC intervention in his country, reversed positions and called for all AU member states to “get out of that court of the West” and leave the westerners “with their court.”<sup>252</sup>

Ultimately, the African states did not withdraw en masse from the ICC. Nevertheless, the ICC’s pursuit of the cases despite African resistance damaged the relationship between the AU and the ICC.<sup>253</sup> At the emergency summit, the AU adopted a decision that “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.”<sup>254</sup> In the same declaration, the AU asked that the trials of President Kenyatta and Vice President Ruto be “suspended until they complete their terms of office.”<sup>255</sup>

The AU adopted several additional declarations on the ICC’s activities in Africa as a whole, all expressing the AU’s “strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts at promoting lasting peace.”<sup>256</sup> In reaffirming eight earlier declarations on the ICC’s African investigations and prosecutions, the AU specifically cited the indictments against Kenyan President Kenyatta and his second-in-command, William Ruto, as a threat “to the on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability, not only in Kenya, but also the Region,”<sup>257</sup> thereby emphasizing the regional interest in the Kenyan cases. The AU also called on the UN Security Council “to defer the investigations and prosecutions in relation to the 2008 post-election violence in Kenya under Article 16 of the Rome Statute,” and called for “a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity.”<sup>258</sup>

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251. *Id.*

252. Miriri, *supra* note 106.

253. *See id.*

254. Solomon Ayele Dersso, *The AU’s Extraordinary Summit Decisions on Africa–ICC Relationship*, EJIL: TALK! (Oct. 28, 2013), <http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship> [http://perma.cc/E9GF-2EZB] (archived Oct. 12, 2015).

255. *Id.*

256. African Union, Assembly/AU/Dec.482(XXI) at 1 (May 13, 2013), [http://au.int/en/sites/default/files/decisions/9654-assembly\\_au\\_dec\\_474-489\\_xxi\\_e.pdf](http://au.int/en/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf) [http://perma.cc/NQC7-59FA] (archived Jan. 6, 2016).

257. *Id.* at 1.

258. The deterioration of the relationship between the AU and the ICC has proved detrimental to the ICC’s legitimacy and raised serious questions about the institution’s ability to bring the perpetrators of international crimes to justice: the AU called on member states “not to cooperate” in the execution of an arrest warrant issued by the Pre-Trial Chamber for Libya’s Qaddafi and expressed “deep concern” at the

The AU also expanded the scope of the African Court of Human and People's Rights from a tribunal with civil jurisdiction over human rights complaints to a "full-fledged criminal court," vested with authority to try individual perpetrators of international crimes, including genocide, war crimes, and crimes against humanity, in a move designed to circumscribe the ICC's reach.<sup>259</sup> At the same time, African leaders voted to give themselves immunity from war crimes before the African Court, emphasizing their disapproval of the ICC prosecutions of sitting heads of state,<sup>260</sup> a major setback in the fight to end impunity and ensure respect for international law.<sup>261</sup>

## 2. The East African Community and the Situation in Kenya

As an alternative to allowing Kenya to handle the investigations and prosecutions concerning the post-election violence, President Kenyatta proposed sending the cases to the East African Court of Justice (EACJ), a regional court serving as the judicial branch of the East African Community (EAC).<sup>262</sup> As with the AU, the EACJ was quick to take up Kenyatta's cause. The EAC's legislative body (the EALA) passed a resolution with "overwhelming support," calling for the EAC's executive branch—the Council of Ministers—to "implore the International Criminal Court to transfer the cases of the four accused Kenyans facing trial at The Hague to the East African Court of Justice."<sup>263</sup>

In the resolution, the EALA asserted that the post-election violence had breached the provisions on good governance, rule of law, democracy, accountability, social justice, and settlement of disputes enshrined in the Treaty of the East African Court of Justice (EACJ Treaty), and, as a result, the EACJ could adjudicate the Kenyan cases.<sup>264</sup> In calling for the transfer, the EALA emphasized several

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handling of the Libyan situation by the ICC Prosecutor. African Union, Doc. EX.CL/670(XIX), *supra* note 106, ¶ 6. The AU asserted that the ICC, instead of combatting impunity, was seriously complicating efforts to negotiate a political solution to the Libyan crisis. *Id.*

259. Adam Nossiter & Marlise Simons, *African Leaders Grant Themselves Immunity in Proposed Court*, N.Y. TIMES (July 2, 2014), <http://www.nytimes.com/2014/07/03/world/africa/african-leaders-grant-themselves-immunity-in-proposed-court.html> [<http://perma.cc/A7W2-CLPX>] (archived Oct. 5, 2015).

260. *African Leaders Vote to Give Themselves Immunity from War Crimes*, AL JAZEERA AM. (July 1, 2014, 2:06 PM), <http://america.aljazeera.com/articles/2014/7/1/africa-summit-immunity0.html> [<http://perma.cc/8HEN-CGNH>] (archived Oct. 5, 2015).

261. *Id.*

262. Ashine, *supra* note 24.

263. Press Release, E. African Legislative Assembly, *Transfer ICC Cases to the EACJ, EALA Resolves* (April 26, 2012), <http://www.eala.org/media-centre/press-releases/345-send-icc-case-to-the-eacj--eala-resolves.html> [<http://perma.cc/6JNM-LK3C>] (archived Oct. 5, 2010).

264. Dan Wandera Ogalo, E. African Legislative Assembly, *Resolution of the Assembly Seeking the EAC Council of Ministers to Implore the International Criminal Court to Transfer the Case of the Accused Four Kenyans Facing Trial in Respect of the*

points: First, that, as a party to the EACJ Treaty, Kenya would be obligated “to implement a judgment of the [EACJ]”; second, that nearly five years had elapsed since the post-election violence, and yet the trials at The Hague remained in the preliminary stages. The EALA reminded the ICC, in this regard, that “justice delayed is justice denied.”<sup>265</sup> Third, the EALA asserted that the ICC indictments would not and could not “resolve the underlying issues” that led to the violence that had raged in Kenya.<sup>266</sup> Fourth, that many in Kenya, the EAC Partner States, and the AU were united in their opposition to the ICC trials and preferred a local response “to promote reconciliation.”<sup>267</sup> Finally, the EAC asserted that the reforms to the Kenyan constitutional order demonstrated that Kenya could resolve “the issues that manifested in the aftermath of the 2007 general elections.”<sup>268</sup> The EALA went on to call for an amendment to the EACJ treaty “as is necessary to bring [the Kenyan cases] within the ambit of the jurisdiction of the [EACJ] and give it retrospective effect.”<sup>269</sup>

### 3. Impact of the Kenyan Trials on Domestic Reforms

Under the principle of complementarity—as described by the ICC Prosecutor—an ICC preliminary examination into crimes within its jurisdiction should prompt domestic prosecutions.<sup>270</sup> In the case of Kenya, the ICC proceedings not only failed to inspire the Kenyan authorities to investigate or prosecute the perpetrators of the post-election violence domestically,<sup>271</sup> but the cases may also have impeded local reform efforts in several ways.<sup>272</sup>

First, the pressure placed on the Kenyan government by the ICC Prosecutor resulted in the prioritizing of witness protection amendments requested by the ICC over other reforms, including “important bills relating to reform of the police, judiciary, electoral process, local government and company law.”<sup>273</sup> Second, the ICC investigation inflamed pre-existing tensions in the fragile power-sharing government negotiated by Kofi Annan and the Panel of Eminent African Personalities and thereby threatened the reform agenda.<sup>274</sup> The impunity-ending measures initially devised by the Kenyan government would have been difficult to pass, even without

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*Aftermath of the 2007 Kenya General Elections to the East African Court of Justice and to Reinforce the Treaty Provisions* (April 26, 2012).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. Bjork & Goebertus, *supra* note 2, at 208.

271. *Id.* at 208–09.

272. *Id.* at 224–25.

273. NICHOLS, *supra* note 212, at 209.

274. *Id.* at 183.

the discord created within the government by the ICC. The ICC prosecutions thus “had the potential to disrupt this vitally important reform agenda.”<sup>275</sup> Third, the Kenyan government apparently passed sham reforms designed to frustrate the progress of the ICC cases rather than to combat impunity.<sup>276</sup>

Moreover, the ICC prosecutions focused exclusively on those who allegedly bore the greatest criminal responsibility for the atrocities committed in connection with the 2007 elections,<sup>277</sup> neglecting the low-level “foot soldiers” who actually carried out the killings, rapes, mutilations, and other crimes.<sup>278</sup> The voices of the victims of the violence have remained largely unheard.<sup>279</sup> As a result, the ICC prosecutions seem to have aggravated fissures in Kenyan society, as communities “now constantly regard each other with suspicion and fear.”<sup>280</sup>

Additionally, the ICC proceedings created a perverse disincentive for local NGOs and social movements to push for domestic reforms to the criminal justice system, due to concerns that building national capacity might forestall ICC prosecutions.<sup>281</sup> Many Kenyan NGOs decided that ICC intervention was necessary to ensure accountability for the perpetrators of the post-election violence,<sup>282</sup> and even those organizations possessing the capacity to impact the national criminal justice apparatus “were inclined, instead, to encourage ICC interventions.”<sup>283</sup> Local citizens likewise appeared to prefer the ICC to domestic proceedings, but this preference stemmed from a lack of understanding about the ICC’s purpose and capabilities.<sup>284</sup> Beyond prosecuting the most responsible perpetrators of the post-election violence, these citizens believe that the ICC will lead to a better life by increasing access to water, food, and housing, and addressing political corruption.<sup>285</sup> Of course, the ICC lacks the mandate to implement such sweeping reforms.<sup>286</sup> And even if it had the necessary authority, the ICC’s top-down approach is unlikely to promote lasting change. Social movements are better suited to

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275. *Id.* at 219.

276. *Id.* at 183 (providing an example of the witness protection amendments requested by the ICC, which ultimately proved toothless, as Kenya refused to implement them); *see also id.* at 210.

277. *See* Kaguongo & Musila, *supra* note 203, at 6.

278. *Id.*

279. *See id.* at 11.

280. *Id.* at 6.

281. Bjork & Goebertus, *supra* note 2, at 224–25.

282. *Id.* at 224–26.

283. *Id.* at 218.

284. *See id.* at 226.

285. *Id.*

286. *See id.* at 213.

address the “complex and intertwined processes of strengthening the rule of law” and create a culture of legality.<sup>287</sup>

The experiences of other African states that have engaged in transitional justice processes to combat impunity and restore the rule of law have demonstrated the critical role of civil society as a “determining factor” in the strength and success of national reform efforts.<sup>288</sup> Likewise, within Kenya, efforts to rebuild national institutions to prevent future atrocities were spearheaded not by the ICC, but by local social movements. Although the ICC prosecution coincided with the passage of a new constitution, the creation of a Truth Commission, and reforms to the judiciary, security agencies, and electoral system, the prosecution did not inspire these changes.<sup>289</sup> These reforms were the product of “an ongoing process that was accelerated by the scale of the post-election violence.”<sup>290</sup>

#### 4. The Implosion of the Case Against Kenyatta

Perhaps the most troubling consequence of the ICC’s Kenyan prosecutions arose from the collapse of the case against Kenyan President Kenyatta.<sup>291</sup> Kenya effectively “created a how-to manual for frustrating court investigations” while maintaining a semblance of cooperation.<sup>292</sup> Additionally, the Prosecutor’s first exercise of the *proprio motu* power was an important test—one the institution failed spectacularly.<sup>293</sup> This suggests that the Court will be powerless—or at least reluctant—to take on sitting heads of state in future situations, thereby frustrating the goal to end impunity by bringing perpetrators to justice. Moreover, the disintegration of the Kenyatta case exacerbated the Court’s already daunting legitimacy problems. The case suggests that the Court’s backers—including European states—neglected to apply sufficient political pressure on Kenya to cooperate with the Court, further exposing the Court’s enforcement problems.<sup>294</sup> Finally, the unraveling of the Kenyatta case has further undermined the credibility of the already controversial ICC and

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287. *Id.* at 214.

288. Lasseko, *supra* note 206, at 227.

289. See NICHOLS, *supra* note 212, at 213.

290. *Id.* at 183.

291. See Kontorovich, *supra* note 15 (claiming the ICC has “suffered its biggest setback since its establishment.”).

292. David Bosco, *How to Destroy the International Criminal Court from Within*, FOREIGN POL’Y (Oct. 10, 2014), [http://www.foreignpolicy.com/articles/2014/10/10/how\\_to\\_destroy\\_international\\_criminal\\_court\\_from\\_within\\_kenya\\_ICC\\_kenyatta\\_hague](http://www.foreignpolicy.com/articles/2014/10/10/how_to_destroy_international_criminal_court_from_within_kenya_ICC_kenyatta_hague) [<http://perma.cc/LC3Q-AJHM>] (archived Oct. 4, 2015).

293. *Id.*

294. See *id.*; see also Anna Holligan, *Uhuru Kenyatta Case: Most High-Profile Collapse at ICC*, BBC (Dec. 5, 2014), <http://www.bbc.com/news/world-africa-30353311> [<http://perma.cc/3GYE-78QW>] (archived Oct. 4, 2015).

provoked questions about whether the ICC Prosecutor is in fact capable of securing evidence and conducting effective investigations into the most serious international crimes.<sup>295</sup> The experience of the Kenyan cases indicates that the ICC urgently needs to partner more closely with local social movements if it is to restore its legitimacy and rebuild its credibility.

#### V. A FRAMEWORK FOR PARTNERING WITH REGIONAL COURTS

One way the ICC can partner more closely with local social movements is to endorse the work of regional human rights courts, particularly where such courts are in a better position to inculcate international values domestically and to mobilize national and regional reform efforts, a crucial first step in determining whether the relevant regional institution is so situated to assess the regional court's legitimacy and efficacy. If the regional court is both credible and effective in promoting the rule of law domestically, the ICC should next consider whether international or regional proceedings are more likely to ensure compliance and combat impunity by evaluating the potential relationship between the regional court and regional social movements.

##### A. *The Credibility and Efficacy of the East African Court of Justice*

Article 9(1)(e) of the East African Community Treaty (EAC Treaty) initially established the EACJ as the judicial organ of the East African Community.<sup>296</sup> The EACJ is mandated to “ensure the adherence to law in the interpretation and application of and compliance with [the EAC Treaty].”<sup>297</sup> The court's judges are appointed “from among persons recommended by the Partner States who are of proven integrity, impartiality and independence” and shall be “jurists of recognized competence, in their respective Partner States.”<sup>298</sup> Article 27 of the EAC Treaty limits the jurisdiction of the court to “the interpretation and application of [the] Treaty.”<sup>299</sup> The treaty thus “expressly excludes human rights” and instead envisions the later adoption of a protocol to bring human rights cases within the court's purview.<sup>300</sup>

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295. Holligan, *supra* note 294.

296. Treaty for the Establishment of the East African Community art. 9, Nov. 30, 1999.

297. *Id.* art. 23.

298. *Id.* art. 24.

299. *Id.* art. 27.

300. Laurence R. Heifer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQ. L. 479, 488 (2013); *see also* Solomon

However, the EAC Treaty establishes “good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights[,]”<sup>301</sup> as foundational principles. The EACJ has used this provision to effectively construe its own powers to adjudicate human rights cases,<sup>302</sup> emphasizing that while it “will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction . . . merely because the reference includes allegation of human rights violation.”<sup>303</sup>

In *Samuel Mukira Mohochi v. Att’y Gen. of the Rep. of Uganda*, the most recent decision in the EACJ’s evolving human rights jurisprudence,<sup>304</sup> Mohochi alleged that Uganda had breached its obligations under both the EAC Treaty and the African Charter on Human and People’s Rights and sought redress from the Court.<sup>305</sup> Uganda responded that, because the case primarily concerned allegations of human rights violations, the Court lacked jurisdiction.<sup>306</sup> In response, the EACJ emphatically affirmed its “*jurisdiction over the interpretation and application of the [EAC] Treaty*,” noting that the EACJ “has consistently held, and the Appellate Division has consistently upheld, that the mere inclusion of allegations of human rights violations . . . will not deter the Court from exercising its jurisdiction.”<sup>307</sup> The Court went on to note that Mohochi’s human rights allegations were limited to those expressly recognized by the Treaty and therefore concerned an alleged breach of Uganda’s Treaty obligations a matter “which lies outside the province of human rights.”<sup>308</sup> In short, while refusing to classify its decisions as implicating human rights, the Court tacitly grounds its opinions in human rights principles, effectively allowing it to hear human rights claims while skirting any jurisdictional issues.<sup>309</sup> As a result, human rights cases may be brought before the EACJ, as long as the applicant

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T. Eboobrah, *Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges*, 17 AFR. J. INT’L & COMP. L. 79, 82 (2009).

301. Treaty for the Establishment of the East African Community, *supra* note 296, art. 6.

302. See Brittany West et al., *Regional Human Rights System*, 21 HUM. RTS. BRIEF 60, 60 (2014).

303. Katabazi v. Sec’y Gen., Judgment, East African Court of Justice, at 16 (Nov. 1, 2007), [http://eacj.org/wp-content/uploads/2012/11/NO.\\_1\\_OF\\_2007.pdf](http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf) [<http://perma.cc/H63X-KZJN>] (archived Oct. 4, 2015).

304. West et al., *supra* note 302, at 60.

305. Mohochi v. Att’y Gen. of the Rep. of Uganda, Judgment, East African Court of Justice, ¶ 6 (May 17, 2013), [http://eacj.org/wp-content/uploads/2013/09/FI\\_Uganda\\_v\\_Muhochi.pdf](http://eacj.org/wp-content/uploads/2013/09/FI_Uganda_v_Muhochi.pdf) [<http://perma.cc/4CXG-PJQL>] (archived Oct. 4, 2015).

306. *Id.* ¶ 19(i).

307. *Id.* ¶ 26.

308. *Id.*

309. West et al., *supra* note 302, at 60; see also Frederick Cowell, *The Death of the Southern African Development Community Tribunal’s Human Rights Jurisdiction*, 13 HUM. RTS. L. REV. 153, 157 (2013).

demonstrates that the conduct violating the relevant rights is tantamount to a violation of the EAC Treaty provisions.<sup>310</sup>

In 2005, two years before the outbreak of violence in Kenya, the Council of Ministers initiated efforts to extend the jurisdiction of the EACJ to expressly include human rights, but the measures were never fully implemented.<sup>311</sup> However, the legislative branch of the EAC appears to have accepted the EACJ's interpretation of its jurisdiction in asserting that the post-election violence in Kenya "may have contravened the provisions of the Treaty as to good governance, rule of law, democracy, accountability, social justice and settlement of disputes and as such are triable by the East African Court of Justice."<sup>312</sup> President Kenyatta's call to transfer the Kenyan cases from the ICC to the EACJ—and the EAC's support for this maneuver—may have been an opportunity to enshrine the regional court's human rights jurisdiction by treaty.<sup>313</sup>

As the EACJ's human rights jurisprudence suggests, the institution has evinced a determination "to firmly protect the rule of law, to guarantee individual access to justice and to review both acts of the EAC and its Partner States,"<sup>314</sup> even in the face of state resistance. For example, in the case of *Prof. P. Anyang' Nyong'o et al. v. Att'y Gen. of the Rep. of Kenya*, the Court issued an injunction preventing nine Kenyan parliamentarians from being sworn in as members of the EALA because the Kenyan rules for electing EALA members prima facie violated the EAC Treaty.<sup>315</sup> In response, the Partner States amended the EAC Treaty to expand the grounds for removing judges from the Court.<sup>316</sup> But the EACJ refused to back down, subsequently holding that both the Kenyan election rules and the treaty amendment enacted by the EALA contravened the EAC Treaty.<sup>317</sup>

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310. Ebobrah, *supra* note 300, at 83.

311. West et al., *supra* note 302, at 60.

312. Ogalo, *supra* note 264.

313. *See id.* (calling for an expansion of the EACJ's jurisdiction to cover crimes implicated in the Kenyan cases and "similar actions" and asking that such expansion be given retrospective effect).

314. Anne Pieter van der Mei, *Regional Integration: The Contribution of the Court of Justice of the East African Community*, 60 ZAÖRV 403, 405–06 (2009).

315. *See generally* Nyong'o v. Att'y Gen. of the Rep. of Kenya, Ruling of the Court, East African Court of Justice (Nov. 27, 2006), [http://eacj.org/wp-content/uploads/2006/11/EACJ\\_rulling\\_on\\_injunction\\_ref\\_No1\\_2006.pdf](http://eacj.org/wp-content/uploads/2006/11/EACJ_rulling_on_injunction_ref_No1_2006.pdf) [<http://perma.cc/ES7K-DFP7>] (archived Oct. 3, 2015).

316. van der Mei, *supra* note 314, at 411.

317. *See generally* Nyong'o v. Att'y Gen. of the Rep. of Kenya, East African Court of Justice.

### B. *The EACJ and Regional Social Movements*

The court's jurisprudence to date "represents a significant instance of building and forging judicial autonomy," achieved in part through the court's own efforts to build a network of lawyers and civil society groups.<sup>318</sup> As with the ECCJ, organized regional civil society groups like the East African Law Society and the national law bar associations of EAC member states supported the expansion of the EACJ's jurisdiction over human rights cases.<sup>319</sup>

The EACJ also seeks to respond to the unique socio-cultural setting in which it operates. The EACJ thus works to fit law and rights to the African experience of "massive poverty and inequality," rather than "the liberal sense of protecting individual civil and political rights, securing property rights, holding free and fair elections."<sup>320</sup> To this end, "[h]uman rights litigation in the EACJ is . . . part of a broader strategy of political mobilization that is giving voice to actors who did not have such legal recourse to advance their claims in the past."<sup>321</sup>

Overall, the EACJ's judges have worked to "develop, cultivate, build and justify the EACJ's relevance and place within the EAC's integration agenda—in essence building its political legitimacy."<sup>322</sup> To do so, the EACJ has "grounded [itself] within a powerful network of lawyer associations, civil society groups and others."<sup>323</sup> This grounding process has enhanced the court's legitimacy and explains "why the EACJ's powerful human rights jurisprudence has not been entirely clipped or eliminated through re-contracting politics."<sup>324</sup>

### C. *Expanding the EACJ's Jurisdiction to Cover the Kenyan Situation—A Path to Promoting International Law in East Africa*

The experience of the EACJ mirrors that of the ECCJ. Like the ECCJ, the EACJ has the benefit of massive support from a well-coordinated transnational social mobilization effort. First, as with the ECCJ, the EACJ's close ties to civil society organizations and local and regional legal actors works to ensure the court's legitimacy—even as it forays into areas beyond the original scope of its jurisdiction. The EACJ is well suited to expand local capacity to strengthen domestic judiciaries, as the EACJ already partners closely with local legal actors, and because the EACJ judges are already sensitive "to local issues, local culture, and local approaches to justice" as they

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318. Gathii, *supra* note 25, at 7.

319. *Id.* at 7–8.

320. *Id.* at 10.

321. *Id.*

322. *Id.* at 16.

323. *Id.*

324. *Id.*

work to transplant international human rights principles into East African soil.<sup>325</sup>

Second, the EACJ is ideally positioned to ensure enforcement of international human rights principles. Although the EACJ—like many other regional courts—lacks the power to coerce compliance, it does have the ability to inspire integration of international laws locally. As a regional court with an express focus on how to make international rules resonate with the East African reality, the EACJ is in a position to pressure the states it serves to “obey international law because of the values of the international society of which they are a part.”<sup>326</sup> The EACJ achieves this by defining membership in the East African Community as membership in a community that values human rights. The “*positive transformational effects*” of the East African states participation in the EACJ’s process, complemented by the participation of East African civil society and legal organizations, works to integrate international rules locally. Although the EACJ—like the ICC—lacks the power to coerce compliance with its rulings, the regional court’s close ties to domestic and regional legal and political activist networks ensure that the institution is well-situated to promote compliance through persuasion and acculturation.

Third, in linking membership in the East African Community to membership in a community dedicated to human rights, the EACJ has already begun to generate the “varying degrees of *cognitive* and *social pressures* . . . to conform.”<sup>327</sup> The EACJ thereby encourages its member states to identify as states that respect human rights and to “adopt[] the beliefs and behavioral patterns” of the international human rights culture.<sup>328</sup>

Fourth, the EACJ’s close ties to East African civil society groups makes it more likely that the East African states will see their own institutions and values reflected back in the work of the Court—and this, in turn, makes compliance with the Court’s rulings more likely.<sup>329</sup> The Court’s authority comes from the East African States. East African civil society groups work alongside the Court. And by encouraging and supporting the work of these civil society organizations, the EACJ encourages and supports the transformation of domestic structures in ways that are more likely to promote compliance with international law.

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325. MORSE TAN, NORTH KOREA, INTERNATIONAL LAW AND THE DUAL CRISES: NARRATIVE AND CONSTRUCTIVE ENGAGEMENT 191 (2015).

326. Omoleye Benson Olukayode, *Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis*, 40 J. L. POL’Y & GLOBALIZATION 47 (2015).

327. RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 26 (2013).

328. See Goodman & Jinks, *supra* note 112, at 638.

329. See *supra* Part II.A.2.

Finally, the ICC had a unique opportunity to entrench the EACJ's authority over human rights claims and create another avenue for redress for victims of violations in the East African region. This speaks to the mobilization effects that international law can have on TSMs.<sup>330</sup> In striking contrast to the AU's response to the ICC proceedings against sitting Kenyan officials, the EALA called for prosecutions at the EACJ and sought to expand the EACJ's jurisdiction to expressly include human rights jurisdiction over international crimes.<sup>331</sup>

These factors counsel in favor of the ICC Prosecutor deferring to the EACJ. To be sure, the Rome Statute envisages national, not regional or continental, complementarity mechanisms,<sup>332</sup> but this is not an insurmountable problem. The ICC Prosecutor and judges have broad discretion to determine what cases to pursue. The Prosecutor may defer a case "in the interests of justice,"<sup>333</sup> taking into consideration the needs of the international community and the political fallout likely from any investigation or prosecution.<sup>334</sup> Moreover, working with, rather than against, fledgling legal institutions like the EACJ accords with the ICC's attempts to situate itself at the heart of the international criminal justice system.<sup>335</sup> By cooperating with the regional EACJ, the ICC can also address the concerns identified by those critics who believe that the universalist assumptions of the ICC are fundamentally flawed.<sup>336</sup>

At the same time, other factors counsel against the ICC transferring the cases of the Kenyan-accused to the EACJ. The manner in which the East African countries set about amending the EACJ's jurisdiction "betray[s] a fundamental lack of understanding about the International Criminal Court, about the East African Court of Justice, and about the legal aspects of criminal jurisdiction and admissibility."<sup>337</sup> Moreover, the attempt to expand the EACJ's jurisdiction came only after the Kenyan government failed three times to establish a domestic mechanism to try those most responsible for the post-election violence in 2008, and after multiple attempts to challenge the jurisdiction of the ICC proved unsuccessful.<sup>338</sup> While Kenya's recourse to its regional human rights

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330. See *supra* Part II.B.

331. See *supra* Part IV.A.

332. AVOCATS SANS FRONTIÈRES, AFRICA AND THE INTERNATIONAL CRIMINAL COURT: MENDING FENCES 12 (2012), [http://www.asf.be/wp-content/uploads/2012/08/ASF\\_UG\\_Africa-and-the-ICC.pdf](http://www.asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf) [<http://perma.cc/G532-GJTX>] (archived Oct. 3, 2015).

333. Rome Statute, *supra* note 16, art. 53.

334. SCHABAS, INTRODUCTION, *supra* note 26, at 182.

335. See *supra* Part I.A.

336. See *supra* Part I.D.1.

337. Press Statement, The Kenyan Section of the Int'l Comm'n of Jurists, Let the ICC Be, <http://www.icj-kenya.org/index.php/resources/publications/papers-dl?download=90:icj-eala> [<http://perma.cc/HLV6-3F5Q>] (archived Oct. 3, 2015).

338. *Id.*

court is a positive development in the fight to end impunity, fundamentally changing the EACJ's jurisdiction through a process so patently tainted by political motivations may have the perverse effect of delegitimizing the EACJ.<sup>339</sup>

Yet the ICC and the EACJ's own network of civil society activists can help prevent such negative outcomes. The ICC has already worked to situate itself at the center of the international criminal justice system, not only through its own prosecutions but also by assisting sister international criminal institutions in their work.<sup>340</sup> Here, too, the ICC could assist the EACJ and its jurists in conducting trials of the Kenyan officials, lending support and expertise to the regional court. The support of the ICC could further enhance the legitimacy of the EACJ. At the same time, by recognizing the credibility of an African regional institution, the ICC could demonstrate faith in the ability of African states to combat impunity within African (as opposed to international) institutions. Moreover, by providing an additional enforcement mechanism if the EACJ prosecution proved impossible or futile, the ICC may also supplement and enhance the movement building around the EACJ. The real threat of ICC prosecution could serve as an impetus for the states to support, promote, and comply with the regional court, in order to avoid trial before the ICC.

## VI. CONCLUSION

The value of the lessons learned from the hybrid and regional courts' attempts, with varying levels of success, to implement human rights domestically does not inhere in the ultimate decision made by the ICC Prosecutor. Rather, the value lies in the process these courts recommend to the ICC Prosecutor to determine when, if ever, to defer to regional court proceedings. This process draws on transnational social mobilization and compliance theories to predict when a regional court will prove better equipped to promote obedience to and internalization of the international legal principles that the ICC seeks to vindicate.

This Article demonstrates how the analysis would work in just one unique situation. The situation in Kenya provides a particularly valuable case study precisely because it was the first (and to date, only) exercise of the Prosecutor's controversial *proprio motu* authority. As the Prosecutor can only exercise this authority in the absence of a referral by the UN Security Council or another state, there is—by definition—less international support for *proprio motu* proceedings. And, in light of the complementarity principle, the

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339. *Id.*

340. *See supra* note 42 and accompanying text.

Prosecutor will only initiate an investigation where a state has itself demonstrated unwillingness to comply with international law, by failing to investigate or prosecute international crimes. Thus, when exercising *proprio motu* powers, it is especially important that the Prosecutor consider the likelihood of compliance with ICC proceedings. TSMs, as demonstrated, provide a reliable indicator of such compliance. This, in turn, suggests that when the ICC encounters enforcement problems, it look to TSMs for support.

By analyzing the efficacy of the regional court, looking for support of the court's work among transnational social movements, and assessing the regional court's rulings in light of the theories of international law enforcement, the Prosecutor can make an informed decision about when a regional trial is more likely to serve the ICC's larger goal of ending impunity and promoting compliance with international criminal law. By respecting and responding to the work of regional courts, the ICC will also help to ensure the legitimacy of these institutions, particularly at the international level. And by undertaking an analysis of the work done by the regional courts, ICC actors can develop a stronger understanding of the diverse local cultures, local values, and local customs that prevail in the communities they serve.