

## **On the Shores of Lake Victoria:**

### **Africa and the Review Conference for the International Criminal Court:**

By

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#### **Introduction**

On May 31<sup>st</sup>, 2010, between 1500 and 2000 delegates will gather on the shores of Lake Victoria in Kampala, Uganda, to attend the first Review Conference for the International Criminal Court. Diplomats from presumably all 111 ICC States Parties will be present, along with their counterparts from many ICC non-Party States and representatives of civil society. That the seven-year Review Conference is taking place at all, only 12 years after the Diplomatic Conference establishing the Court was held in the city of Rome, is extraordinary. The conventional wisdom on the ICC's establishment was that it would take decades, not a mere four years, to achieve the necessary 60 ratifications to bring the Statute's entry into force. That this important Diplomatic gathering for the first Review Conference – the only one mandated by the ICC Statute<sup>1</sup> – is taking place in the City of Kampala, is even more extraordinary, and profoundly important.

All five situations currently before the Court involve African nations, subjecting the Court

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<sup>1</sup> Rome Statute of the International Criminal Court, article 123(1).

to accusations that it is biased against Africa.<sup>2</sup> At the same time, it is widely, although not universally, acknowledged that victimization in Africa has been widespread, and that these cases represent precisely the kinds of situations the Court was established to address: the “most serious crimes of concern to the international community as a whole.”<sup>3</sup> Bringing the Review Conference to Africa, where African victims and African leaders, as well as the larger international community, can discuss these issues as part of the “stocktaking exercise” planned for the first week of the Review Conference is deeply significant, much more so than if the issues were being discussed in an assembly hall located in New York, Geneva or The Hague. Just as it seemed both appropriate and fortuitous that the 1998 Diplomatic Conference establishing the ICC was held in Rome, an historic city that had itself suffered centuries of war,<sup>4</sup> there is no doubt that the decision to hold the Review Conference in Kampala – the capital of an ICC situation country – may affect not only the atmospherics of the meeting, but influence its substantive outcome, as well.

Ten years ago I wrote that the Rome Diplomatic Conference may have effectuated a “constitutional moment” for the international legal order.<sup>5</sup> It was apparent in 1998 that the adoption of the International Criminal Court Statute, after more than seventy-five years of false starts, posed a challenge to classic understandings of sovereignty and our understanding of the international legal system established by the United Nations Charter. The ICC Statute places

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<sup>2</sup> See, e.g., Mary Kimani, *Pursuit of Justice or Western plot?*, 23 AFRICA RENEWAL 12 (2009), available at <http://www.un.org/ecosocdev/iii/233-icc.html>.

<sup>3</sup> *Id.* preamble, cl. 9.

<sup>4</sup> Leila Nadya Sadat, *The New International Criminal Court: An Uneasy Revolution* 88 Georgetown L. Journal 381, 385 (2000)(with S. Richard Carden).

<sup>5</sup> Sadat, *Uneasy Revolution*, *supra* note 4, at 395.

State and non-State actors side by side in the international arena, and there are significant elements of supra nationalism in the Statute, particularly as regards the ability of the Court's Assembly of States Parties to take decisions by majority vote.<sup>6</sup> The adoption of the ICC Statute, by vote rather than consensus, over the objections of the United States and China, also challenged the hegemony of the great powers, and particularly the five Permanent Members of the Security Council.<sup>7</sup> This carried over into article 16 of the ICC Statute which permits the Security Council to stop an ICC investigation for 12 months, but only if the Council can muster the votes to do so, effectively denying the P-5 the veto they wanted over proceedings before the Court.<sup>8</sup>

Kampala presents an extraordinary opportunity to build upon the successes of Rome and reflect more deeply upon the implications of what was wrought there, particularly with respect to the early operations of the Court and the relationship between the ICC and situation countries. Yet, Kampala may also become the epicenter of a struggle to tame the Court and make it more amenable to the wishes of the great powers, particularly the P-5 (three of which have remained outside the Rome regime and all of which are skeptical, to varying degrees, about including the crime of aggression in the Statute) and, at the same time, make it more responsive to States Parties which are directly experiencing the operations of the Court on their territories and in their region.

To the extent that Rome, with its challenge to the Westphalian system, represented an "uneasy revolution," the revolution is far from complete. In spite of the larger number of

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<sup>6</sup> *Id.* at 384-87. Rome Statute, *supra* note 1, art. 112(7).

<sup>7</sup> The United Kingdom and France were the only two Permanent Members supporting the adoption of the ICC Statute, and they are the only two Permanent Members that have joined the Court.

<sup>8</sup> Rome Statute, *supra* note 1, art. 16.

ratifications the ICC Statute has attracted, resistance to the Rome Paradigm remains, and has even increased over the past twelve years in some quarters. Certainly, the U. S. position on the International Criminal Court only hardened with the election of a new U.S. President determined to reassert what he saw as America's preeminence and prerogatives.<sup>9</sup> The U.S. attack on the Court probably had an important effect on its early development. (Whether the net effect of that attack strengthened or weakened the Court, however, remains to be seen). Both China and the United States seem recently to have softened their opposition to the ICC,<sup>10</sup> and there is no doubt that the presence of a U.S. (Non-State Party) delegation – for the first time in nine years – at the Eighth Session of the Assembly of States Parties, was a harbinger of a possible rapprochement between this new international institution and its greatest foe. At the same time, on many issues, there is still more divergence than convergence between the U.S. government and the ICC, particularly as regards the crime of aggression,<sup>11</sup> which will be negotiated, and possibly inserted into the Statute, at Kampala.

The ICC's job has also been made more difficult in some ways because it has focused all its early investigations in Africa. Africa's struggle against colonialism and the ensuing attachment of Africans to sovereignty and "strong" understandings of the meaning of self-determination have

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<sup>9</sup> Leila Nadya Sadat, *Summer in Room, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, 21 WIS. INT'L L.J. 557 (2004)

<sup>10</sup> In a recent speech, Béatrice le Fraper du Hellen, head of Jurisdiction, Complementarity, and Cooperation for the ICC Office of the Prosecutor, stated that China now considers itself to be a "Non-State Party Partner" of the International Criminal Court. Béatrice le Fraper du Hellen, *Remarks*, Annual Meeting of the American Society of International Law, March 27, 2010.

<sup>11</sup> Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Mar. 25, 2010, available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

made the ICC's interventions particularly controversial,<sup>12</sup> especially following the issuance of the arrest warrant against Sudanese President Omar al Bashir, and the decision by the Prosecutor to apply to the Court to open up an investigation into the Post-Election violence in Kenya, a decision narrowly approved by the Court in a recent 2-1 decision of Pre-Trial Chamber II.<sup>13</sup> Given that the Office of the Prosecutor has received communications from 8461 individuals since July 2002 alleging that crimes had been committed, mostly from individuals located in France, Germany, Russia, the United Kingdom and the United States,<sup>14</sup> many – and not just Africans – have wondered aloud at the Court's apparent focus upon Africa, and have argued that the ICC should have taken up investigations in countries such as Colombia, Afghanistan, the activities of British nationals during the invasion of Iraq in 2003 (because the Court had no jurisdiction over Americans) and even Palestine.<sup>15</sup> Is the Court's focus on Africa a question of bias? Holding the Review Conference in Kampala places this issue front and center.

A second controversy that has plagued the ICC regarding its initial arrest warrants is whether the issuance of those warrants in the Uganda and Sudan situations interfered with an ongoing peace process and jeopardized civilians suffering from violent assaults on their lives, their

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<sup>12</sup> See, e.g., Graeme Simpson, *One among Many: The ICC as a Tool of Justice during Transition, in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA (Nicholas Waddell & Phil Clark, eds., 2008).

<sup>13</sup> Situation in the Republic of Kenya, Pretrial Chamber II, Case No. ICC-01/01 (Mar. 31, 2010).

<sup>14</sup> International Criminal Court, Communications, Referral and Preliminary Analysis, available at [www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/).

<sup>15</sup> The CICC website lists the countries of Afghanistan, Columbia, Cote d'Ivoire, Georgia, Guinea and Palestine as targets of OTP's investigations.

way of life, and their possessions. Indeed, one of the four items to be taken up during the first week on “stocktaking” is the issue of “peace and justice,” and the outcome of those discussions will be very important to shaping the Court’s future.<sup>16</sup> This short article leaves that question open, but at the same time suggests that there is very little empirical evidence that the ICC’s arrest warrants have destroyed prospects for peace in any situation country currently before the Court.

So Kampala promises to be a test of States’ commitments to the principles they embraced at Rome, and a very significant test of political support for the Court. For African nations, upset at being the target of the ICC’s investigations, it will take a great deal to overcome their perceptions that African States are being unfairly singled out, and focus upon the good that the Court can do in the world, and on their continent. On the question of aggression, if discussions progress in a manner not acceptable to the United States and the other Permanent Members of the Security Council, those States may find themselves opposing the Court as well (and African States may feel that their refusal to accept the crime of aggression is simply more evidence of the double standards that now imperil the Court’s legitimacy). It will take skillful leadership and cool heads to navigate these twin threats to the Court, and like Odysseus’s decision to choose Scylla over Charybdis in navigating difficult straits, some difficult political compromises may be necessary to avoid the entire Kampala conference collapsing. The hope, of course, is that the States Parties to the International Criminal Court will leave Kampala willing to recommit themselves to the ICC and the principles it stands for – no impunity for the commission of atrocity crimes and a commitment to justice as well as peace. If that happens, Kampala will proudly stand, as Rome did

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<sup>16</sup> International Criminal Court, Assembly of States Parties, *Report of the Bureau on Stocktaking: Peace and Justice*, ¶ 1, ICC Doc-ASP/8/52 (Mar. 10, 2010).

in 1998, as the center of the “civilized world”<sup>17</sup> – the place to which those who suffer from the commission of atrocities that shock the conscience of humankind came to lift their voices and press their cause so that “their” Court could successfully carry out the work it was established to do.

## **II. Africa and the International Criminal Court**

African nations represent the largest regional contingent in terms of ICC ratifications, with 30 of 111 States Parties.<sup>18</sup> Five African nationals sit amongst the 18 judges of the Court,<sup>19</sup> and the ICC’s Deputy Prosecutor, Fatou Bensouda, is from The Gambia. African civil society supported the establishment of the Court, and more than 900 African NGOs can be found among the 2500 members of the Coalition for the International Criminal Court (CICC). Looking at the ICC today, one could conclude that African states have embraced international justice as much or more than any other region of the world.

When the Prosecutor encouraged the submission of “self-referrals” by Uganda and the Democratic Republic of the Congo, there was an initial sense that he was proceeding cautiously and properly, given his lack of police powers and the ensuing need for cooperation by the State upon whose territory the crimes were being committed. The ravages of the Lord’s Resistance

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<sup>17</sup> Sadat, *Uneasy Revolution*, *supra* note 4, at 459.

<sup>18</sup> See International Criminal Court, The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/>. Of the 111 States Parties, 30 are from Africa, 15 are Asian States, 17 Eastern Europe, 24 from Latin America and the Caribbean, and 25 from Western European and other States.

<sup>19</sup> From Botswana, Ghana, Mali, Kenya and Uganda.

Army in Northern Uganda<sup>20</sup> and the terrible atrocities being committed in the DRC<sup>21</sup> undoubtedly represented situations that “ought” to be at the ICC. They involved the large-scale commission of atrocities and national authorities were unable to quell the violence. With respect to the Central African Republic, another self-referral, questions were raised not so much about the appropriateness of the investigation, given the widespread nature of the atrocities, particularly as regards crimes involving sexual violence, but concerns were raised about the arrest warrant issued for former DRC Vice-President Jean-Pierre Bemba Gomba. Indeed, one observer even suggested that Gomba was being targeted by the ICC at the behest of the current political leadership of the

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<sup>20</sup> The Ugandan situation involved a war that had lasted for more than two decades, and had involved the death of thousands, the abduction of an estimated 80,000 children, and the forced displacement of an estimated 1.7 million civilians. Mark Kirumira, *Betty Bigombe Gets Dutch Rights Prize for Peace Effort*, THE MONITOR, Mar. 17, 2010, *available at* 2010 WLNR 5554804. Because it was a self-referral, which was made in 2003 by President Museveni under article 14 of the Rome Statute, the issue of complementarity did not originally arise until the Ugandan government began to adopt and enforce legislation demobilizing rebels and granting amnesties to lower level perpetrators. Amnesty Act 2000 (Uganda), *available at* [http://c-r.org/our-work/accord/northern-uganda/documents/2000\\_Jan\\_The\\_Amnesty\\_Act.doc](http://c-r.org/our-work/accord/northern-uganda/documents/2000_Jan_The_Amnesty_Act.doc). *See also* Agència Catalana de Cooperació al Desenvolupament, Uganda (Amnesty Act 2000-08) 2, *available at* <http://escolapau.uab.cat/img/programas/desarme/mapa/uganda08i.pdf>. In 2008, however, PreTrial Chamber II initiated proceedings under article 19(1) to determine the admissibility of the case given the subsequent desire of the Ugandan government to handle its problems with the LRA domestically. These cases are still pending at the ICC, but with the death of two of the original five indictees, and the recent adoption of a provision of Ugandan law establishing a special War Crimes Chamber in 2008, it may be that ultimately Uganda, and not the ICC, will try those LRA members who have not been amnestied. Annexure to the Agreement on Accountability and Reconciliation Between the Lords Resistance Army/Movement and the Government of Uganda, 19 February 2008, *available at* <http://www.icc-cpi.int/iccdocs/doc/doc589233.pdf>. It is not clear that the amnesties would have effect before the ICC; moreover, they would presumably not apply to LRA crimes committed outside of Uganda. *See, e.g.*, HUMAN RIGHTS WATCH, *Trail of Death* (March 28, 2010), *available at* <http://www.hrw.org/en/reports/2010/03/29/trail-death-0>.

<sup>21</sup> The situation in the Democratic Republic of the Congo has been described as the “deadliest documented conflict in African history,” Citizens for Global Solutions: ICC: Democratic Republic of Congo, *available at* [http://www.globalsolutions.org/issues/international\\_criminal\\_court/DRC](http://www.globalsolutions.org/issues/international_criminal_court/DRC).

DRC (or that the ICC was unwittingly being hijacked by domestic political agendas).<sup>22</sup>

Likewise, the decision of the Security Council to refer the Darfur situation to the ICC was generally welcomed, although the tepid support for the referral by China, and the United States,<sup>23</sup> as well as the failure of the Council to combine the referral with a solid plan of action to stem the ongoing atrocities, was an obvious disappointment. When, however, Prosecutor Ocampo announced his intention to seek a warrant of arrest against Sudanese President Omar al Bashir, the African Union at a February 2009 summit in Addis Ababa, requested the Security Council to invoke article 16 and stop proceedings, which the Security Council declined to do. When a warrant of arrest against al Bashir was subsequently issued by Pre-Trial Chamber I, on March 4, 2009, many African leaders reacted angrily. These included former Nigerian president Olu gun Obasanjo, who argued that the ICC was “drifting towards politics in its investigations.”<sup>24</sup> Likewise, Libyan leader Moammar Gaddafi and Jean Ping of Gabon, the two leaders of the African Union, successfully pressed the AU to adopt a decision not to cooperate with the ICC arrest warrant.<sup>25</sup> Interestingly, following the lead of the Court’s other primary foe, the United States of America, the AU Decision is based upon article 98 of the ICC Statute itself, providing:

AU Member States shall not cooperate pursuant to the provisions of Article 98 of

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<sup>22</sup> Peter Rosenblum, *The ICC’s African Foray: Justice, Politics and the Delicate Task of Building Legitimacy*, Remarks delivered at conference on American Exceptionalism, Webster University, May 1, 2009, <http://www.webster.edu/depts/artsci/news/Exceptionalism.htm>.

<sup>23</sup> S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar.31, 2005) (Brazil, China and the United States abstained from voting).

<sup>24</sup> *Former Nigerian president criticizes ‘politicized’ ICC*, SUDAN TRIBUNE, Mar. 20, 2009, available at 2009 WLNR 5259645.

<sup>25</sup> Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), July 3, 2009.

the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of the Sudan.<sup>26</sup>

In the press release accompanying the Decision, it was explained as a “logical consequence” of, among other things, the “publicity-seeking approach of the ICC Prosecutor” and “the refusal by the UN Security Council to address the request made by the African Union and other important international groupings for deferment of the indictment . . . under Article 16 of the Rome Statute.”<sup>27</sup> Feelings about the Bashir indictment and Prosecutor Ocampo himself ran so high that a campaign began to press African states to withdraw from the Rome Statute,<sup>28</sup> a campaign that was, in the words of William Pace, convenor of the Coalition for the International Criminal Court, “the most serious threat to the ICC” since the United States declared its opposition to it in 2002.<sup>29</sup>

The AU’s decision was heavily criticized, and more than 160 African NGOs signed a Statement opposing it,<sup>30</sup> suggesting that African civil society and African governments may be parting company on this issue. At the same time, the crisis caused the African Union Peace and Security Council to establish a High-Level Panel to look at ways to bring peace to Darfur. Headed by former South African President Thabo Mbeki, the Panel released a 145 page report on October 29, 2009 which, among other things, called for the establishment of a new hybrid court for

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<sup>26</sup> *Id.* para.10.

<sup>27</sup> Press Release, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, Addis Ababa, July 14, 2009, para. 4.

<sup>28</sup> Colum Lynch, *Africans Defend Sudan’s Indicted Leader as International Court Under Fire*, WASHINGTON POST, June 30, 2009, available at 2009 WLNR12462101.

<sup>29</sup> *Id.*

<sup>30</sup> This list was provided to the author by the Coalition for the International Criminal Court on April 21, 2010.

Darfur.<sup>31</sup> This proposal notwithstanding, as of this writing, the ICC arrest warrant for President al Bashir remains in effect and he has not been able to travel to ICC Party States because of it.<sup>32</sup> At the same time, frustration with perceived double standards continues, and in November 2009 the African Union proposed an amendment, to be taken up at Kampala, that would have allowed the General Assembly to ask for deferral of an investigation if the Security Council did not so upon request.<sup>33</sup> Interestingly, although South Africa brought the proposal to the floor at the Eighth Meeting of the Assembly of States Parties to the International Criminal Court, only Senegal spoke in favor of the proposal and no other African State took the floor to support the idea (which was then swiftly rejected by ICC States Parties from other regions of the world).<sup>34</sup>

### **III. Peace and Justice Dilemmas and the Problem of Double Standards**

The modern international criminal justice system is often criticized as a Western construct, insensitive to African, Islamic and other non-Western sensibilities. At the same time, modern writers on the subject correctly point to Chinese, Islamic and Hindu traditions that underscore the universal values enshrined in the prohibition of *jus cogens* crimes that shock the conscience of humankind.<sup>35</sup> Anthony Anghie recently delivered the Grotius Lecture at the annual meeting of

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<sup>31</sup> African Union High-Level Panel Report on Darfur, October 29, 2009.

<sup>32</sup> See *FACTBOX: Bashir's List of Skipped Events Keeps Growing Since ICC Warrant*, SUDAN TRIBUNE, Mar. 22, 2010, available at <http://www.sudantribe.com/spip.php?article34507>.

<sup>33</sup> See The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Report on the Eighth Session of the Assembly of States Parties, The Hague, November 2009 at 3, Dec. 3, 2009, <http://www.amicc.org/docs/ASP8.pdf>.

<sup>34</sup> Author's Notes.

<sup>35</sup> See, e.g., M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 21-55 (2003).

the American Society of International Law, underscoring the important contributions that jurists like Christopher Weeramantry and Mohammed Shahabudeen have made to the canonical texts of international law through their judicial decisions and important writings.<sup>36</sup> To his list of important jurists writing outside of the western canon, one could also add the voices of Abdul Cadire Koroma, of Sierra Leone, Awn Shawkat Al-Khasaweneh, of Jordan and many others who have been influential on and off the Court. Moreover, as I have written elsewhere,<sup>37</sup> unlike human rights law, which has a comprehensive agenda, international criminal law limits its concern, for the most part, to “the most serious crimes of concern to the international community as a whole,”<sup>38</sup> avoiding perhaps some of the difficulties human rights lawyers face when they argue universality in the face of national legal rules challenging the international standards asserted.

Yet serious arguments have been made that “African problems require African solutions,” and even the ICC Prosecutor has suggested that tribal and traditional mechanisms will fulfill the need for justice in African countries.<sup>39</sup> This argument is uncontroversial insofar as these mechanisms might complement international justice; but to the extent that the argument takes a

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<sup>36</sup> Anthony Anghie, *Should International Law Lead or Follow in Changing Times?*, Remarks at the 104<sup>th</sup> Annual Meeting of the American Society of International Law, Mar. 24, 2010 (forthcoming in ASIL PROCEEDINGS 2010).

<sup>37</sup> Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955 (2006).

<sup>38</sup> See, e.g., *Rome Statute*, *supra* note 1, Preamble.

<sup>39</sup> Int’l Criminal Court, *Report of the Prosecutor of the Int’l Criminal Court, Mr. Luis Ocampo, To the Security Council Pursuant to UNSCR 1593 (2005)*, 10, delivered to the Security Council, ICC-OTP-0629-105 (June 29, 2005), available at [http://www.iccnw.org/documents/LMO\\_UNSC\\_OnDarfur\\_29June05\\_eng.pdf](http://www.iccnw.org/documents/LMO_UNSC_OnDarfur_29June05_eng.pdf).

stronger form and suggests that they should *supplant* international justice mechanisms, even in cases where international justice clearly would seem to play an important role, they raise more questions. No nation will find in the procedures of the ICC a carbon copy of its penal code or its legal traditions. Indeed, one of the primary objections of U.S. opponents of the Court, is the absence of a right to trial by jury, a right guaranteed to criminal defendants under the U.S. Constitution, and every country could point to some discrepancy between its law and the ICC Statute. Could it be that the notion of “African” solutions is a way to suggest that the justice individuals expect in Europe and Latin America is not possible for the victims of atrocity crimes in Africa?<sup>40</sup> Certainly respect must be afforded to African *traditions*; but aren’t African *victims* entitled to equal, or perhaps even greater, respect?

Putting this issue to one side as beyond the scope of this short article, what *is* certainly a fair critique, however, is that the *enforcement* of international criminal law depends upon a combination of force and political power, and is heavily influenced by the foreign policy agenda of powerful States. Just as rich and powerful citizens may dominate a national legal system, wealthy and powerful countries not only influence which cases are brought, but even more problematically, often refuse to permit the application of international criminal law to themselves and their nationals, even when insisting it should be applied to others.

The United States has often been criticized in this regard, and there is no doubt that the failure of three of the Security Council’s five Permanent Members to ratify the International Criminal Court Statute provided an excuse to the African Union to refuse to cooperate with regard

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<sup>40</sup> Tim Allen, *Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* (Nicholas Waddell & Phil Clark, eds., 2008).

to the ICC arrest warrant against Sudanese President al Bashir. Frustration at the failure of the Security Council to take up the Goldstone report on Gaza or the allegations of crimes committed during the Iraq war, for example, has also led to fierce criticism from the African Union.<sup>41</sup> As one African prosecutor opined:

There is not a single case at the ICC that does not deserve to be there. But there are many cases that belong there, that aren't there.<sup>42</sup>

The obvious unfairness, indeed, the imperialism evinced by this double standard in the application of legal rules decreases the legitimacy of the entire endeavor; but it would perhaps be a mistake to confuse the *tu quoque* defense with a principle of justice. As Justice Robert Jackson argued in his opening statement at Nuremberg, those credibly accused of the commission of human rights atrocities may be “hard pressed” if called to account before the bar of justice, but can they really argue that they have been “ill-used?”<sup>43</sup> To put it another way, it does not excuse the criminality of some to argue that not all are being punished. Nonetheless, the inequalities evinced by the current system of international criminal justice have the potential to delegitimize the entire effort.

Imperialism also infuses the argument that one should “trade justice for peace” in order to end a conflict quickly. While it may be correct that in exceptional cases, exile or amnesty could serve both the long and short term interests of peace, the exception easily becomes the rule, with highly corrosive effects on the rule of law, as well as international peace and security. There is

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<sup>41</sup> *Gaddafi elected AU head, Union backs Sudan in critique of ICC*, rfi.France, Feb. 2, 2002, available at [http://www.rfi.fr/actuen/articles/110/article\\_2786.asp](http://www.rfi.fr/actuen/articles/110/article_2786.asp) (statement by Jean Ping, Chairman of the African Commission that the ICC has “double standards” and always “targets only the Africans” not investigating Gaza, Columbia or Iraq).

<sup>42</sup> Robert Marquand, *African Backlash Against International Courts Rises*, THE CHRISTIAN SCIENCE MONITOR, Oct. 6, 2009.

<sup>43</sup> ROBERT H. JACKSON, THE NÜRNBERG CASE 34 (1971).

absolutely no empirical evidence that “trading justice for peace” actually produces a lasting peace, and what few case studies exist seem to point in the other direction.<sup>44</sup> International negotiators may wish to solve a conflict, but at what price? Although it is true that President Bashir expelled 13 aid organizations in response to his indictment by the ICC,<sup>45</sup> it has not been demonstrated that the arrest warrant either jeopardized an ongoing peace process or prolonged the war. Thus, it is important to be wary of assertions that failing to grant war criminals amnesty in a “naive” pursuit of justice will lead to terrible consequences, including the deaths of thousands of innocent victims. Blanket amnesties, particularly when issued by leaders who have presided over the commission of atrocities to themselves and their followers, are, for the most part, simply self-serving declarations by government officials exempting themselves from the reach of the law. They are an attempt to trump the application of rules of law, and as such constitute a threat to both the legitimacy and the fairness of the rules.<sup>46</sup> They are evidence of a different, more local, variety of “double standards” in which powerful leaders can profit from their position, but their victims cannot.

In the Uganda situation before the ICC, both of the above critiques – interference with the peace process and disrespect for “local” solutions – were leveled at the ICC’s intervention as regards the arrest warrants issued for Joseph Kony and other LRA leaders. But several careful

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<sup>44</sup> See Sadat, *Exile, Amnesty and International Law*, *supra* note 37; see also HUMAN RIGHTS WATCH, *Selling Justice Short: Why Accountability Matters for Peace*, July 7, 2009, available at <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short>.

<sup>45</sup> Neil Macfarquhar, *World Briefing: United Nations; Sudan Again Allows Aid Groups*, N.Y. TIMES, June 12, 2009, <http://query.nytimes.com/gst/fullpage.html?res=9804E6D61E3FF931A25755C9A96F9C8B63> (last visited Apr.21, 2010).

<sup>46</sup> Cf. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 16 (1995).

studies have demonstrated that the ICC arrest warrants may instead have brought Kony back to negotiations he had otherwise spurned; and Betty Bigombe herself, formerly Chief Mediator between the Ugandan government and the LRA, has recently argued that the ICC arrest warrants should be implemented.<sup>47</sup> Indeed, it is arguable that much of the problem with the ICC arrest warrants is not their issuance, but the fact that States, and the international community, are either unable or unwilling to implement them. Certainly, one positive effect of the ICC arrest warrants has been to serve as a catalyst for Ugandans – both in civil society and in the government – to shore up the domestic capacity of the Ugandan legal system to address the problem of atrocity crimes. This was evidenced through the adoption of legislation in 2008 to create a special division of Uganda’s High Court<sup>48</sup> to hear cases involving the commission of atrocity crimes, and the adoption of legislation on March 10, 2010 to make punishable the crimes in the Rome Statute as a matter of Ugandan law.<sup>49</sup>

#### **IV. Conclusion**

Bringing the ICC Review Conference to Africa is an important symbolic and practical gesture. It reassures Africans that this is “their Court” not something imposed upon them from the

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<sup>47</sup> See Betty Bigombe, *Remarks*, Midwest Regional Conference on International Justice: The International Criminal Court 10 Years after the Rome Conference (Apr. 25, 2008)(author’s notes); see also Amnestyusa.org, Betty Bigombe Commentary, <http://www.amnestyusa.org/International-justice/expert-commentaries/betty-bigombe-commentary/page.do?id=1041208> (last visited Apr. 21, 2010.)

<sup>48</sup> Annexure to the Agreement on Accountability and Reconciliation, *supra* note 20.

<sup>49</sup> International Criminal Court Bill, 2006, Mar. 10, 2010. See Coalition for the International Criminal Court, Uganda Page, <http://www.iccnw.org/?mod=country&iduct=181> (last visited Apr. 22, 2010). It is unclear how this provision will interact with Uganda’s amnesty laws, however. *Trail of Death Report*, *supra* note 20, at n. 149.

outside; it brings non-Africans to the heart of Africa to listen and debate what this Court means (and does not mean) to victims of atrocity crimes. Yet the tensions that swirl around the existence and the operation of the ICC remain, and some may even be intensified by the African venue. Charybdis looms large. The great powers, unwilling to relinquish their prerogatives, may stymie progress on the crime of aggression and other important agenda items for the Review Conference; African leaders may wish the Court to become more pliable and sensitive to their political realities. The Conference Chair and leadership of the Assembly of States Parties have a daunting task before them to navigate these twin obstacles to success and emerge from Kampala with a Court that is strengthened rather than weakened by the difficult conversations that will need to take place on the shores of Lake Victoria. Let us hope, for the sake of the victims, that they are able to do so.