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Africa and the ICC: An Introduction

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The International Criminal Court (ICC) is going through turbulent times. After years of almost romantic enthusiasm for international criminal justice, states and commentators have started to question whether the international prosecution of a handful of high-level perpetrators is always the most suitable way to address mass atrocity crimes. Calls for alternate forms of justice that may be delivered by local and regional justice mechanisms, rather than an international court or tribunal, have become more vocal. To be sure, the ICC still enjoys the support of large parts of the international community, but it cannot be overlooked that the Court increasingly faces criticism, even from some of its strongest allies.

At this moment, one of the most serious challenges for the ICC is its embattled relationship with Africa. Since the announcement of the prosecution of the Sudanese president, Omar al-Bashir, in 2008, many African states have expressed their concerns about the Court's track record, while some have even threatened to withdraw from the Rome Statute altogether.¹ Although this opposition has not been univocal, and clearly does not reflect the views of all African states, let alone of all Africans, it has become common to speak of the ICC's 'Africa problem'.

For quite some time, it appeared that this problem was not seen as a priority by the Court and by the majority of its States Parties. Although the ICC suffered a backlash from al-Bashir's indictment, the Court's first Prosecutor, Luis Moreno-Ocampo, refuted the criticism of African states. Time and again he repeated that his duty was 'to apply the law without bowing to political considerations'.² For its part, the UN Security Council (Security Council) also proved unwilling to address the concerns of African states. Despite numerous requests from the African Union (AU), the Security Council refused to defer the prosecution of al-Bashir and later to suspend the prosecution of the Libyan leader, Muammar Gaddafi.³

In the last few years, the Court and its supporters have started to take the objections of African states more seriously. The Court's second Prosecutor, Fatou Bensouda, and a large group of States Parties have called for 'a dialogue' with the AU and with concerned African states.⁴ Even though Bensouda has continued the rhetorical strategy of her predecessor and has repeatedly stressed that she cannot take political considerations into account, she has acknowledged the concerns of African states and has used some of her diplomatic leverage to ease the ongoing tensions.⁵

In this respect, the election of ICC indictees Uhuru Kenyatta and William Ruto as president and deputy president of Kenya in March 2013 has been a real game changer. In the autumn of 2013, the scheduled start of their trials generated such a political turmoil that the Court and its States Parties had no choice but to respond. While a Security Council deferral was narrowly averted – with seven votes in favour and eight abstentions – the Assembly of States Parties (ASP) recognized the urgent need to address the situation. Amidst threats of an African mass withdrawal, the ASP's annual meeting in November 2013 witnessed the very first inter-state debate on the Court's fractious relationship with Africa, and more specifically on 'the indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation'.⁶ Eventually, the States Parties 'gave in' to one of the AU's demands by amending the Court's rules on presence at trial for those accused who fulfil extraordinary public duties at the highest national level. These amendments were effectively intended to reduce the amount of time that Kenyatta and Ruto would have to spend in The Hague.⁷

This 'sign of goodwill' did not lead, however, to a rapid improvement of the ICC's relationship with Africa. A few weeks after the ASP, the AU Assembly of Heads of State and Government (AU Assembly) welcomed the new rules on presence at trial, but also expressed its 'deep disappointment' that the Security Council had not acted on its deferral request(s) and stressed that the Council should do more 'to avoid the sense of lack of consideration of a whole continent'.⁸ To prevent future deferral requests from being ignored and to ensure that no other sitting African Head of State would be indicted by the Court, the AU Assembly called for several amendments to the Rome Statute. Most importantly, the gathered African states demanded that the UN General Assembly would be authorized to defer the Court's proceedings and that Heads of State would become immune from prosecution by the Court during their time in office.

Furthermore, the African leaders decided to expedite the process of establishing the African Court of Justice and Human and Peoples' Rights (African Court).⁹ This involved giving the African Court jurisdiction over a range of

crimes, including the four international crimes that form the subject matter jurisdiction of the ICC: crimes against humanity, war crimes, the crime of genocide, and the crime of aggression. The result is the early formation of an 'African Criminal Court', which in the future may come to function as a regional alternative to the ICC. The Amendment Protocol of this new Court, which was adopted by the AU Assembly in June 2014, provides immunities for incumbent heads of state and remains silent on the African Court's complementarity with the ICC.¹⁰

In December 2014, the Prosecutor's decision to withdraw the charges against Kenyatta marked another dramatic moment in the Court's relationship with Africa. In explaining her decision, Prosecutor Bensouda accused the government of Kenya of failing to provide the Office of the Prosecutor (OTP) with 'important records', and claimed that 'hurdles' caused by Kenya's lack of cooperation had 'a severe adverse impact' on the case.¹¹ With the collapse of Kenyatta's trial, one of the main triggers behind the recent intensification of the AU's campaign against the ICC disappeared, but it did not take all the concerns of African states away. While the assembled African leaders welcomed the withdrawal of charges in January 2015, they also expressed their regret over 'the period it took the Office of the Prosecutor to arrive at [this] decision', and noted with concern that the case against Deputy Ruto still continues.¹²

In addition to the Kenyan cases, the indictment of the Sudanese president al-Bashir also remains an important source of tension between Africa and the ICC. While it seems that the AU has given up on its initial deferral request for al-Bashir, the AU continues to argue that the Sudanese president enjoys immunity from arrest. Despite decisions of the Court's Pre-Trial Chamber countering this claim, al-Bashir has travelled to several African States Parties, including Nigeria, the Democratic Republic of the Congo (DRC), and, most recently, South Africa.¹³ All this illustrates that, for the time being, the ICC's 'Africa problem' is far from over.

A Debate on Africa and the ICC

How have scholars approached the continuing tensions between Africa and the ICC? With the risk of overgeneralizing, we find that until now the debate has followed two trajectories. First, scholars have analysed the legal arguments that have been raised and the amendments that have been suggested by the AU.¹⁴ Based on their assessments of these arguments and amendments, this first group of scholars has formulated a range of recommendations on how 'to solve' the tensions.¹⁵ Their approach may be described as *legalist* or *pragmatic*.

These scholars have taken the ‘law’ and the Court as frames of reference and have thought alongside it – that is, together with the Prosecutor, the ASP, and the Security Council – to seek solutions within the legal order that the Rome Statute constitutes.¹⁶

A second tenor in the existing literature has been to assess the appropriateness of the concerns that African states have voiced about the ICC. Much has been said and written about whether Africa’s concerns are simply false rhetoric from self-interested leaders.¹⁷ This question has sparked a debate on the structural selectivity of international criminal justice or, to phrase it more sharply, the alleged neo-colonial and racial politics behind the Court’s investigations and prosecutions in Africa.¹⁸ The approach underlying the relevant contributions has been to make a *normative* assessment of the concerns and criticisms of African states. Put differently, are African leaders ‘right’ to criticize the Court?

This volume also takes the ongoing tensions between Africa and the ICC as its starting point, but focuses on different sets of questions. Instead of pragmatic solutions or normative assessments, our aims are to explore and understand the different perceptions of the ICC in Africa. How has the ICC manifested itself in Africa and how do African audiences perceive the Court? We approach these and related questions from different angles, looking at the interactions between African states and the ICC, but also *beyond African states*, at the ‘societal impact’ of the ICC in different African communities, and *beyond the ICC*, at other local and regional justice mechanisms in Africa.

First, we seek to deconstruct the origins of the Court’s fractious relationship with Africa. Is there something inherent to the ICC as a legal system or to the contemporary political and socio-economic state of Africa that may enhance our understanding of the current tensions? Second, we study the interactions between African states and the ICC to make sense of what has motivated African states to criticize but at times also to support the Court. In this context, we also ask how the ICC has reacted to the concerns of African states. Third, we look beyond African states at the engagements between the ICC and different audiences and individuals in Africa, including those who are directly concerned with the Court as ‘victims’ or witnesses. How do they perceive the ICC and how are attitudes toward its investigations and prosecutions formed? How do local media portray the ICC, how has the Court’s involvement affected domestic politics, and in what ways, if at all, have its proceedings helped to shape the public narratives of local and regional conflicts? Finally, we look beyond the ICC at local and regional justice mechanisms that have been developed before, alongside, or as an alternative to the Court in Africa.

How have different African communities dealt with mass atrocity crimes since the end of the Cold War? What types of judicial and non-judicial mechanisms can be identified and how do they relate to the ICC?

These and other relevant questions about the engagement of the ICC with Africa are viewed in this volume through different disciplinary lenses. The background of the various contributors includes international law, anthropology, sociology, African history, political science, critical theory, and media studies. Moreover, some of the authors have been directly involved with the work of the ICC and with other local and regional justice mechanisms that are discussed in this volume. Their contributions add a helpful practitioner's view to the mix of interdisciplinary perspectives on the questions that this volume seeks to answer.

Of course, the questions and perspectives that we raise can and should not always be separated from the normative, legalist, and pragmatic approaches that have until now dominated the debate on Africa and the ICC. As a matter of fact, several chapters in this volume do make normative claims, analyse relevant legal provisions, and discuss practical solutions. Still, the point of departure for this volume as a whole is not to assess the concerns of African states or to solve the Africa problem of the ICC, nor is it to presume that judicial mechanisms are the only tools that are available to post-conflict states. Instead, the ultimate aim of this volume is to expose the complexity of the Court's troubled relationship with Africa and to ponder the plethora of judicial and non-judicial developments underway in Africa.

B Perceptions of the ICC in Africa

The remainder of this introductory chapter sets the stage for these explorations, and is divided into four parts. We begin with a reflection on how scholars can study the perceptions of international courts among different audiences. In this first part we also explain how these perceptions relate to the 'legitimacy' of international courts. It is often said that the criticism from African states threatens to undermine the ICC's legitimacy. Yet, as we shall see, this claim is subject to competing interpretations, depending on whose perceptions are being addressed and in what manner this is done.

In the second part, we introduce three different phases in the Court's relationship with Africa. Starting with the negotiations on the Rome Statute, we highlight some of the political structures and uneven power relations that are embedded in the ICC's legal system and which may help to explain shifts in Africa's engagement with the Court. Specifically, in its early years, there appears to have been a form of strategic cooperation between individual

African states and the ICC. However, developments after 2008, starting in particular with the indictment of al-Bashir, have prompted an ongoing phase of active opposition against the Court and, as of late, a reorientation towards other justice mechanisms, such as the early development of an African Criminal Court.

In the third part, we briefly consider some of the different local and regional justice mechanisms that were developed long before, but in some cases also as an alternative to, the ICC in Africa. While some of the responses to mass atrocity crimes in Africa and corresponding justice mechanisms have retributive components that are similar to international criminal prosecutions, others take a more restorative and relational approach. By introducing these different justice mechanisms in Africa, this part foreshadows the chapters in this volume that look beyond ‘Hague Justice’.

In the final part of this introductory chapter, we provide an overview of the themes, organization, and contents of this volume.

I PERCEPTIONS OF INTERNATIONAL COURTS AND TRIBUNALS

The political battles that have defined the Court’s relationship with Africa over the last few years sometimes create the image of a univocal African continent with a uniform position on the ICC. This image is wrong, or at least overly simplified. Not all African states have, for example, criticized the prosecution of al-Bashir, and not all Kenyans have opposed the trials of Kenyatta and Ruto.¹⁹ It should be stressed that the ICC has many different audiences throughout Africa, ranging from government officials, national courts, local communities, sub-regional organizations, and civil society groups to witnesses, victims, and legal experts.²⁰ Among these different audiences, understandings and ideas about the Court and its practices are not uniform. Whereas some may have never heard of The Hague, even in regions that are under investigation by the Court, others will read about the latest developments at the ICC in their daily newspapers. This highlights the reality that perceptions of the Court among its different African audiences are *multilayered*.

A Why Do Perceptions Matter?

For the ICC and for international courts and tribunals more generally, the perceptions of their different audiences tell us something about the effectiveness and appropriateness of the norms that they represent and the decisions that they take. Perceptions can, in this sense, spark social behaviour, but can also function as a normative yardstick for scholars.²¹

First of all, perceptions can be an internal motivation for social actors to behave in a certain way. A positive perception of an institution like an international court can be an incentive to comply with the rules and decisions of that court, whereas a negative perception can lead to (active) opposition. In political science, but also in social psychology, anthropology, and sociology, scholars often refer in this regard to sociological, socio-cultural, or perceived legitimacy, by which they mean the perceptions or subjective beliefs of social actors that a norm or institution is ‘appropriate, proper and just’.²² These perceptions or beliefs can be studied among different audiences to unravel how they influence the thoughts, feelings, and behaviour of these audiences, and ultimately to explain the (in)effectiveness of an international court or tribunal.²³ For the ICC, effectiveness may be defined as its ability ‘to engender respect for its rulings and for the rules it enforces’.²⁴ In this sense, studying the ‘sociological legitimacy’ of the ICC means deconstructing how the perceptions of different audiences about the ICC may affect their behaviour towards the Court and how this in turn influences the Court’s ability to achieve the objectives of the Rome Statute.²⁵

Second, the perceptions of audiences can also be a normative yardstick for scholars to assess the appropriateness of the norms and decisions of an international court or tribunal like the ICC. To give an example, if victims do not perceive prosecutions as just, then this could be a reason for scholars to question whether these prosecutions are really offering what is intended to be delivered. In other words, ‘justice misperceived’ may be equated with ‘justice denied’. Scholars in political science, but especially in political philosophy and international legal theory, have developed different and often competing standards for the normative or moral legitimacy of international law, global governance, and institutions, including international courts and tribunals.²⁶ In addition to criteria like procedural correctness and fairness, it is often stressed that the relevant audiences of an international court should perceive its workings as legitimate, whatever that may require.²⁷ Studying the perceptions of the ICC, as this volume aims to do, thus also opens up an argumentative space in which the moral value of the Court can be defended or challenged. In other words, studies on the sociological legitimacy of the ICC can be part of the debate on its normative legitimacy as well.²⁸

B Whose Perceptions Matter and How Can These Perceptions Be Studied?

When analysing the perceptions of international courts and tribunals, it is important to distinguish between different levels at which the effectiveness

and appropriateness of their norms and decisions can be examined. Whose perceptions are we talking about and how can they be studied? In this volume, we broadly distinguish between three different ‘levels’ of perceptions: (1) state actors, (2) particular communities, and (3) individuals who have been directly affected by violence, such as victims and witnesses. Whereas the first level is the main field for scholars in International Law and International Relations (IL/IR), the second and third levels call for, among others, sociological, anthropological, historical, and social psychological approaches.

These three levels and associated approaches are, in many ways, interconnected. For instance, what state actors have to say about an international court or tribunal will likely affect the perceptions of domestic audiences about its proceedings, and *vice versa*. Yet, as scholars we cannot problematize everything at once. The essays in this volume share an interest in the perceptions of the ICC in Africa, but they focus on different audiences. Lee Seymour’s chapter looks, for example, at the behaviour of African states and government officials (level 1); Sammy Gachigua’s chapter analyses how the ICC is portrayed for and by domestic audiences in Kenya through newspaper cartoons (level 2); and Chapter 12, written by Stephen Smith Cody, Alexa Koenig, and Eric Stover, studies how ICC witnesses have perceived and experienced their participation in the Court’s proceedings (level 3).

Furthermore, even when studying the same audience, one can take different paths in analysing their perceptions. The contributions in this volume work with different theoretical assumptions and methodologies, which are developed in response to dominant debates within their respective disciplinary field(s). For the purpose of this introduction, some general patterns in the theoretical assumptions and methodologies that are ‘applied’ throughout this volume may be identified.

First of all, on the level of state actors, the relevant contributions explore the interactions between African states and the ICC, and examine how the Court and its States Parties have responded to the concerns and accusations that African states have voiced, especially through the AU. An important theoretical question in this respect is what shapes the behaviour of states towards international courts? To what extent do perceptions and legitimacy play a role in states’ decisions to support or criticize the ICC?

As IL/IR scholarship remains strongly divided between different ‘isms’,²⁹ there are many competing theories about the relations between states and international courts and tribunals.³⁰ Some of the relevant approaches can generally be described as ‘rationalist’, in the sense that they assume that states are strategic unitary actors who behave instrumentally in creating and interacting with international judicial bodies. To the extent that perceptions play

a role in these approaches, it is mainly as perceptions of utility. A second set of approaches may be labelled ‘constructivist’, in the sense that they focus on the role that norms, discourse, and culture play in constituting the interests of states and in shaping their behaviour towards international courts and tribunals. In constructivist models, perceptions of appropriateness are seen as constitutive of state interests and are therefore an important factor in explaining the behaviour of state actors. While discussions on the sociological or socio-cultural legitimacy of international courts are ‘constructivist’ at heart, since they point to perceptions of appropriateness, the various chapters that examine the interactions between African states and the ICC do not apply strictly ‘constructivist’ or ‘rationalist’ assumptions and methodologies. Instead, they combine both approaches in order to explore instrumental considerations behind the behaviour of African states as well as the perceptions of African states about the appropriateness of the ICC’s norms and decisions.³¹

Second, on the level of particular communities, this volume aims to study the Court’s ‘societal impact’ in Africa. How have the Court’s proceedings been perceived within different communities? How have domestic media portrayed the ICC? How has the Court’s involvement affected domestic politics and national legislation? And how, if at all, have its investigations and prosecutions helped to shape the public perceptions and narratives of local and regional conflicts?

Throughout this volume, the chapters apply various methods for answering these and related questions about the perceptions of the ICC in different African communities. One method that is used is population-based surveying; perceptions can be ‘measured’ and analysed with the help of public polls, focus groups, and semi-structured interviews.³² A second method is to trace the impact of the Court’s involvement in domestic politics and national legislation by studying policy documents, public statements and speeches, news reports, and secondary literature, as well as through conducting one-on-one interviews with involved officials. These sources can be collected and interpreted to ‘reconstruct’ and explain how the Court’s investigations and prosecutions have influenced political and legislative developments at the national or local level. A third method is to study how domestic media have portrayed the ICC, which likely has significant effects on public perceptions of the Court as well. There are various ways to go about this, including employing ethnography and discourse reconstruction by analysing TV or written news reports, but also by interpreting artistic objects like editorial cartoons that have appeared in national or local newspapers. In composing this volume, we have sought to include contributions that apply different methods in order to show

some of the ways in which scholars have studied the impact of the ICC in particular African communities.

Finally, at the level of individuals who have been directly affected by violence, we are interested in how they perceive either the ICC's proceedings or other methods for achieving justice and how these perceptions might shape affective responses. This includes especially the witnesses and 'victims' that have participated in the Court's proceedings, but we also consider the experiences of 'victims' with different local and regional justice mechanisms, such as the *Gacaca* courts in Rwanda. The main methods for studying the perceptions of witnesses and 'victims' are ethnographic, involving participant observation, semi-structured interviews, and focus groups.

In short, the collected contributions analyse the perceptions of different audiences in Africa and apply a variety of methods for studying these perceptions. By investigating how state actors, particular communities, and individuals that are directly affected by violence perceive the ICC, we highlight that the perceptions of the Court in Africa are multilayered. Ultimately, this demonstrates that the ICC's fractious relationship with Africa is much more complex than the problematic – but powerful – image of a unified African continent with a common position on the ICC.

II DIFFERENT PHASES IN THE ICC'S RELATIONSHIP WITH AFRICA

In pondering the different perceptions of the ICC in Africa, it is important to recognize that the Court's relationship with the continent has changed significantly over time. One might characterize the shift from Africa's initial support for the ICC to the current campaign of African states against Hague Justice as a result of how the political structures and uneven power relations that are embedded in the ICC's legal framework have played out since the adoption of the Rome Statute in 1998. Inequalities are reflected in the rules and decisions of the ICC in various ways, including the nature of the crimes that are part of the jurisdiction of the Court, the nature of the mechanisms that are available to trigger the Court's jurisdiction, and its strong focus on individual culpability for crimes that are fundamentally collective.

Remarkably, these and other socio-political factors that may influence perceptions of the ICC that are often overlooked in legal analysis. The reason for this is that legal questions easily lead scholars to disregard the socio-political foundations of 'the law' itself. As a result, in studying the Court's rules and decisions, many legal scholars work on the implicit assumption that the negotiations on the Rome Statute were somehow part of a democratically