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## **The International Criminal Court and Africa**

Edited by Charles Chernor Jalloh and Ilias Bantekas. Oxford, Oxford University Press, 2016. 387 pp. \$104 (cloth). ISBN 978-0-19-881056-8

In November 2017 the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda made a request to Pre-Trial Chamber to permit an investigation into alleged war crimes and crimes against humanity in Afghanistan. Along with other cases from Ukraine and Columbia currently under preliminary examination and the ongoing investigation into alleged crimes in Georgia, the application to investigate Afghanistan shows how, in its second decade, the ICC is expanding its reach beyond Africa. During its first decade all of the ICC's cases came from Africa – the first situation referred to it was from Uganda and its first successful prosecution arose from the civil war in the Democratic Republic of Congo. Whilst dealing with cases where serious crimes had clearly occurred the Court's exclusive focus on Africa was used by its detractors to allege it was an institution that ignored the crimes of the powerful and discriminated against Africans.

This context is briefly sketched out in the introduction to Charles Chernor Jalloh and Ilias Bantekas's volume, which they describe as an attempt to answer what "went wrong" in the relationship between the ICC and African states. A number of the book's chapters discuss the reference to the ICC of the situations in Dafur and Libya by the UN Security Council. In chapter eight, Jalloh analyses the ICC and the Security Council's expansive interpretation of Article 13 of the Rome Statute. In chapter five, Naldi and Magliveras detail how the saga surrounding the arrest of Sudanese President Omar al-Bashir helped undermine the legitimacy of the ICC. The failure to execute the Bashir arrest warrants and the hostility of a number of African states, as well as at an institutional level the African Union (AU), created a series of ongoing political crises for the Court. A different series of challenges posed by the Kenyan case are detailed in several other parts of the book. Neatly tracking the highs and lows of the ICC, these chapters show how in Kenya the initial strong public support for taking cases to the ICC arising from the post-election violence in 2007 eventually turned into outright hostility as leading political figures, including the President, faced indictment. The Kenyan cases seem to demonstrate the limits of the ICC's complementarity principle under Article 17 of the Rome Statute as the Prosecutor, exercising his *proprio motu* powers, took over the case from the domestic authorities. As Bensen Chinedu Olugbuo notes in his contribution to the book, "Operationalizing the Complementarity Principle: The Case for a Differentiated Standard in Kenya's Post-Electoral Violence," even if the Prosecutor's decision was consistent with the provisions of the Rome Statute its effect was to threaten the principle that "it is the primary responsibility of states to hold their citizens accountable for international crimes" (90).

It would be an understatement to say that the Court was taken aback by the scale of political controversy it faced. The tangible dimension of this controversy is sketched out in Bantekas's contribution to the book in which he examines the argument surrounding the ICC's role in peace negotiations and the potential for these negotiations to come into conflict with the demands of justice. Interestingly, although there has been little practical evidence that ICC indictments have altered the course of conflicts, it is hard to disagree with Bantekas's argument that these indictments have "not proved successful in isolating or delegitimizing their targeted addressees" (109). In chapter nine, Manisuli Ssenyonjo outlines how this lack of success is leading states to cite the alleged loss of credibility of the ICC and its seemingly "unfair" focus on Africa as grounds for withdrawal from the Rome Statute. As Ssenyonjo argues, the Rome Statute's withdrawal clause notionally protects the sovereign autonomy of states at the same time as it supports the aim of the ICC to promote international justice; these conflicting demands are difficult to balance. As it has been a feature of many of

the on-going political crises the ICC has faced in relation to the execution of its decisions, withdrawal from the ICC, or threatened withdrawal from the ICC, is discussed in several chapters of the book. Given the practice of withdrawal or threatened withdrawal from international courts and supranational organisations around the world, this feature of the crises faced by the ICC needs to be understood in terms of the interaction between states and a supranational body. Frustratingly, beyond a brief discussion of the topic in the introduction, the wider political context of the ICC's operation as a supranational body is never examined in any real depth.

A recurring theme across a number of chapters is the argument, often advanced in AU resolutions, that local or regional processes should be prioritised over the ICC. Chapter fourteen considers the ICC alongside community based justice mechanisms such as the Gacaca courts, which were used to provide community based justice in post-genocide Rwanda. In setting out this analysis, Pacifique Manirakiza is careful to note the limitations of community justice mechanisms for dealing with complex mass atrocities. Chapters six, ten, and twelve explore different regional alternatives to the ICC in some depth, including the African Court of Human and Peoples Rights (ACHPR) and the possibility of creating a new court or using sub-regional tribunals. These alternatives have rarely been fleshed out but when they are suggested by political actors it often appears to be a stalling tactic, a suspicion confirmed by the Malabo Protocol to the ACHPR which restricted its (or any future regional court under the AU's auspices) from trying sitting heads of state. As the International Court of Justice's decision in *Case Concerning the Arrest Warrant of 11 April 2000* (2002) implies that sovereign immunity is not a barrier to prosecution for international crimes, the Malabo Protocol seems to fly in the face of accepted customary international law.

The AU is generally reluctant to interfere in the domestic affairs of member states, an inheritance from its predecessor the Organisation of African Unity (OAU). As an organisation, the OAU protected the sovereignty of newly independent African states to such an extent that it defended organisational inaction in response to systemic human rights abuses taking place within member countries. In chapter ten, Kebeab Weldsellasie's discussion of the pre-colonial and colonial context of criminal justice in Africa provides some welcome background on the evolution of criminal law in the region but it does not analyse differing assumptions about sovereignty. These assumptions are addressed by Jalloh in chapter twelve, who notes, "ideas of self-determination were central to the struggle by the people of the continent for their fundamental freedoms" (297). Given this history, the approach of regional bodies to supranational institutions was always likely to be cautious. In the introduction to the book, Jalloh and Bantekas flag this wariness as a vital issue, noting that one of the core demands of the decolonisation movement was in addition to the establishment of independent nation states the expectation that those states would have a say in international rule-making. In this context, the difficulties that the ICC has faced in relation to some of its African cases seem all the more understandable. This point is important for understanding the Kenyan and Sudanese cases outlined in earlier chapters in the book. Unfortunately, it is only really explored by Jalloh in chapter twelve.

One criticism of the book is that it is not divided into thematic sections exploring individual issues, such as the Kenyan case or head of state immunity. This makes it difficult to read as a whole volume and in places leads to an overlap of subject matter between chapters. Nevertheless this is an important collection of scholarly work with a level of detail that is highly informative and some chapter will almost certainly continue to be an important source of reference as the ICC enters its next phase.

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