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Res Schuerch

The International Criminal Court at the Mercy of Powerful States

An Assessment of the Neo-Colonialism Claim
Made by African Stakeholders



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Foreword

I had the privilege of serving on the doctoral commission for the Ph.D. defence of Dr. Res Schuerch. For many, serving on a Ph.D. commission is a responsibility—a burden of sorts. But to serve on the commission for Res Schuerch's Ph.D. was an absolute pleasure and privilege. I did not know Res Schuerch at the time. I have since come to know him as a scholar who is very knowledgeable about Africa, international criminal law and who cares deeply about those suffering from the scourge of conflicts on the African continent. He has also demonstrated himself to be acutely aware of the role that power and geo-politics can play in the dispensing of international justice.

The last ten years have seen an explosion in the literature on international criminal law, much of it focused on the on-going tension between the International Criminal Court and the African Union. Very few of the academic contributions on this subject, however, have been able to avoid what I have previously termed the 'hero-villain' trend—an 'ideological chasm' in which the participants see themselves as 'protagonists' and the other as 'villains'. This trend ignores that the truth is something more nuanced, less clear and highly complex. That no one is cloaked in white and everyone has some dirt on their hands.

This excellent book by Res Schuerch, *The International Criminal Court at the Mercy of Powerful States: An assessment of the neo-colonialism claim made by African stakeholders*, based on his Ph.D. thesis, is yet another contribution to this very important topic. It has a provocative title. At first glance one would expect to find a biased, one-sided account of the debate, suggesting that the ICC is the 'villain' and the AU the 'hero'. Yet Res Schuerch has approached this topic with the maturity and objectiveness not often seen in the debate. He takes no side. He simply presents the facts as he sees them. This allows him to capture some of the nuance and complexity of the issues of the debate. Res Schuerch's book has been able to avoid the hallmarks of the 'hero-villain' trend associated with the ICC-AU debate and will, for this reason, make a valuable contribution to the discourse on the International Criminal Court and its troubled relationship with the African continent.

The practical significance of the issues discussed in Res Schuerch's book became evident in the recent developments involving South Africa and its decision to withdraw from the International Criminal Court. South Africa's decision not to arrest Omar Al Bashir, without question, involved complex legal issues. Although the High Court decision—declaring the decision not to arrest Al Bashir to be inconsistent with both international law and domestic law—presented the issues as uncomplicated, the Supreme Court of Appeal judgment did reveal some of the complexities. On the one hand, the Supreme Court of Appeal found the decision not to arrest Al Bashir to be consistent with international law—the Court found that there was no international crimes exception to the customary international law obligation to respect the immunity of a sitting of Head of State, concluding that '[o]rdinarily that would mean that President Al Bashir was entitled to inviolability while in South Africa ...' The Court, nonetheless, found that there was a duty *under domestic law*—not international law—to arrest Al Bashir because the South African law implementing the Rome Statute did not make provision for the respect of immunities.

Leaving aside interesting questions such as an apparent internal incoherence of the judgment (it is not at all clear whether a duty to cooperate under the domestic implementation legislation can exist if there is no duty under international law) and whether there was no duty by the Court to interpret the domestic legislation in a manner consistent with international law, the mere determination that there is conflict between domestic and international law should give those that view the issues raised by South Africa's decision not to arrest Al Bashir as simple, clear and uncomplicated, cause for pause. But more than that, the developments in South Africa reveal the political complexities of the ICC-AU tension. In its communication to the United Nations explaining the decision to withdraw from the ICC, the South African government raised not only the immunities question (the legal question), but it also raised the political questions such, the asymmetry and selectivity in the application and enforcement of international criminal law, both in terms of who, as an empirical fact, is the target of the enforcement and who is not, and the bias that results from the institutional structures and relationships that make-up the international criminal law machinery, centred around the Rome Statute and the International Criminal Court.

It is these issues that Res Schuerch tackles in this book. He tackles many of the issues that have been raised in the literature in the AU-ICC. These include the fact that Africa accounts for all but one of the ten active investigations before the ICC and the powers of the Security Council to refer situations and defer investigations and prosecutions, with the privilege this implies for the veto-holding powers on the Council. Against these empirical facts, Schuerch attempts to test whether there is any validity to the accusations of neo-colonialism that are often levelled against the International Criminal Court. But he does this in a dispassionate and scientific manner. He seeks to move beyond the normal rhetoric of the debate by distilling an objective, legal meaning of the concept of neo-colonialism from various discourses. It is through providing legal content to the otherwise political concept of 'neo-colonialism' that the Res Schuerch hopes to rid the concept of neo-colonialism

of its ‘indeterminacy and vagueness’ and ‘translate the feeling of (neo-) colonial inequality into a legal vocabulary’. It permits him to ask, for example, whether international criminal law reflects the imposition of Western laws; and whether the privileged position of powerful States protects them from the reach of the ICC and produces selectivity.

The result of Schuerch’s study is a wonderfully written book that, I hope, will illustrate that law and politics of international criminal justice are not as simple as hero-villain movies. In fairness, Res Schuerch’s analysis is limited to the normative and structural framework of the Rome Statute. He decides not to address the practice and implementation. For example, he excludes from the study any detailed analysis of the failure to open active investigations in, for example, Afghanistan and Palestine—two situations in which the ICC clearly has jurisdiction and in which any investigation would affect the most powerful State and one of its closest allies, since this decision does not flow from the Rome Statute itself. What the book does provide, however, are the tools to enable us, with objectivity, to assess, honestly, the state of international criminal justice and the ICC.

The current impasse concerning the ICC, which has led to the decision to withdraw from the International Criminal Court by one of the leading voices of international criminal justice, exists because of the fundamentalism that dominates the discourse on either side of the deep chasm. Fundamentalism itself results from and feeds on an indeterminacy of concepts such as neo-colonialism, justice and accountability and the amorphous ‘fight against impunity’. Schuerch’s powerful book does not decode all of these concepts focusing on only neo-colonialism. But it does shine the light on how an objective assessment of all of these might be undertaken to avoid the fundamentalism that often accompanies debates surrounding international criminal justice. It is my sincere hope that this book will inspire more objective and dispassionate scholarship on international criminal law and international criminal justice.

Finally, I congratulate Dr. Res Schuerch on the completion of this book and encourage him to continue to explore difficult and complex subjects in a balanced manner. I thank for his courage to produce such an interesting and thoughtful book.

January 2017

Dire Tladi
University of Pretoria,
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Legal developments have been taken account of, to the best of my knowledge, up to July 2016. All websites were last accessed in November 2016.

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Abbreviations

AMIS	African Union Mission in Sudan
AU	African Union
Berlin Conference	Berlin West Africa Conference 1884/5
CAR	Central African Republic
DRC	Democratic Republic of Congo
EU	European Union
EU/AU Expert Group	Technical Ad hoc Expert Group constituted by the African Union and European Union
GA	General Assembly of the United Nations
HRC	United Nations Human Rights Council
ICC	International Criminal Court
ICID	International Commission of Inquiry on Darfur
ICIL	International Commission of Inquiry on Libya
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMTFE	International Military Tribunal for the Far East
IMT	International Military Tribunal at Nuremberg
LMG	Group of Like-Minded States
LRA	Lord's Resistance Army
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NGO(s)	Non-governmental Organisation(s)
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of the Prosecutor of the International Criminal Court

P-5	Permanent Members of the United Nations Security Council (United States, United Kingdom, China, Russia, France)
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
PSC	African Union Peace and Security Council
PTC	Pre-Trial Chamber of the International Criminal Court
Rome Conference	United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June–17 July 1998
RPE	Rules of Procedure and Evidence
RS	Rome Statute of the International Criminal Court
SADC	Southern African Development Community
SCSL	Special Court for Sierra Leone
SC	United Nations Security Council
SOFAs	Status of Forces Agreements
UNC	Charter of the United Nations
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UN	United Nations