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SELECTIVE ENFORCEMENT
AND INTERNATIONAL
CRIMINAL LAW

The International Criminal Court
and Africa

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Selective Enforcement and International Criminal Law

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To my parents Veronica and Garikai Nyawo

PREFACE

A major controversy that has arisen during the International Criminal Court's first decade has been the issue of selective enforcement of international criminal law. This has been prompted by the Court failing to open investigations or prosecutions outside Africa. This book assesses the claims of this nature made against the Court – primarily by some African leaders and ruling elites – and how the criticism has impacted on the role of the Court as a mechanism for promoting the international rule of law. The assumption is that if the claims that the Court, based in The Hague, the Netherlands, focuses selectively on Africa are valid, then the Court's role as an effective mechanism for promoting the international rule of law could be called into question.

The book analyses three key components of the Court's legal framework – the mechanisms that trigger the Court's jurisdiction, admissibility rules and the independence of the Office of the Prosecutor – in order to establish how the Court became engaged in Africa and its problems. It argues that the Court's broad, yet not universal, jurisdiction means that it is expected to intervene in other regions apart from Africa. However, when African politicians and members of the ruling elite claim that the Court is selectively focusing on Africa, they mean that it is targeting sitting heads of state and other government officials, to the exclusion of their political rivals or ordinary citizens.

The underlying theme that emerges from this analysis is that the Court is a victim of *realpolitik* both at the global and state levels. At the global level, powerful states, particularly the permanent members of the United Nations (UN) Security Council, seek to utilise the Court to further their own interests against those states that they consider to be against their own hegemonic interests. At the state level, the ruling elites tend to be comfortable with the Court as long as it targets their political competitors, but are willing to mobilise state apparatus to frustrate the Court if they become the focus of the Court's interventions. Still, since there is no contestation on the principle of ending impunity for atrocity crimes which the Court stands for, perhaps African states have to first play their primary role through their domestic jurisdictions and deny the 'politicised Court' any room for intervention. In other words, if African states could demonstrate that they are willing and capable of addressing the impunity gaps within their boundaries, there would be no need for the Court or the UN Security Council's intervention. If African states could act proactively, they could actually boost their own empirical sovereignty.

Key findings of the research include that the timing of African leaders' criticisms of the Court usually corresponds with the Court's decisions to investigate/issue warrants of arrests or summons to the aforementioned leaders. However, the fact that African states that have referred situations in their own territories to the Court have not challenged the admissibility of the cases suggests that they agree that the Court is the best and most effective forum for delivering justice. The role of the UN Security Council in referring situations to the Court, and in not acting on the African Union's requests for deferrals of proceedings in Darfur and Kenya, has been the main source of African leaders' dissatisfaction with the Court. This book links African leaders' early support for the Court to their distrust of the UN Security Council's handling of African issues, especially with regard to the Lockerbie crisis in Libya and the situation in Rwanda before and during the genocide against the Tutsi.

The book argues that the political dynamics that led to the establishment of the Court – especially the early opposition of the US to the Court and the emergence of the European Union (EU) as the political and financial supporter of the Court – complicated the Prosecutor's ability to use his powers to initiate investigations in areas where he was likely to confront either the US or national interests within the EU. Although the codification process of the substantive and procedural law of the Court was heavily influenced by the legal positivism philosophy of international law, which was necessary if the Court was to gain universal acceptance, the evidence in this book suggests that politics (at both the global and domestic levels) played a crucial role in the application of the international criminal law by the Court. In this regard, the findings in this book are oriented towards the assertion made by critical legal studies that the application of law is not neutral, but follows the political structure of any given society.

Practically speaking, the Court and the proponents of international criminal law need to acknowledge that politics is the Achilles' heel for effective enforcement of international criminal justice and should begin to work within such a reality to devise mechanisms to engage politics in a positive and constructive manner. This could include encouraging domestic prosecutions and the Prosecutor should be free to exercise his power to push back on UN Security Council referrals unless certain guarantees are given, including sustained political and financial support throughout the proceedings.

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*'Before considering double standards on the international level you should
confront double standards at home'*

Navanetham Pillay,
former United Nations Commissioner for Human Rights
and Judge of the International Criminal Court, 2015

