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CRIMINAL COURT

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OF THE INTERNATIONAL
CRIMINAL COURT

Between a Rock and a Hard Place

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The Independence of the International Criminal Court. Between a Rock and a Hard Place

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'In assessing the ICC's independence and legitimacy, Alphonse Muleefu is scrupulously even-handed in weighing the claims of the Court's supporters and critics. The book's dialogical approach enables a deep understanding of how the ICC views its role in addressing mass crimes and why the Court's critics - especially in Africa - are so concerned about its impact across the continent. This book is nuanced, thorough and essential reading for anyone trying to fathom where the ICC finds itself 17 years into its existence.'

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"The Independence of the International Criminal Court: Between A Rock and A Hard Place" provides a tremendously vivid and fascinating study of politics in action. By analysing the public speeches and written texts that mark critical moments in the court's history, the book offers a desperately needed analysis of the place of politics in the life of the law. Alphonse captures beautifully various key discourses and sets them side-by-side forcing us to contend with the difficulties of the ICC's relationship with Africa and their implications for understanding law in an uneven world. He also turns us to the crude realities of that world as seen in the spoken and written word, highlighting how the key challenge of twenty-first century justice analysis is not only what is done and what is said but also how those things are seen. A refreshing account of the complex dynamics of discourse. A must read.'

Professor Kamari M. Clarke, The University of California, Los Angeles

'Dr. Alphonse Muleefu has written a book that calls for an in depth dialogue between the critics and supporters of the International Criminal Court. It is definitely worth reading.'

Professor Dr Rianne M. Letschert, Rector Magnificus, Maastricht University

'In his much-needed and penetrating study of the International Criminal Court, Alphonse Muleefu provides an alternative perspective on questions of legitimacy and judicial independence that avoids the simplistic approaches advocated by both the most passionate supporters of the court and its most ardent critics.'

Professor Mark Goodale, University of Lausanne

*I dedicate this book to my dad, Yohani Bushishi, for his endless support
and patience towards my quest for knowledge.*

PREFACE

In 2010, one of my Public International Law professors, while explaining to our LLM class of Public International Law and Human Rights about the current issues, appreciated the fact that the US was actively involved in the Kampala Review Conference of the Rome Statute of the International Criminal Court. In response, I immediately disagreed. I did not believe that it was a good idea for a non-state party to be that influential; not so long ago it had been busy discrediting the Court and discouraging other countries from cooperating. After writing this book, I think my point of view was an uncompromising one, that of 'you are either in it or out'. For those who believe in the Bible, the Saviour is against the lukewarm. In the book of Revelation, chapter 3 verse 16, it is stated that: 'So then, because you are lukewarm, and neither cold nor hot, I will vomit you out of My mouth.'¹ I have come to understand that my professor's point of view was one of optimism, believing that the Court's success will depend on its good relationship with all countries including those that are not parties to the Rome Statute, especially the most powerful. He might have seen the US' engagement as an assurance of the Court's future and a sign of its recognition as a global actor (legitimacy). And probably he might have (wrongly) thought that the US involvement in shaping the rules of the Court was a positive indication that in the near future it would consider becoming a state party. Therefore, I admit to having been naive and idealistic, for believing in a utopian sovereign equality of states, and he was perhaps more realistic because the Kampala Review Conference was about the amendment of the Rome Statute, an important step in shaping the Court, something a powerful state could not have ignored. As Barkin notes, '[t]he first way to influence an [international organisation] is through its creation negotiations, state's capacity to influence the rules to govern (...)'.² The Realists, Barkin observes, see no problem in making rules that govern international organisations according to the interests of the powerful because in their view, weaker states are 'always subject to a similar degree to the preferences of the larger, more powerful states'.³

¹ The Holy Bible: Containing the Old and New Testaments (New King James Version, Thomas Nelson), 853.

² J. Samuel Barkin, *International Organizations: Theories and Institutions* (2nd ed., Palgrave Macmillan, 2013), 20.

³ *ibid.*, 12.

The brief exchange outlined above can demonstrate how easily two different people can perceive certain things differently. It also demonstrates that a disagreement might remain unresolved for some time with different consequences. In my case, it has been an inspiration behind the question at the heart of this book. After that classroom debate, I developed an interest in considering all diverging views about the International Criminal Court. Since then, I have been collecting and analysing different opposing arguments about its workings and mandate. However, turning this curiosity into a book could not have been possible without big support from different people and institutions. Special thanks go to the Swiss Federal Commission for Scholarships for Foreign Students (FCS), which awarded me the Swiss Government Excellence Scholarship that allowed me to stay for a whole year at the University of Lausanne. I would like to acknowledge Professor Andreas Ziegler, my contact person at the University of Lausanne for his support during the application process, for providing me with a recommendation and an invitation letter, without which I could not have been awarded the scholarship. I would not have been able to contact Professor Ziegler if it were not through Dr. Roberta Arnold, so thank you so much. I am indebted to all people who wrote reference letters and recommendations throughout the process: Professor Rianne Letschert, Dr. Felix Ndahinda and Dr. Etienne Ruvebana, thank you so very much for your kind support.

Sincere gratitude goes to the management of the University of Rwanda, which authorised me to be away for the entire period of writing this book. The same appreciation goes to different staff members of the Swiss Institute of Comparative Law. The study leave and stay at the University of Lausanne could not have been productive without a very supportive team of librarians who worked tirelessly providing me with all reading materials I needed to complete the book. I am sincerely grateful to the ESN Buddy Program, specifically to Jacques Frauche, for welcoming me to the University, and showing me all important facilities at the campus and the city of Lausanne. Special thanks also go to those who offered their time to discuss with me the different aspects of the subject; to mention just a few: Dr. Eefje de Volder, Professor Barbora Hola, Dr. Thijs Bouwknegt, Professor Mark Goodale and different ICC staff members. I greatly benefited from Dr. Roelof Haveman who agreed to edit the whole manuscript. His constructive critical and candid comments strengthened my arguments.

The library life was very lonely, and I couldn't have remained sane if it were not because of different people (friends) outside the university campus. Without mentioning names, I would like to appreciate the Rwandan community in Lausanne and other friends who were always available to go out with me at different restaurants and bars, and sometimes invited me into their homes. Special thanks again go to those friends who travelled long distances at different times just to be with me for some few days in Lausanne. Thank you to Dr. Annemarie Middelburg and Mr. Erik Walschots, Loes Lijnders, and

Andrew Bayingana. Every visit you made left me filled with a lot of energy and good spirit to continue working. Last but absolutely not the least are my friends and relatives back in Rwanda who kept contacting me through different channels of communication; I am thankful that you kept me in your thoughts while I was far away. I am grateful for the fact that you kept reminding me that there is another important thing in life that I haven't accomplished, and I can promise you to make it a priority now.

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LIST OF ABBREVIATIONS

AI	Amnesty International
ASP	Assembly of States Parties
AU	African Union
CDA	Critical Discourse Analysis
CICC	Coalition for the International Criminal Court
CLS	Critical Legal Studies
ExCom	The Office of the Prosecutor's Executive Committee
FIDH	<i>Fédération Internationale Ligue des Droits de l'Homme</i>
HRW	Human Rights Watch
IAT	Implicit Association Test
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IEU	Information and Evidence Unit
JCCD	Division of Jurisdiction, Complementarity and Cooperation
LRA	Lord's Resistance Army
NGOs	Non-Governmental Organisations
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SAS	Situation Analysis Section
SCSL	Special Court for Sierra Leone
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNSC	United Nations Security Council
UPDF	Uganda People's Defence Force
WHO	World Health Organization

