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The International Criminal Court at the Mercy of Powerful States

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

Res Schuerch

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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,
UN International Law Commission

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This book is a revised version of my dissertation submitted to the Faculty of Law of the University of Amsterdam in April 2016. I would like to thank Prof. van der Wilt for having supported this project from the outset with great enthusiasm, competence and guidance. Many positive qualities of this book are owed to his honest and inspiring comments. I would also like to thank the members of the doctorate committee, Yvonne Donders, André Hoekema, Guénaël Mettraux, Elies van Sliedregt and Dire Tladi, all of which are truly inspiring characters, for their willingness and time to participate in the jury as well as for their valuable comments.

My gratitude goes to the Amsterdam Center for International Law, where I could spend the first year of my doctoral research and which offered me a perfect environment not only in terms of academia but also at a personal level. I am also indebted to Max Lieberman for proofreading the manuscript and numerous colleagues for their continuous support during the writing of this book. To my parents, it would not have been possible to be where I am without your patience and your continuous support, even when it sometimes seemed that this would be a never-ending journey. This work is dedicated to you! Pierina, thank you for always believing in me and making life even more joyful!

Last but not least I would like to express my gratitude to T.M.C. Asser Press for publishing this book as part of the International Criminal Justice Series.

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.

Contents

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

Chapter 1
Introduction: The International Criminal Court—Old Wine in a New Bottle?

'We have not forgotten that the law was never the same for the white and the black, that it was lenient to the ones, and cruel and inhuman to the others'.

Patrice Lumumba, Speech at the Proclamation of Congolese Independence, 30 June 1960

'A comprehensive understanding of the politics of the tribunals involves not only an analysis of the role of the winners and losers but also of the powerful and weak'.

Victor Peskin, 2005, p.228

Abstract When the International Criminal Court became operational on 1 July 2002, it was welcomed with great expectations by the international community as an important player in the fight against impunity worldwide. However, a few years and a number of investigations into African situations and cases later, initial enthusiasm has waned and African constituencies in particular started raising serious misgivings about the Court's selection of situations and cases, including allegations of neo-colonialism. This chapter introduces at what point in time allegations of neo-colonialism started growing, which rhetorical force is behind this expression and how the book is going to assess this claim in relation to the ICC.

Keywords Neo-colonialism · Colonialism · International Criminal Court · International Criminal Law · African states · Dependency

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1.1 The Allegation of Neo-Colonialism

On 17 July 1998, the constituent assembly of states voted into existence the International Criminal Court (ICC) at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (Rome Conference). This historic vote translated into reality what had been asked for by international lawyers for decades: a permanent criminal tribunal which is based on the voluntary transfer of criminal competences of sovereign states and not unilaterally dictated by an alliance of powerful nations, as was the case after the Second World War and in the context of the Former Yugoslavia and Rwanda.[1] The creation of the ICC was welcomed with great enthusiasm by important international constituencies such as states, international and non-governmental organisations.[2] With this instrument, it seemed that International Criminal Law (ICL) had finally overcome the shadowy existence to which it had been doomed for decades prior to the 1990s.[3] Kofi Annan, one day after the adoption of the Rome Statute of the International Criminal Court (RS),[4] hailed this achievement in the following terms: 'The establishment of the International Criminal Court was a gift of hope to future generations, and a giant step forward in the March towards universal human rights and the rule of law'.[5] Despite much praise in advance, however, the Court, which eventually became operational following the deposit of the sixtieth state ratification on 1 July 2002,[6] soon faced headwinds from various corners.

One of the most intriguing critiques was that the ICC is a project of powerful states exercising twenty-first century neo-colonialism, a term which originally became popular in the post-colonial period to describe continuing political and

[1] In the wake of the Second World War, the Allied Powers established two International Military Tribunals, in Nuremberg (IMT) and Tokyo (IMTFE) respectively. In 1993 and 1994, the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were brought into being on the initiative of the Security Council (SC). On these tribunals, see *infra* Chap. 6, Sect. 6.2, and *infra* Chap. 9, Sect. 9.2.3.

[2] An introduction to the negotiation process is provided in *infra* Chap. 6, Sect. 6.4.1.

[3] On the development of the discipline of ICL, see *infra* Chap. 6, Sect. 6.2.

[4] Rome Statute of the International Criminal Court (17 July 1998, 2187 UNTS 3, Entry into Force 1 July 2002) [hereinafter Rome Statute/RS]. At the time of writing, there are 124 states parties to the Rome Statute.

[5] This quote can be found in United Nations, Press Release (1998) Secretary-General Says Establishment of International Criminal Court is a Major Step in March Towards Universal Human Rights, Rule of Law, UN Doc L/2890.

[6] Article 126(1) RS.

economic dependency of African states to their former colonial masters.[7] Neo-colonialism allegations in relation to the ICC became particularly widespread after the Court had issued an arrest warrant in March 2009 against the ruling Sudanese President Omar Al-Bashir over alleged criminal conduct in the Darfur conflict.[8] By then, it had formally opened investigations into four situations, all of which were in African countries.[9] In response to these developments, the Rwandan President Paul Kagame provocatively commented: '[W]ith ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. The ICC is made for Africans and poor countries'.[10] In the same vein, Mahmood Mamdani, a respected Ugandan scholar of anthropology and political science, has labelled the ICC 'a Western court to try African crimes against humanity' whose '"responsibility to protect" is being turned into an assertion of neocolonial domination'.[11] With a view to the growing discontent among African stakeholders towards the ICC, Charles Jalloh summarised African apprehensions at that time in the following terms: '[T]he growing perception is that Africans have become the sacrificial lambs in the ICC's struggle for global legitimation'.[12] Bearing in mind the unmistakable universalistic rhetoric which accompanied the establishment of the ICC at the Rome Conference in July 1998,[13] this change of mood indeed marks a significant departure from the enthusiasm that initially prevailed after the adoption of this instrument.

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[7] See *infra* Chap. 3, Sect. 3.2.

[8] *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 04 March 2009.

[9] The ICC, at that time, had formally opened investigations concerning the situations in the Democratic Republic of Congo ('The Office of the Prosecutor of the International Criminal Court Opens its First Investigation' (Press Release, 23 June 2004) ICC-OTP-20040623-59), Northern Uganda ('Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda' (Press Release, 29 July 2004) ICC-OTP-20040729-65); Central African Republic ('Prosecutor Opens Investigation in the Central African Republic' (Press Release, 22 May 2007) ICC-OTP-20070522-220) and Darfur, Sudan ('The Prosecutor of the ICC Opens Investigation in Darfur' (Press Release, 6 June 2005) ICC-OTP-0606-104).

[10] This statement can be found in D. Kezio-Musoke. 'Kagame tells why he is against ICC charging Bashir' *Daily Nation* (03 August 2008). http://www.nation.co.ke/news/africa/-/1066/446426/-/3huvkb/-/index.html. Accessed 12 November 2016. See also, X. Rice. 'Sudanese president Bashir charged with Darfur war crimes' *The Guardian* (04 March 2009). http://www.theguardian.com/world/2009/mar/04/omar-bashir-sudan-president-arrest. Accessed 12 November 2016.

[11] M. Mamdani. 'Darfur, ICC and the new humanitarian order' *Pambazuka News* (17 September 2008). https://www.pambazuka.org/governance/darfur-icc-and-new-humanitarian-order. Accessed 12 November 2016.

[12] Jalloh 2009, p. 463.

[13] The universal nature of the ICC was pointedly emphasised by M.C. Bassiouni at the Ceremony for the Opening for Signature of the Rome Statute at the Rome Conference on 18 July 1998: 'The establishment of the ICC symbolizes and embodies certain fundamental values and expectations shared by all peoples of the world and is, therefore, a triumph for all peoples of the world' (Bassiouni 1998, p. xxi).

It is quite obvious that most of the neo-colonialism allegations raised in relation to the ICC are a response to the Court's one-sided focus on African situations and cases while the Court, at the same time, seems to turn a blind eye on crimes committed in other parts of the world.[14] Another aspect that appears to have contributed to the neo-colonialism claim is that the indictment against Al-Bashir, whose country has not acceded to the ICC treaty, was arguably ill-timed and undermined efforts of the African Union (AU) to broker peace in the context of the Darfur conflict.[15] A similar line of argument was later used by the AU to demand the deferral of proceedings under Article 16 RS against the President and Deputy President of Kenya, a request that was rejected by the Security Council.[16] According to some commentators, furthermore, the selective targeting of African leaders by the ICC shows that Western States still have a vested interest in the destabilisation of African states 'to keep African countries compliant to the dictates of the West and its allies'.[17] This perspective derives from a political understanding of neo-colonialism and links the concept to the Western states' interest to wield influence on African states' political affairs.[18]

However, the argument of neo-colonialism did not find much support among international scholars. It is argued that many of the African situations under ICC scrutiny were voluntarily referred to the Court by the governments of these states.[19] Others generally contend that claims of neo-colonialism would exaggerate the strength of the ICC[20] and that the argument merely is a powerful 'trope' which

[14] At the time of writing, the Office of the Prosecutor (OTP) is investigating situations in nine countries, of which eight are in Africa: Uganda, Democratic Republic of Congo, Sudan (Darfur), Central African Republic (two situations), Kenya, Libya, Côte d'Ivoire, Mali and Georgia (on the status of investigations and prosecutions in these situations see https://www.icc-cpi.int/pages/situations.aspx. Accessed 12 November 2016).

[15] See, among others, A. De Waal, J. Flint and S. Pantuliano. 'ICC approach risks peacemaking in Darfur' *The Guardian* (10 June 2008). http://www.theguardian.com/world/2008/jun/10/sudan.unitednations. Accessed 12 November 2016; in a similar vein, A. De Waal. 'Sudan and the International Criminal Court: a guide to controversy' (14 July 2008). https://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy. Accessed 12 November 2016; and P. Moorcraft. 'Africa suspicious of court's motives in taking on Bashir' *BusinessDay Live* (06 March 2009). Accessed 9 June 2015.

[16] See *infra* Chap. 11, Sect. 11.5.3.

[17] F. Kuvirimirwa. 'ICC agent of neo-colonialism' *The Herald* (29 May 2014). http://www.herald.co.zw/icc-agent-of-neo-colonialism/. Accessed 12 November 2016. In a similar vein, Rice, *supra* note 10.

[18] On the label 'neo-colonialism' in political discourse, see *infra* Sect. 1.2. On the historical notion of neo-colonialism, see *infra* Chap. 3, Sect. 3.2.1.

[19] N. Fritz. 'Black-white debate does no justice to a nuanced case' *BusinessDay Live* (13 August 2008). Accessed 9 June 2015.

[20] See P. Clark. 'The ICC is only a small piece in the justice puzzle of Africa's conflicts' *The East African* (11 April 2011). http://www.theeastafrican.co.ke/news/-/2558/1141438/-/o3vyj7z/-/index.html. Accessed 12 November 2016. In a similar vein, Jalloh 2009, at 463.

'reasonate[s] with many constituencies for political and historical reasons'.[21] In addition, it is emphasised that the

> Court's selections are not informed by nefarious intentions. Rather they are indicative of its shrewd political calculus. The ICC does not have the legitimacy or backing at this point to go to politically sensitive places—places where a major power might object.[22]

In assessing the 'African bias' claim one should also keep in mind that the Office of the Prosecutor of the ICC (OTP) is conducting preliminary investigations on an ongoing basis in a number of non-African countries.[23] In January 2016, in addition, the prosecutor of the ICC was authorised by the ICC Pre-Trial Chamber (PTC) to formally open an investigation into the situation of Georgia, which is the first non-African situation under the Court's jurisdiction.[24]

Summarising the above, it is noticeable that many commentators remain rather vague about how the concept of neo-colonialism relates to the jurisdiction of the Court.[25] This does not come as a surprise to the author of this book. Having had the possibility to visit a number of African countries and discuss the involvement of the ICC in Africa with locals interested in the matter, the author's impression is that the reference to the term neo-colonialism is often based less on rational arguments but on the feeling that traditional inequalities are reproduced within the system of the ICC.[26] Put in a different way, the notion of neo-colonialism seems to revitalise the demons of African colonial inequality in a contemporary international criminal law context. However, the vague and ambiguous way the notion of neo-colonialism is used to criticise the ICC at the same time lays bare that the concept is subject to different interpretations and ultimately lies in the eye of the beholder. From a scientific perspective, the diversity of perceptions on how neo-colonialism transpires in the context of the ICC does certainly not help to contribute to a better understanding of the term in an ICL context. In this sense, Steve Odero is surely right in noting that 'the neo-colonial argument can easily be relegated to the realm

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[21] M. Kersten. 'The Africa-ICC Relationship—More and Less than Meets the Eye' (17 July 2015). https://justiceinconflict.org/2015/07/17/the-africa-icc-relationship-more-and-less-than-meets-the-eye-part-1/. Accessed 12 November 2016.

[22] W.D. Smith. 'The International Criminal Court: The Long Arm of Neocolonialism' (1 November 2009) International Affairs Review. http://www.iar-gwu.org/node/87. Accessed 12 November 2016.

[23] At the time of writing, the OTP conducts preliminary investigations with regard to the following situations: Afghanistan, Burundi, Colombia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, Ukraine and the Registered Vessels of Comoros, Greece, Cambodia (on the status of these investigations, see https://www.icc-cpi.int/pages/preliminary-examinations.aspx. Accessed 12 November 2016).

[24] See *Situation in Georgia* (ICC-01/15), Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016.

[25] This is also confirmed by a number of other authors who argue that the allegations are not sufficiently supported by facts (see Fritz, *supra* note 19; Kersten, *supra* note 21 and Jalloh 2009, p. 463).

[26] Those were informal conversations with local people on the matter; they were neither recorded nor empirically evaluated.

of conspiracy theories if not well-posited by its proponents'.[27] It is exactly this indeterminacy and vagueness of the neo-colonialism claim that initially caught the author's attention and motivated him to assess allegations of that kind in relation to the ICC. In this respect, the present book is an attempt to translate the feeling of (neo-)colonial inequality into a legal vocabulary with a particular view to the ICC.

1.2 The Label 'Neo-Colonialism' in Political Discourse

The term 'neo-colonialism', as will be shown in more detail in Chap. 3, was originally used to describe lasting influence of former colonial powers on their former African possessions on the basis of continuing political and economic ties. Today, it appears that the notion of neo-colonialism has transcended the historical context of post-colonial dependencies and is used to describe all kinds of policies allegedly leading to political subordination and economic exploitation of states in the post-colonial era. Along these lines, the intention of China to offer cheap monetary assistance to economically run-down European countries in the aftermath of the financial meltdown in 2008 gave rise to fuel fears of neo-colonial dependence[28] and some commentators even suggest that Southern European countries are being dealt with in a neo-colonialist fashion by the European Union (EU).[29] Moreover, Western states and China frequently accuse each other of pursuing neo-colonialist political strategies in relation to the African continent. As such the U.S., with a view to China's investment policy, warned of 'a creeping "new colonialism" in Africa from foreign investors and governments interested only in extracting natural resources to enrich themselves'.[30] At the same time, China pillories the West's top-down approach to economy and development in Africa and

[27] Odero 2011, p. 154.

[28] See Anonymous. 'The scramble for Europe?' *The Economist* (27 June 2011). http://www.economist.com/blogs/charlemagne/2011/06/china-and-europe. Accessed 12 November 2016.

[29] See, e.g., C. Douzinas and P. Papaconstantinou. 'Greece is standing up to EU neocolonialism' *The Guardian* (27 June 2011). http://www.theguardian.com/commentisfree/2011/jun/27/greece-bailout-eu-neocolonialism. Accessed 12 November 2016; and C.H. Smith. 'Greece and the Endgame of the Neocolonial Model of Exploitation' (19 February 2015). http://www.oftwominds.com/blogfeb15/Greece-neocolonialism2-15.html. Accessed 12 November 2016.

[30] See M. Lee. 'Hillary Clinton warns Africa of 'new colonialism' (06/11/2011)' *The World Post* (08 November 2011). Accessed 9 June 2015. In a similar vein, B. Dennis. 'China's Economic Neo-colonialism in Africa' *NewsFlavor* (17 December 2010). Accessed 9 June 2015.

the Western states' political and military interference in African political affairs as a form of neo-colonialism.[31]

The inflationary (and reciprocal) use of the term in contemporary political and media discourse suggests that the notion of neo-colonialism is seen by politicians as a rhetorical weapon for delegitimising (foreign) policies of political adversaries and, as a corollary, a means of avoiding responsibility for negative effects linked to their own conduct. A similar phenomenon can be observed in relation to post-colonial African governments. More specifically, it is claimed by some commentators that the argument of neo-colonialism is (mis-)used by post-independence African politicians as an excuse for their own failure to run their governments in a responsible way for the benefit of their own people.[32] According to these voices, reference to the term neo-colonialism implies that the root causes for many problems in African states are *unjustifiably* attributed to factors external to the African continent. This understanding, as Tunde Obadina concludes, has wide-ranging consequences for the development of these states: '[t]he fatalistic view that Africa is caught in a neo-colonial straitjacket has hampered the growth of popular political movements for social and economic change in the continent'.[33]

However, assessing the soundness of the above uses of the term neo-colonialism is an endeavour that extends beyond the scope of this monograph and exceeds the competence of the present author, who is a lawyer and not a political economist. Rather, the examples given primarily serve to illustrate the rhetorical power which is inherent to the label 'neo-colonialism'. They also show that the term is used in multiple contexts and subject to different perceptions today. Regardless of their validity in their respective contexts, what all these accusations have in common is that the notion of neo-colonialism is used as an instrument to emotionalise political discussions by (sometimes misguidedly) historicising specific topics.

1.3 The Scope of the Book

The present book sheds light on the claim of neo-colonialism made by African stakeholders and assesses how far one could claim that ICL in general and the Rome Statute in particular promote a form of neo-colonialism. Having an education in a Western legal system, moreover in neutral Switzerland, however, the present author obviously does have not the same practical or emotional connection to the topic of colonialism as people who suffered, or still suffer from this concept of

[31] See H. Chi-Ping. 'Be vigilant against Western neocolonialism' *China Daily* (22 June 2011). http://www.chinadaily.com.cn/hkedition/2011-06/22/content_12747834.htm. Accessed 12 November 2016.

[32] See Gassama 2008, pp. 327–360.

[33] T. Obadina. 'The myth of Neo-colonialism' *Africa Economic Analysis* (23 January 2008). http://www.africaeconomicanalysis.org/articles/gen/neocolonialismhtml.html. Accessed 12 November 2016. In a similar vein, Price 1984, p. 164.

control. In this sense, the present book is not written from an African perspective, but from a Western point of view with a focus on Africa. In other words, the author aims to approach the issue of neo-colonialism objectively without relying on pre-conceptions about neo-colonialism in the context of structural dependencies in post-colonial African states. Because of its manifold usages in present-day political discourse, the term 'neo-colonialism' must thus be carefully defined for the purposes of this book. This requires deconstructing the traditional concepts of colonialism and neo-colonialism and identifying their characteristic elements, in order to re-conceptualise the notion of neo-colonialism from an international criminal law perspective. The resulting understanding of legal neo-colonialism should therefore be considered as a *sui generis*-definition, which takes into account the historical and structural context of colonial and neo-colonial dependencies, as well as the peculiarities and challenges of contemporary ICL.

That said, the reason for confronting the ICC with the neo-colonialism allegation is that any perceived (neo-colonial) bias or selectivity of the Court is threatening its legitimacy and credibility, which is greatly based on a universalistic rhetoric. Although the notion of universal justice in the context of the ICC, due to structural peculiarities and limited resources and capacities available,[34] needs to be defined in its own terms, any *unjustified* (or neo-colonial) selectivity in the enforcement regime jeopardises the very foundation of the Court. However, as will be outlined in Chap. 9, the escape of some violators from effective law enforcement is intrinsic to criminal processes in general and the system of the ICC in particular due to system related imperfections.[35] Therefore, the inequalities produced should be based on rational and objective arguments and not relate to the relative strength of states within the international system.[36] It is in this sense that the present book assesses whether the system of the ICC fosters a neo-colonial dimension and if so, how far a legal neo-colonialism would be attributable to the Court itself. In other words, the classical colonial and neo-colonial dichotomy between powerful and weak states in the context of the prosecution of perpetrators of international crimes is put to scrutiny.

Having explained what this book aims to achieve, it will now be set out how this objective is going to be reached. To eventually be able to conclude whether the ICC conducts a form of legal neo-colonialism, it is first necessary to understand the historical concepts of colonialism and neo-colonialism, to see whether they can be applied in relation to the field of ICL (Chap. 3). Since the historical understanding of neo-colonialism is traditionally not associated with legal implications,[37] the legal dimension of (neo-)colonial relationships is established through reference to the legal strategies of the European colonial powers in their African colonial possessions (Chap. 4). In consideration of the French and the British predominance in

[34] See *infra* Chap. 9, Sect. 9.1.4.

[35] Ibid.

[36] On the structural dimension of the field of ICL, see *infra* Chap. 9, Sect. 9.2.

[37] See Kämmerer 2012, p. 333, para 3.

colonial Africa, this chapter particularly focuses on the French policy of assimilation and the British indirect rule, both of which strategies provided a legal framework for the exercise of colonial rule.

The second part of the book shifts focus towards the domain of ICL and examines the extent to which this discipline is susceptible to the allegation that *Western laws and values*—comparable to the law and order administration during European colonial rule—are imposed on states without their prior approval. This first requires assessing how far the core values underlying the system of ICL—the core crimes—have emancipated themselves from their Western origin and coalesced into universal values over the course of time.[38] Chapter 7 subsequently focuses on the second aspect of the universal value debate, namely whether the system of core crimes is *unjustifiably imposed* on sovereign states. This is necessary since the violation of the sovereignty of a state constitutes an important feature of neo-colonial patterns of suppression. In other words, this part deals with the question whether a purportedly universal law defeats the principle of national sovereignty in the context of ICL and the ICC in particular and, if so, what implications this does have for our definition of legal neo-colonialism?

The third part combines the historical approach with legal analysis, comprising elements of political analysis in the context of interstate patron-client relationships. It starts with customising the understanding of neo-colonialism gained in the first two parts to the peculiarities of the field of ICL (Chap. 9). With this end in mind, Chap. 9 not only reconsiders the pervasive concept of illegitimate asymmetry but at the same time deals with fundamental structural conditions which were established after the Second World War, with the creation of the United Nations Charter (UNC)[39] and the concomitant establishment of the United Nations Security Council (SC). In this section, the concepts of structural power and international political cliency relationships help explain some of the anomalies in the prosecution of international crimes and the derogation from the rational power of the rule of law in the context of international criminal tribunals. The latter concept, in particular, is used as a general pattern to explain how influence exercised by powerful states is extended to friendly client states under the provisions assessed in Chaps. 10–12, which investigate the extent to which the system of the RS fosters a neo-colonial dimension. These final chapters focus on mechanisms inherent to the RS which are potentially subject to manipulation by powerful states, comprising analyses of Articles 13(b), 16 and 98(2) RS.

[38] See *infra* Chap. 6.

[39] Charter of the United Nations (26 June 1945, 3 Bevans 1153, Entry into Force 24 October 1945).

1.4 Limitations and Definitions

Amongst international treaties, the underlying treaty of the ICC—the Rome Statute—is a fascinating product in many respects. It is intriguing to see how the Statute strikes a balance between the sovereign interests of states, parties and non-parties alike, and the interests of the international community in the prosecution of international crimes.[40] However, the ambition to obtain the greatest possible acceptance at the Rome Conference for the establishment of the ICC[41] has at the same time meant that the Statute leaves room to states, again parties and non-parties alike, to exert influence on the way the ICC operates. A popular example to illustrate the leverage of states parties relates to the Court's dependency on these states in cooperation matters, among other things, for apprehending suspects and gathering evidence.[42] Thus, it is maintained by some authors that notably the instrument of self-referral entails the risk that governments may try to (mis-)use the Court to their own political ends 'to target political opponents while protecting themselves from prosecution'.[43] According to Phil Clark, '[t]he ICC's reliance on state co-operation leaves it open to these sorts of domestic political machinations'.[44] Another alleged dimension of state influence adopts an inverse perspective and pertains to the ability of powerful states to prevent the application of the RS against certain categories of nationals altogether.[45] In other words, the latter kind of influence is not related to selectivity within a situation under scrutiny but to the presumption that powerful states are in a position to shield their nationals from being subjected to the jurisdiction of the ICC. This form of selectivity, as we learned in the previous section, allegedly implies that the system of the ICC is directed only against nationals of weak states.[46]

In what follows, and this is also reflected in the selection of provisions assessed in Part III, the focus of this book exclusively lies on the latter dimension of selectivity. This is particularly because the historical concepts of colonialism and neo-colonialism are similarly based on the dichotomy between powerful and weak states. Moreover, the selection of cases within a single situation, as will be shown in detail in Chap. 9, is less relevant in structural terms because the OTP, following a state party referral or on the basis of the prosecutor's *proprio motu* powers, is bound to observe legal—as opposed to illegitimate—criteria in deciding whom to prosecute and whom not.[47] In addition, although a government, in the case of a

[40] On the scope of (complementary) ICC jurisdiction, see *infra* Chap. 7, Sect. 7.2.

[41] See *infra* Chap. 6, Sect. 6.4.1.

[42] The cooperation between states and the ICC is ruled in Part 9 of the Rome Statute (International Cooperation and Judicial Assistance).

[43] See Clark, *supra* note 20.

[44] Ibid.

[45] See *infra* Chaps. 10–12.

[46] See Kezio-Musoke, *supra* note 10.

[47] See *infra* Chap. 9, Sect. 9.1.4.

self-referral, has a structural advantage over non-state actors in terms of cooperation with the Court, it also makes itself vulnerable to ICC prosecution by transferring criminal law enforcement competences to the Court.[48] However, as we saw from Phil Clark's previous statement, it should be noted that the OTP's selection pattern within single situations has similarly attracted allegations of one-sided and politicised prosecution.[49]

It should also be emphasised that the author exclusively examines whether the *Rome Statute* fosters a neo-colonial dimension. Accordingly, the following analysis is in so far incomplete as the performance of national jurisdictions, which have the primary responsibility for prosecuting international crimes subject to the Rome Statute,[50] is not taken into account. However, the argument advanced is not affected by this omission because exercising jurisdiction at a national level does not defeat the structural inequalities which are inherent to the system of the RS. In this context, it is also noteworthy that the author, in Chaps. 10–12, repeatedly makes use of the term immunity. The usage of this term should *not* be understood in the sense of general immunity from international crimes prosecution but rather as immunity from ICC prosecution only.

From the preceding discussion, it becomes clear that the book makes use of the historical concepts of colonialism and neo-colonialism to receive an understanding of the definitional elements of these concepts in order to apply them to the field of ICL. The historical part thus serves setting the framework within which the subsequent argument is developed. In this sense, the historical analyses, by merely presenting historical facts which are then transformed into an ICL environment, are only descriptive and not designed to contribute towards a new understanding of the historical concepts of colonialism and neo-colonialism. In addition, although the topic discussed obviously has also a political dimension, the author, by deconstructing the concepts of colonialism and neo-colonialism, primarily aims at understanding the structural dimension of these concepts. This is above all because the present book is keen to avoid being seen as a political manifesto. In this sense, the author, in particular in Chaps. 10 and 11, also refrains from delving too deeply into country specific political discussions in the contexts of Chapter VII evaluations and the (non-)application of Articles 13(b) and 16 RS by the SC.

Having taken the prosecutorial focus of the ICC on African situations and cases as a point of departure, it remains to be noticed that the author has focussed throughout the book on the African cause. Starting with the historical analysis of

[48] Ibid.

[49] These allegations, amongst others, were raised with regard to the situations in Uganda, the Democratic Republic of Congo (DRC) and Ivory Coast. See, e.g., M. Kersten. 'In the ICC's Interest: Between "Pragmatism" and "Idealism"' (16 July 2013). http://justiceinconflict.org/2013/07/16/in-the-iccs-interest-between-pragmatism-and-idealism/. Accessed 12 November 2016; and Human Rights Watch. 'Unfinished Business: Closing Gaps in the Selection of ICC Cases' (September 2011). https://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf. Accessed 12 November 2016.

[50] The principle of complementarity is explained in *infra* Chap. 7, Sect. 7.2.1.

European colonialism on the African continent, the concepts of colonialism and neo-colonialism, with additional reference to the Latin American *Teoría de la Dependencia*, are elaborated in an African context. In keeping with this historical focus, furthermore, the assessment of the development of a number of universal core crimes specifically focuses on the position of African political entities such as African states or the African Union. However, despite focusing on the African cause, it should be emphasised that the findings obtained are not only valid for African countries but for states from other regions of the world as well which can be classified along the powerful-weak state dichotomy.

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Part I
The Historical Concepts of Colonialism and Neo-Colonialism

Chapter 2
Introduction Part I

Abstract Part I, comprising two chapters, is concerned with historical analyses of the concepts of colonialism and neo-colonialism (Chap. 3), including an assessment of the role of law during European colonialism on the African continent (Chap. 4).

Keywords European legal colonialism · Neo-colonialism · Colonialism · Structural Power · Expansion · Latin American Dependency Theory

Contents

Having outlined in the introductory chapter how the term neo-colonialism is used in present-day political discourse, we now turn to the historical analyses of the traditional concepts of colonialism and neo-colonialism. More specifically, this section aims at identifying characteristic elements of these historical concepts to reflect on how these notions can later be used in a contemporary ICL context.

What both colonialism and neo-colonialism have in common is that they are used to describe formal or informal influence exercised by a number of powerful states in some other parts of the world.[1] The literature on these concepts of domination is extensive and authors, depending on the specific historical context, often rely on different labels to describe the dichotomy between the different actors involved in these processes of expansion and subordination. In the context of colonialism, the colonial powers themselves often relied on the difference between civilised and barbaric societies or between industrialised and backward states.[2] A more modern description, which was used to describe Latin American dependency-relationships, relied on the difference between developed and

[1] See *infra* Chap. 3, Sects. 3.1 and 3.2.
[2] See *infra* Chap. 3, Sect. 3.1 and *infra* Chap. 4.

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