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### INTERNATIONAL CRIMINAL JUSTICE

# POWER POLITICS AND ITS GLOBAL SHADOWS: FROM MARGINS TO CENTER

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*Rough Justice: The International Criminal Court in a World of Power Politics* is an eloquently articulated book about international criminal law and American unipolar power in the twenty-first century. Combining international relations (IR) scholarship with an unprecedented mapping of the conceptualization, growth, and crystallization of international criminal justice, author David Bosco tells a story about the play of power amongst “powerful states” as it relates to the formation and development of the International Criminal

Court (ICC). By taking up the way that IR and legal scholars have conceptualized the workings of globally dominant state powers – especially in dealing with international organizations they do not formally control—the book explores the ways that major state powers have approached the ICC with either “marginalization” or “controlling” behavior. Moving beyond Robert Keohane’s classic theory (1984) that repeated interactions can produce rational cooperation, Bosco invokes the work of IR scholars, Barbara Koremenos, Charles Lipson and Duncan Snidal to argue that while the spectrum of state behavior – ranging from active marginalization, to control, and acceptance – can be deployed to manage the ICC, western states such as the United States have used forms of mutual accommodation to neutralize the threats of ICC encroachment. Bosco argues that major state powers have attempted to control the ICC (by engaging formal mechanisms such as the UN Security Council or informal diplomatic measures). In this way, the Court has become an instrument for “major powers” to respond to the instability of “weaker states”.

Yet, as much as Bosco’s conceptualizations of influence, decision-making, and the politics of state behavior are laudable, his trajectory reflects the workings of certain forms of power and does not fully take into consideration a large part of the story. By distinguishing between national states according to categories such as “strong” and “weak,” he sets himself up to miss nuances that are actually critical to how power and influence work in formal and informal settings. For example, once we recognize that the story of the origins of ICC justice is not simply one about the power of “strong” and “weak” states, we begin to understand international relations in more complex ways. We are called to make sense of the force of law, the play of sub- and supra-state power, and the relevance of political economy in the messy engagements between the Global North and the Global South.

Bosco begins his book with an inquiry into why and when so called “powerful” states joined or did not join the Rome treaty system. He spends very little time, despite the ICC’s Africa focus, exploring why those African states that eventually became the subjects of ICC investigations joined the treaty. Instead, he describes how political jockeying among Western states after Nuremberg and during and

after the Cold War was key to contemporary state behavior among “strong states”. For Bosco, politics and control of the ICC is pivotal. He described crimes that were defined under the subject matter jurisdiction of the Court in the following way: “Efforts by some states to include crimes that had not been clearly defined internationally, including terrorism and drug trafficking, failed” (52). However, an investigation into why economic crimes failed and what that failure meant in relation to the de facto immunity of various Western states is critical to a full appreciation of the story. The identification of certain core crimes in the Rome Statute is consequential: whether the core crimes were spectacular and individuated crimes or economic crimes like drug trafficking is relevant to what ultimately comes under the Court’s jurisdiction. Rather than reading the construction of Rome Statute crimes as revealing broader political interests, however, Bosco instead takes up questions concerning the structure of the Court that are based on an acceptance that its subject matter jurisdiction occurs outside of the political. This assumption, that the making of the subject matter jurisdiction of the Court is separate from the play of politics, appears to establish his comfort with ICC crimes as political and individually driven rather than enabling crimes involving multiple economic interests, Western and non-western, rebels or democratically elected, and this orients his analysis of the brute forms of *justice* that are underway in the first decade of the ICC’s existence.

Because political economy and micro-politics of power are bracketed in *Rough Justice*, African resource-driven violence is relevant only insofar as it relates to Africans becoming subjects of the Court. What is missed – as a result – are the economic drivers of conflict and those Western interests that are being protected. Instead, the book asserts that the statute gave the Court jurisdiction over four crimes: aggression, genocide, war crimes, and crimes against humanity. These crimes are classified as those already elaborated in international law and therefore enjoying widespread acceptance. In the end, Bosco highlights the fundamentally “political” aspects of those crimes but stops short of analyzing the conditions of legal possibility by which African states became subjects of the ICC. Through his focus on the negotiations of major powers he forecloses the relevance of African states in ICC deliberations. Yet, it is the “powerful states”

that shaped the conditions in which African states rather than European states became subjects of the Court, and in the shadows were a range of other crimes, enabling crimes, that Bosco dismisses without comment. And herein is the surprising absence in *Rough Justice*: the link between resource struggles that contributed to violence and the conditions of possibility in which enabling crimes fell outside of the Court's orbit.

It is not possible to tell the story of the contemporary ICC and focus on the negotiations of Western powers without making connections between Western resource interests, plunder, and endemic violence. Despite the focus of *Rough Justice* on Western state power and its relationship with international institutions, the macro-story is actually one of continuities in economic disparities and the workings of broader structures of power. It is true that Northern states remained outside of the reach of the Court for all of the reasons that Bosco explains. However, such instances of inequality are not marginal to the play of international power. Rather, they are central to the way that African leaders or African rebel leaders and not US or French or British leaders became pivotal to the ICC's exercise of personal jurisdiction. This analytic gap is compounded by the missing explanations of why a regional majority of ICC state parties joined the ICC in the first place. In fact, it was not the spirit of Nuremberg that inspired the moral impetus of African-ICC involvement. Rather, the Rwandan genocide and the euphoria of post-apartheid South Africa contributed to the mobilization of African interests in setting up a body that might deter such mass violence in the future. Further, many African states joined the ICC treaty system based on the formal and informal pressure of Western states, institutions, and civil society groups. Western state actors tied international treaty participation to monetary lending; signing treaties like the Rome Statute were used as statistical indicators for predicting various state economic outcomes. From state stability, state fragility, and the probability of violence, such measures helped to propel new rule-of-law institutions and contributed to the conditions under which submission to international treaties was initially welcomed by many states, as it allowed for the renewal of various aid package and loan renewals. With the shift to new linkage measures that connected demonstrations of good governance and the

renewal of critically important loans (from the International Monetary Fund and the World Bank for example), signing international treaties became an indicator of good governance measures and was increasingly represented as state sanction of the new international order. These realities are critical to understanding the increasing significance of African states in the exercise of *Rough Justice*, and their absence from Bosco's analysis is curious.

Africa enters Bosco's analysis in relation to African violence seen as separate from Western interests. However, the violence in Africa pursued by the ICC, is not simply a narrative of violence begetting more violence. The discovery and extraction of natural resources like oil, diamonds, and gas has compounded situations of armed conflict across the African continent. Oil-rich Nigeria, for example, experienced ten successive military coups beginning in 1966, just a few years after independence and immediately following the discovery of its reserves. The struggle to control Nigeria's government has always been in large part a struggle to control its massive resources. Minimal attention was given to developing state institutions. Instead, a highly centralized federal body with little to no accountability formed in its place. This is a pattern repeated across the continent. So it isn't surprising that the race for political control in many African countries has led to electoral violence, and in some cases the development of rebel groups vying for political influence and the control of various extraction industries. The recent histories of the Democratic Republic of the Congo, Somalia, Liberia, Nigeria, Uganda, Sierra Leone, and Congo-Brazzaville all fit this trajectory – each with various international companies, rebel groups and governments deeply embattled in controlling resource extraction across Africa. In ICC 'situation countries', the reality is no different. From oil to coltan to various diamonds, gold and timber, the control of natural resources has been amongst the most important factors in Africa's major conflicts. In the DRC, attempts by various actors to gain control over gold, coltan, and tin extractions such as tantalum and tungsten – used in commercial cellular phones, ipods, digital cameras and video recorders – continues to drive this complex conflict, drawing in neighboring states such as Rwanda that are backed by Western powers. Amongst the most central resource is oil; African states account for close to twelve percent of the world's oil

with large amounts being extracted from Nigeria, Cameroon, Equatorial Guinea and North Africa, as well as Sudan, the DRC and Chad – all regions that have recently experienced related conflict. Similarly, control of the Central African Republic and the DRC's diamonds are also central to two of the ICC's situation countries. Foreign multi-national corporations have been involved in extracting minerals in addition, to various African rebel groups engaged in fighting for control of those resources or selling them illegally. These realities demonstrate the relevance of highlighting economic crimes, such as pillage, alongside those seen as more spectacular such as genocide, crimes against humanity, war crimes and the crime of aggression. They also call into question the modes of liability for such violence that became framed through the individualization of criminal responsibility.

The second absence in *Rough Justice* is the relevance of the anti-ICC response by African states as a critical component of the play of power in the past six years of the Court's existence. Since the warrants of arrests issued by President al-Bashir in Sudan and subsequent African leaders, as the basis for their growing opposition to ICC interventions, various African leaders began to criticize publicly the ICC for its partiality and selectivity of African defendants as well as for the *de facto* immunity enjoyed by the West. Yet, Bosco's timeline ends at the moment when a new development is underway in international relations jockeying – namely, the Africa-ICC push-back. Contrary to his 10-year analysis that focuses on the US and P5 power, developments have taken shape since 2012 by which the Court has started to take the objections of African states more seriously. Most notably, the Court's second Prosecutor, Fatou Bensouda, as well as a large group of States Parties, have called for "a dialogue" with the AU and with individual African states.

The election of Uhuru Kenyatta and William Ruto as President and Deputy President of Kenya in March 2013 has shifted the African landscape as it relates to the ICC. In the fall of 2013, the commencement of Ruto's trial and Kenyatta's pre-trial hearing generated such political turmoil that the Court and its States Parties were forced to respond. At the 2013 Assembly, States Parties 'gave in' to one of the AU's demands by amending the Court's rules on presence at trial for

those accused before the Court who also fulfill extraordinary public duties at the highest national level—such as sitting Heads of State. As a result of perceptions of inequality, various African states criticized the ICC and called for amendments to the Rome Statute, insisting that sitting Heads of State should become immune from prosecution by the Court.

African leaders have also expedited the process of establishing the African Court of Justice and Human and People's Rights (African Court). This involved extending the jurisdiction of the African Court to include a range of transnational crimes and introducing modes of liability that include individual and corporate liability. The result was the early formation of an 'African Criminal Court', which expands punishable crimes from crimes against humanity, war crimes, genocide, and the crime of aggression to those seen as relevant to Africa's economic resource wars and illegal economies. The expansion of punishable crimes includes piracy, mercenarism, terrorism, corruption, illicit exploitation of natural resources, money laundering, the crime of unconstitutional change of government, and the trafficking of drugs, persons, and hazardous waste. These developments, as well as the reality of economic drivers of conflict, are central to the play of power in international institutions— not peripheral to it. They are an example of the workings of itinerant forms of power that prove difficult to trace within the "strong" state paradigm that Bosco's analysis employs. To capture the complexity of the ICC's work and the broader political economy in which it operates, we must carve out conceptual spaces for understanding human action and behavior that are not tied to rational cognitive processes leading to mutual accommodation, but that instead capture the inchoate and messy responses to international law. These responses reveal other assemblages that are as central to how "rough" justice can be when justice is understood through the conditions of possibility, the entanglements of interests, and the real effects of power.

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