1. Intersections of law and culture at the International Criminal Court: Introduction

Julie Fraser and Brianne McGonigle Leyh

On a rudimentary level, culture is often seen as the shared ideas and values of a community,[1] and law as institutionalising and enforcing the norms of a society's culture.[2] Yet, while this view of the relationship between law and culture may serve in small-scale, relatively homogeneous societies, our modern complexity asks for a deeper inquiry into the intricacies of these intersecting, mutually constitutive concepts. 'Culture' denotes a set of ideas far more complex than only shared understandings and practices, and laws are more than a means to enforce cultural norms in that they also 'revise and reshape' culture,[3] and are themselves part of culture.[4] Despite this, law and culture are often divorced, estranged, or even pitted against one another as antithetical. This dichotomy is most observable from a legal perspective.

With some notable exceptions, law and culture are often studied in separate academic disciplines with limited interactions between the scholarship. However, as revealed especially in practice, law and culture cannot be addressed so independently as this positioning undermines our understanding of how they connect, contest and influence one another. We are in an era where an increasing awareness of positionality, identity and structural power relations invites us to uncover the nuanced entanglements of law and culture as revealed in different contexts. This edited volume takes up that invitation and explores the intersections of law and culture at the International Criminal Court (ICC or the Court).

As in domestic criminal systems, as well as other international(ised) systems, questions of 'culture' raise important issues for the ICC. Such issues relate to

[1] Robert Post, 'Law and Cultural Conflict' (2003) 78 Chicago Kent Law Review 485, 490–92.

[2] Patrick Devlin, *The Enforcement of Morals* (OUP 1965) 10.

[3] Post (n 1) 488.

[4] Naomi Mezey, 'Law as Culture' (2001) 13 Yale Journal of Law and the Humanities 35. See, for example, the scholarship of Max Weber and Emile Durkheim.

the substantive charges brought against the accused and their defences, to the operation of the criminal process, the scope and content of victim reparations, and even the organisational culture of the Court's day-to-day functioning. However, these issues often go unaddressed, or even unacknowledged, as culture is so deeply embedded in one's identity and consciousness[5] that cultural codes can easily be overlooked or mistaken as objective/neutral by those positioned within their frameworks. In the context of the ICC, the failure to acknowledge and understand the symbiotic nature of law and culture becomes more urgent due to the Court's position of power, impacting many through the narratives it creates and upholds. In fact, the ICC's position of power has come under fire in recent years, partly due to strong counter-narratives that invoke 'culture' in an effort to discredit the Court, leaving it in a crisis of legitimacy.[6]

This book is the first comprehensive volume to directly address these questions of 'culture' at the ICC, exploring in theory and practice how notions of 'culture' impact the Court's legal foundations, functioning and legitimacy. With chapters from scholars as well as practitioners, this multi-disciplinary volume contributes important insights on the often implicit and overlooked role of 'culture' at the ICC. The book exposes and explores the myriad ways in which cultural aspects arise in the Court's founding legal texts, operations and deliberations, as well as its position as an international institution. Given the Court's mandate and potentially global reach, culture plays an important role in its work and will continue to do so going forward. Each new preliminary examination and case at the Court necessarily brings with it a host of issues to be addressed, including languages, traditions and beliefs that impact upon the criminal justice process. As such, this book not only looks back at the last 20 years of the Rome Statute system, but also forward to the years ahead.

1. UNDERSTANDING 'CULTURE' AND 'LAW AS CULTURE'

The first thing that requires explication is our understanding and use of 'culture' throughout this volume. While an agreed definition across the numerous fields

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[5] Abdullahi Ahmed An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1992) 23.

[6] See, for example, Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia' (2018) 29(1) Criminal Law Forum 63.

of enquiry remains elusive,[7] 'culture' can generally be seen to encompass the complex features that characterise a society/social group, including its modes of life, languages, value systems, traditions and beliefs.[8] According to the anthropologist Clifford Geertz, culture signifies 'a system of inherited conceptions expressed in symbolic forms by means of which men [*sic*] communicate, perpetuate, and develop their knowledge about and attitudes towards life'.[9] Rather than being inert or monolithic, cultures are 'unbounded, contested, and connected to relations of power … marked by hybridity and creolization rather than uniformity or consistency'.[10] Culture is then both a system of meaning – by which individuals define the world through a particular lens – as well as the practices that reproduce and/or contest that system. Accordingly, culture is always in a state of flux.[11] It is therefore a paradox that culture combines stability (or the perception of it) with persistent dynamism.[12]

On this basis, scholars have critiqued essentialised portrayals of culture in international law as static and homogeneous.[13] For example, references to traditional African or Asian societies tend to present cultural notions, their informal institutions, and practices as fixed, whereas cultures are in fact 'eclectic, dynamic, and subject to significant alteration over time'.[14] Merry notes the tendency in human rights discourses particularly to view culture as an

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[7] Hans Schoenmakers, *The Power of Culture: A Short History of Anthropological Theory about Culture and Power* (University of Groningen 2012) 50.

[8] See, for example, the preamble of the UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO in Paris (2 November 2001); UNESCO Mexico City Declaration on Cultural Policies, adopted at World Conference on Cultural Policies Mexico City (26 July–6 August 1982). See also the Fribourg Declaration art 2(a): '"culture" covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meanings they give to their existence and to their development'. Fribourg Declaration on Cultural Rights (adopted in Fribourg, 7 May 2007).

[9] Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 89.

[10] Sally Engle Merry, 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)' (2003) 26(1) Political and Legal Anthropology Review 67.

[11] Mezey (n 4).

[12] An-Na'im (n 5) 27.

[13] Post (n 1) 490–92; William Twining, 'Legal Pluralism 101', in Brian Tamanaha, Caroline Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (CUP 2012) 118. In contrast see UN ESCR Committee, General Comment No. 21: The Right of Everyone to Take Part in Cultural Life, E/C.12/GC/21 (21 December 2009) paras 11–13.

[14] Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22 Human Rights Quarterly 841.

ancient practice, as something backward or primitive.[15] In this way, 'culture' is portrayed as an obstacle to human rights (which is itself a cultural project).[16] These misconceptions contribute to the othering of culture as something practised by distant (read backward) communities 'in the field' or 'on the ground', as well as the invisibilisation of other cultural norms.[17] The ubiquity of culture is frequently under-appreciated, with the Special Rapporteur in the Field of Cultural Rights having to reiterate: 'Culture permeates all human activities and institutions, including legal systems, in all societies across the world.'[18] Therefore, a more nuanced perspective of culture needs to be adopted in such discourses.

The editors of this volume take the view of law as an expression of culture, drawing heavily from anthropology. From this perspective, culture includes a community's responses to norm-breaking behaviour – which in contemporary societies tends to translate into institutionalised legal systems. In this way, law can be seen as an expression of a cultural attitude towards communal challenges surrounding norm-breaking, power, discipline and security. This perspective emphasises the mutually constitutive nature of law and culture. As a corollary, if a cultural attitude is not shared, it will impact upon the way in which the law, the legal process and the fairness of an outcome are perceived. Another common perspective juxtaposes law and culture as two distinct spheres in need of either separation or reconciliation. As seen above, law is frequently presented as neutral, objective and independent of cultural concerns. This perspective, which, taken to an extreme, can result in reified and essentialist understandings of culture, underpins many approaches to 'culture' and the ICC. This is not unique to the ICC nor to international criminal law as the predilection to downplay particularity and highlight universality is characteristic of international institutions and law in general.

2. THREE KEY DEVELOPMENTS IN INTERNATIONAL LAW

International law is grounded in sources, customs and principles that are primarily meant to stabilise relations among States through mutual agreement about acceptable and desirable State behaviour.[19] As developed and applied

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[15] Merry (n 10) 58, 60.

[16] Julie Fraser, *Social Institutions and International Human Rights Law: Every Organ of Society* (CUP, 2020) 62.

[17] ibid.

[18] UN General Assembly (UNGA), Report of the Special Rapporteur in the Field of Cultural Rights, A/67/287 (10 August 2012) para 2.

[19] Anders Henriksen, *International Law* (second edition, OUP 2019) chapter 1.

around the world, it is (largely) presented as not limited or bound by a particular value system or culture. Whether regulating international trade, dispute settlement, or armed conflict, the agreed-upon international rules are seen as applicable to all situations and States regardless of their diversity.[20] Although law can be and has been used to reinforce authoritarian rule, legitimise unequal power relationships, and authorise the discrimination or destruction of entire peoples, it is, nevertheless, seen as way to bring about order in an otherwise disorderly world. Nevertheless, the inadequacies of the international legal order became glaringly apparent in the lead-up to and during the Second World War and the Holocaust. The response to these shortcomings, however, was not abandoning law in favour of other responses, but rather to bolster international law through the proliferation of laws and legal institutions. From international trade to peace and security, the international law movement grew under the UN and other regional developments. As Mazower noted, 'the revival and reinvigoration of international law thus emerged as the natural adjunct to liberal concern for world peace and, in particular, for the safeguarding of human rights'.[21]

Three important legal developments occurred during this time, each of which has profoundly impacted the scholarship on law and culture at the ICC. The first development concerns the birth of modern international criminal law itself after 1945, with the creation of the Nuremberg and Tokyo Military Tribunals as well as other post-war criminal processes.[22] A significant aspect of this development was the fact that States from diverse philosophical perspectives agreed that domestic and international criminal legal processes were suitable and desirable to address the human rights and humanitarian law violations. Another significant aspect of this development was the repositioning of the individual as a subject of international law. This meant that individuals, along with States, have obligations under international law and can be held accountable for violating them, including the prohibition of war crimes, crimes against humanity, crimes against peace (aggression), and later genocide. The phenomenon of States and legal professionals coming together to agree common understandings of the prohibited acts, the rules of procedure and evidence, and the application of the laws was truly remarkable. The

[20] Differentiated responsibilities are an exception to this general rule. See, for example, Sabrina Safrin, 'The Un-Exceptionalism of US Exceptionalism' (2008) 41 Vanderbilt Journal of Transnational Law 1307, 1342–50.

[21] Mark Mazower, *Dark Continent* (Penguin Books 1998) 200.

[22] See Beth van Schaack, 'A Concise History of International Criminal Law: Chapter 1 of Understanding International Criminal Law' (2009) Santa Clara University School of Law, Legal Studies Research Papers Series No 07-42, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016152, accessed 17 January 2020.

Tokyo Tribunal alone had almost a dozen States working together, providing judges and prosecutors, with the common endeavour to address serious crimes through international criminal law.[23]

The second important legal development at this time was the growth of the international human rights movement, beginning with the passage of the Universal Declaration of Human Rights (UDHR) in 1948.[24] Through the UDHR, States recognised internationally for the first time the inherent rights and dignity of individuals vis-à-vis the State. The premise of the UDHR, and all subsequent human rights instruments, is that human rights are universally applicable. Yet, from the beginning, questions arose about the claimed universal nature of human rights. The American Anthropological Association (AAA) warned the UN 'against adopting a universal bill of rights that did not attend to cultural particularities'.[25] This argument is compelling as it stresses that tolerance and respect for cultural difference is an important consideration in the pursuit of a global legal order.[26] In fact, the AAA's Statement was made in the context of colonialism and the predominant belief at the time of the superiority of Western culture and biology.[27] Already at this nascent stage, scholars were cautioning against a view of law as separate from culture, and the possible incompatibility of this type of normative legal system with different cultural particularities around the world.[28]

The last important development following the conclusion of the Second World War relevant for examinations into international law and culture was decolonisation. The causes of decolonisation are complex (including financial, military and political-ideological reasons),[29] but what is clear is that the result

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[23] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011) 135–36.

[24] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

[25] Karen Engle, 'From Skepticism to Embrace: Human Rights and American Anthropological Association 1947–1999' (2001) 23 Human Rights Quarterly 536, 537. Regarding the contemporaneous human rights survey undertaken by UNESCO, see Mark Goodale (ed), *Letters to the Contrary: A Curated History of the UNESCO Human Rights Survey* (Stanford University Press 2018).

[26] Fraser (n 16) 26.

[27] 'That belief had earlier permitted slavery in the United States and had supported the colonialism that still existed in 1947.' Karen Engle, 'Culture and Human Rights: The Asian Values Debate in Context' (1999–2000) 32 New York University Journal of International Law and Politics 308. Renteln notes that 'relativism was introduced in part to combat these racist, Eurocentric notions of progress'. Alison Dundes Renteln, 'Relativism and the Search for Human Rights' (1988) 90(1) American Anthropologist 56, 57.

[28] Merry (n 10) 57.

[29] Mazower (n 21) 383.

was a large wave of societies around the world asserting their self-determination. It certainly enabled (at least modestly) a larger number of perspectives to be voiced and heard on the international stage as newly independent States.[30] Yet, the new voices were very often subjected to agreements already in place, as well as the geo-political realities dictated by the Cold War, resulting in reliance on former or new imperial powers for economic and military support. Breaking with the colonial past is an ongoing project that involves dismantling structures of imperialist thinking that covers everything including State structures and cultural identities. Postcolonial and Third World Approaches to International Law (TWAIL) scholars have dedicated enormous intellectual energy to identifying the various political, economic and cultural biases embedded in the project of international law.[31]

Importantly, all three of these developments in international law are ongoing. International criminal law continues to expand through the proliferation of norms and courts, most notably the creation of the world's first permanent international criminal court by the Rome Statute in 1998.[32] Human rights law continues to evolve and expand, becoming more inclusive – although still contested. More than 70 years after the UDHR, rights continue to be challenged, most recently by the reappearance of populism. Decolonisation efforts continue to make progress, urging a re-examination of norms, institutions and epistemologies, including human rights and criminal justice. International law has played and continues to play a central role in all of these areas. As is characteristic of culture, international law too is dynamic and contested. While it can be seen on the one hand as a stabilising factor throughout the decades of change, on the other hand it can also operate as a hegemonic tool to dominate and exclude. Throughout this volume, contributors grapple with these developments and their implications to interrogate how notions of culture impact the multifaceted work of the ICC.

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[30] The greatest influx of States to the UN was in the 1960s with several African States joining, and in the early 1990s following the collapse of the Soviet Union. See UN, Member States, 'Growth in United Nations membership 1945-present', www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html, accessed 22 February 2020.

[31] The TWAIL project relates to understanding how 'colonialism and imperialism and their ways of knowing have been crucial to the formation and practice of international law as a discipline'. Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3(1) Trade, Law and Development 104, 117. See also Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43(1&2) Osgoode Hall Law Journal 177.

[32] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9 (Rome Statute).

3. 'CULTURE' AND THE INTERNATIONAL CRIMINAL COURT

While the ICC is presented as a legal institution that objectively applies international law, the chapters in this volume demonstrate how the Court and international law are much more culturally particular than as portrayed to the outside world. For example, as an international organisation with 123 States Parties, the ICC operates in a culturally diverse environment with staff representing some 100 nationalities[33] and situations being addressed in more than a dozen localities. This diversity presents challenges (as well as opportunities), including in relation to language and communication. Additionally, due to the right of defendants to receive information in a language they fully understand, the Court's Registry has a large translation and interpretation section working in languages such as Lingala, Sango and Zaghawa. This raises many multilingual issues as explored by Leigh Swigart in her ethnographic research in Chapter 2. She notes that while the presence of, and need to communicate in, many languages may be obvious to those involved in the work of the ICC, the multiplicity of cultural understandings and stances that are a corollary to linguistic diversity may be less obvious. The contributors to this volume address not only the more visible aspects of 'culture' at the ICC, but also highlight and interrogate those less visible.

We have identified three levels of 'culture' that manifest in the work of the ICC. First is the micro level, where different individuals and cases come into contact with the ICC. Such individuals may be those accused, as well as potential victims and witnesses of the crimes. The second is the meso level of the organisational culture of the ICC itself. The Court has grown from small beginnings two decades ago, with prosecutors, judges, and registrars elected, rules of procedure adopted, and buildings erected. Over these years, its staff, operations and procedures have given rise to a set of shared understandings and practices. Finally, the third macro level is the global reach and legitimacy of the ICC as it positions itself as an authoritative cultural agent in a world of difference. Although the notion of 'culture' could become so definitionally overstretched that it is a 'vague abstraction',[34] this book adopts a broad understanding of the term. Contributors were encouraged to articulate their

[33] ICC, 'Report of the Bureau on equitable geographical representation and gender balance in the recruitment of staff of the International Criminal Court' ICC-ASP/18/26 (2 December 2019) paras 9, 16–21. This report notes the over-representation at the Court of nationals from the Western European and Others Group (WEOG).

[34] AR Radcliffe-Brown, 'On Social Structure' (1940), reprinted in AR Radcliffe-Brown, *Structure and Function in Primitive Society: Essays and Addresses* (The Free Press 1952) 190.

conceptions of 'culture' and how it relates to law generally and to international criminal law as practised at the ICC in particular. The chapters are arranged in four sections, addressing cultural elements in (1) the Court's substantive crimes; (2) its proceedings; (3) defences, sentencing, and victim participation and reparation; and (4) the wider geo-political context.

4. SUBSTANTIVE CRIMES AND CULTURE

Culture has been raised explicitly in cases like that of Mr Al Mahdi. He was the first person to be accused and plead guilty to the war crime of attacking historic and cultural monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali.[35] Such cases raise questions regarding how international criminal law can be used to protect cultural heritage, to deter crimes against it, and how it can contribute to repairing damage to victims. It also illustrates how the ICC is now operating in the same space as cultural actors like UNESCO. Peta-Louise Bagott's chapter examines this case and distinguishes the destruction of cultural property during military hostilities from its deliberate destruction outside of such a context. She identifies a gap in the Court's legal framework and proposes a new crime against humanity that prohibits the destruction of tangible cultural heritage beyond the context of war.

In their chapter, Kelly Breemen and Vicky Breemen also address cultural heritage destruction by focusing on libraries and the human rights dimensions of such destruction. They argue that given the intent of UNESCO and the ICC to strengthen their cooperation in the protection of cultural heritage in times of conflict,[36] and given the role of libraries in promoting peace,[37] the place of cultural heritage destruction in the work of the ICC should be a priority area. Martyna Fałkowska-Clarys and Lily Martinet take these arguments further by addressing the under-studied notion of intangible cultural heritage, including songs, dances, lace-making, building techniques, and rituals. While outside the text of the Rome Statute, they examine the extent to which damage to

[35] The Prosecutor v. Ahmad Al Faqi Al Mahdi (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016) para 30 (*Al Mahdi*).

[36] See UNESCO, 'International Criminal Court and UNESCO Strengthen Cooperation on the Protection of Cultural Heritage' (6 November 2017), https://en.unesco.org/news/international-criminal-court-and-unesco-strengthen-cooperation-protection-cultural-heritage, accessed 15 February 2019.

[37] See, for example, the International Federation of Library Association's article on libraries building and supporting peace through understanding, inclusion, healing and remembrance, https://www.ifla.org/publications/node/81664, accessed 15 October 2018.

intangible cultural heritage can be used in determining constitutive elements of crimes, the gravity threshold, or the extent of harm to victims for the purposes of reparations.

Alison Renteln provides an analysis of sexual violence in international criminal law in her contribution. She begins by tracing the global social movement that led to the inclusion of provisions in the Rome Statute explicitly mentioning sexual violence, before examining how the Court has dealt with such crimes in its jurisprudence. While scholars have been critical of the ICC's approach, including the definition of gender in the Rome Statute and the Court's narrow interpretation of sexual violence, Renteln argues that the ICC's focus on sexual violence is a dramatic improvement in international criminal law.

5. PROCEEDINGS AND CULTURE

Organisational culture is evident in all of the organs of the Court and impacts upon their processes, policies and decision-making. Cale Davis examines in his chapter the prosecutorial culture at the ICC and how it influences the Office of the Prosecutor's exercise of their broad discretion. He identifies and explains 'doing justice' as a core value of the Prosecutor's Office, based upon his personal interviews with over 30 current and former international prosecutors. Gregor Maučec's chapter complements this analysis by focusing on the judiciary. He examines cultural sensitivity and bias in judicial decision-making at the ICC. Without understanding culture-specific norms regulating the transmission of knowledge, as well as taboos and inhibitions, international judges risk making erroneous assessments of evidence. Maučec advocates an increased role for cultural experts to enhance the judges' awareness of the cultural context before them, as well as their own cultural biases.

Given the diversity of witnesses testifying before the ICC, culture is an important factor in taking testimonial evidence that can impact upon fact-finding and credibility. Joshua Bishay is critical of the general solemn oath or 'undertaking' that witnesses must take before testifying, and proposes that the Court facilitate witnesses using a meaningful oath from their own cultural framework, which may impact positively upon truth-telling. Delving into the transcripts of the *Katanga* case from the Democratic Republic of Congo, Suzanne Schot examines the socio-cultural aspects of the testimonial evidence given, and considers the ways in which this impacts the judges' interpretation of the facts as well as the credibility of witnesses. Similarly, Adina-Loredana Nistor, Andrew Merrylees, and Barbora Holá map the ways in which spiritualism and the supernatural arose in Mr Ongwen's trial, and how they were used by the parties. Their chapter evaluates the extent to which the ICC, as a purportedly global institution applying universal norms, is equipped to deal

with highly cultural issues, rooted in a community's local understandings and belief systems.

6. DEFENCES, SENTENCING, VICTIMS AND CULTURE

Defendants' cultural backgrounds have at times been raised before national courts as part of a defence against the charges. Such 'cultural defences' can be highly controversial and are arguably more so at the international level because international criminal law is presented as being universal. Noelle Higgins examines the potential for, and desirability of, cultural defences in international law and assesses whether the ICC can, and indeed should, accommodate such legal arguments based on 'culture'. Mr Al Mahdi was the first accused before the ICC to dispense with defences and entered a guilty plea for war crimes.[38] This guilty plea raises questions about culpability, acknowledgment of guilt, and expressions of remorse as perceived by different cultural communities. Phoebe Oyugi and Owiso Owiso consider these aspects in their chapter on the possibility for plea bargaining before the ICC, and how cultural practices and ceremonies could be used to address crimes from a more restorative perspective.

Formulating an appropriate criminal sentence necessarily implicates notions of justice and fairness with regard to the defendant, victims and the public at large. Justice and fairness are, however, culturally relative concepts informed by the relevant society's views on ideas like retributivism, rehabilitation and restoration. Michelle Coleman analyses these issues in her chapter, which reviews the Court's sentencing decisions to date and analyses to what extent cultural considerations have been – may be – incorporated into the sentencing decision. Fiona McKay also considers issues like justice and fairness but in the context of victim participation and reparation – two important innovations at the ICC. Based on her years of practice in this field, including at the ICC, she surveys how the Court has navigated the cultural diversity that emerges in connection with victims, and whether the Court can and should do more to respond to these factors, in order to have the full impact to which it aspires.

7. ICC'S GLOBAL REACH AND LEGITIMACY

While the Prosecutor's investigations have now extended beyond the African continent, its initial and continued focus on crimes committed in Africa has garnered significant criticism. At a special African Union summit on the topic

[38] *Al Mahdi* (n 35).

in 2013, threats were made for African States to withdraw en masse from the Rome Statute. In her chapter, Ingrid Roestenburg-Morgan addresses the Court's cultural legitimacy (or lack thereof) across parts of Africa. She suggests a third-way response between universalism and relativism in order for the Court to be seen as legitimate and fair in light of its culturally diverse constituency. Despite accusations of the ICC having a Western bias, the largest power in the West, the US, remains outside the Rome Statute system. In her chapter, Brianne McGonigle Leyh details the deep-seated cultural phenomenon of US exceptionalism, which underlies the US' isolationist approach to international law. She examines how US exceptionalism severely restricts the capacity of the US to engage with the Court, and may even undermine the Court's ability to investigate and prosecute crimes.

A similar approach of isolation – albeit for different reasons – can be seen across Asia, which is the region with the fewest States parties to the Rome Statute. Controversially, the Philippines has followed Burundi and is the second State to withdraw from the Statute.[39] In his chapter, Nikhil Narayan reflects upon 'Asian values' and cultural relativism to analyse Asia's reluctance regarding international law and the ICC. Julie Fraser also considers the reluctance of States across the Asian continent – many of which are Muslim-majority – to join the Rome Statute system. She explores the relationship between Islamic law and international criminal law, and how Islamic law could be used in relevant ICC cases. Fraser argues that reference to Islamic law in the Court's relevant cases may help to promote the ICC's cultural acceptance in Islamic contexts.

8. CRISIS AT THE ICC: LOOKING AHEAD

From religion and politics to the definition of crimes and their interpretation by the judges, the chapters in this volume all touch on important intersections of law and culture at the ICC. The issues raised, commonalities and differences, are poignantly reflected upon by Mark Goodale in his Afterword. These intersections, with their struggles and contestations, highlight expanding cracks in the armour and operations of the global court. The challenges related to culture (in all of its interpretations) add to the growing number of critiques faced by the Court.[40] Now is most certainly the time for the Court's judges, prosecutors

[39] ICC Statement on The Philippines' notice of withdrawal: ICC, 'State participation in Rome Statute system essential to international rule of law' (20 March 2018) https://www.icc-cpi.int/Pages/item.aspx?name=pr1371, accessed 14 February 2019.

[40] Joseph Powderly, 'International Criminal Justice in an Age of Perpetual Crisis' (2019) 32 Leiden Journal of International Law 1, 1.

and other staff to self-reflect in order to address the sense of disillusionment and discontent felt by many.[41]

We recognise that many of the issues raised in this volume remain open-ended questions, as the dynamics at play are constantly evolving. Even where the Court changes course to address criticism, new counter-narratives will emerge seeking to contest and delegitimise. It is our contention that the Court's position as a powerful institution necessitates a constant exchange between the Court, scholars and those impacted by the Court's operations to ensure that advancements are built upon a conscious appraisal of the power dynamics generated within, as well as beyond, the Court. It is hoped that the insights and recommendations put forward in this volume will aid in these considerations as we look ahead to the Court's future.

[41] Elies van Sliedregt, 'International Criminal Law: Over-Studied and Underachieving' (2016) 29 Leiden Journal of International Law 1, 5.