

SURRENDER OF ALI KUSHAYB AND PAUL GICHERU:  
NEW PERSPECTIVES IN AFRICA’S RELATIONSHIP  
WITH THE ICC

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I. INTRODUCTION

In recent years, there have been significant debates about the legitimacy of the International Criminal Court (the ICC or the Court) in Africa. Critical perspectives view the Court as an instrumentalization of global human rights norms and hegemony. Similarly, there are scholarly debates about the imagined beneficiaries of an international criminal justice regime that is isolated from local constituencies, with limited representation and participation from conflict-affected communities.<sup>1</sup> It is thus imperative to critically analyse any developments regarding the ICC in African countries, as these can either enhance or reduce the Court’s legitimacy in the region.

This article uses the case studies of Sudan and Kenya to offer insights on the Court’s legitimacy and demonstrate new perspectives on

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1. See, e.g., Frédéric Mégret, *In Whose Name? The ICC and the Search for Constituency*, in *CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS* 23, 26 (Christian De Vos et. al. eds., 2015) (explaining the need for the ICC to engage more directly with conflict-affected communities and victims, in addition to states and the international community). See also PHILIP CLARK, *DISTANT JUSTICE: THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON AFRICAN POLITICS* 4 (2018) (revealing the impact of isolating the ICC’s practices from local contexts).

the ICC in Africa. In particular, the article links the discourse surrounding the surrenders to the ICC of Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) of Sudan and Paul Gicheru of Kenya with the Court's legitimacy in both countries. This discussion comes at a time when the relationship between the ICC and African states has soured, leading to a backlash as the states contest the institution's legitimacy, viewing it as an extension of Western hegemony.<sup>2</sup> Because of the perception that the ICC is a political institution, its intervention in these situations has emerged as a critical issue regarding its legitimacy.<sup>3</sup>

This article argues that both the issuance of indictments and the apprehension of suspects have the potential to enhance the Court's legitimacy. On the other hand, its inability to apprehend indicted criminals can undermine its authority and legitimacy within affected communities. In countries where the Prosecutor has opened formal investigations, local audiences have been concerned about the Court's failure to pursue government perpetrators, instead prosecuting only a handful of bad actors.<sup>4</sup> Still, however, after the ICC's indictment of incumbent high state officials in Kenya and Sudan, the ICC began facing significant hurdles, including new legal dilemmas regarding the execution of arrest warrants.<sup>5</sup>

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2. PETER BRETT & LINE ENGBO GISSEL, *AFRICA AND THE BACKLASH AGAINST INTERNATIONAL COURTS* 36 (2020). See also Joe Oloka-Onyango, *Unpacking the African Backlash to the International Criminal Court (ICC): The Case of Uganda and Kenya*, 4 STRATHMORE L.J. 41, 66 (2020) (citing Uganda and Kenya as classic examples of countries where the ICC has had fractious relationship with the governments); Marco Bocchese, *Odd Friends: Rethinking the Relationship between the ICC and State Sovereignty*, 49 N.Y.U. J. INT'L L. & POL. 339, 351 (2017) (explaining how state referrals of situations to the ICC by the governments of the Democratic Republic of the Congo and Uganda were triggered as a way of pursuing domestic political goals).

3. See David Bosco, *Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations*, 111 AM. J. INT'L L. 395, 408 (2017) (showing ways in which state political preferences bear on the Prosecutor's decisions regarding preliminary examinations); see also Francis Ssekandi & Netsanet Tesfay, *Engendered Discontent: The International Criminal Court in Africa*, 18 GEO. J. INT'L AFF. 77, 78 (2017) (arguing that dissent resulting from the ICC's perceived bias towards Africa threatens to harm the Court's legitimacy).

4. See generally Margaret deGuzman, *Punishing Atrocities Symposium: Selectivity, Goals, and the Legitimacy of International Criminal Law*, OPINIO JURIS (May 24, 2019), <http://opiniojuris.org/2019/05/24/punishing-atrocities-symposium-selectivity-goals-and-the-legitimacy-of-international-criminal-law/> (discussing the ICC's selection of situations and cases for investigation; there are often conflicting goals and priorities between global and local audiences, which impact the legitimacy of the Court).

5. See Thomas Weatherall, *Inviolability Not Immunity: Re-evaluating the Execution of International Arrest Warrants by Domestic Authorities of Receiving States*, 17 J. INT'L CRIM. JUST. 45, 60 (2019) (showing how the domestic execution of international arrest warrants for an incumbent high state official raises questions of diplomatic immunity).

This article utilizes the conceptual framework of sociological legitimacy to analyse the acceptance of the authority of the Court and its trials and decisions.<sup>6</sup> Additionally, emerging literature in international criminal law stresses the importance of victim-centred approaches in ICC practice and court procedures.<sup>7</sup> This article combines both of these approaches to first construct victims' perceptions through a critical analysis of the discourse surrounding their legal representatives, and then to reflect on these attitudes as they concern the legitimation of the Court's authority.

This article will demonstrate that the recent developments in both Kenya and Sudan have the potential to enhance the Court's "victim-centred" model of justice. This article further argues that the ICC can use these developments to strengthen its outreach activities and strategy of "local ownership," as a way of developing its domestic constituency.<sup>8</sup> Following this introduction, Section II will explore the surrender of Kenyan lawyer Paul Gicheru to the ICC, showing how the discourse surrounding victims' representatives impacts the sociological legitimacy of the Court. Section III will discuss how the surrender of Ali Kushayb in Sudan may impact the legitimacy of the ICC as a transitional justice initiative. Finally, Section IV concludes with recommendations on how the Court should engage in Africa, leveraging these developments to neutralize backlash and enhance its legitimacy before victims and domestic audiences.

## II. PAUL GICHERU SURRENDER: NEW TWIST IN THE KENYAN SITUATION

The intervention of the ICC in Kenya followed a presidential electoral process that was hotly contested, leading to ethnic tension and violence between December 2007 and January 2008. Those two months of conflict led to over one thousand deaths and massive

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6. See Marlies Glasius & Tim Meijers, *Constructions of Legitimacy: The Charles Taylor Trial*, 6 INT'L J. TRANSITIONAL JUST. 229, 232 (2012) (explaining that while normative legitimacy "derives from the position that a court has moral authority to concern itself with the case in question," sociological legitimacy relates to the acceptance of its authority by the relevant stakeholders).

7. See, e.g., Tonny R. Kirabira, *Elements of Aggravation in ICC Sentencing: Victim Centred Perspectives*, 13 AMSTERDAM L. F. 25, 28 (2021) (advocating for the recognition of broader victims' concerns within the ICC's sentencing practice).

8. See Christian De Vos et. al., *Introduction to CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS*, *supra* note 1, at 1, 7 (the term "local ownership" is increasingly used by proponents of the ICC to indicate contextual sensitivity and engagement with conflict-affected communities).

internal displacement.<sup>9</sup> One of the key drivers of the conflict was the political manipulation of ethnicity by top leaders. The ICC Prosecutor, Luis Moreno Ocampo, subsequently charged six Kenyans, including President Uhuru Kenyatta and his Deputy President William Ruto, with orchestrating the post-election violence (PEV). The indictment of serving leaders elicited strong criticism against the Prosecutor.<sup>10</sup> Despite a number of transitional justice initiatives, including the establishment of the Truth, Justice and Reconciliation Commission and ICC investigations, the country still faces a legacy of gross human rights violations as critics continue to fault the Court for its inability to provide justice to the victims of the 2007-2008 PEV.<sup>11</sup> Moreover, the cases against both Kenyatta and Ruto at the ICC collapsed, primarily due to witness interference and non-cooperation by the Kenyan government.<sup>12</sup>

On November 2, 2020, Kenyan lawyer Paul Gicheru surrendered to authorities in the Netherlands, pursuant to an arrest warrant that the ICC issued in 2015.<sup>13</sup> Together with Philip Kipkoech Bett, Gicheru was indicted for offenses against the administration of justice, including corruptly influencing Prosecution witnesses in the ICC's cases against William Ruto and Joshua Arap Sang. More specifically, the pair were alleged to have bribed or attempted to bribe, with over \$50,000, six

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9. See generally HUMAN RIGHTS WATCH, *BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE* (Mar. 16, 2008), <https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance> (noting that politicians exploited ethnic rivalries between the dominant tribal groups in Kenya, which exacerbated the violence).

10. See M. Cherif Bassiouni, *The ICC's Twelfth Anniversary Crisis: Growing Pains or Institutional Deficiency?* in *PROMOTING ACCOUNTABILITY UNDER INTERNATIONAL LAW FOR GROSS HUMAN RIGHTS VIOLATIONS IN AFRICA* 91, 96 (Charles C. Jalloh & Alhagi B.M. Marong eds., 2015) (the ICC intervention in Kenya was based on the state's failure to redress the post-election violence of 2007-2008, where top government officials were accused of masterminding the crimes. To Bassiouni, the Kenyan case was "the drop that made the glass overflow.").

11. See generally Kenya: *Elusive Justice for Gross Injustice, Abuse*, HUMAN RIGHTS WATCH (Dec. 10, 2019, 12:00 AM), <https://www.hrw.org/news/2019/12/10/kenya-elusive-justice-gross-injustice-abuse>. See also Lydiah K. Bosire & Gabrielle Lynch, *Kenya's Search for Truth and Justice: The Role of Civil Society*, 8 INT'L J. TRANSITIONAL JUST. 256, 276 (2014) (depicting the failure of the Truth, Justice and Reconciliation Commission and the politicised nature of its work).

12. See, e.g., Anushka Sehmi, *Now That We Have No Voice, What Will Happen to Us?: Experiences of Victim Participation in the Kenyatta Case*, 16 J. INT'L CRIM. JUST. 571, 590 (2018) (highlighting the experiences of victims participating in the Kenyatta case and demonstrating the need for restorative justice).

13. Press Release, Int'l Criminal Court, *Situation in Kenya: Paul Gicheru Surrenders for Allegedly Corruptly Influencing ICC Witnesses* (Nov. 2, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1540>.

prosecution witnesses in order to withdraw their positions as witnesses for the prosecution. This systematic interference with witnesses played a key role in the ICC's ultimate closure of the Kenyan case.<sup>14</sup> Critics regarded the development as "the death of justice for crimes perpetrated in the aftermath of the 2007 elections," attributing the closure to poor planning by the ICC coupled with pushback from the Kenyan government.<sup>15</sup> In other words, by prosecuting a sitting head of state, the ICC triggered a pushback from the Kenyan government, depriving the Court of much-needed state cooperation.

Gicheru's surrender invites discussions on the frosty relationship between Kenya and the ICC, since the initial intervention not only adversely impacted the Court's legitimacy, but also generated divergent domestic responses.<sup>16</sup> The discourse reveals an interconnection between the Court's work and its sociological legitimacy. As affirmed by the legal representative of victims in the case concerning Deputy President Ruto and journalist Sang, following Gicheru's surrender, the Court will require the political will of the state in order to implement its mandate and operations.<sup>17</sup>

In effect, the ICC's ability to deter international crimes depends on the level of its intervention and the type of targeted actor.<sup>18</sup> By trying mid-level officials as opposed to sitting heads of state, the Court is in a better position to obtain state cooperation and prosecute cases. Ultimately, the forward momentum of cases positively impacts the Court's legitimacy among victims and affected communities. Thus, since Gicheru is not a key actor in Kenyan politics, there is likely to be

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14. For a more detailed discussion, see Jon Silverman, *The Justice Conundrum: Africa's Turbulent Relationship with the ICC*, HARV. INT'L L.J. BLOG (Feb. 18, 2019), <https://harvardilj.org/2019/02/the-justice-conundrum-africas-turbulent-relationship-with-the-icc/>.

15. See, e.g., Mark Kersten, *Justice for Post-Election Violence in Kenya – An Obituary*, JUST. CONFLICT (Apr. 8, 2016), <https://justiceinconflict.org/2016/04/08/justice-for-post-election-violence-in-kenya-an-obituary/>.

16. See generally Stephen Chaudoin, *How Contestation Moderates the Effects of International Institutions: The International Criminal Court and Kenya*, 78 J. POL. 557 (2016) (showing how pro- and anti-ICC compliance groups mobilized during the 2013 presidential campaigns in Kenya).

17. Patrick Lang'at, *Lawyer's Surrender Opens ICC Can of Worms for Ruto*, DAILY NATION (Nov. 3, 2020), <https://nation.africa/kenya/news/lawyer-s-surrender-opens-icc-can-of-worms-for-ruto-2729222>.

18. See Yvonne M. Dutton & Tessa Alleblas, *Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya*, 91 ST. JOHN'S L. REV. 105, 174 (2017) (using evidence from the Kenyan situation to show how the ICC's deterrence goal is limited for each context, depending on who is indicted).

greater cooperation from the state in prosecuting his case.<sup>19</sup> In turn, by trying Gicheru, the Court is likely to rekindle debates about the role of the ICC in Kenya, enhancing its sociological legitimacy among those victims and communities that had previously doubted its relevance.

Another important impact of Gicheru's surrender is the issue of reparations to victims of the post-election violence. Procedurally, because this case falls under Article 70 of the Rome Statute, victims cannot participate in the proceedings and therefore are not eligible to receive reparations.<sup>20</sup> Nonetheless, if the Court holds Gicheru accountable for witness tampering, Gicheru's trial could provide a more general, symbolic justice.

In July 2016, ICC Trial Chamber V declined to consider the victims' reparation request because the case against Ruto and Sang had been terminated in April of that year.<sup>21</sup> Despite the impossibility of attaining court reparations in Gicheru's case, there may still be other forms of redress available, such as assistance to victims. For instance, international criminal lawyer Anushka Sehmi has argued that the participation of victims has the potential to provide restorative justice, no matter the final outcome of the case.<sup>22</sup> Sehmi's scholarship is vital to the discourse on the ICC's intervention in Kenya because of her role as a Legal Representative for Victims (LRV).<sup>23</sup> As an LRV, her role is to reflect the voice of victims, not the Court or state interests. In this role, she has emphasized the need for the ICC Trust Fund for Victims

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19. See Katie A. Lee, *Kenyatta and the Government Shield: Leveraging Article 87(7) as a Tool for Cooperation at the International Criminal Court*, 38 BERKELEY J. INT'L L. 125, 151 (2020) (showing how the failure of the ICC to make a formal finding of noncompliance against Kenya contributed to the erosion of its legitimacy).

20. Rome Statute of the International Criminal Court [hereinafter Rome Statute] art. 70 (Rome, 17 July 1998) U.N. Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002. An art. 70 case concerns offences against the administration of justice that undermine ICC proceedings. These include witness interference in the form of intimidation or corruption.

21. Tom Maliti, *Judges Decline to Consider Reparation Request of Victims in Ruto and Sang Case*, INT'L JUST. MONITOR (July 15, 2016), <https://www.ijmonitor.org/2016/07/judges-decline-to-consider-reparation-request-of-victims-in-ruto-and-sang-case/>.

22. E.g., Sehmi, *supra* note 12, at 590.

23. LRVs represent the views and concerns of victims in ICC proceedings, given the often-large numbers of participating victims. See Int'l Criminal Court, Rules of Procedure and Evidence rules 90, 91, U.N. Doc. IT/32, (prescribing the legal representation of victims in ICC proceedings).

(TFV) to act swiftly and provide logistical and financial assistance to victims in order to support their rehabilitation.<sup>24</sup>

Although this line of discourse does not directly link to Gicheru's case, the TFV, and the rehabilitation it sponsors, are another tool the ICC can use to enhance its sociological legitimacy. For instance, the TFV has a mandate to provide assistance programmes regardless of the outcome of cases. On February 1, 2021, the TFV launched an assistance programme for victims of sexual and gender-based violence (SGBV) in the context of the post-election violence in Kenya.<sup>25</sup> These forms of assistance both reaffirm the ICC's practice of victims' participation and provide a form of justice for victims of the 2007-2008 PEV. Additionally, the TFV plans to work with local implementing partners that have both previously represented victims and supported the Court during its initial investigation of the PEV case, further integrating affected communities.

In sum, the surrender of Gicheru and subsequent confirmation of charges against him raise an opportunity for the Court to legitimise its work in Kenya, following the failure of previous attempts to prosecute indicted individuals.

### III. SURRENDER OF ALI KUSHAYB: ENHANCED LEGITIMACY OF THE ICC?

In addition to the Kenyan case, the situation in Sudan and the surrender of Ali Kushayb help demonstrate potential avenues for achieving justice for victims and enhancing the ICC's legitimacy in the country.

The ICC intervention in Sudan, which followed crimes against humanity committed by the Janjaweed militia in the Darfur region between August 2003 and March 2004, elicited mixed reactions from both state and non-state actors.<sup>26</sup> The ICC initiated three cases regarding Darfur: *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* ('Ali Kushayb'); *The Prosecutor v. Omar Al Bashir*; and

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24. See Schmi, *supra* note 12, at 287 (noting that Article 79 of the Rome Statute created the TFV to implement court-ordered reparations and provide physical, psychological and material support to victims under the "assistance mandate").

25. *Request for Expression of Interest (EOI): Assistance Programming for Victims in Kenya*, TR. FUND FOR VICTIMS, <https://www.icc-cpi.int/get-involved/Pages/expressions-of-interest.aspx> (navigate to Reference Number: 128882 or Description: "Assistance programming for victims in Kenya," select "English" hyperlink) (last visited Sept. 17, 2021).

26. Pietro Sullo, *Justice for Darfur: The ICC and Domestic Justice Initiatives Eleven Years after the UN Security Council Referral*, 16 INT'L CRIM. L. REV. 885, 889-90 (2016).

*The Prosecutor v. Bahar Idriss Abu Garda*.<sup>27</sup> Similar to the Kenyan situation, there was a lack of cooperation from Sudan in these cases. The situation in Sudan reflects the importance of prosecution of perpetrators to fulfil local audiences' political goals, which in turn can impact how these local actors view the Court's legitimacy.

In 2009, the ICC issued a warrant for the arrest of Sudanese President Omar Al Bashir, triggering pushback from the African Union and accusations of judicial imperialism.<sup>28</sup> This reaction was further accompanied by anti-Western sentiments, political marginalization of actors who cooperated with the Court, and the loss of the Court's legitimacy in Sudan.<sup>29</sup> Furthermore, the intervention had a "trickle down" effect on the work of local actors that represented victims' concerns, as they faced government retaliation.<sup>30</sup>

Ali Kushayb, a key leader of the Janjaweed, surrendered to the ICC on June 9, 2020, following his indictment on April 27, 2007.<sup>31</sup> From a victims' rights perspective, this is a positive step, in contrast to the tensions surrounding the indictment of Al Bashir and an earlier decision in which the Pre-Trial Chamber declined to confirm charges against another suspect, Bahar Idriss Abu Garda.<sup>32</sup> On October 19, 2021, the Court appointed Natalie von Wistinghausen and Nasser Mohamed Amin Abdalla as Common Legal Representatives (CLRs) for the victims throughout the trial proceedings.<sup>33</sup>

While this recognition of procedural and participatory rights enhances the Court's sociological legitimacy, it is critical to keep in mind the attitudes of the greater affected community towards the Court and

27. *Id.* at 887.

28. See Brett & Gissel, *supra* note 2, at 42 (demonstrating that the ICC's indictment of serving heads of states is among the causes of African states' backlash against the Court); TIM MURITHI, JUDICIAL IMPERIALISM: THE POLITICISATION OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA 88 (2019) (discussing Pan-African support for Al Bashir).

29. Mattia Cacciatori, *When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents*, 12 INT'L J. TRANSITIONAL JUST. 386, 396 (2018).

30. *Id.* at 392.

31. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following the Surrender and Transfer of Alleged Militia Leader, Ali Muhammad Ali Abd-Al-Rahman, also Known as Ali Kushayb, to the Court*, INT'L CRIMINAL COURT (June 9, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=200609-otp-statement-ali-kushayb>.

32. *Prosecutor v. Bahr Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Public Redacted Version - Decision on the Confirmation of Charges, ¶ 236 (Feb. 8, 2010).

33. *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC-02/05-01/20, Decision on Victims' Participation and Legal Representation in Trial Proceedings, ¶ 10 (Oct. 19, 2021). As a way of considering the distinct interests of victims, Rule 90(3) of the ICC Rules allows the Chamber and the Registry to select common legal representatives. *Supra* ¶ 8.



the transitional justice process in Sudan. According to Sudanese lawyer Gibreel Hassabu, Kushayb's trial is a step towards justice for victims and raises hope that Omar Al Bashir will be tried in the Hague.<sup>34</sup> Hassabu's views mirror the discourse of national and international civil society groups that continue to demand swift and effective justice for Darfur victims. Consequently, these groups view Kushayb's surrender as a positive step towards achieving justice for victims and encouraging the transitional government to hand over other suspects to the ICC.<sup>35</sup>

Unlike in Kenya, the political situation in Sudan has swiftly evolved since the ousting of former President Al Bashir in April 2019 and the establishment of a transitional government in September of that year, with important implications for the recognition of the ICC's legitimacy in the country. For instance, a coalition of former rebels and civilians has demanded Al Bashir's extradition to the ICC for trial.<sup>36</sup> Following a military coup on October 25, 2021, it remains uncertain whether he will be extradited to the ICC due to his close working relationship with some military leaders.<sup>37</sup> Nonetheless, the transitional government signed a peace agreement with rebel groups from the Darfur region on August 31, 2020, acknowledging the international criminal justice system and agreeing to other measures for accountability, including to "work for national and international justice for crimes of genocide, crimes against humanity and war crimes [and to recognize] that the quest for justice excludes any possibility of amnesty or protection for perpetrators of genocide, crimes against humanity and war crimes."<sup>38</sup>

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34. *Darfur Suspect Rejects 'Untrue' War Crimes Charges*, AL JAZEERA (June 15, 2020), <https://www.aljazeera.com/news/2020/6/15/darfur-suspect-rejects-untrue-war-crimes-charges>.

35. *Sudan: After Ali Kushayb Surrender, Government Must Hand over Omar al Bashir and Others to ICC*, AMNESTY INT'L (June 10, 2020), <https://www.amnesty.org/en/latest/news/2020/06/sudan-after-ali-kushayb-surrender-government-must-hand-over-omar-al-bashir-and-others-to-icc/> (calling on the transitional government to hand over Omar Al Bashir, Ahmad Harun and Abdel Raheem Muhammad Hussein, to the ICC for prosecution).

36. See Michael Atit, *Sudan Coalition Wants Bashir Turned Over to ICC*, VOA (Nov. 7, 2019, 4:32 PM), <https://www.voanews.com/africa/sudan-coalition-wants-bashir-turned-over-icc>.

37. See Mark Kersten, *Sudan Coup Puts Justice for Atrocities in a Lurch*, JUST. IN CONFLICT (Nov. 3, 2021), <https://justiceinconflict.org/2021/11/03/sudan-coup-puts-justice-for-atrocities-in-a-lurch/> (showing the challenges of using international criminal justice as a form of transitional justice within the context of Sudan).

38. Gwenaëlle Lenoir, *Sudan: After Peace, Transitional Justice?* JUST. INFO (Oct. 2, 2020), <https://www.justiceinfo.net/en/45555-sudan-after-peace-transitional-justice.html> (citing an extract on transitional justice from an unofficial translation of the Darfur Peace Agreement).

This Peace Agreement presents the Sudanese government with an opportunity to cooperate with the ICC in relation to investigations and prosecutions through the extradition of indictees to ICC custody, the protection of victims and witnesses, and the provision of evidence.<sup>39</sup> More critically, the cogent recognition of international criminal justice within the Peace Agreement has the potential to legitimise the work of the ICC among national audiences and victims.

The surrender of Ali Kushayb serves to enhance the legitimacy of the ICC as a transitional justice initiative in the polarised situation of Sudan. In order to develop its legitimacy, the Court should partner with local non-governmental organization intermediaries to support its outreach programmes that impact local communities. Such outreach has served as a key feature underpinning the Court's work in Kenya and Uganda.<sup>40</sup> In Sudan, such intermediaries have the potential to reinforce pre-existing relationships with domestic audiences and victims, thus enhancing the legitimacy of the Court and consequently triggering a key turn in the discourse around the ICC's relationship with the country.

#### IV. CONCLUSION

The recent surrenders by Ali Kushayb and Paul Gicheru to the ICC have created pathways for a new relationship between the ICC and African states. In terms of impact, these developments in Kenya and Sudan have the potential to enhance the sociological legitimacy of the Court within conflict-affected communities. A critical analysis of victim-oriented discourses in both cases has illustrated that the ICC is still a relevant institution in Africa.

A comparison of the case studies in Kenya and Sudan demonstrates potential avenues for the ICC and its engagement with African states to better resonate with the realities of victims. As the analysis is limited to the two cases of Kenya and Sudan, it does not generalize the perceptions toward the ICC throughout Africa. Nonetheless, perceptions matter in many African situations in which the ICC has

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39. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a Media Briefing in Khartoum, Sudan: "There Is an Urgent Need for Justice in Sudan. Sustainable Peace and Reconciliation Are Built on the Stabilizing Pillar of Justice,"* INT'L CRIMINAL COURT (Oct. 20, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=201020-otp-statement-sudan>.

40. See Leila Ullrich, *Beyond the Global-Local Divide: Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court*, 14 J. INT'L CRIM. JUST. 543, 554 (2016) (explaining the role of "local intermediaries," a new category of actors within the ICC's processes).

intervened.<sup>41</sup> This article does not attempt to unsettle the normative legitimacy concerns in these situations. Instead, it has focused on the notion of sociological legitimacy rooted in the perspectives of victims and domestic audiences.

By situating justice for victims within the discourse surrounding the legitimacy of the ICC in Africa, this article has departed from contemporary scholarship that conceptualizes the ICC's interventions within the ambit of state actors and power relations. In sum, the surrenders of Gicheru and Kushayb have triggered new perspectives on Africa's relationship with the ICC. Therefore, the latter should leverage these developments to enhance its legitimacy in the face of victims and domestic audiences as a way of neutralizing backlash and enhancing local ownership of transitional justice.

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41. For a more detailed discussion, see Bocchese, *supra* note 2, at 387.