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International Justice in the time of ‘outsourced illiberalism’: Africa and the International Criminal Court

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International Justice in the time of ‘outsourced illiberalism’: Africa and the International Criminal Court

Mwenda Kailemia¹

Abstract

The purposes of this paper are, first, to demonstrate the inconsistencies of the international criminal justice practice, with a specific focus on the International Criminal Court’s (ICC) relationship with Africa, and, secondly, to demonstrate how such inconsistency is itself consistent- precisely because it flows in the direction of post-cold war neo-liberal ‘exceptionalism’. To explore the consistency of this inconsistency we deploy the notions of ‘McGuffins’ (the empty pretext which sets the narrative in motion but has no other value to the plot) popularised by Hitchcock’s films, and ‘The Invisible Gorilla’ (the optical illusion from a focus on an object under pressure) popularised by Chambris and Simons’ (2010) psychological experiment.

Introduction

The first permanent global crimes court started to work on July 1st, 2002 in The Hague, Netherlands, with the power to tackle genocide, crimes against humanity, and war crimes. The framers of the Rome Statute which established the court intended that anyone, from a head of state to an ordinary citizen, would be liable to ICC prosecution for human rights violations, including systematic murder, torture, rape, and sexual slavery. As Kofi Annan put it then:

‘There must be recognition that we are all members of one human family. We have to create new institutions. This is one of them. This is another step forward in humanity’s slow march toward civilization’ (Zizek, 2014: 333).

However, while the court has been hailed by some as the biggest milestone for international justice- at least since top Nazis were tried by an international military tribunal in Nuremberg after World War II- the court faces stiff opposition from both member and non-member states who feel that it has failed to live up to its mandate. The most pronounced criticism has been on the question of national sovereignty: The African Union (AU) has specifically opposed indictments of sitting heads of state¹ while global powers, including the United States, Russia and China, have refused to ratify the Rome Statute² on fear that the court could be used for politically motivated prosecutions of their officials or soldiers working outside their borders. (The U.S. Congress has even weighed legislation authorizing U.S. forces to invade The Hague where the court is based, in the event prosecutors grab a U.S. national³.) Nonetheless, as Zizek (2010) and Chomsky (2014) contend, the US and other members of the UN Security Council have been happy to lend support to the court- or to stand out of its way- whenever such help is in line with or does not threaten their national interest. This split between support or opposition to the ICC has been most clearly rendered apropos the Israeli-Palestine conflict: Following a rejection by the UN security Council (under US veto) for a resolution asking for a deadline to a final peace agreement on Israeli withdrawal from the occupied territories, the Palestinian Authority applied, and was subsequently accepted as the 123rd member of ICC. Subsequently Israeli withheld \$83m tax revenue collected on behalf of Palestine. There ensued a coordinated

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critique of the ICC, by both the Israeli and the US government. Israeli Prime Minister Benjamin Netanyahu told the Israeli Post, for example, that:

'The decision by the prosecutor at the International Criminal Court to begin an inquiry against the State of Israel is the height of hypocrisy and the opposite of justice'⁴.

Similarly, a spokesman for the US state department pointed out that:

'We have said repeatedly, we do not believe that 'Palestine' is a state and therefore we do not believe that it is eligible to join the ICC. We will continue to oppose actions against Israel at the ICC as counterproductive to the cause of peace'- US State Department, 2015

This may be contrasted to the US stance on cooperation of the Kenyan state with the ICC: At around the time of the Palestinian Conundrum the US urged Kenya to cooperate with the ICC as a matter of 'the importance of accountability, justice and the rule of law'⁵

Recent commentary has focused on this split between opposition to the ICC where a key ally of the US is involved and the stance of support where another state is concerned (see, for example, Chomsky 2014; Zizek, 2010; Ignatieff, 2012). There is an important point of contact between this (obvious) critique, and other underlying factors in the increasingly difficult operational environment of the ICC which are worthy of further exploration. Since its inception in July 2002, the ICC, and to be specific the Office of the Prosecutor (OTP), has faced two primary critiques: First that it has been inefficient, and secondly that it has preoccupied itself with Africa and in that respect failed to investigate equally severe conflicts elsewhere (HRW, 2008; Fairlie, 2011; Ignatieff, 2012). As others have pointed out, criticism of the court should also be put into context: ICC operation must be understood within the context of the court's recent creation, administrative and personnel challenges, legal impediments imposed by the Roma Statute, and external pressure to prosecute as many cases as possible in order to satisfy its value-oriented goal of guaranteeing lasting respect for and the enforcement of international justice (Basiouni, 2005). As Basiouni shows, these factors have made the choices of the prosecutor largely inevitable, although a strong case can be made for fundamental future reform of OTP operation.

It is in this context that the choices of the ICC and its uneasy relationship with its constituency are understood and critiqued in this paper. Apropos of this uneasy relationship between the ICC and major powers, for example, Zizek (2014) points out the noteworthy paradox: The rejection, by the US, of the jurisdiction of a tribunal constituted with the full support (and vote) of the U.S. itself, when it comes to US citizens (or government officials of key allies), but apparent support for the court's jurisdiction when it is invoked in relation to other (usually, non-ally) states! As Zizek points out, the result of this apparently selective recognition of the court's mandate by a central plank of the UN security Council, the ICC's *modus operandi* has evolved under (and even to an extent been characterised by) the publicised fissure between states which have recognised (and ratified) the ICC membership- but are uneasy about this exception- and states which do not recognise the mandate of the ICC over their population but see opportunities in selective support for the ICC (see also, Zizek, 2005, Chomsky, 2014).

The purpose of this paper is to highlight the 'method' in this 'madness'; that is, how the post-Rome statute framework of state accountability relies on a 'consistent inconsistency', or what Jamieson and McEvoy (2005) - apropos of 'state crimes by proxy'- refers to as 'juridical othering', which sometimes means that victims of state crimes are not unrecognized, or that state crimes are themselves reconstituted as 'necessary evils'.

This is not an original, nor a unique, way of reading the conflicting logics of international (In)justice: Apropos of state crimes, Crelistein (2003) and Jamieson and McEvoy (2010) show the deliberate legal logic in which perpetrators and victims are respectively placed beyond the ambit of protection or condemnation. This may range from the use of carceral archipelagos (such as Guantanamo bay) which are beyond the reach of the juridical protection of the state

holding 'dangerous suspects'. It may also involve the use of private military contractors who, as non-state actors, are not obligated by important protocols such as the Geneva Convention. As Connor O'Reilly (2005) has demonstrated, there are problematic areas in the use of private contractors for 'state business', especially the problematic of the applicable law when prosecuting systematic violations of international law. (In addition to the question of applicable law it is not always easy to link systematic use of practices criminalized by international humanitarian law (e.g. when proxies are acting on behalf of the state) under the threshold criteria of the Rome Statute. This is not to mention that the state may also 'deny' any links with such contractors. Add to this 'othering technique' the use of 'ethnic militias', or the practice of state kidnap pejoratively referred to as 'rendition', or the literal denial of prison facilities or the existence of any victims in 'torture regimes' (Jamieson, 2005).

In this sense, the logic of 'consistent inconsistency' is that otherwise conflicting logics, of Imperial domination and universal justice (Chomsky, 2012; 2014) are able to strike a balance- at the expense of victims of international injustice, of course- because such injustices can be 'outsourced', that is 'sold-out', to what Gros (2003) apropos of Aas (2007), has referred to as 'the wastelands of globalization'- usually illiberal states which are nonetheless critical to western (energy) security. In the context of Post-Rome Statute state accountability, such 'outsourcing' (under the 'war on terror' which is presently in vogue) pits victims against each other thereby allowing the perpetrators to 'get away with it' (Zizek, 2014; Chomsky, 2014).

This paper is sympathetic to the viewpoint, presently gaining traction, that by exerting tremendous pressure on African states to deliver to the ICC its citizens accused of war crimes and crimes against humanity, while not recognizing the legitimacy of the Hague court when it comes to its own citizens, the US is making American citizens effectively "more equal than others" (Zizek, 2014; Chomsky, 2014). In similar vein, when the African leadership- Under the African Union- seeks to appropriate to itself this 'right to be equal than others' apropos of its opposition to the ICC, the obvious losers are the victims of international injustice caught between the sides.

To illustrate the logic of consistent inconsistency, we have developed two motifs: Alfred Hitchcock's McGuffin's⁶ (a plot device that motivates the characters and advances the story- but has no use its overall theme or substance) and Chambris and Simons' (2010) '*The Invisible Gorilla*' experiment which shows how focus on certain things under pressure engenders optical illusion.

'Consistent inconsistency': The logic of McGuffins

In order to render the strange logic of ideological consistency, Hitchcock narrates the now familiar discussion:

'Two gentlemen meet on a train, and the one is struck by the extraordinary package being carried by the other. He asks his companion, 'What is in that unusual package you are carrying there?' The other man replies, 'That is a McGuffin.' 'What is a McGuffin?' asks the first. The second says, 'A McGuffin is a device used for killing leopards in the Scottish highlands.' Naturally the first man says, 'But there are no leopards in the Scottish highlands.' 'Well,' says the second, 'then that's not a McGuffin, is it?' (Deutelbaum and Poague, 2009)⁷.

As it has now become recognised apropos of Hitchcock, a McGuffin (sometimes MacGuffin or maguffin) is a plot in the form of some goal, desired object, or other motivator that the protagonist pursues, often with little or no narrative explanation. As an empty pretext⁸, the specific nature of a McGuffin is typically unimportant to the overall plot; what it serves is the purpose of occluding immediate recognition, or discussion, of the 'real thing' (Zizek, 2005). In Hitchcock's train incidence, the purpose of the McGuffin is merely a conversation starter, which

allows the two men, as it were, to say 'too much about nothing'. This stylistic device is common in films, as a central focus in the opening acts, but subsequently declining as the narrative unfolds- although it may re-appear at the climax of the story, only to be (usually) forgotten by the end of the story.

Does not Hitchcock's McGuffin conform to the present hypocrisy apropos of both the prosecution of international criminals and the recognition of victims of state crimes? A consideration of the US treatment of the Sudanese and Palestinian engagement with the ICC should illustrate the point.

'He is coming to a city near you': From Al Bashir's fiasco to Palestine

In June 2015, the ICC sensationally sought the arrest and repatriation of Sudan's Al Bashir- the first sitting head of state indicted for war crimes and crime against humanity- during an African Union Heads of States Summit in South Africa⁹. Despite a court order for his detention, however, the South African government refused to arrest and hand-over Al Bashir, thus breaking its obligation as an ICC member. South Africa's principle argument, which we shall return to in due course, was that the ICC, in calling for Bashir's arrest, had intentionally placed itself in conflict with the 2014 resolution of AU that no sitting head of state shall be summoned to ICC hearings- and an even older grant of immunity to heads of states within territory of the AU membership. During the ensuing drama the US state department expressed its frustration in South Africa's reluctance to arrest Al Bashir. The US State Department spokesman John Kirby said that while the U.S. is not a part of the International Criminal Court, it strongly supports efforts to hold accountable the perpetrators of genocide and war crimes. As such, "In light of the atrocities in Darfur, we call on the government of South Africa to support the international community's efforts to provide justice for the victims of these heinous crimes¹⁰," Kirby said in a statement.

Critics of the US position contrasted this enthusiasm for the arrest of 'yet another African' with the US criticism of any involvement of the ICC in the Israeli bombings of Gaza, which a UN report has described as 'possible war crimes¹¹'. No surprise then that the South African government issued a rejoinder to the US State Department, pointing out that:

'The ANC holds the view that the International Criminal Court is no longer useful for the purposes for which it was intended. Countries, mainly in Africa and Eastern Europe ... continue to unjustifiably bear the brunt of the decisions of the ICC, with Sudan being the latest example.'¹²

Criticism of US double standards would appear to be justified: As pointed out above, the US has actively vetoed any attempt by the Palestinian Authority to accede to full ICC membership- and recently threatened to withhold aid to Palestine should its government refer Israel to the ICC¹³. (Analysts have pointed out that any cut in U.S. funds would be deleterious to Palestinian self-rule, by plunging already struggling local institutions in the West Bank and Gaza into a struggle to survive¹⁴.) U.S. President Barack Obama's Democratic administration has repeatedly said it does not believe Palestine is a sovereign state and therefore does not qualify to be part of the ICC. Apropos of Palestine's application to the ICC, Lindsey Graham, part of a seven-member delegation of US senators visiting Israel, Saudi Arabia and Qatar, said existing U.S. legislation 'would cut off aid to the Palestinians if they filed a complaint' against Israel. At a news conference in Jerusalem, Graham called the Palestinian step "a bastardising of the role of the ICC' which is 'incredibly offensive.'¹⁵ Graham also warned that

'We will push back strongly to register our displeasure. It is already part of our law that would require us to stop funding if they actually bring a case.'¹⁶

Traditionally, the US has been critical of any contact between Palestine and the ICC, especially since majority of UN member states voted to recognize Palestine as non-member state in 2010.

(In 2014 the US actually vetoed the UN Security Council Resolution 242, which obliged Israel to commit to a deadline for withdrawal from occupied territories.)¹⁷ Unsurprisingly, when Palestine referred Israel to the ICC in 2015, the US and Israeli opposition was uniform: Israel, a key ally on ‘the war on terror’, needed to be protected and encouraged, not ‘threatened’. As Netanyahu put it:

‘At a time when terrorism is attacking the free world, this step will hurt international efforts to fight terrorism... The decision by the prosecutor at the International Criminal Court ... gives legitimacy to international terrorism’ (The Jerusalem Post, 2015).

This was echoed by Diane Feinstein, the US senator from Californian, who pointed out that:

‘The United States must aggressively oppose this court each step of the way, because the treaty establishing an International Criminal Court is not just bad, but I believe it is also dangerous... None of us would like to see a court that frivolously prosecutes Americans or which acts with politics, not justice as its motivating force’¹⁸.

Similarly, in a debate in the US senate, Rand Paul claimed that groups such as the ICC ‘that threaten Israel cannot be allies of the US’¹⁹ and that the US senate should ‘continue to do everything in its power to make sure this president and this Congress stop treating Israel’s enemies as American allies’²⁰. Feinstein’s and Paul’s assessment of the ICC’s mandate is not unique; it represents the paradox of US’ opportunistic exception- where the ICC is to be opposed when it threatens the foreign policy interests of the US, but supported when its success does not threaten the same interests (Zizek, 2005; 2014; Chomsky, 2014).

Race and prosecution: How ‘the Africans’ see things

The African Union (AU) has consistently highlighted that, since its inception, the ICC has only prosecuted Africans. The AU sees this as a betrayal of the spirit of the Rome statute- and a slap in the face on the vain hopes of those like Kofi Annan who viewed the ICC as a ‘triumph of humanity’ (Zizek, 2014: 333). Prime Minister Hailemariam Desalegn of Ethiopia, a former AU chairperson, has claimed that the ICC process ‘has degenerated into some kind of race hunting’²¹. Kenya’s Kenyatta- a co-indictee with 5 others on crimes against humanity committed in 2007- has gone further to claim that

‘The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers’²².

These sentiments are in line with wider criticisms of the ICC, including that by the influential *Black Agenda Magazine*, which pointed out that:

‘it’s a travesty of justice that the ICC only indicts Africans, but even more importantly, the International Criminal Court also only indicts those politicians that get on the wrong side of the United States and the former colonial powers in Africa. The ICC is a tool of U.S. foreign policy, an instrument of neo-colonialism’ (Black Agenda Magazine, 2013).

Nonetheless, while there are valid points in such critiques, they also appear blind to the specific ways in which state cooperation (or lack of it) with the ICC has, perhaps more than race, contributed to placing African cases before the ICC. Let us examine the Kenyan case, in order to illustrate the point.

The reverse twist of fate: Kenya’s ‘self-referral’

After the Kenyan post-election violence in 2007, a coalition government was put in place under what was then referred to as ‘Agenda 4’²³. Under Agenda 4, a truce brokered by Kofi Annan would lead to establishment of a national unity government, which was to fast-track

constitutional and electoral reforms on time for the next cycle of elections in 2012. (This culminated in the promulgation of a new constitution in 2010.) As part of Agenda 4 also, 2 commissions of inquiry were set up. One, *The Independent Review Commission* (IREC), Chaired by a retired South African Judge Hans Kriegler, was tasked with investigating all aspects of the 2007 presidential elections and to make findings and recommendations to improve the electoral process. The other, the *Commission of Inquiry into Post-Election Violence* (CIPEV), chaired by Judge Phillip Waki of Kenya, was to investigate the facts and surrounding circumstances related to the violence that followed the elections and to make recommendations to prevent any recurrence of the violence in future.

Each commission presented elaborate findings and recommendations. The Kriegler Commission concluded that, because of the incompetent performance of the Kenyan electoral commission, it was difficult to determine a winner between the two political coalitions that had claimed victory and plugged the country into violence. The second commission did 2 radical things, however: First, on top of mapping the areas of electoral violence, it also drew a list of people who- from interviews with civil society groups- were estimated to be most responsible for organizing the violence. This list of approximately hundred names was put in a sealed envelope and handed over to Kofi Annan. Secondly, the commission recommended that coalition government should set up an independent division of the judiciary to hear cases related to the activities of the individuals in the list, failure of which the list would be submitted to the ICC prosecutor.

There were four problems with this move, however. First, without revealing the identity of the individuals mentioned by the inquiry, most of them may not have been given the right to set the record straight²⁴. This appeared to some as a violation of the cardinal rule of natural justice; the right to know one's accusation and accuser, as the *US Institute of Peace* also recognises²⁵. Secondly, instead of providing closure, or prompting the country down the road of justice and reconciliation, the list formed the basis for new animosity: Every speculated candidate for the list had followers who vowed to 'out' the people who helped draw the list²⁶. Alleged extra-judicial killings of journalists, civil rights activists in the early 2008 period were anecdotally linked to the contents of the Waki report. (The UN rapporteur on extra-judicial killings, Phillip Alston, issued a damning report in 2008 alleging mass execution of kikuyu young men who were linked to 'Mungiki', an outlawed sect which linked to most of the retaliatory violence against supporters of the opposition²⁷).

Thirdly, because of the virtual collapse of institutions after the violence- for example the dismissal of members of the judiciary, or the disbandment of the electoral commission- it meant that Kenya went through a prolonged period without vital organs of government²⁸. Fourthly, any attempt to set up a local tribunal faced the constitutional challenge of amending the country's laws to allow domestication of an international court. Although the Rome Statute's principle of complementarity allowed this, political whirlwinds stood in the way²⁹. Extraordinary parliamentary sessions called by the government to debate a bill on establishment of a post-election tribunal were boycotted or mocked by those who felt that a tribunal would undermine their political future. Political factions of the principle indictees fought 'tooth and nail' to oppose any attempt to set up a tribunal. The wisdom at the time was that an ICC process would take longer than a local process. This opposition became the slogan '*Don't be Vague, It's Hague*' by politicians allied to William Ruto and Uhuru Kenyatta, long before the contents of the Waki envelope were even revealed- although later on their camps would claim that they were either framed at the ICC³⁰. And so the deadline set by the Waki Commission passed, and the sealed envelope was passed to the ICC prosecutor, Moreno Ocampo, who would thereafter draw out the names of six individuals, who came to be pejoratively referred to as 'The Ocampo Six'³¹.

This detailed analysis should highlight the Kenyan, and AU's, hypocrisy on alleged 'race hunt' in two ways: First, it shows how Kenya misused its many opportunities to give justice to

the victims of the 2007 violence- for example by failing take significant steps to set up its own court to hear the cases. Secondly, the Kenyan case also illustrates the claim of this paper that, the allegations of ICC racism or imperialism by AU leadership are a clever ruse to the real issue: the growing recognition that, in most parts of the world, a stronger, not a weaker, ICC (with universal jurisdiction) is the only route to justice for victims of state crime. In this connection, the AU's opposition to the ICC has been self-serving in ways which bring to mind Chambris and Simons' (2010) 'invisible Gorilla' experiment which we should turn to next.

The Invisible Gorilla; or what we can't see behind the AU drama

In *'The Invisible Gorilla'*, a seminal work on cognitive illusions, Christopher Chambris and Daniel Simons (2010) reveal how intense focusing can make people effectively blind, even to stimuli that should ordinarily attract attention. Chambris and Simons constructed a short film of two teams passing basketballs, one team wearing white shirts, the other wearing black. The viewers of the film are instructed to count the number of passes made by the white team, ignoring the black players. This task is difficult and completely absorbing. Halfway through the video, a woman wearing a gorilla suit appears, crosses the court, thumps her chest, and moves on. The gorilla is in view for 9 seconds. Many thousands of people have seen the video and about half of them do not notice anything unusual. It is the counting task-and especially the instruction to ignore one of the teams- that causes the blindness. No one who watches the video without the instruction misses the gorilla. The most important aspect of the finding, the authors note, is that people find its results very surprising. Indeed, the viewers who fail to notice the gorilla argue that it was not there- they cannot imagine missing such a striking thing.

Does not the same optical illusion obtain apropos of the present love-hate relationship Africa has with the ICC? Is the gorilla here not the apparent obsession with the ethnicities of the indicted, which deters the proper perspective on; firstly, the hypocrisy of wanting to appropriate the 'colonial immunity' (Chomsky, 2014) allegedly enjoyed by major powers (Russia, China, US and their protégés); secondly, the 'invisibility' of the internally displaced people, such as Kenyan victims of alleged crimes against humanity who are still languishing in 'IDP' camps?³² When the AU at the urging of the Kenyan president convenes an 'extraordinary session' of the AU to deliberate on the continent's relationship with the ICC (for example in February 2016 where a decision to commence the block's pull-out from the court's membership was agreed) shouldn't the focus rather be on the visible contrast between the plight of victims of state crimes across Africa, with the complaint by the incoming chairman of that block that 'Elsewhere in the world, many things happen, many flagrant violations of human rights, but nobody cares'³³?

As in Chambris and Simons' experiment, debate on the future of the ICC has degenerated into a ball-pass, between 'white' and 'black' teams, on who should be allowed to abuse the process- rather than what should be done to ensure none of the perpetrators get away with their crimes. And, similar to the 'invisible gorilla' experiment, contemporary commentary on the effectiveness of the ICC continues to miss 'such a striking gorilla'. The US and its other powerful allies are, after all, the last line of defence against the ever-changing membership of the 'axis of evil': What is US non-membership of the ICC against the dreadful possession of a nuclear weapon by Iran- or Putin's annexation of Crimea?

Thirdly, don't most of the critiques of the ICC homologise its many arms? Isn't the critique of 'race hunting' not more a critique of the priorities of the OTP than, say, the presidency- or the different pre-trial and trial chambers? In fact, while criticism of the court's 'selective justice' was raging within the ranks of the AU, the pre-trial chamber (in the Kenyan case) dismissed the cases of 3 of the co-accused (Mr Muthaura, Mr Hussein and Mr Kosgey),

while Mr. Kenyatta's case was withdrawn by the OTP shortly before it went to trial in December, 2014. Citing her obligations on evidentiary threshold, the prosecutor stated that:

'Given the state of the evidence in this case, I have no alternative but to withdraw the charges against Mr Kenyatta... I am doing so without prejudice to the possibility of bringing a new case should additional evidence become available.' (Guardian, 2014)

In this sense, we can adduce that critiques of the court have (to an extent at least) little to do with the trials themselves, but the (political) capital to be gained or lost by indictment or threat of indictment. This is best illustrated by the fact that, as indictees of the ICC, the Kenyan coalition regime of Kenyatta and Ruto were international outcasts to the extent of their cooperation or non-cooperation with the court. Every juridical move is thus interpreted as a 'destabilizing' move to a fragile coalition built on two erstwhile warring camps: Mr Kenyatta and Ruto have built their political reputation precisely on their ability to bring peace by holding together in government the centrifugal forces in the fragile Kenyan democracy³⁴.

But it is precisely this unspoken (subliminal) acceptance of the dominant narrative of differential regard of Africa by the ICC that is the problematic instruction belying the optical illusion (Chambris and Simons, 2010). The authors of the invisible gorilla kept people 'blind' by counting the passes. In similar vein the status quo at the helm of African leadership keeps the narrative framed on an unsubstantiated differentiation by cleverly concealing the fact that most of the cases at the ICC have been referred to the court by African states themselves, with the exception of Sudan which was referred the UN Security Council.

Back to the naive point: The ICC's other gorillas

To be fair, the ICC has what could, for want of a better phrase, be loosely referred to as 'inbuilt inconsistencies', or windows of abuse, such as how the court should deal with supra-national entities, such as terrorist organizations or ethnic militias. We should recall the difficulty alluded above in our reading of the works of Stanley (2005) on 'juridical othering' (especially the use of militias, or 'special forces') and O'Reilly's (2010) discussion of 'private contractors'. It is a given that, due to the nature of intentional crimes, and how they come to the attention of the ICC (via UNSC referral, Own state referral or the OTP's *motu proprio*) there is a major grey area whereby appendages of a regime can carry out major violations of international law camouflaged as 'common criminality'. A notable post-Rome Statute resolution of this conundrum is the indictment of senior leadership of the Janjaweed militia and Sudanese officials in the case of War crimes in Darfur presently before the ICC.

Space does not permit an exhaustive appraisal of the ICC's effectiveness (or lack thereof) when it comes to non-state actors. Perhaps this is fine for these purposes, since this is the area in which the ICC has received the least criticism from African states: There is little criticism of the prosecution of the Congolese Bosco Ntagada or the arrest warrant for the LRA's Joseph Kony, for war crimes.

Perhaps the ICC's Achilles' heel in Africa is that it is intended to offer a juridical solution to political problems, most of them stemming from wider, and deeply seated, problems of the post-colonial state's political economy (Mamdani, 2001; Jamieson, 1999). But, in equipping the ICC with adequate teeth to deal with the gravest atrocities, the court's framers were also aware that treaty ratification would be difficult unless certain limitations were in place to assuage the concerns of states with prior prolonged periods of conflict - or those which through other apparatus, such as 'Truths and Reconciliation Commissions', had managed to put their demons to rest (Stanley, 2005; Mamdani, 2001). This means that, for logistical reasons alone, it is impossible and/or unnecessary to prosecute most instances of systematic human rights violations by states, even where they are carried out under conditions which should require referral to the ICC or the OTP's *motu proprio*. In respect of the Kenyan cases before the ICC,

although the country's ethnic cleansing history stretched way back to post-independence Kenya (Anderson, 2005; Wrong, 2009) the details of the systematic use of the electoral cycle for rape and displacement of population can only provide contextual background- and cannot be substantive evidence of the involvement of the indicted (in previous rounds of ethnic clashes), as Fayal Gaynor, counsel for victims has repeatedly showed in the trial of William Ruto and Joshua Sang³⁵.

But there are other issues specific to the conduct of ICC business which has specific bearing on the ideal of justice, specifically the application of article 68, *Rules of procedure and Evidence*³⁶. In its original state, Rule 68 (a) allowed for introduction of prior recorded testimony but only if both the prosecutor and the defence had the opportunity to examine witnesses during the recording. In 2013 amendments were introduced which expanded the scope of 'prior recorded testimony', because the requirement that the parties should have had opportunity to examine the witness was deemed too demanding and difficult to satisfy. The amendment was intended to allow evidence from witnesses who had died, were presumed dead or unable to testify orally and where it comes from a person who has been subjected to interference. As part of the Assembly of State Party's (ASP) negotiations African states accented to the amendments on proviso that the rule would not be retroactively used in the on-going cases, including that of Mr Kenyatta and Mr. Ruto. The ASP communique was that:

"Following the debate on the supplementary item "Review of the Application and Implementation of Amendments to the Rules of Procedure and Evidence introduced at the Advance version ICC-ASP/14/20 20-E-031215 13 12th Assembly", the Assembly recalled its resolution ICC-ASP/12/Res.7, dated 27 November 2013, which amended rule 68 of the Rules of Procedure and Evidence, which entered into force on the above date, and consistent with the Rome Statute reaffirmed its understanding that the amended rule 68 shall not be applied retroactively.³⁷"

It is easy, from a political perspective, to see why it was expedient for the AU to secure this agreement: This amendment was crucial in the successful prosecution of the Congolese 'warlord' Thomas Lubanga when, in 2012, allowance was made for the admission of the recorded, crucial testimonies of two witnesses, 0582 and 0598, in respect of the use of 'Conscripting and enlisting children under the age of fifteen years'³⁸. Then, in 2015 the trial chamber in the case of William Ruto and Joshua Sang allowed the prosecutor to use recanted evidence of 5 crucial witnesses who had recanted their earlier testimony, as she informed the court, as a result of fear, blackmail or intimidation. This ruling set the ICC in a collision with the AU briefly, before an appeal chamber disallowed the use of recanted evidence in the case of Sang and Ruto.

The principle of complementarity is perhaps another 'gorilla': In a nutshell, the ICC is only seized of matters which members states are unable or unwilling to handle- or matters referred to the court by the UN Security Council. When taken together with the power of veto wielded by permanent members of the Council, it means that, in practice, only a state with no powerful friends at the top- or one which deliberately self-incriminates- is likely to face meaningful pressure. (Matters are even worse when the perpetrator is a permanent member of the UNSC. It is unthinkable that the prosecutor would even consider indicting the presidents of the US or Russia or China- were these liable to prosecution.)

Complementarity has not only mean that justice is delayed- or ultimately denied- to citizens of regimes allied to the so-called 'war on terror' campaign, but also that jurisdictional interpretations of various offences mean crimes against humanity may be investigated and prosecuted as 'failures of judgement' or 'cases of indiscipline'. (The prosecution of US servicemen for crimes in the middle east- in closely guarded military tribunals without the involvement of their victims who are rarely acknowledged (Kramer and Michalowski, 2005; Jamieson and McEvoy, 2005)- is a good example.) In respect of such incidences the onus is on the prosecutor of the ICC to prove not only that the Rome statute has been violated, but also

that the state on whose territory the crimes took place is unwilling or unable to prosecute- or deems its territory to have been violated. This is a toll order.

Conclusion: International Justice and the wider climate of (US) exceptionalism

The logic of exceptionalism is an old theme- and has other applications beyond the field of international justice, mostly dominated by narratives of US prowess in commerce and industry (Kramer and Michalowski, 2005; Lippens, 2004). As Zizek (2005) points out, this logic of exceptionalism rides on a wider 'structural' logic of today's 'global' capitalism, under so-called 'outsourcing'. Here, the 'powerful' are able to 'outsource'- that is to say, 'give over'- the "dirty" process of material production. In this way, one can easily avoid ecological and health rules; the production is done in, say, Indonesia where the ecological and health regulations are much lower than in the West, and the Western global company which owns the logo can claim that it is not responsible for the violations of another company (Klein, 2002; Chomsky, 2012; Zizek, 2008).

Criminologists (for example Crelistein, 2003; O'Reilly, 2005; Lippens, 2004; Kramer and Michalowski, 2005; Aas, 2007; Gros, 2003) see homology between this logic of economic exceptionalism and globalization of international criminal justice. Crelistein demonstrates how torture, which is a violation of Geneva protocols and the Rome Statute, has been 'outsourced', that is left, to the (Third World) allies of the US which can do it without worrying about legal problems or public protest- or where there are guarantees to 'allies' of US veto in the UNSC. The implications of this logic to post-Rome Statute international criminal justice is that states are now competing to appropriate to themselves this incivility, or that the services of transnational and supra-national actors are required in order to circumvent state obligation under international law. Where this quest goes awry, and the ICC is invoked, two scenarios ensue: Based on positionalities of the international political pecking order there may be requirement to comply with the court, to dismiss the court as 'out of step'. (It helps if you are number of countries.) Alternatively, states can cut lose and hand-over the 'baddies'. The conflicts Africa, under the leadership of the AU, is having with the court have to do with the first scenario.

On the second scenario, Africa's relationship with the ICC is a template of the challenges of a globalizing world, which is being driven (as Lippens, 2004) appropriately claims, by a neoliberal logic of empire: For some parts of the world, post-cold-war narrative of universal justice is an ambition built on the back of 'outsourced' illiberalism (Chomsky, 2014; Zizek, 2014). Here, neo-liberal values in the west are sustained against the background of carceral archipelagos such as Guantanamo Bay and Diego Garcia where the global policeman can do to others what it would not consider doing to itself (Zizek, 2010, 2014; Jamieson and McEvoy, 2005).

The inevitable conclusion is that in order for universal international criminal justice to be secured, this logic of exception, this consistent inconsistency, must be challenged- and ultimately destroyed. The tribal logic of shielding 'our own', whether practiced by the African Union or by the US, is deleterious to equality in international criminal justice practice: As a minimum, the present discussion over whether the ICC is a neutral actor- or, as Kenya's Kenyatta referred to it, a 'tool of declining powers'- ignores the fact that a decade after the post-electoral violence which killed 130 people in 2007, internally displaced Kenyans are still living in tents. Similarly, Israel's support by the centre-right fringe in America does not allow concrete discussion of the enduring condition of those affected by the shelling in Gaza- or by Hezbollah's rockets. These are just two examples out of very many others around the world.

The McGuffins of international justice is that those who need international justice the most- those in poorer, less politically stable countries, whether they are in power or not- have failed to recognise how the fate of the ICC is interlinked with theirs; how the threats to the future of the ICC are also threats to the future of the justice they so badly need. In a sad twist

the prosecutor of the ICC has increasingly leaned to the cooperation and help of the non-membership of the ICC, in order to deal with the non-cooperation of the ICC membership. States that were sceptical and in opposition to the ICC's espoused doctrine of universal justice are now the most prominent 'supporters'- from a distance. Meanwhile, states that viewed the ICC as a watershed moment in international justice now spend more time criticising and seeking to weaken the institution they created! It is a sad time for international criminal justice.

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Notes

- ¹ In an extraordinary session called to discuss the indictment of Kenya's president and his deputy, the African Union (AU) in 2014 urged its members to "speak with one voice" against criminal proceedings at the International Criminal Court against sitting presidents. The 54-nation organisation said it was disappointed that a request to the United Nations Security Council to defer the trials of Kenya's leaders had not yielded the "positive result expected."
- ² The Rome Statute is a treaty establishing the ICC. Statute ratification legally obliges co-operation with the Court, including in arresting and transferring indicted persons or providing access to evidence and witnesses. States parties are entitled to participate and vote in proceedings of the Assembly of States Parties, which is the Court's governing body. Such proceedings include the election of such officials as judges and the Prosecutor, the approval of the Court's budget, and the adoption of amendments to the Rome Statute
- ³ <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law>
- ⁴ <http://www.i24news.tv/en/news/international/middle-east/58085-150118-palestinians-to-complain-at-icc-against-israeli-settlement-construction>
- ⁵ See for example, <http://www.nation.co.ke/News/-/1056/1312878/-/yx4vjz/-/index.html>
- ⁶ The term "MacGuffin" was coined by a screenwriter Hitchcock when he worked with Angus Macphail, but the principle goes back at least as far as Rudyard Kipling. Perhaps the most important thing to remember about the MacGuffin is that it contains the word "guff," which means a 'load of nonsense'.
- ⁷ See also: Lowe, Nick (1986) *The Well-tempered plot device*, Anvisible: Berkshire, England) (46).
- ⁸ For Hitchcock's own interpretation of a McGuffin, see: <http://www.openculture.com/2013/07/alfred-hitchcock-explains-the-plot-device-he-called-the-macguffin.html>
- ⁹ See: <http://www.bbc.co.uk/news/world-africa-33269126>
- ¹⁰ See the full statement at: www.state.gov/r/pa/prs/ps/2015/06/243793.htm
- ¹¹ http://www.nytimes.com/2015/07/30/world/middleeast/report-cites-possible-war-crimes-in-israeli-hunt-for-ambushed-soldier.html?_r=0
- ¹² See <http://uk.reuters.com/article/2015/06/15/us-africa-summit-bashir-icc-idUSKBN0OU0K420150615>
- ¹³ <http://mondoweiss.net/2015/01/palestinians-consequences-settlements>
- ¹⁴ The U.S. supplies more than \$400 million annually to the Palestinian Authority, but Israel has, following Palestine's accession to the ICC, frozen a monthly transfer of some \$120 million in tax revenues it collects for the Palestinians. This move was criticised by the EU as a breach of the 1993 Oslo accords.
- ¹⁵ <http://uk.reuters.com/article/2015/01/19/us-usa-israel-palestinians-idUSKBN0KS24Z20150119>
- ¹⁶ <http://uk.reuters.com/article/2015/01/19/us-usa-israel-palestinians-idUSKBN0KS24Z20150119>

¹⁷ See: <https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories.html>

¹⁸ See: <http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi>

¹⁹ <http://www.usnews.com/opinion/blogs/world-report/2014/11/13/israel-is-the-middle-east-ally-the-us-cannot-lose>

²⁰ <http://www.newrepublic.com/article/120953/senators-threaten-cut-palestinian-funding-over-icc-membership>

²¹ <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10082819/International-Criminal-Court-is-hunting-Africans.html>

²² see <http://www.capitalfm.co.ke/news/2013/10/icc-toy-of-declining-imperial-powers-uhuru/>

²³ <http://reliefweb.int/report/kenya/kenya-national-dialogue-and-reconciliation-building-progressive-kenya-background-note>

²⁴ See for example: <http://news.bbc.co.uk/1/hi/world/africa/7673304.stm>

²⁵ <http://www.usip.org/publications/truth-commission-kenya>

²⁶ <http://www.usip.org/publications/truth-commission-kenya>

²⁷ See the full report at: https://wikileaks.org/wiki/Kenya:_The_Cry_of_Blood_-_Report_on_Extra-Judicial_Killings_and_Disappearances,_Sep_2008

²⁸ This was not helped by the rivalry and tuff wars between the various arms of government, in any case drawn from former rival political camps. Aware of the stakes of 2012, each arm of the coalition did the most to undermine the other.

²⁹ The former opposition coalition (ODM) had not yet splintered into rival factions pitting Raila Odinga- its presidential candidate- and William Ruto, a charismatic figure with a huge following especially among the Kalenjin community which occupies the parts of the Kenyan Rift Valley which were the most affected by the violence

³⁰ See: <http://thehagueinstituteforglobaljustice.org/index.php?page=Commentary-Commentary-Articles-Recent-Commentary-Don%E2%80%99t-be-Vague;Let%E2%80%99s-Go-to-Hague%E2%80%9D:Kenya%E2%80%99s-tumultuous-relationship-with-the-ICC&pid=176&id=280>

³¹ A lot has been written about the wisdom of this gesture- especially the prosecutor's reliance on a commission report, rather than his own investigations- that there is no room to debate it here. Suffice to say that, at the time of writing this paper, all the cases as a result of what has come to be referred to as the OTP's 'shoddy' investigations.

³² See: <https://research.unsw.edu.au/projects/investigating-health-needs-vulnerable-people-living-internally-displaced-persons-idp-camps>

³³ <http://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court>

³⁴ http://www.nytimes.com/2013/03/15/opinion/why-kenyan-democracy-is-a-fragile-proposition.html?_r=0

³⁵ In the case of Kenya, certainly, the post-election violence of 2007 was a continuation of previous inter-ethnic conflicts, which had flared up in the past, encouraged by Arap Moi's single-party dictatorial regime. Pejoratively referred to as 'land clashes', they had become state-sponsored land-grabs in which one community was evicted out of their farms around election-time every 5 years. Invariably, these were members of the Kikuyu ethnic group which were allied to the political opposition during the 2007 conflict, but which were perceived as part of the 'eating' group- owing to one of their own occupying power in 2007³⁵.

³⁶ <https://www1.umn.edu/humanrts/instate/iccrulesofprocedure.html>

³⁷ See for example: <http://www.ifjustice.net/en/icc-cases/asp-statement-on-rule-68-is-irrelevant-in-ruto-and-sang-cases-a-bensouda>

³⁸ See, for example <http://www.theguardian.com/law/2012/jul/10/icc-sentences-thomas-lubanga-14-years>