***The globalization of neoliberal violence and its implications for international criminal justice in Africa***

***Abstract***

The article critically engages with the logics of neoliberal economics, not only as a specific form of violence, but also one whose toxic mix with the nature of the post-colonial African state neutralizes any revolutionary effort to redress rampant injustice. Critique of the role of neoliberalism on international justice in Africa is aimed at rendering the specific ways in obsession with subjective violence- that is violence, with an identifiable (prosecutable) agent- normalises and also neutralises any revolutionary gesture in the international system (including in *ad hoc* UN tribunals and at the *International Criminal Court*), but also how the post-colonial African state is the platform *par excellence* for testing out the limits of neoliberal exceptionalism.

**Key words: Violence; Capital; Neoliberalism; Externality; Language; Africa; International Criminal Court; International Criminal Justice**

***Introduction; ‘In the world interior’ of neoliberal violence in Africa***

The purpose of this paper is to critically engage with the logics of neoliberal economics, not only as a specific form of violence (Springer, 2012; Zizek, 2011; Harvey, 2005), but one rendered more violent through toxic collusion with state and supra-state collusion. We are in agreement with Springer, that

‘the relationship between neoliberalism and violence is directly related to the system of rule that neoliberalism constructs, justifies, and defends in advancing its hegemonies of ideology, of policy and program, of state form, of governmentality, and ultimately of discourse (2012:16).

As Springer also correctly observes, neoliberalism is a context in which the establishment, maintenance, and extension of hierarchical orderings of social relations are re-created, sustained, and intensified, where processes of ‘othering’ loom large. There is no greater example of this ‘othering’ than the social-political and economic antagonisms that neoliberalization engenders, not only in terms of neutralizing any revolutionary effort to redress rampant social injustice, but also when as an organizing philosophy of statecraft, neoliberalism encourages and moulds understandings of justice and injustice in which victims and survivors are recognised through metrics of profitability, efficiency, and value-for-money. A discussion of the impact of neoliberal matrices of international criminal justice is important because, although there has been elaborate discussion of violence in recent analyses of the international criminal justice system- especially in recent reviews of the prosecution of high profile cases by *ad hoc* UN tribunals and at the *International Criminal Court* (ICC)- these analyses have emphasized understandings of violence which prejudice its ‘subjective’ form; the ‘violence with an identifiable agent’ (Springer, 2012; Zizek, 2011). We are in agreement with recent works (for example, Springer, 2012; Harvey, 2013; Zizek, 2017; Kailemia, 2016; Chomsky, 2016; Hillyard and Tombs, 2004; Zizek, 2010; Green and Ward 2004 and Valentić, 2016) that neoliberalism is a form of globalizing, state-corporate, violence which perpetuates itself through invisibility. We claim, along this vein, that the present focus of the international criminal justice system- through the UN framework of the ICC, for example- has potential to negate, ignore, and delete the social harms of structure, including the specific ways in which placement of laws, institutions and other instruments of global statecraft are inimical to equality, diversity and freedom.

The purpose of this article is to render the context of this alienation through the prism of the relationship between the people of Africa, on the one hand, and the states and political leaders of Africa, on the other hand, in order to render the role of the *International Criminal Court* (hereinafter, ICC) in negotiating the antagonism between them when crimes are committed. Africa is important to this debate because it- or at least majority of its populations- occupies the ‘exterior’ of what Sloterdijck (2013) has referred to as ’the world interior of capital’: According to Sloterdijck, neoliberal globalization includes a permanent alienation of potential to reshape global relations of inequality, because debate on rights and other entitlements of a globalised capitalist system always-already happen within predetermined parameters. As Sloterdijck has argued, globalization takes place inside ‘invisible, yet insurmountable’, boundaries which are inhabited by one a half billion ‘winners of globalization’, with roughly ‘3-times’ this number left standing outside the door (2013: 8). As a consequence, most social life now takes place ‘in an expanded interior, a domestically and artificially acclimatized inner space’. Zizek (2017) observes apropos of Sloterdijck that the implication of this is the introduction of a radical class division across the whole world, between those who are inside and those who are outside of a rigged cupola, in which, as an example

The latest Paris terrorist attacks, as well as the flow of refugees, are monetary reminders of the violent world outside our [Europe’s] cupola, a world which, for us insiders, appears mostly on TV reports about distant violent countries- not as part of our reality but encroaching on it (2017:5)

Zizek then makes an observation which summarises this paper’s objective of analysing Africa, as the outsider in this cupola:

Our ethico-political duty is not just to become aware of the reality outside our cupola, but to fully assume our co-responsibility for the horrendous outside (2017: 5)

To properly grasp Africa’s position in the international system of neoliberal justice, one must therefore understand not only the nature of neoliberalism as a specific form of violence and its role in extending the subjugation of Africa (and elsewhere with persistent power inequality), but also how its power to harm is a refraction of the specific conditions of the post-colonial state. We begin our analysis by turning two issues in the next two sections. Thereafter, we consider the role of the post-colonial state as a platform for neoliberal violence, but also show how this platform is embedded in a global system of violence contoured by American exceptionalism- best exemplified by the priorities of the International Criminal Court, such as the court’s relationship with states based on their alignment to American economic, cultural and political interests. Critique here aims at the court’s predicament on matters of referral, indictment and prosecution of cases, comparing the support it gets or lacks when its focus is on Africa compared to elsewhere- Israel or Palestine for example- but also how it’s weakened by self-appropriation of exceptionalism by regional blocks such as the AU which has imposed limits on prosecution of sitting heads of states. What is the impact of this to the victims, how and why is this possible? More importantly, is the court positioned to prosecute the Real violence, resulting from historical injustices? What would happen to the court if it actually did?

***Neoliberalism and its grave-diggers***

The standard notion of neoliberalism, according to Harvey (2005) for example, is a model of capitalism which focuses on the economy and its deregulation to enable a free market-based economic system. Here, the state’s role is envisaged as one of marshalling its machinery to ensure the best conditions are created for capital to self-regulate, through a regime of regulations and inducements to investment and, increasingly in the last few decades, consumption. In practice, however, neoliberalism has become a harm-generating form of capitalism that systematically incorporates the state, not into self-regulation, but into regulation of all factors that may challenge untrammelled capitalist accumulation. In contemporary reading (for example, Harvey, 2013; Zizek, 2017; Kailemia, 2016; Chomsky, 2016; Hillyard and Tombs, 2004), neoliberalism is not only a principally harmful ideology, responsible for a range of social harms present in today’s society, but some (if not all) of its globalized practices constitute ‘criminality’ as such, in three specific ways: *Financialisation* (and attendant subjectivation through indebtedness from predatory lending); *militarisation* of all forms of social engagements and politics-from mass incarceration of ‘others’ (refugees, asylum seekers, undocumented people, orphans…), stealth killing through drone warfare, punitive sanctions to gain or sustain trade imbalance (or to coerce extraction of raw materials from poor countries) and so forth and; *privatization*- of commons such as forests, land, mines- or asset-stripping of state enterprises by oligarchs, usually with complicity of powerful states (or criminal groups). Together neoliberal privatization, militarisation and financialisation are responsible for far more human suffering at an unprecedented scale in the globe (from epidemics of war, genocide, disease, rampant crime or suicides), so that recent analyses of its globalization have drawn attention to inequalities of health, wealth and welfare.

Recent studies, such as Hall and Winlow (2017) have specifically highlighted the role of neoliberalism on the rise of the right in the West, culminating for example in the UK vote to leave the EU, or widespread attacks of migrants and refugees, from Calais to Berlin to Naples (Chomsky, 2016; Zizek, 2017). Other critiques of neoliberal economics have surrounded its globalization of inequalities (and accompanying ecological disorganization) (Ruggiero and South, 2013; Varoufakis, 2013), including the specific role of neoliberalism on state crimes, for example Whyte’s (2010) examination of ‘the crime of neoliberalism in occupied Iraq’. Criminologists have even analysed the impact of Chinese investment in Africa, focusing not merely on how it’s rearranging the traditional coordinates of multinational exploitation, but the specific threats it presents to the development of criminal justice system on the continent. Kailemia’s (2017) study examined the role of Chinese communicative capitalism in Africa’s criminal justice, showing how the juridical system in most African states is coming under increased pressure to evolve along the narrative of China and Africa and bosom buddies trying to catch up with the big (Western) boys of globalization, in which the small matter of ecological rights may have to pave way to full-throttle modernization.

Unsurprisingly, the logical outgrowth of this analysis has been re-visitation of Marx’s warning, in *The Communist Manifesto*, (written in the spring of 1814) of a ‘spectre haunting Europe’, which Marx hypothesized to be the ‘spectre of communism’. Albeit Marx’s premonition of a total collapse of capitalism has not (yet) materialised, more than ever today political economists find it hard to ignore the key point he made apropos of the instabilities of (untrammelled) capitalist accumulation: Unregulated capitalism cuts the very feet on which [bourgeoisie] accumulation rests so that, as Marx saw it, ‘what the bourgeoisie produces, above all, are its own grave diggers’. We know, retrospectively, that Marx was off-target with prophesy of a triumph of the proletarian- what with the miseries of a ‘gig economy’, zero hours’ jobs (from the suicides of indebted Uber drivers in India to violent eviction of cleaners at the *London school of Economics)* (Zizek, 2017; Chomsky, 2016) or even US corporate employers taking out insurance policies on their employees with long term illnesses so that the corporations, not family members, are compensated once the worker is deceased (Zizek, 2017)! But, Marx was right in warning us of a looming catastrophe resulting from the violent aims of accumulation, such as the ‘democratization’ projects in oil and mineral-rich countries, where the priorities of powerful countries (usually pushed by corporate interests) are dropping of arms to ‘moderate rebels’ (Chomsky, 2016; Kailemia, 2016; Zizek, 2017), or the ‘arrangements’ between ‘war lords’ (who may be indicted at some point by the international criminal court, if they are from Africa) and corporations, in which, apropos of Congo, Zizek (2010) observes that

Congo no longer exists as a united operating state; its eastern part in particular is a multiplicity of territories ruled by local warlords controlling their patch of land…each warlord has business links to foreign companies of corporation exploiting the wealth- mostly mineral. This arrangement suits both partners: The corporation gets mining rights without paying taxes and so forth, while the warlord gets paid… so in short, forget about the blaming the conflict on the ‘savage customs’ of the local population: Just take away from the equation the foreign high-tech companies and the whole edifice of ‘ethnic warfare fuelled by old passions’ will fall apart’ (2014: 23)

Zizek’s crucial point is thus the recognition of neoliberalism as a specific form of violence, underlying the light edifice of other forms of violence. Elsewhere, Zizek (2011) contrasts ‘subjective (SOS) violence’ (rape, mugging, armed threat…) to ‘Objective violence’ (the province of neoliberal economics, staged in production and consumption in so-called late modernity) (see also, Bauman, 1989; Beck, 1992; Zizek, 2011; Hobsbawm, 1994) and ‘symbolic violence’-the province of ‘language proper’, of discourse, of ‘naming’. At the global level neoliberalism involves a lethal mix of objective and symbolic violence most manifest in how society, exercising its functions through the state (and the international system of politics and commerce), distributes public ‘goods’ and ‘bads’ (Stiglitz, 2012; Lazzarato, 2011); how the state, or corporates, or a regional regime includes or excludes certain of its subjects from the ranks of those who bear the costs or benefits or harms of environmental exploitation, economic boom and/or busts, debt and wages and so on (Zizek, 2014; Lazzarato, 2011; Varoufakis, 2013). Apropos of ‘symbolic violence’ Heidegger (2000) taught us that man’s relationship with phenomena around him is contoured by the linguistic worldview he develops or inherits: Not only are relations of subservience and domination of others- and of nature- reproduced in our habitual speech forms, but there is also violence in language as such, in naming- such as when we call a metal ‘gold’, as Chomsky (2014) also shows, thus opening (what was otherwise a piece of rock) to exploitation, speculation, modification, sale, site of war and so forth.

The importance of this delineation of violence is in identifying how normalised deployment of the machinery of state against subjective violence, including ‘evidence-based’ adversarial court systems, alienates engagement with the other two forms of violence constructing them as ‘externalities’- the business lingo the father of neoliberalism, Hayek (1973), developed to explain ‘the unintended consequences of doing business’, which to him, ‘occur after the proper legal caveats have been served’, so that damage cannot be properly claimed by those to whom it would otherwise be due.

Which brings us to the core purpose of this paper: To analyse the nature, scope and impact of neoliberal economics in Africa, highlighting its toxic mix with Africa’s unique position in the international criminal justice system.

***The neoliberal framework of the post-colonial Africa state.***

The brutality of neoliberal economics, presided over by the ‘Bretton Woods Institutions’ (IMF, World Bank...) is now the stuff of legend. What however evokes wonder is fact that, with the exception of a few, the new economies of the post-colonial state did not completely fall off the international system of ‘trade’, but managed to hang on the proverbial ‘doorway’- alluded to in Sloterdijck’s (2013) notion of cupolas- albeit, initially as basket cases of ‘dead aid’, as the World Bank economist Dambisa Moyo (2008) has argued, but subsequently as ‘management’ burdens (Zizek, 2012); candidates for absorption into the debt economy. In the management fiasco stage, the IMF, WB, and a handful of politicians, now decide for everyone which resources should take priority, which part of the national income should go into servicing which debt and so on. As such, the debt economy has deprived many citizens of political power, which had already been diminished through the concessions of colonial-era systematic dismantling of communal institutions (see, for example, Anderson, 2005; Nugent, 2004; Mamdani, 1996). As Nugent also shows, the conflicts ravaging Africa (from the Congo wars, to the ‘blood diamond’ conflicts in Liberia and Sierra Leone) should be read against the background of the systematic dismantling of community networks by the colonial economy: The violence which has characterised the past 50 years of post-colonial Africa’s experience, Nugent argues,

Decolonization was such a fraught affair because it involved a transfer of power, at two levels simultaneously: That is, from European officials to African politicians and from chiefs to locally elected leaders. The electoral principle, which had never found favour amongst the colonial authorities, was now formally enshrined as the basis on which the right to command rested…Throughout the first half of the 20th century, chiefs had been the most trusted intermediaries of the colonial regimes, only to find themselves jilted at the altar of independence’ (2004: 110).

The implication of this ‘jilting’ is not only that the post-colonial state inherited weakened community structures of command, but that such inherited structures were infused with the colonial apparatus of ‘divide and rule’, involving governance through patronage and terror by the post-colonial elites (See also, Mamdani, 2001; Guest, 2004): A common pattern of the post-colonial state, Nugent tells us, was the systematic dismantling of devolved government in favour of centralized control using peripheral cronies installed by the power of the day. In tandem, the post-colonial indigenization of the economy was also its ethnicization, so that the fertile lands, the mineral rich regions, and important arms of government and the economy (tourism, military, policing, agriculture) were in the control of the ‘tribe’ in power. (In ‘citizen and subject’ Mahmood Mamdani (2006) renders the post-colonial state as a form of decentralized despotism’, exercised by chiefs who owed their allegiance to their new masters with the same zeal they displayed for the colonial masters.)

This reading is important for two reasons: First, because the survival of the ‘decentralized despot’ was guaranteed not by the allegiance of those he ruled, but by the mercies of the appointing authority (in the state/tribal HQ), he was more mindful of the welfare of the centre than the periphery. This also meant that any challenge to the centre was confronted at the periphery and *vice versa* (with some chiefs exercising more power than cabinet ministers in the regimes of Kenyatta and Moi, in Kenya) (Mamdani, 1996; Guest, 2004). Secondly, with the local despots seized of the business of ‘putting out fires’, the elites at the centre could carry out the business of dismantling anything that stood in the way of ‘masters abroad’ (Nugent, 2004; Moyo, 2008). The implication is that as the states grew their GDPs (and earned more foreign exchange) these benefits did not truckle down to the peripheries, so that in most states there are still no roads outside the capital cities (Warrah, 2008; Nugent, 2004; Guest, 2004).

Such export of value, where the finance accumulated and was later transferred outside the countries (through tax evasion or use of offshore accounts to hide loot by the political elite) not only tilted the economies in favour of exports of primary commodities, but it also ‘politicised the economic and economised the political’ (Guest, 2004): In order to guarantee trade, industrialists invested in the rentier economy by ‘buying’ the support and/or allegiance of politicians and politicians who, in turn, looted the more, lining the pockets for the next battle for political survival. Thus, to be in politics was about becoming wealthy (as opposed to public service) and to be wealthy became participating and surviving in politics.

There is wonderful documentation of the ‘shackled continent’ (2004) resulting from this, again itemizing the precise links between post-colonial corruption and the creation of zero-sum politics. There are even critical readings of the links between the pre-colonial, the colonial and post-colonial state-building and genocides, such as the wonderful ethnographies by Jamieson (1999) on ‘genocide and the social reproduction of immorality’ and Mamdani’s (2001) account of ‘the victims who became killers’ in the Rwandese genocide. The point here is not so much about economic speculation as a form of violence (because this case hardly needs making), but how the normalization of this speculation (and other forms of value- extraction) are distanced from their impact; how bloody conflict, for example, is conveniently explained as ‘tribal rivalry’, or ‘spontaneous’ reaction to electoral theft, without acknowledging the connections of this spontaneity or ‘tribe’, to the schism in the economy. Or, as Zizek also argues

The fundamental systemic violence of capitalism, much more uncanny than any direct pre-capitalist socio-ideological violence…is no longer attributable to concrete individuals and their ‘evil intentions’, but is purely objective , systemic, anonymous… One can experience this gap in a palpable way when one visits a country where life is obviously in shambles. We see a lot of ecological decay and human misery. However, the economists’ report that one reads afterwards informs us that the country’s economic situation is ‘financially sound’- reality doesn’t matter, what matters is the situation of capital…’

***The neoliberal state as a platform of violence***

The neoliberal state- and the international system which it is part of- is the platform *par excellence* for managing and neutralizing any threats to the system of rigged cupolas (whether these arise or result from political, economic, and environmental) challenges. Disentangling the criminal from its economic justice underbelly is therefore naïve, to say the least, not only because of the universalising role of capital but, needless to say, because most conflicts have their root in economics: Conflict may not necessarily be fought on economic terms, or for clearly articulated economic gains, but it’d be naïve to decentre the economic from any environmental, cultural or political conflict or a solution to the same (Mamdani, 1996; Wrong, 2009; Moyo, 2009).

Lazzarato (2011), in ‘indebted man’, is already aware of this when he argues that debt is now the neoliberal weapon of choice to control the subjects of global capital:

The debtor-creditor relationship…intensifies the mechanisms of exploitation and domination at every level of society... Everyone is a debtor, accountable to and guilty before capital. Capital has become the great creditor, the universal creditor… Through the public debt entire societies become indebted. Instead of preventing ‘inequalities’, the latter exacerbates them (2011: 8).

As part of the hegemony of neoliberalism, Lazzarato argues, the logic of market competition is extended to all aspects of social life, so that for example health and education- or even political decisions (voting) themselves- are perceived as investments made by the individual in his or her own dimension as an investor. The collective indebtedness, sometimes out of arrangements entered between ruling elites and multilateral lenders, are taken as collective entrepreneurial decisions by the citizens; national growth (in GDPs etc.) signals good investment decision-making (and is rewarded as such with more debt), while poor growth is an investment offence (punishable by downgrading of ‘ratings’, or the rollback of investment in social safety nets). Alongside this logic, poverty is a diagnosis of poor decision-making, by the African entrepreneur-of-the-self, so that it is right to punish this failure through the *International Monetary Fund* (IMF)’s ‘structural adjustment programmes’ in Africa. In ensuing cycles of employment and retrenchment, entrepreneur appraisal ensures that the worker is no longer perceived as merely labour power, but as personal capital making good and bad ‘investment’ decision as s/he moves from job to job therein in/decreasing his/her net capital worth. The implication of this is that risks (financial, ecological, and psychological) are outsourced from the company and the state (or insurance and banking institutions) to the individual: Social protections are individualized (privatized) to align them to market norms, and thus they are no longer guaranteed, but are conditional on the performance of the individual whose life is opened up for assessment.

Along the same veins, the absence of ‘subjective’ violence, cue the absence of any forms of picketing against depressed wages or bad investment decisions by national elites, is rewarded by high ratings in ‘ease of doing business’ or ‘transparency’ indices, so that, presently, some of the most draconian regimes in Africa (Ethiopia, Rwanda, Egypt etc.) are also increasingly being held up as totems of good management to be envied and emulated. In similar vein, the easiest way for an African leader to be invited to Davos or to the G7, as an ‘observer’, is not to provide clean water, or to widen democratic space, but to maintain a ‘stable outlook’- perhaps with their presence in these revered summits signalling wise decision-making by the subjects they oversee?

The question then is: How is this logic extended when the post-colonial African state enters the avenue of international criminal justice?

***The court that is under siege in Africa and elsewhere.***

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 crimes against humanity- during an *African Union* *Heads of States Summit* in South Africa[[1]](#endnote-1). 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 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 ICC, 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 crimes[[2]](#endnote-2)," 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 crimes[[3]](#endnote-3)’. 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.’[[4]](#endnote-4)

The ANC’s criticism of the ICC is in line with the African Union’s (AU) which 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 of 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’[[5]](#endnote-5). 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’[[6]](#endnote-6).

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).

Criticism of US double standards would appear to be justified[[7]](#endnote-7): As Chomsky’s (2012) points out, 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 ICC[[8]](#endnote-8). Or, consider the move by the Trump administration to cut aid to the Palestine territories following a successful vote by the UN to not recognise, along the US, Jerusalem as the capital of Israel. While announcing Palestine aid cut, US ambassador Nikki Hailey regretted that, at the UN, Israel had become ‘a nation… singled out for attack in this organisation… a nation is disrespected. What’s more, that nation is asked to pay for the privilege of being disrespected[[9]](#endnote-9)’. The irony is that, while the US opposed the UN vote in support of Palestine, the US immediately called a Security Council special seating to discuss the situation in Iran, where protesters were on the streets over food prices. That week the leader of the free world’s twitter insults were fairly divided between supporters of the Palestinian cause, and the Iranian leadership which, unsurprisingly, was finding it difficult to govern under the threat of US sanctions which the Trump administration was threatening to re- impose, contemporary to the Iranian nuclear deal signed by the Obama administration. This digression is aimed at showing that US positionality on international justice is not new or subject to radical review after regime change, but is in fact consistent: While the Obama and Trump administration are different in many respects, the US remains adamant to recognise the victimization of peoples and states that are not aligned to American exceptionalism, as ‘allies in the war on terror’ or those with significant cultural support inside the US, such as Israel (Chomsky, 2016; Kramer and Michalowski, 2005). The US has consistently opposed Palestinian application of ICC membership: Barack Obama's administration repeatedly said it did not believe Palestine is a sovereign state to qualify for ICC membership, Lindsey Graham, part of a seven-member delegation of US senators visiting Israel, Saudi Arabia and Qatar characterising Palestinian application for ICC protection as "a bastardising of the role of the ICC’ which is ‘incredibly offensive.’[[10]](#endnote-10) (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.)[[11]](#endnote-11) 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’[[12]](#endnote-12).

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[[13]](#endnote-13)’ 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’[[14]](#endnote-14). 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, 2009; 2014; Chomsky, 2014; Kailemia, 2016). The US, which would not consider membership of the ICC is opposed to any state joining the court, if this threatens Israeli or US interests, but is happy to lend logistical and material support to the court if this helps to prosecute those who ran afoul of US interests, from Libya, Syria, Kenya, Congo or even Sudan (Kailemia, 2016).

***The difficult role of the ICC under post-colonial injustices***

Perhaps the ICC’s Achilles’ heel in Africa is that it has attempted to offer a juridical solution to a political problem that reaches beyond the activity of the visible agents whom it is possible to drag into the courts. By contrast, the violence staged over elections is the result of wider, and deeply seated, problems of the post-colonial state’s political economy (Mamdani, 2001; Jamieson, 1999). This is not to deny that the ICC can be active in prosecuting such crimes, or that the ICC’s efforts are in vain, until all the other forms of violence have been resolved: Rather, it is an argument that the ICC is only a part of the solution to the violence- in this instance it is only effective against one type of it. Actually, 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).

It is easy to see the interplay between the objective and the subjective forms of violence in the Kenyan cases which resulted in the post-electoral violence of 2007/08. After incumbent president Mwai Kibaki was declared the winner of a disputed election, held on December 27, 2007, supporters of Kibaki's main opponent, Raila Odinga, alleged electoral manipulation and took to the streets in so-called ‘mass action’. The ensuing violence left more than 1300 people dead, and close to 650000 internally displaced. 6 people (nicknamed the ‘Ocampo’ Six) including the current president Uhuru Kenyatta and his deputy- formerly on opposite sides of the violence- were indicted by the International criminal court for crimes against humanity. All the cases have ‘collapsed’, after a collective pre-trial and trial period of 5 years. The cases have become a case study for the ICC’s relationship with Africa, exposing the positionalities of global powers when it comes to the business of the ICC, as Kailemia (2016) argues. As Kailemia (2016) argues, the ICC indictees may very well have been part of the main perpetrators, but still this was only possible because of systematic assault on the mechanisms of governance of the Kenyan state, not only by a rentier economy presided by the Kleptocracy of Arap Moi (who ruled under a single party for 24 years), but also by international interests through which large sums of monies are channelled to the main candidates during elections in Africa. This point is illustrated by the fact that, even after the indictments at the ICC, Kenya has not been spared systematic violence at every 5-year electoral cycle. Kenyan elections, like most of Africa’s, are zero-sum contests in which the main candidates have regional and international backers willing to protect their man and vilify his opponent. In the last general election in 2017, largely seen as compromised, and boycotted by the opposition after the court nullified it in a historical move for the continent, the opposition cited international lack of interest in a credible system for Africa because, as Raila Odinga said, Americans and Europeans were only interested in a ‘peaceful’, rather than a just, process as long as this keeps their interests intact. As a key ally in the so-called ‘war on terror’, through its self-proclaimed ‘operation Linda nchi’ (operation protect the nation) in Somalia, Kenya is host to a large US military and logistical facilities, so that an acceptable candidate is one who does not rattle this arrangement. We know from the ‘leaked cables[[15]](#endnote-15)’ that, in 2007 elections, the Americans were not fond of Mwai Kibaki’s ‘turn east’ policy which they viewed as replacing American interests with the Chinese and so Odinga was their preferred man. Condoleezza rice has elaborated American concerns over this election, including the need Americans placed in a power-sharing arrangement for Kenya, in her autobiography released after her tenure as US secretary of state. 10 years later, Kenyatta was the west’s darling (after extending British access to training facilities in Nanyuki, Kenya) and a highly publicised visit by Obama in 2016- or even the presence of Israel’s Benjamin Netanyahu at Kenyatta’s contested inauguration for a second term (following a 98% win after a voter turnout of 38% in the repeat poll).

These examples illustrate the rentier arrangements captured in Warrah’s (2008) ‘*Missionaries, Mercenaries and Misfits’* where politics in Kenya is part of a ‘micromanaged exchange-rate mechanism’, where the man coming in does the bidding of the major powers. The Americans may have their military bases, but the Israelis also have a million acres of land at the Kenyan coast and a host of other interests to protect. Who cares about the small matter of systematic dismantling of industry, decline in prices of primary commodities in international markets, collapse of the tourism industry from western imposed ‘travel advisories’ and so on, if this is what it takes to get the right man or turn the wrong one around? As one can guess, this vicious cycle damages the capacity of the state to provide basics services, culminating in precisely the violence which characterises the standard notion of ‘state collapse’.

The implication for international criminal justice here is that, even where a case is referred to the prosecutor by the UNSC- as happened in Ivory Coast in 2010, following the overthrow of Laurent Gbagbo by French troops[[16]](#endnote-16), the prosecutor receives the support of the main powers as long as this extends to prosecution of the villain, not an exhaustive investigation of the whole environment of criminality. This is an old theme as far as Africa is concerned: The trial of CIA-trained-and backed-Charles Tailor by the International Crimes Tribunal for Sierra Leonne, only followed after he fell afoul of US interests[[17]](#endnote-17). So, to go back to an old theme of race, highlighted above in relation to the obsessive prosecution of Africans by the ICC, perhaps the question (also raised by Karim Khan, QC, defence for William Ruto in the Kenyan trial) perhaps the issue is not whether the ICC prosecutes Africans and not non-Africans: The issue is what kind of African the ICC prosecutes. This point has also been illustrated by the exercise of the prosecutor’s *motu proprio.* In respect of Libya, it is Saif al Gadhafi, the surviving son of the former Libya leader, who has been begging the ICC to prosecute him, while the ‘interim Libyan administration’- and Washington- is opposed to the ‘prosecutor’s meddling with Libya’.

But, let us now lose sight of the key issue: The ICC trial may appear to provide justice, but it is not adequate because the violence it is equipped to prosecute is only the veneer of a deeper, historical injustice. In the Kenyan case, the country’s ethnic cleansing history stretches way back to post-independence Kenya (Anderson, 2005; Wrong, 2009), as does Ivory Coast’s history of violence- related to French micro-management of ‘Francophone African’ countries (Zizek, 2010; Kailemia, 2016). As Fayal Gaynor, counsel for Kenyan victims of the 2007/8 violence repeatedly reminded the trial court, the post-election violence of 2007 was a continuation of post-colonial Western-backed population displacement to pave way for large-holder commercial farming, pejoratively referred to as ‘land clashes’ in election cycles. (See also, Kailemia, 2016; Wrong, 2009).

***Conclusion***

In ‘Who rules the world’ Chomsky (2017) has painted the ‘world interior’ of those to whom the global system of values is aligned with their needs for security (or food or a future), such as deployment of aircraft and naval vessels to the overfished waters in the gulf of Eden to ward off potential threat from ‘pirates’- usually disenfranchised Somali fishermen or farmers caught between so-called jihadists and European vessels stealing fish or dumping industrial waste off their coast (Kailemia, 2016; Ruggierro and South, 2013). Here, subjective violence (say piracy) goes hand-in-hand with objective violence (resources theft or toxic waste dumping) but, whereas the European vessel has a choice of where to trade or dump the waste alongside the stipulation of a number of voluntary protocols in which it has flag state or insurance indemnity, the Somali fishermen doesn’t have platform even to articulate his loss. He is not even allowed the decency of a court trial in the jurisdiction of the large vessel’s state. As the Somali piracy trials have shown, wealthy countries have both the luxury of not only being able to deal with the threat from the nuisance of hijackings, but they can also farm out the trials and detentions of the pirates, to regional courts in Kenya-usually in exchange for training or weapons (Ruggiero, 2013; Ruggiero and South, 2013).

Reflecting on this predicament of the ICC, Zizek (2008) sees the international criminal Court as merely an appendage of an international system of ‘post-politics bio-politics’; that is, a type of (international) politics which claims to ‘leave everything behind’ (old ideological struggles, old injustices…) to achieve the primary goal of the efficient administration of life. The main achievement of post-political bio-politics, Zizek argues, is objectification of social life, so that it can be administered through fear or the threat of sanctions: Instead of radical emancipation, the political subject is encouraged to ‘accept things as they are’ and move on: Forget apartheid, forget the stolen money in offshore accounts, just create a conducive environment for investors, acquire new voting machines and so forth-or you will be arraigned in a distant court as a super-predator, abandoned by your [corporate] financier et cetera. Or, as the British Foreign Secretary, Boris Johnson, told a gathering in Libya, the country can be lie Dubai; it just needs to clear the bodies form the beaches- never mind the NATO aerial attacks that got the [Libyan] bodies on its beaches or its country roads.

Johnson’s foolish comments are of course in line with what others have been saying for some time about the exceptionalism of neoliberal violence: O’Reilly, (2005), Kailemia (2016) and Kramer and Michalowski (2005) caution against any attempt to disentangle the globalization of conflict from its main driver: American neoliberal exceptionalism. For Kailemia, global conflicts cannot be understood unless we also come to terms with the capacity of the ‘conflict-free’ places to ‘outsource’- that is to farm out, to leave- to the (Third World) allies of the US (and increasingly, Russia), which allows the developed world to not have worry about the legal problems or public protest; we supply the drones/ aircraft, you clear the bodies (and, one can add, ‘we restrain the court’)! 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 unto itself (Zizek, 2010, 2014; Jamieson and McEvoy, 2005).

The post-political role of the ICC is thus to enhance the ability of neoliberal globalization to ‘eat and have its cake’, by throwing down crumbs which satisfy the mechanisms of popular socio-political or environmental causes, but in which participation is premised on no attempt to rearrange the underlying causes of global injustice. Were such instruments to challenge the location of the insiders or outsiders of this rigged cupola- say, by arraignment of corporate CEOs to answer for mineral related crimes against humanity at the ICC- then we’d see the real opposition to the courts or protocols. As a matter of fact, key members of the international community- the US, Russia or China- remain non-members of the ICC, for the fact that they would not wish to submit to a ‘rogue’ court which may hold them to the same standard as Gambia or Congo and so forth (Zizek, 2010; Kailemia, 2016).

What then should be our conclusion: In order to properly prevent international criminal injustices, we must not only conceptualise but also prosecute their subjective forms (rapes, pogroms, ethnic cleansing…) along the contours of their underlying ideological forms (including the deliberate forms of language through which the elimination of the ‘other’ is made inevitable, denied, or normalized. Yes, let us look at the pogroms, but let us also look at the system of international values which determines who receives or is denied justice- let us look at the ‘exceptionalism’ of international justice (Kailemia, 2016; Zizek, 2009) including the condition of the African ‘other’, not only the state, but also the victim of violence whose interest are not reflected in the African Union’s elite indemnity of sitting heads of states. Yes, let us worry about ethnicization of ICC prosecutions, but let also challenge the AU hypocrisy of wanting to appropriate to itself the ‘colonial immunity’ (Chomsky, 2014) allegedly enjoyed by so-called major powers to the detriment of the African woman and child, especially those, such as in the Kenyan case, who have languished for decades in internally displaced people’s camps?[[18]](#endnote-18)

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1. See: <http://www.bbc.co.uk/news/world-africa-33269126> [↑](#endnote-ref-1)
2. See the full statement at: www.state.gov/r/pa/prs/ps/2015/06/243793.htm [↑](#endnote-ref-2)
3. <http://www.nytimes.com/2015/07/30/world/middleeast/report-cites-possible-war-crimes-in-israeli-hunt-for-ambushed-soldier.html?_r=0> [↑](#endnote-ref-3)
4. See <http://uk.reuters.com/article/2015/06/15/us-africa-summit-bashir-icc-idUSKBN0OU0K420150615> [↑](#endnote-ref-4)
5. Http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10082819/International-Criminal-Court-is-hunting-Africans.html [↑](#endnote-ref-5)
6. see http://www.capitalfm.co.ke/news/2013/10/icc-toy-of-declining-imperial-powers-uhuru/ [↑](#endnote-ref-6)
7. 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. 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. [↑](#endnote-ref-7)
8. http://mondoweiss.net/2015/01/palestinians-consequences-settlements [↑](#endnote-ref-8)
9. <http://www.independent.co.uk/news/world/trump-palestine-pakistan-israel-aid-payments-money-threat-latest-a8138921.html> [↑](#endnote-ref-9)
10. <http://uk.reuters.com/article/2015/01/19/us-usa-israel-palestinians-idUSKBN0KS24Z20150119> [↑](#endnote-ref-10)
11. See: https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories.html [↑](#endnote-ref-11)
12. See: http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi [↑](#endnote-ref-12)
13. http://www.usnews.com/opinion/blogs/world-report/2014/11/13/israel-is-the-middle-east-ally-the-us-cannot-lose [↑](#endnote-ref-13)
14. <http://www.newrepublic.com/article/120953/senators-threaten-cut-palestinian-funding-over-icc-membership> [↑](#endnote-ref-14)
15. For example, https://www.standardmedia.co.ke/article/2000218973/leaked-top-secret-us-cables-reveal-uhuru-s-take-on-kibaki-and-raila [↑](#endnote-ref-15)
16. <http://www.voltairenet.org/article169436.html> [↑](#endnote-ref-16)
17. <https://intelnews.org/2012/01/19/01-911/> [↑](#endnote-ref-17)
18. See: <https://research.unsw.edu.au/projects/investigating-health-needs-vulnerable-people-living-internally-displaced-persons-idp-camps> [↑](#endnote-ref-18)