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

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***Resume***

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, in this sense, the post-colonial African state has been rendered as 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 ideology of neoliberal economics, in order to render it as not only 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, not only at the level of the political economy, but also at the level of international criminal justice. A discussion of the impact of neoliberal violence on 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 piece-meal understandings of violence that prejudice its ‘subjective’ form- which Zizek (2011:4) defines as ‘violence by an identifiable agent’- to the detriment of its structural and symbolic forms. This ‘subjective’ emphasis, we shall contend, ignores evidence of the structural materiality of post-colonial injustice, specifically in its narrow frame of the victims and perpetrators of international injustice, or indeed in terms of what is procedurally recognized, punished or redressed as the victimisation or perpetration of such crimes or injustice. Our contention fits within the key arguments of critical criminology, and specifically social harms theory: That the narrow evidentiary requirement of an adversarial system of policing, investigation, prosecution and sentencing- based on notions of ‘proof’, ‘intent’, ‘culpability’- has temporary and spatial limitations on the extent it can be relied on as a comprehensive system of justice, even though within specific contexts it can function well as a credible system of punishment. Recent social harms perspectives (for example Hillyard and Tombs, 2004; Kailemia; 2016; Zizek, 2017) have demonstrated how, to take one example, an adversarial system of justice based on ‘intent’ may function well in terms of investigating and prosecuting ‘individual’ crimes, such as murder, manslaughter, or rape, but may be limited in terms of how it recognises the impacts, the victims or the perpetrators of industrial tragedies or state-corporate crimes.

This paper is thus also in agreement with recent works (for example Chomsky, 2014; Zizek, 2010; Ruggierro, 2013 and Ruggierro and South, 2013) that have located the limitations of what has come to be referred to as ‘corporatist’ notions of justice onto the ideology that underlies and informs its priorities: Neoliberalism. Neoliberalism, Harvey (2011:15) argues for example, is based on not only commodification of nature and social relations, but an attitude to interpretation of the injuries and redresses that occasion the commodification as inevitable and justifiable as long as the ultimate goal of profitability is maintained. As we have come to accept, however, the globalization of neoliberal priorities of profit, security, privatization and so on has not just been limited to the sphere of the global economy but has infested other institutions including the institutions of social and criminal justice. Apropos of neoliberal globalization, Gros (2003: 67) and Crelistein (2003: 2986) have authoritatively demonstrated how the loss of the economic ‘paradise’ has unfolded in tandem with the loss of the criminal justice ‘paradise’, including the gross violations of liberty and human rights under the phenomenon we have now come to refer to as ‘the war on terror’.

In what follows, we shall aim to extend this reading to the nature of the neoliberal African state, showing how its relationship with the international criminal justice apparatus negates, ignores, and deletes the social harms of structure, including the specific ways in which placement of laws, institutions and other instruments of global justice are inimical to equality, diversity and freedom, not only for African states, but for the peoples of Africa. Africa is important to this debate because it- or at least majority of its populations- occupies the ‘exterior’ of what Sloterdijck (2013: 10) has referred to as ’the world interior of capital’: Neoliberalism, in this conceptualization, entails a permanent alienation of potential to reshape [global] relations of inequality, whereby discourse on the material and symbolic entitlements of a globalised capitalist system always-already happens within predetermined parameters which delineate between fragile winners of globalization, and the ‘others’ to whom increasingly violent structures must be maintained in order to keep them out. As Sloterdijck has indeed 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). A consequence of this alienation, Sloterdjick argues, is that most social life now takes place ‘in an expanded interior, a domestically and artificially acclimatized inner space’ (2013: 10). Zizek has observed apropos of Sloterdijck how one of the implications of this alienating globalization has been 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).

In order to properly grasp the inequalities 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. This point has also been made by Mamdani (2001) who reads the phenomenon of genocide in Rwanda as an extension of colonial notions of ‘master’ and ‘servant’; the former constructed in the post-colonial state arrangement as the fragile absolute, the gatekeeper of what can be recognised, recompensed or protected; the latter similarly reconstructed by the post-colonial state, but as the invisible hurdle to be surmounted, through sheer projection of state-corporate violence, in the untrammelled march to economic paradise.

The argument below unfolds thus: We begin our analysis with neoliberalism itself- its ideals and the matrices of its implementation, including how this implementation constitutes violence as such. This is followed by analysis of the role of the post-colonial state as a platform for this violence, showing how this platform is embedded in a global system of violence contoured by state-corporate exceptionalism. This is then followed by a brief analysis of the *International Criminal Court* (hereinafter ICC) showing how this facility is embedded in this state-corporate exceptionalism in its priorities, financing and mechanism of cooperation. This will then give way to some critical pointers of the dangers of this exceptionalism to international justice more broadly, but to the injustices that this arrangement stages for those among the peoples of Africa who are alienated from the instruments of the clientele post-colonial state. Specifically, our critique is aimed at the ICC’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 further weakened by ironical self-appropriation of exceptionalism by regional blocks such as the African Union (AU), which impose limits on the 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 attempted to do that?

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

The standard notion of neoliberalism, according to Harvey (2011: 2) 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 so much into self-regulation, but into regulation of all factors that may challenge untrammelled capitalist accumulation. A number of recent works (Zizek, 2010; 2017; Kailemia, 2016; Chomsky, 2014; Whyte, 2007) have highlighted how neoliberalism is not only a principally harmful ideology, responsible for a range of social harms present in today’s society, but also that its globalization constitutes ‘criminality’ as such.

Broadly, there are three summary patterns in which neoliberalism is a form of violence: (1) *Financialization*, involving such practices as predatory lending, punitive repayment plans for debt accumulated in corrupt transactions, (2) *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, which have driven record profits for the war and carceral industry, and (3); *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).

A crucial analysis of neoliberalism has been provided by Zizek (2011) who recognises neoliberalism as a specific category within a spectrum of violence. Zizek defines neoliberalism as a toxic mix of ‘Structural violence’ (which is to be distinguished from the ‘subjective’- or what he refers to as ‘SOS Violence’ of machetes, guns and so forth-) and ‘symbolic violence’ (inherent in language and imagery in which violence may be normalised or amplified based on how it is mediated or represented). Through this toxic mix, Zizek argues, neoliberalism functions at the global level through selective representation of ‘public goods’ and ‘public bads’: Regimes of ideology include or exclude phenomena from the ranks of what constitutes threats, opportunities and risks, based on what is perceived as a threat to the system of global accumulation. This interpretation normalises and justifies deployment of the state-corporate machinery against subjective violence (through ‘evidence-based’ adversarial court systems, for example) thus alienating the problems of structure from their structural solutions. Even where there is recognition of the structural basis of violence, this recognition is limited and premised, under neoliberalism, as an ‘externality. The concept of ‘externalities’ was coined by ‘the father of neoliberalism’, Hayek (1973: 14), who deployed it as explanation, or even justification, for what he regarded as ‘the unintended consequences of doing business’. Since this coinage, ecological destruction, inequality, social tension and other forms of what would be regarded by social harms theory as ‘subjectivation’ have been regarded in quite a cavalier manner as ‘necessary’ injuries to the process of securing the profitability that will alleviate socio-economic problems when, as it is assumed, the product of the entrepreneur ‘freed from the serfdom’ of state regulation, trickles down from the entrepreneur, to the state and thence to the recipient of state intervention. In its crudest form, the attitude here is, in Hayek’s conceptualization at least, that the aggrieved party is the capitalist- or monopolist- and not the society as a whole: The state must not intervene in any dispute between the individual and the whole, unless the state is protecting the individual’s right to make a profit. The state, moreover, should take positive measures to make sure that the individual is unencumbered by regulation, as much as is possible for his quest for profit; the state should also allow the individual to privatize as much as is necessary for profitability, and should intervene to protect the right to make more profit. In other words, the only important feature is a state’s economic profitability; all other aspects of its health may collapse, but its GDP growth must be shielded and fiercely defended. Where social ill arises, it is attributable to the whole, not to the individual entrepreneur, whereas when good arises, it is attributed to the individual’s entrepreneurial genius, rather than to a healthy functioning of society. Here is Zizek:

The fundamental systemic violence of capitalism, much uncannier 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’ (2017: 13).

Ruggiero and South (2013) and Whyte (2007) have highlighted the dangerousness of neoliberal interventionism which extends this thinking, and specifically its linkage to global state-corporate crimes. Whyte’s analysis, for example, concludes that the specific purpose of the American invasion of Iraq in 2003 was to satisfy American corporate interests in Iraq’s natural resources wealth: The occupation that would result from this invasion, Whyte argues, has demonstrated the underlying American state need to alter the Iraq economy- in contravention of international law- in order to align it with the interests of American corporations with monopoly interest in the Iraq oil infrastructure. Whyte alleges a number of ‘crimes of neoliberalism in occupied Iraq’, including money laundering, targeted killings, enforced disappearance, population displacement and so on.

Not unrelated, other analysis has highlighted the impact of neoliberal economics in Africa’s ecological disorganization resulting from Chinese financing. As Kailemia (2017) argues, Chinese investment in Africa has exacerbated the ‘traditional’ model of state-corporate exploitation of Africa, by corrupting the entire spectrum of political and criminal justice accountability: Chinese control, through funding and investment in Africa’s communicative capitalism (newspapers, TV and Radio stations) goes hand-in-hand with Chinese single-sourced financing of the construction critical state infrastructure, from parliament and court buildings, to rails and airports. This has empowered the state in relation to civil organizations and, importantly, freed the state from the precautionary due diligence that would be done under previous funding arrangements. With due respect to the well-known mechanisms of western exploitation of Africa, the entry of China has given the African state (and its ruling class) important monopoly and leverage in relation to state nascent institutions of state accountability. As an example, Kailemia’s (2017) study examines how the juridical system in most African states is coming under increased pressure to evolve along the narrative of China and Africa as bosom buddies trying to catch up with the big (Western) boys of globalization, of course with important questions relating to environmental and economic harms being regarded as non-priorities.

Other analyses have shed even more troubling light in regard to the links between the ecological collapse of parts of Africa with the activity of a predatory and poorly regulated global arms industry. Apropos of Congo, Zizek (2014) 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 here is thus the recognition of neoliberalism as a specific form of violence, underlying the light edifice of other forms of violence. Neoliberalism, in a nutshell, is responsible for far more human suffering at an unprecedented scale in the globe, from epidemics of war, genocide, disease, rampant crime or suicides, not to mention its impact in the troubling reconfigurations of social relations around the world, and specifically the so-called ‘rise of the right’, or ‘The Trump phenomenon’- named after the shock election of the openly anti-immigrant candidate in the 2016 US election- in Western democracies.

But, to grasp what this means for Africa, one must have an understanding of the neoliberal history, and predicament, of the post-colonial African state. Let us provide a brief analysis of this below.

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

The starting point for any analysis of neoliberalism in Africa is usually the story of how the Bretton Woods’ Institutions (The World Bank, The International Monetary Fund and, later, the World Trade Organization) brutality imposed conditions for free trade which treated the misery that was visited on the citizens of Africa as an unavoidable ‘externality’ of rebalancing Africa’s trade deficit, debt-GDP ratio and a plethora of other mantra in the neoliberal jargon. This justification was at the root of widespread layoffs, monopoly privatization of national assets, state shrinkage which affected provision of basic social services like healthcare and education and so on. Analysis of the role of the Bretton Woods conspiracy against poor and weak Africa is almost so complete that it is hard to come by alternative or complimentary analysis. What however evokes wonder is the fact that there is almost dearth of analysis of the connection between the groundwork laid during this period of so-called ‘structural adjustment’ and the edifice of criminal justice that arose from this foundation. Needless to say, the economies of the post-colonial state did not completely fall off the international system of ‘trade’ as would have been excepted of victims of economic violence, broadly speaking. Rather, the African state and institutional victims of neoliberal violence became its fiercest reproducer, its fiercest advocate. Alternatively, African states- and its edifice of educational, political and to an extent its religious institutions- remained at the proverbial ‘doorway’ of neoliberalism, neither completely in nor out. In Moyo’s (2008) reading, these states managed to cling on to the punishing, rotten ‘dead aid’ carcase. As such these states were also ‘management’ burdens (Zizek, 2010)- candidates for absorption into the debt economy- when and as it suited global neoliberalism. In this ‘management burden’ arrangement, to provide one example, the IMF, WB, and a handful of politicians continued to decide for everyone which resources should take priority, which part of the national income should go into servicing which debt and so on. The debt economy for example continued to deprive 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, on the one hand, and subsequent (systematic) dismantling carried out by African elites who replaced the European coloniser. As the European system of violence faded, Nugent argues, a struggle ensued between African people and their elites which 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. In this sense, to take one example,

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’ 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. We shall see below how this system of patronage is staged in the relationship between the so-called ‘allies’ on the so-called ‘global war on terror’.

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, for example (Mamdani, 1996). 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). 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; 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 also ‘politicised the economic and economised the political’ (Guest, 2004: 12): In order to guarantee trade, Guest argues, 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.

Guest’s documentation of the ‘shackled continent’ (2004) resulting from this is important in its clinical inventory of the precise links between post-colonial corruption and the creation of zero-sum politics. There are of course other critical readings of the links between the pre-colonial, the colonial and post-colonial state-building and ‘genocidal’ politics, 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) have been distanced from their impact by the post-colonial arrangement presided over by what would have been the victims of colonial-era alienation: Under the post-colonial ‘coloniser’ the violence embedded in the colonial structure of patronage has not been dismantled; rather it has been both normalised and deliberately hidden: It has been normalised for example through convenient interpretation of bloody conflict as ‘tribal rivalry’, or ‘spontaneous’ reaction to electoral theft; it has been hidden through mechanisms that disallow other interpretations, but which mechanisms also place both victim and perpetrator beyond the ambit any legal punishment or recompense. Nowhere is this more visible than in relation to the wars of plunder in which African resources and its people are trodden not only by its elites, but by a system of recognition which is vulnerable to elitist interests, interpretation and support for its most basic operability.

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

As the above analysis shows, 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 also, 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 (NY Times, 2015).

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.’[[3]](#endnote-3)

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’[[4]](#endnote-4). 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’[[5]](#endnote-5).

These sentiments are in line with wider criticisms of the ICC, including that made 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. As Chomsky (2014) 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[[6]](#endnote-6). 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[[7]](#endnote-7)’. 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 Trump’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, contrary to the Iranian nuclear deal signed by the Obama administration.

Our digression here 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 the American exceptionalism of corporate interest, as ‘allies in the war on terror’- most useful to the American military industrial complex- or those with significant cultural support inside the US, such as Israel (see also, Chomsky, 2014; Kramer and Michalowski, 2005). In fact 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.’[[8]](#endnote-8) 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.)[[9]](#endnote-9) 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’[[10]](#endnote-10).

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[[11]](#endnote-11)’ 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’[[12]](#endnote-12).

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, 2010; 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 globalised state-corporate neoliberal violence***

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, to take one example, is the result of wider, and deeply seated, structural problems of the post-colonial state, which are economic in nature (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. It is easy to see the interplay between the structural 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[[13]](#endnote-13)’ 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 (2008:23) ‘*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 UN Security Council- as happened in Ivory Coast in 2010, following the overthrow of Laurent Gbagbo by French troops[[14]](#endnote-14), 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[[15]](#endnote-15). 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 not 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).

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. In any event, 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). 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). 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 Office of the Prosecutor’s (OTP) operation.

***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. Here, subjective violence (say piracy) which otherwise goes hand-in-hand with objective violence (resources theft or toxic waste dumping) is alienated when framing solutions to global problems of injustice. The problem with this interpretation of and resolution to apparently global problems is the inequality it perpetrates; whereas a 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.

In this sense the ideology of international criminal justice that informs facilities like the ICC places these facilities as mere appendages of an international system of what Zizek (2014: 2) terms ‘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 like 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 in the first place.

Johnson’s unfortunate comments are of course in line with what others have been saying for some time about the exceptionalism of neoliberal violence: 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 and China) and powerful corporations. This farming out allows the developed world to not have to worry about the legal problems or public protest which would accompany public traces of neoliberalism’s violence. There appears to be an unspoken pact in the global neoliberal agenda: 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). Under this post-ideological agenda, the role of international criminal justice frameworks such as the ICC is thus to enhance the ability of globalizing neoliberalism 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, structural forms: 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, or the fact that states that violate international law casually are also irreplaceable allies of a court of criminal justice seeking universal support.

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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. See <http://uk.reuters.com/article/2015/06/15/us-africa-summit-bashir-icc-idUSKBN0OU0K420150615> [↑](#endnote-ref-3)
4. Http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10082819/International-Criminal-Court-is-hunting-Africans.html [↑](#endnote-ref-4)
5. see http://www.capitalfm.co.ke/news/2013/10/icc-toy-of-declining-imperial-powers-uhuru/ [↑](#endnote-ref-5)
6. http://mondoweiss.net/2015/01/palestinians-consequences-settlements [↑](#endnote-ref-6)
7. <http://www.independent.co.uk/news/world/trump-palestine-pakistan-israel-aid-payments-money-threat-latest-a8138921.html> [↑](#endnote-ref-7)
8. <http://uk.reuters.com/article/2015/01/19/us-usa-israel-palestinians-idUSKBN0KS24Z20150119> [↑](#endnote-ref-8)
9. See: https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories.html [↑](#endnote-ref-9)
10. See: http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi [↑](#endnote-ref-10)
11. http://www.usnews.com/opinion/blogs/world-report/2014/11/13/israel-is-the-middle-east-ally-the-us-cannot-lose [↑](#endnote-ref-11)
12. <http://www.newrepublic.com/article/120953/senators-threaten-cut-palestinian-funding-over-icc-membership> [↑](#endnote-ref-12)
13. For example, https://www.standardmedia.co.ke/article/2000218973/leaked-top-secret-us-cables-reveal-uhuru-s-take-on-kibaki-and-raila [↑](#endnote-ref-13)
14. <http://www.voltairenet.org/article169436.html> [↑](#endnote-ref-14)
15. <https://intelnews.org/2012/01/19/01-911/> [↑](#endnote-ref-15)