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# The Legal Politics of the Article 16 *Decision*: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise

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## Abstract

This introductory essay aims to offer a framework through which to make sense of the controversies arising from International Criminal Court (ICC) intervention in Africa. One such controversy is related to the deployment of the powers to refer and defer ICC cases central to Article 16 of the Rome Statute for the ICC. The manner in which the UNSC has employed this power has led critics – particularly on the African continent – to conclude that a range of geopolitics has undermined the judicial independence of the ICC. The essay argues, therefore, that the drafting history of Article 16 of the Rome Statute shows the workings of the political origins of the law and the manner in which foundational inequalities were woven into the very fabric of the Rome Statute. Following theorists such as Giorgio Agamben and Walter Benjamin who have conceptualized law as violence and who have taken seriously the ways in which violence and inequality live on through the law, the authors argue that not only can contemporary ontologies of international criminal law not escape the politics of its making, but if we are to adequately address the conditions of violence in the postcolonial African state there must be an ontological shift in the way we conceptualize law. They propose a rethinking that acknowledges root causes of violence and that take seriously politically adumbrated histories of violence that continue live in the armature of the postcolonial state. Considering how and when political settlements are relevant and rethinking how complementarity and cooperation might work more effectively are key to the conceptual framework.

## Keywords

African Union – Article 16 – force of law – International Criminal Court – International Criminal Law – power of the decision – Rome Statute for the ICC – United Nations Security Council – The African Court – political settlements – selectivity in law

## 1 Introduction

The relationship between the International Criminal Court (ICC) and the United Nations Security Council (UNSC) has been constructed by many ICC proponents as a relationship ultimately concerned with the maintenance of international peace and security. On paper, the ICC is not an organ of the UN. In practice, however, various permanent members of the UNSC have sought to control the activities of the ICC from its inception. During early stages of negotiations to establish the Court, permanent members of the UNSC insisted that the activation of the jurisdiction of the Court should be subject to the approval of the UN Security Council. A compromise was reached during the negotiations for the adoption of the Rome Statute that accommodated both the desires of the UNSC and other delegates. But that compromise came with a price. The UNSC was given powers to refer non-states parties to the Court under Article 13(b) of the Rome Statute and defer cases before the ICC under Article 16 while acting under Chapter VII of the UN Charter. These provisions have led to significant controversies in ICC relationships with states and regional actors, and they have been seen by many critics as having the potential to undermine the judicial independence of the ICC.<sup>1</sup>

One of the emerging challenges has not only involved the seemingly preferential role of the Security Council in exercising its deferral power. It has also involved the play of power in which the UNSC has referred some cases and not others. Syria is one such example of an instance of UNSC inaction. Over the past three years, Syria has been engulfed in a violent conflict with 250 000 besieged civilians and a death toll surpassing 100 000. Both government forces and non-government armed groups have committed widespread attacks, including murder, rape, torture and enforced disappearances. In response, various resolutions have been presented to the UNSC to refer the situation to the ICC, but have all been vetoed. Of late, 65 UN member states, of which several were African states, cosponsored a draft resolution for adoption asking the UNSC to refer the situation to the ICC. Once again, this resolution was vetoed by China

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1 K.M. Clarke, unpublished manuscript, 2014.

and Russia, prompting questions regarding the play of political interests in the dynamic between the UNSC and the ICC. This perception of politically motivated selectivity has highlighted the extent to which the politics of *the decision* (Agamben, 1998) is at play and shapes the terms on which the suspension of the law is mobilized toward particular ends. This politics of the executive decision is far from mundane and continues to be a feature of late modernity, manifest in what is known today as the new international order,<sup>2</sup> an order characterized by the realignment of state sovereignty with greater emphasis on state inter-relationships with each other and international institutions.<sup>3</sup>

As a feature of modernity, the power of *the decision*, whether exercised through domestic constitutional provisions, international tribunals or international organizations such as the UNSC, has implications for not only understanding the workings of state power in our contemporary international system but also the workings of the international order, made up of international organizations such as the United Nations. While these organizations are perceived to be democratic in their representational politics, they are actually constituted through the maintenance of a particular legal democratic order. This order is exemplified by the political compromise reached during the negotiations of Article 16 of the Rome Statute and in relation to current cases before the ICC. This conceptualization of the democratic order as fundamentally shaped by the play of power and not the ability to ensure equality (between states, in relation to poverty, etc.) calls for the rethinking of the potential of the *new international order* to undermine inequality and produce the terms for the absence of violence.<sup>4</sup>

International law scholarship that has analyzed Article 16-UNSC-ICC issues have tended to identify the problem, assess 'lessons learnt' and then issue a range of recommendations to help reach a solution. For instance, Charles Jalloh, Dapo Akande and Max du Plessis have taken up the problem of the Article 16 referrals as they relate to the AU, ICC and UNSC and issued a range of recommendations from the need to promote more effective cooperation and a deeper engagement between ICC States Parties, the ICC and the UNSC and the need for the AU and the UN to communicate with one another as per the existing protocols, to the need for the expansion of the use of domestic

<sup>2</sup> K.M. Clarke, unpublished manuscript, 2015.

<sup>3</sup> A. Chayes and A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, MA, 1998).

<sup>4</sup> K.M. Clarke, unpublished manuscript, 2015.

mechanisms for ICC crimes.<sup>5</sup> Lawrence Moss examines the referral and deferral powers of the UNSC and issues concluding recommendations ranging from the establishment of a UNSC working group on referrals, recommending that the UNSC work to promote justice and accountability and enhance the deterrent effect of the Court.<sup>6</sup> Tim Murithi recommends that the AU and the ICC “reorient their stances” towards one another, identifies a need for enhanced dialogue and engagement, and recommends that a political liaison officer be appointed at the ICC to facilitate communication with political organizations such as the AU, while Makau Mutua has suggested that the Security Council should generally resist using their deferral powers and politicizing the work of the ICC.<sup>7</sup> By and large, these interventions operate from within the legal frame or within the pre-existing structures and procedures of the Rome Statute and UN Charter.<sup>8</sup> Though we do not discount the relevance of such interventions, what this special issue will highlight is the reality that legal reform within the contemporary ICC-judicial system or the reorganization of the Security Council in favour of a more democratic social order is not all that is missing – at least as far as the existence of violence in the postcolonial African state is concerned. The reality is that in most of the situations involving overt forms of violence against the human body on the African continent, this contemporary violence has roots in the formation of the colonial and-or settler state.<sup>9</sup> The plunder of African resources, the decimation of its peoples and their worldviews, the implementation of systems of imperial governance and its designated hierarchies of rights-bearing subjects and citizens worked alongside the law and the law’s modernity – as we know it.<sup>10</sup> But for some scholars and a range of human

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- 5 D. Akande, M. du Plessis and C.C. Jalloh, *Position Paper: An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (Institute for Security Studies, Pretoria, 2010).
- 6 L. Moss, *The UN Security Council and the International Criminal Court: Towards a More Principled Relationship* (Friedrich Ebert Stiftung International Policy Analysis, Berlin, 2012).
- 7 T. Murithi, *The African Court and the International Criminal Court: An Embattled Relationship?* (Policy Brief No. 8, The Institute for Justice and Reconciliation, Cape Town, 2013); M. Mutua, *The International Criminal Court in Africa: Challenges and Opportunities*, Noref Working Paper (September 2010), available online at [http://www.peacebuilding.no/var/ezflow\\_site/storage/original/application/d5dc6870a40b79bf7c1304f3befe0b55.pdf](http://www.peacebuilding.no/var/ezflow_site/storage/original/application/d5dc6870a40b79bf7c1304f3befe0b55.pdf) (accessed 13 June 2014).
- 8 Akande et al., *supra* note 5, p. 26.
- 9 M. Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror* (Random House, New York, NY, 2009).
- 10 *Ibid.* See also A. Anghie, ‘Time Present and Time Past: Globalization, International Financial Institutions and the Third World’, 32 *NYU Journal of International Law and Politics* (2000), 243–290.

rights organizations in general, law, and in particular justice, has been conceptualized as the opposite of violence.<sup>11</sup> For others it has been articulated as a form of violence with the potential to exert a performative and self-preserving force.<sup>12</sup> The foregoing presumes that law is a self-preserving mechanism that – through its agents – has the ability to preserve order, re-conceptualize it or hide the basis of its power.<sup>13</sup> This ability to preserve itself – and indeed, following Derrida and Agamben, to preserve and sustain the political powers that constitute it – is central to the workings of law.

In much of the Western constitutional law literature the legitimizing foundations of law are presumed to exceed the play of politics. Much of that scholarship constructs the continuity of a socio-rational order as being aligned with the intentions of the “founding fathers”. The founding intentions – as political acts – are often ritualized to legitimate a new social order, after which time politics are often understood to be disarticulated from law.<sup>14</sup> This perceived tension between the political and the legal is neither new nor unique. In the various tensions and contestations between the ICC and the African Union, there is a similar division at play between ‘the law’ and ‘politics’, with the ICC embodying what is often seen as *law* and the Security Council characterized as decidedly *political*, undemocratic and non-transparent in nature. Such distinctions are also drawn at the national level, between state institutions that are considered political. This distinction provides the foundation for the law to legitimate itself, as a system of neutral rules that stand apart from and even above the partisan process, which is seen to be quintessentially political. Following Sarah Nouwen and Wouter Werner (2011), the ICC is inherently and inextricably political, in so far as it demarcates friends and enemies. They argue that efforts to demarcate law and politics render an analysis of the politics of the law impossible.<sup>15</sup> Nevertheless, various statements by agents of the ICC reflect such an effort to demarcate law and politics. For example,

11 See Harold Kongju Koh, ‘International Criminal Justice 5.0’ 38 *Yale Journal of International Law* (2014), 525–542.

12 R. Buonamano, ‘The Economy of Violence: Derrida on Law and Justice’, 11(2) *Ratio Juris* (1998), 169–179.

13 See J. Derrida, ‘Force of Law: The Mystical Foundation of Authority’, in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Psychology Press, Abingdon, 1992); Buonamano, *supra* note 12; K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism* (Cambridge University Press, Cambridge, 2009).

14 Derrida, *supra* note 13.

15 S. Nouwen and W. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, 21 *European Journal of International Law* (2011), 941–965.

in a 2008 article by the former Prosecutor of the ICC, Luis Moreno-Ocampo, “The prosecutor’s duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is time for political actors to adjust to the law . . . we have no police and no army but we have legitimacy.”<sup>16</sup> In an interview in early 2014, current Prosecutor Fatou Bensouda insisted that “political and extraneous considerations” played no role in the decisions of her office.<sup>17</sup> At play, then, is a discourse seeking to assert the Court as decidedly apolitical. Law and politics are presented as two separate domains, with the ICC operating firmly in the first and with no regard for the latter. These claims that the institution is impartial and independent and that the decisions of its key agents are guided solely by judicial and legal criteria are meant to affirm the credibility and legitimacy of the Court. This has been further affirmed by a range of critically engaged scholars. Judith Shklar describes efforts to articulate law and politics as two separate domains, “Politics . . . regarded not only as something apart from law, but as inferior to law. Law aims at justice, while politics look only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies.”<sup>18</sup> Clearly law, and international law in particular, cannot escape the politics of its origins and enactment. The idea that law is set up to combat political interests and endemic violence highlights the reality that the politics of the “founding” violence of law is actually re-inscribed within the framework that the law reproduces.

TWAIL (Third World Approaches to International Law) scholars have critiqued the establishment of the ad-hoc tribunals ICTY and ICTR by the UN Security Council, uneasy with the manner in which the Security Council – reflecting the opinions of a limited selection of states – is arrogating to itself the power to deal with numerous international questions which have been the subject of on-going negotiations by the larger international community.<sup>19</sup> They, too, have rejected the notion of international law as divorced from its

16 L. Moreno-Ocampo, ‘The International Criminal Court: Seeking Global Justice’, 40 *Case Western Reserve Journal of International Law* (2008), 215–225.

17 Interview with Fatou Bensouda, *New African Magazine* (London 28 January 2014), available online at [http://www.newafricanmagazine.com/index.php?option=com\\_k2&view=item&id=1192:interview-with-fatou-bensouda&Itemid=681](http://www.newafricanmagazine.com/index.php?option=com_k2&view=item&id=1192:interview-with-fatou-bensouda&Itemid=681) (accessed 10 June 2014).

18 J.N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, Cambridge, MA, 1964), p. 111.

19 A. Anghie and B. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’, 2 *Chinese Journal of International Law* (2003), 77–103, at p. 93.

social, historical and political context, and advance the view of the law as “a crucial site for the production of ideology and the perpetuation of social power.”<sup>20</sup> These scholars have called for ways of understanding the founding origins of violence that have been part of the colonial and imperial tenets of international law.<sup>21</sup>

Similar sentiments have been echoed by a range of political actors – such as those engaged in the African Union-ICC pushback. To date, the AU has publicly denounced the ICC as pursuing Western interests and has begun to entertain the possibility of establishing a criminal chamber of the African Court of Justice on Human and People’s Rights that will take responsibility for crimes committed on the African continent. With the negotiations of a protocol to extend the jurisdiction of the African Court of Justice and Human and Peoples’ Rights to include jurisdiction over international crimes, we see similar deliberations: whether it would be desirable for the Peace and Security Council of the African Union to play a role in referring cases to the Court for consideration. While some scholars argue that the draft protocol is simply advancing the ideals of the ICC and a way of ensuring that there is no impunity in the continent through the prosecution of international crimes peculiar to Africa,<sup>22</sup> others argue that the draft protocol is a “laundry basket” of crimes and a project that is not feasible and cannot be effectively implemented.<sup>23</sup> Additionally, there is a critical response to the assumption that the international criminal justice architecture with its primary focus on retributive justice is a panacea to the myriad developmental problems facing Africa today. Given these recent developments, there is a need to re-examine the relationship between the ICC and the UNSC, as well as to make sense of the role of the African Union in the

20 J.T. Gathii, ‘Rejoinder: Twailing International Law’, 98 *Michigan Law Review* (2000), 2066–2071, at p. 2066.

21 See Gathii, *supra* note 20; O.C. Okafor, ‘Newness, Imperialism, and International Legal Reform In Our Time: A TWAIL Perspective’, 43 *Osgoode Hall Law Journal* (2005), 171–191; K. Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’, 16 *Wisconsin International Law Journal* (1997–1998), 353–420; M. Mutua, ‘What is TWAIL?’, in *Proceedings of the American Society for International Law* (Washington, DC, April 2000), Anghie and Chimni, *supra* note 19; S. Grovogui, ‘Regimes of Sovereignty: Rethinking International Morality and the African Condition’, 8 *The European Journal of International Relations* (2002), 315–338.

22 For example, the crime of unconstitutional change of government.

23 A. Abass, ‘Prosecuting International Crimes in Africa: Principles, Issues and Limitations.’ Workshop paper presented at *The International Criminal Court and the Future of International Law in Africa*. African Studies working group initiative on International Law in Africa, Yale University, 14 September 2012.



increasing politicization of social inequality in sub-Saharan Africa. This is so not just because of the need to understand the play of power, but also through the need to rethink how modernity is conceived as well as its manifestation in the life of the law.<sup>24</sup>

The life of the law is based on a modern social order that encapsulates an understanding of equality and justice and a discourse of rationality. The rational foundations discourse has produced a legal modernity in which a particular ontological order is at play. Put another way, modernity – and its attendant conception of law – privileges a certain way of understanding being or existence. This ontology has its roots in the rationalization, industrialization and institutionalization of a particular philosophy of being that asserts ways of knowing that value enlightenment principles such as rationality and progress, and it works through institutions, notions of certainty, transparency, and due process through the law. In essence, ontology is a particular way of conceptualizing being or existence and works through the modernity of the social order to structure what kind of presumptions are built into law as a social field. When applied to the ontological order of the UNSC as an extension of this logic, the reality is that it neither precludes inequality nor presumes equality as the basis of its mission. Through its theory of existence it establishes the terms in which the law can be mobilized in the defence of the socio-political order. For instance, the UNSC has five permanent members, and each of those members has veto power. The UN General Assembly also elects ten non-permanent members for two-year terms on the Council. In May 2014, thirteen of the fifteen Council members supported the resolution to refer the Syrian situation to the ICC, but China and Russia exercised veto power to oppose the ICC referral. Veto powers in various international organs, such as the UNSC, are a mechanism of assurance in which a particular order is maintained in the name of peace and security.

In the ICC relationship with the UNSC, articulating recommendations for judicial action alone only represents a mechanism for the reorganization of violence – from the physical to the judicial. While the adherence to a Chapter VII referral attends to the reality of political considerations in legal action, in many of the ICC cases various root causes, ranging from colonial and settler historical land disenfranchisement, ethnic violence, and plunder emerged from earlier histories of disenfranchisement that, following Mahmood Mamdani and Thabo Mbeki, require a range of political settlements.<sup>25</sup> The challenge, as we

24 K.M. Clarke, unpublished manuscript, 2015.

25 T. Mbeki and M. Mamdani, 'Courts Can't End Civil Wars' *The New York Times* Opinion Pages (5 February 2014).

will see featured in some of the foregoing articles in this special issue, is that decisions regarding the referral of cases to the ICC are driven by actions legible to legal temporalities rather than endemic problems at the core of violence.<sup>26</sup> This reality has created a heuristic in which legal action is privileged and distanced from those considerations seen as *political*. The themes to be raised address vast and complex considerations related to legal norm making. We explore the controversies over the management of violence by various political actors in Africa and beyond by way of clarifying that the very legal provisions intended to be the basis for peace and security are actually representative of on-going forms of social inequality that the law was assumed to abrogate.

## 2 Enduring the Conundrum: The Violence of the Law and Ending Violence through Law

Over the past century, approaches to understanding the workings of modern law as a form of continued structural and conceptual violence have been widespread and detailed. Among some of the most provocative approaches have been those conceptualizations that have returned us to the perceived banality of the social order in which violence is understood as being deeply embedded in the norms of daily life.<sup>27</sup> From Walter Benjamin's (1921) conceptualization of the very laws perceived to be liberatory as the very legal provisions with originary powers that result in both the violence of exclusion and the daily reinforcement of that violence through policing and other modalities, to Franz Fanon's assertion of violence and not its absence being key to the modernity of the settler-native relationship, to Hannah Arendt's conceptualization of the 'banality of evil' in which some of the most extreme and totalitarian forms of violence became gradually embedded in the norms of daily life.<sup>28</sup> And it was Giorgio Agamben's later clarification of the way that violence functions through law to reinforce its constituent and constituting powers that a vivid clarification of the basis for the social order through the juridical was articulated as

26 Clarke, *supra* note 13; K.M. Clarke, unpublished manuscript, 2005.

27 See D. Thomas, *Exceptional Violence: Embodied Citizenship in Transnational Jamaica* (Duke University Press, Durham, NC, 2011).

28 See W. Benjamin, 'Critique of Violence', in P. Demetz (ed.), *Reflections: Essays, Aphorisms, Autobiographical Writings* (Shoken Books, New York, NY, 1921); F. Fanon, *The Wretched of the Earth* (Grove Press, New York, NY, 1963); H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press, New York, NY, 1963).

the sovereign right of *the decision*.<sup>29</sup> The power of the decision, of potentiality, whether through the ability to exercise veto power, or suspend the social order through martial law or executive order was articulated by Agamben as being embedded in the space of actuality, of the constituent order of law. Here Agamben used the historical Nazi “concentration camp” as an example of the mobilization of the law to enforce the power to kill with impunity.<sup>30</sup> He later invoked the manner in which legal protection and rights were – through the US-War on Terror – denied to US Guantanamo Bay detainees through a reclassification of their status as ‘enemy combatants’ and not Prisoners of War (POWs). As this classification of ‘enemy combatants’ through US executive order did not exist as a protected category under international humanitarian law, this reclassification placed them outside of the law and denied them the legal protection that being classified, as POWs would have offered. It is the reality that the US suspension of the law was operationalized through executive order, through an executive *decision*, – and not through a constitutional judicial protection – that remains central to the originary violence of law in which executive action can be deployed to maintain particular ontologies of power. All of these theorists note how violence – whether quotidian or exceptional – lives on through the work of law, contesting the liberal premise that law seeks to contain its excesses. As examples of quotidian and exceptional violence, these theorists also show how the law preserves such violence through its constituted order, resulting in the preservation of contemporary law.<sup>31</sup> This preservation has produced a particular legal and conceptual inheritance that has had implications for the negotiation of law’s relevance. In contemporary Africa the law has both produced the terms for a particular modern ontological order as well as a space in which particular inequalities are played out.

The goal of this special issue, therefore, is to explore a reconceptualization of *the political* and the potentialities of international law as ways to infuse a rethinking of the contemporary social order in Africa. We explore the way that a new legal politics can be arrived at not through a simple revision to the constitutional democratic order as we know it, but through what Agamben referred to as a *disarticulation* of the contemporary constitutional state. A disarticulation of international and domestic law is a separation of particular constellations of the legal order. Such approaches to disarticulation may involve a rethinking of the working of law through a reconceptualization of modernity’s foundational origins and, as such, a rethinking of how the law

29 G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford, CA, 1998).

30 *Ibid.*, at p. 95.

31 K.M. Clarke, unpublished manuscript, 2015.

might be deployed as the basis for empowering the postcolonial state. As the papers in this issue suggest, in order to make sense of the problem of perceived inequality in the ICC's Africa focus and the adumbrated problem of selectivity of referrals, especially those produced by the UNSC, a rethinking of the ontological foundations of the Article 16 compromise is necessary. In keeping with twentieth century scholarship that has engaged in bridging the relationships between law, modernity, and violence and twenty-first century platforms for rethinking its fictions, we suggest that the contemporary national and international social order requires a rethinking of the very legal order through which we make sense of our world.<sup>32</sup> Such a reconceptualization would produce the terms through which politically adumbrated histories of conflict can be addressed through a range of considerations beginning with political settlements that acknowledge the violent roots of the postcolonial states, in this instance in Africa, and that weigh when and how responsibility for that violence should be parsed. A more equitable space for negotiation must both return us to the perceived disarticulation of law from politics as well as bring us closer to a new conceptual basis through which to remake law's ontology.

The special issue boasts four articles that are divided into two sets of conversations – those that work within the law to search for solutions to the problem of violence, and those that examine the workings of legal actors to not only explore the constituting power of law but also to make sense of the reinforcement of a particular social form that articulates the terms of inequality. Through both points of departure, the goal is to call for a reconceptualization

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32 See Benjamin, *supra* note 28; Derrida, *supra* note 13; Arendt, *supra* note 28; B. Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Polity Press, Cambridge, 2009). See also Anghie and Chimni, *supra* note 19; Grovogui, *supra* note 21; Mbeki and Mamdani, *supra* note 25; K.M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, Cambridge, 2009); S. Kendall, 'Critical Orientations: A Critique of International Criminal Court Practice, in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law* (Routledge, London, 2014); S. Kendall, 'UhuRuto" and other Leviathans: The International Criminal Court and the Kenyan Political Order', 7 *African Journal of Legal Studies* (2014), 000–000 (this issue); S.N. Grovogui, *Beyond Eurocentrism and Anarchy: Memories of International Order and Institutions* (Palgrave Macmillan, Basingstoke, 2006); S.-J. Koulen, 'Justice limited by Law?' Exploring the place of Socio-Economic Rights in International Criminal Justice through the Lubanga Trial', *Issues in International Criminal Justice, Special Volume: The Lubanga Trial: Lessons Learnt* (2012) 85–99; A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford University Press, Oxford, 2011); G. Mukundi, *Africa and the ICC: Can a New Prosecutor Bridge the Divide?*, Open Society Initiative for Southern Africa (March 2012), available online at <http://www.osisa.org/opensource/regional/africa-and-icc-george-mukundi> (accessed 24 June 2014).

of the current potentialities of international law in Africa and beyond in which not only are we committed to the workings of law (in its multiple forms) and politics to produce a world absent of violence, but we are also committed to the realization that if we are going to address violence writ large we need to produce the terms for ontological change in the modernity of the law and its inheritance. The essays by the two scholars writing from the global North, Kendall and Jennings, have highlighted the genealogical contours of the law in establishing the basis upon which the founding legitimacy of international law was mobilized through political acts that became detached from the politics of their making. Those essays offer examples of the ways that particular ontologies of violence have been preserved through the law. For the two writing from the global South, both with significant professional experience in African policy and governmental circles, the point of departure is the challenge of using the same international legal tenets of the Rome Statute for the ICC to reorient the basis for legal action and to dictate what form it should take. The issue for Tladi and Olugbuo is unambiguously about the extent to which particular legal principles are useful in the operationalization of the contemporary post-colonial state, and if so, which ones, why and who governs the shape of those creations? In this light, those writing from the African continent are not positioning themselves as beneficiaries of law's violence. Rather, they are engaged in the process of clarifying on what terms particular mechanisms might be deployed to address the foundational particularities of the contemporary post-colonial state.

### 3 Law's Modernity: The ICC and the Contemporary Social Order

The International Criminal Court (ICC) celebrated the tenth anniversary of its existence in July 2012 and just months prior – on 15 May 2012, Fatou Bensouda from The Gambia was sworn into a nine-year term as the Chief Prosecutor of the International Criminal Court. The ICC is a permanent court that operates on the principle of complementarity, which means that states have primary jurisdiction over offences committed by their national citizens or over crimes committed on their territories. And if a state is 'unwilling or unable genuinely' to prosecute their nationals, the ICC can make a case to claim jurisdiction over the punishment of such offenses. In this regard, the ICC has been celebrated by some as the missing link in international justice;<sup>33</sup> but among others it rep-

33 K. Annan, Address to the opening plenary of the Preparatory Commission to the International Criminal Court (1999), available online at <http://www.ngos.net/un/icc.html>.

resents the play of selective politics in the international sphere. Supporters have argued that the presence of the ICC serves as a deterrent to would-be dictators and their collaborators and that it will help in ending impunity for gross human rights violations.<sup>34</sup> For these advocates, the active docket of the ICC is a sign that it is having the desired impact in the world. Among its critics, the ICC is seen as targeting African cases, thereby regionalizing international justice in the African continent. There are currently 21 cases in 8 situations before the ICC, all of them African situation countries. Of these cases four were constituted through self-referrals, two were initiated through the Prosecutor's *proprio muto* powers, and two – the situation in Darfur (2005) and the situation in Libya (2011) were initiated through the UNSC's referral power.

African states appeared to have initially embraced the ICC as an effective way of redressing mass crimes on the continent and Senegal was the first country in the world to sign the Rome Statute. Today 33 out of 54 members of the AU are States Parties to the ICC – more than any other continent. The concentration of the ICC's cases in Africa and the role of the UNSC in pursuing interventions have resulted in criticism about the interplay between law and politics and the inequalities related to the way that prosecutorial and judicial discretion is being exercised in various African cases in which violence is ongoing or peace agreements are being negotiated. The ICC's interventions in Uganda and Sudan in the midst of peace talks were seen by some as another example of bodies external to Africa obstructing an internal peace and reconciliation process.

The fallout from these cases led to serious conflicts between the ICC and the AU – Africa's regional body responsible for peace, security, growth and development in the region. Central to the tension has been the indictment of sitting President Al Bashir of Sudan. The AU requested that the Security Council of the UN defer the indictment of President Omar Al-Bashir of Sudan so that peace negotiations could be negotiated in the region. This request was not acted upon by the Security Council and resulted in the decision by the AU to not cooperate with the ICC in his arrest and surrender to The Hague. This non-cooperation has created suspicion and lack of trust between the ICC and the AU in fighting impunity on the continent. A 2013 decision issued by the Assembly of the African Union, stated "There is a need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception

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34 R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, Cambridge, 2005).

of double standard, in conformity with the principles of international law.”<sup>35</sup> Ugandan President Yoweri Museveni, at the inauguration of ICC indictee and Kenyan President Uhuru Kenyatta, depicted the ICC as ‘individuals engaged in legal gymnastics in a far off land.’ Various observers have pointed to perceived double standards in which cases are brought to trial and which are not, a lack of transparency and predictability in OTP decisions and express concern that “external political and strategic interests have biased the ICC’s judicial interventions.”<sup>36</sup> Much of the suspicion centres around the ‘democratic deficit’ of the Security Council, with only five veto-wielding permanent members (the P5), and with the role of the executive in judicial decision-making. This suspicion is further compounded by the fact that several of these P5 members are not States Parties to the Rome Statute and are thus not bound by the obligations set out therein, yet have the power to bring other non-state parties within the scrutiny of the Court.

#### 4 Violence through Law: The Sovereign Right of the Decision

The situation in Libya was referred to the ICC by the Security Council in February 2011, pursuant to UNSC Resolution 1970, and the Prosecutor opened an examination days later.<sup>37</sup> In contrast, the situation in Syria – in which 250 000 civilians have been subjected to siege warfare by government forces – has still not been referred to the ICC while the crisis (as of publication in 2014) is in its third year. Despite the reports by the Independent International Commission of Inquiry on the Syrian Arab Republic, finding that crimes against humanity have been committed by the Syrian government, that war crimes have been committed by both parties to the conflict, and that the Security Council must seek a “referral to justice”, on 22 May 2014 a draft Security Council resolution referring the situation to the ICC for investigation was vetoed for the fourth time by Russia and China, even as more than 60 countries supported the

35 African Union, ‘Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)’ May 2013. Doc. Assembly/AU/13(XXI) In Decisions, Declarations and Resolutions of the Twenty-First Ordinary Session of the Assembly of the Union, May 2013.

36 A. Tiemessen, ‘The International Criminal Court and the Politics of Prosecutions’, *The International Journal of Human Rights* (2014), in press, DOI:10.1080/13642987.2014.901310. See also K. Ambos, ‘ICC OTP Report on the Situation in Colombia – A Critical Analysis’ (1 February 2014), available online at <http://www.ejiltalk.org/icc-otp-report-on-the-situation-in-colombia-a-critical-analysis/> (accessed 12 June 2014).

37 UNSC Res 1970 (26 February 2011) UN Doc S/Res/1970.

measure.<sup>38</sup> A common critique has become ‘why Libya and not Syria?’, with explanations often sought in the political and strategic interests of two P5 members of the Security Council.<sup>39</sup> At play here is the sovereign right of the decision, and the monopoly of particular states to decide based on interests not necessarily central to the elimination of violence.<sup>40</sup>

The examples are myriad. In 2006 the OTP decided that the alleged crimes committed in Iraq did not meet the requisite ‘gravity threshold’.<sup>41</sup> In addition, the ‘gravity threshold’ has been applied within a given situation and used to justify the prosecution of actors on one side of a given conflict and not the other. For instance, in the Uganda situation cases have been brought against the rebel group the Lord’s Resistance Army (LRA) but not against government forces, with the Prosecutor maintaining that the crimes allegedly committed by government forces were relatively less grave.<sup>42</sup> Carl Schmitt had long argued that ‘indeterminate clauses’ are central to juridical life.<sup>43</sup> Such clauses leave open spaces for judicial clarification – often framed as neutral forms of clarification.

38 I. Black, ‘Russia and China veto UN move to refer Syria to international criminal court’ *Guardian* (22 May 2014). See also United Nations General Assembly, Human Rights Council, ‘*Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*’ (12 February 2014), A/HRC/25/65.

39 Amnesty International, ‘UN: Russian and Chinese vetoes of Syria ICC resolution “callous”’, press release 22 May 2014, available online at <http://www.amnesty.org/en/news/un-russian-chinese-vetoes-syria-icc-resolution-callous-2014-05-22> (accessed 10 June 2014). See also Mukundi, *supra* note 32.

40 Agamben, *supra* note 29, at p. 17.

41 In May 2014 the OTP announced that it had received further information and that the preliminary examination into war crimes involving systematic detainee abuse in Iraq from 2003 until 2008 would be re-opened. See International Criminal Court, ‘*Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq*’, press release 13 May 2014, available online at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-iraq-13-05-2014.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-iraq-13-05-2014.aspx) (accessed 1 June 2014).

42 See A. Tiemessen, ‘*Defying Gravity: Seeking Political Balance in ICC Prosecutions*’, blog post (22 April 2013), available online at <http://justiceinconflict.org/2013/04/22/defying-gravity-seeking-political-balance-in-icc-prosecutions/> (accessed 1 June 2014); International Criminal Court, *Statement by Chief Prosecutor Luis Moreno-Ocampo, 14 October 2005*, available online at [http://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda\\_LMO\\_Speech\\_141020091.pdf](http://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf) (accessed 14 June 2014).

43 C. Schmitt, *State, Movement, People: The Triadic Structure of the Political Unity, 1933: The Question of Legality 1950* (Plutarch Press, Washington, DC, January 2001).



'Gravity' is presented in ICC discourse as a neutral legal criterion, a judicial rule that requires simple application, yet it is not defined within the Rome Statute. OTP policy papers indicate that when assessing 'gravity' the office considers the alleged scale of the crimes, the severity of the crimes, the systematic nature of the crimes, the manner in which they were committed, and their impact on victims.<sup>44</sup> As William Schabas writes, "The gravity language strikes the observer as little more than obfuscation, a laboured attempt to make the determinations more judicial than they really are . . . They have undoubtedly convinced themselves that they have found a legalistic formula to do the impossible, namely, to take a political decision while making it look judicial."<sup>45</sup>

This reality that legal decisions emerge from political decisions reflects not only the play of sovereign decision-making, but also the accommodations for judicial rule provided by the spaces of neutrality provided by 'indeterminate clauses'. In the case of the political struggle over the UNSC referral to the ICC with respect to crimes committed on the territory of Egypt since 1 June 2013, on 25 April 2014, after receiving communications from lawyers representing Egypt's Freedom and Justice Party and representing former President Dr. Mohamed Morsi, the Office of the Prosecutor decided that the complaint could not proceed. In a May 2014 statement on the issue, the OTP explained that, legally, the applicants lacked standing to seize the jurisdiction of the Court, as Dr. Mohamed Morsi – who had been ousted by a coup in 2013 – was no longer recognized as the Egyptian head of state. In addition, the Office concluded that the allegations contained in the complaint fell outside of the territorial and personal jurisdiction of the Court.<sup>46</sup> On the same date, the Prosecutor had decided to open a preliminary investigation after receiving a declaration from the government of Ukraine accepting the jurisdiction of the Court over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. The lawyers handling the Egyptian complaint were outraged by the decision, issuing the following statement: "The paradoxical positions taken about the

44 International Criminal Court, Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013), available online at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf) (accessed 1 June 2014).

45 W. Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (Oxford University Press, Oxford, 2012), 89.

46 International Criminal Court, *The determination of the office of the Prosecutor on the communication received in relation to Egypt*, press release (8 May 2014, available online at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx) (accessed 14 June 2014).

two situations appear to suggest the process used by the Prosecutor to determine the similar complaints was at best seriously flawed and at worst inappropriately politically motivated.”<sup>47</sup>

The KC’s Office of the Prosecutor has consistently offered legal or pseudo-legal explanations couched in the Rome Statute framework to explain its decisions. But clearly, these decisions also deal with intensely political questions related to issues of responsibility and democratic legitimacy, i.e., what constitutes a grave crime, what constitutes a state, who may issue complaints and speak on behalf of a state, who is the rightful governing authority. Such questions have particularly played out in relation to Palestine.

In early 2009, Ali Khashan acting as Minister of Justice of the Government of Palestine lodged a declaration pursuant to Article 12(3) of the Rome Statute, accepting the exercise of jurisdiction by the Court for acts committed on the territory of Palestine since 1 July 2002. A key issue, of course, was whether Palestine qualified as a state and could thus accede to the Rome Statute. The OTP concluded in April 2012 that the Palestinian request was not valid due to Palestine’s unclear status and that this was a matter for the UN Secretary General, and by extension the UN General Assembly, to resolve.<sup>48</sup> In November 2012, Palestine’s status within the General Assembly became ‘non-member state observer’, opening the way for Palestine to accede to the Rome Statute and seize the jurisdiction of the Court. As political negotiations with Israel – brokered by the United States – were on-going over 2013 and early 2014, Palestinian President Mahmoud Abass had resolved not to seek accession to the Rome Statute during this period. In May 2014, a group of 17 Palestinian and international human rights organizations wrote a letter to President Abass, urging him to withstand political pressure from Israel, the US, France, the United Kingdom, Italy and Canada not to accede to the International Criminal Court and to resist these efforts to “politicize justice for victims of serious crimes under international criminal law.”<sup>49</sup>

47 ‘ICC complaint will continue despite Prosecutor’s “wrong” decision’, *Middle East Monitor* (1 May 2014), available online at <https://www.middleeastmonitor.com/news/europe/11222-icc-complaint-will-continue-despite-prosecutors-wrong-decision> (accessed 1 June 2014).

48 International Criminal Court, *Situation in Palestine*, report available online at <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf> (accessed 1 June 2014).

49 ‘Joint Letter to President Abass on the International Criminal Court’ (8 May 2014), available online at <http://www.hrw.org/news/2014/05/08/joint-letter-president-abbas-international-criminal-court> (accessed 1 June 2014).

As the above review has made visible, at issue is not a distinction between law and politics or efforts to distil law from politics, but rather both the very political origins of law and the spaces of indeterminacy within which law actually operates. This space of indeterminacy provides an opening for certain decisions to be operationalized by the power of the P5 and relevant “strong states”. It provides the possibility for the originary ontologies of modern power to be negotiated in the name of the law. Such dynamics are visible when one analyses the negotiating politics present in the production of the drafting of the Rome Statute and the inclusion of Article 16 in particular and the legal questions related to the ICC’s exercise of authority. Ultimately, the ICC’s disavowal of jurisdiction over crimes committed in Palestine and Israel was tied to the political non-recognition of Palestinian statehood. The decision to base the exercise of jurisdiction on the particularities of state recognition precluded the ICC’s jurisdiction, leaving the P5 and various strong states and personalities in the region to be the arbiters of its future.<sup>50</sup> In cases where statehood is recognized, the Article 16 provision has allowed the UNSC – through its executive decision-making – to carve out a space from which the decision to suspend or to engage the work of the ICC can be taken on by the prosecutor of the court.

## 5 The ICC, The UNSC and the Management of Africa’s Violence

In ‘Critique of Violence’ Walter Benjamin outlined a theory of violence that both articulated violence in relation to acts of power with an ability to ‘extort’ action and in relation to the distinction between *law-making violence*, *law-preserving violence* and *law-destroying violence*. This approach to violence and its management ranged from a conceptualization that involved both action and inaction, overt attacks against the body and the place of formal and informal norm making as the basis for constituting the modern socio-legal order. By articulating the manifestation of contemporary law – its originary goals, its logic, its preferential practices – as a form of violence, what Benjamin was addressing were both the constituent and constituting powers of the *sovereign state* that Giorgio Agamben went on to clarify later in his work as *the force of law*.<sup>51</sup> What we see at play with the nature of ICC cases and the special powers accorded the UNSC is an example of the operationalization of the *force of law* and the foundational inequalities in the decision-making process. Nowhere is there a better example of the schism between the principles of democracy and

<sup>50</sup> International Criminal Court, Office of the Prosecutor, *supra* note 48.

<sup>51</sup> Agamben, *supra* note 29.

equality and the workings of power as that of international law-making circles in which the UNSC is central to the preservation of the modern contemporary order and political inequalities have become normalized through law, as shown by the Article 16 provision. Article 16 of the Rome Statute provides the Security Council with the power to defer cases before the ICC for a renewable, one-year period. A deferral of ICC jurisdiction requires approval of nine of the 15 Council members and no veto by the P5 members.<sup>52</sup> A review of the drafting history of this particular article makes clear that the provision, now crystallized in law, required significant political negotiation and ultimately, compromise. The compromise reached was one which recognized the role of the Security Council in the maintenance of international peace and security, but sought to avoid what was thought to be undue interference in the workings of the Court.<sup>53</sup> A deferral of ICC jurisdiction requires the approval of nine of the 15 Council members and no veto by the P5 members.<sup>54</sup> The drafting history of the Rome Statute, which resulted in a considerable role for the UNSC, illustrates the political origins of the law and the manner in which foundational inequalities are woven into the very fabric of the Rome Statute. Once the founding negotiations are concluded, and the text approved, a provision transitions into the force of law. A rupture is presumed to take place, which erases the various inequalities from the political negotiations, and a new domain for reconstituting the legal as non-political is born.

The four essays in this volume each take up central questions concerning law, power, and politics in relation to ICC processes and the challenge over sovereign decision-making, public protest, as well as the various ways that states mobilize cooperative or non-cooperative options in the pursuit of law-making. The first two essays by Kendall and Jennings highlight the ontological basis by which agents of international criminal law have claimed its power. In her contribution, Kendall, international law professor writing from a deconstructivist framework in Europe, conducts a case study of the effects produced through the ICC intervention in the Kenyan situation – related to prosecuting those most responsible for the post-election violence which swept through particular coastal areas, the slums of Nairobi and the Rift Valley in late 2007 and early 2008. She illustrates the various effects – both material and discursive – of this “international judicial intervention” in the domestic arena. In her article, she

52 Akande et al., *supra* note 5, p. 16.

53 S. Kim, ‘Maintaining the Independence of the International Criminal Court: The legal and procedural implications of an Article 16 deferral request’, Año XVIII, 29 *Agenda Internacional* (2011) 179.

54 Akande et al., *supra* note 5, p. 16.

takes up “the theoretical construction of international criminal law as a collective project of the international community devoid of political interests and embracing the moral call to ‘end impunity’”, and contrasts this with the field’s work in practice, arguing that contrary to what is imagined, international judicial interventions are in reality infused with selectivity and political considerations. In discussing examples from Kenya, she makes visible how the Court’s intervention – far from being a neutral or objective intervention – has had the power to produce identities and narratives that in turn yield new sites of political contestation. Through this move she demonstrates how ICC legal actors have operationalized the space of indeterminate social action through which to exercise legal decisions, and how various public officials have counter-mobilized to produce new terms for social engagement with international law.

Ronald Jennings, legal scholar and anthropologist at Stanford University in the United States, uses the establishment of the ICTY and the seeming break from the political to the legal process in order to demonstrate how the idea of international criminal intervention as a cosmopolitan norm has implications for the global constitutional order. This essay advances the argument that the development of international criminal law and the concomitant notion of individual criminal accountability reflect a profound realignment of the contemporary order. Jennings takes issue with the dominant view of international criminal law as simply another international legal subjectivity operating alongside others – such as the system of treaty agreements between sovereign states on the basis of reciprocity. Rather, he argues that what he calls ‘cosmopolitan law’ is ontologically distinct and reflects an underrated departure from previous centuries of legal opinion which considered the sovereign state to be the sole subject and object of international law and sovereign power as the sole constitutional basis for law-making. In this manner, Jennings makes visible the power of the decision, and the ways in which political decisions lead to legal decisions – even legal decisions that potentially dissolve or undermine the very basis of that political power (i.e., the sovereign state). Describing not just the originary moment of international criminal law, i.e., the Security Council resolution to establish the ICTY in 1993, and the subsequent creation of an entire international juridical system, Jennings also takes up the remarkable roles played by particular, well-placed individuals as drivers of this and subsequent decisions and enactments. By revisiting a key moment and key players in the genealogy of international criminal law, he makes clear that what may seem to be a unremarkable statutory enactment – i.e., a Security Council resolution – was in effect a radical paradigm-shift, but that this rupture went largely unrecognized and was further normalized by the precedent-setting nature of the law.

The second and third essays, by Olugbuo and Tladi, respectively, detail the way that state actors use the law to intervene through the retraction of cooperation or the undermining of the ICC legal order through its replacement with an African Court. Writing from the experience of both former state legal advisor and professor of international law in South Africa, Tladi discusses the tension between the African Union and the ICC, taking the role of the Security Council in ICC referrals and deferrals of cases as a key element of this tension. Critics of the involvement of the ICC in referring cases to the ICC have pointed out that the Security Council is a political body, with a political mandate, and as such, may undermine the credibility and legitimacy of the ICC as an independent judicial institution. In his analysis, cooperation of States Parties to the Rome Statute – as established in Article 86 of the Rome Statute, which obligates states to “cooperation fully with the Court in its investigations and the prosecution of Rome Statute crimes” – is essential to the success of the ICC, and it is cooperation that suffers from the fraught relationships between the ICC, the African Union and the Security Council. He takes the relationship between these three institutions as a “triangle of conflictual relationships” and illustrates how cooperation, or rather the lack of thereof, “is both used as a tool to achieve political objectives and also suffers as a victim of the posturing” to the ultimate detriment and “impoverishment” as the author argues, of international criminal justice. In Tladi’s argument, cooperation has been a victim of a tug of war between the key players. He maps the various political sensitivities at play – the reasons why the AU has issued decisions on non-cooperation and the SC passing of narrow resolutions or its unwillingness to fund investigations – and argues that legal processes – such as effective investigations, or the obligation to cooperate, the objectives of the Rome Statute to end impunity and ensure accountability – have become victims to these political processes, similar to the well-known African proverb, “*When elephants fight, it is the grass that suffers.*” In this analysis he demonstrates that both the metaphorical *elephants* and *grass* are central to the working of international law. Ultimately, and in an interest to parse when international law could be operationalized toward effective ends, he insists that negotiations that lead to the leveraging of cooperation (or its withdrawal) can serve as a force for political action, allowing a space for it to be mobilized toward particular progressive ends.

Benson Olugbuo, scholar of international criminal law with a Non-governmental Organization (NGO) background, writing from the University of Cape Town, similarly explores AU-ICC tensions, or as he categorises it, “AU misunderstandings with the ICC”, and examines the relationship between the Security Council, the ICC and the AU. Olugbuo identifies roles for each of these

organizations in the overall maintenance of international peace and security and develops policy recommendations to improve the working relationship between the ICC and the African Union – taking as a central objective burden sharing and the effective cooperation between these institutions. He ends with a series of recommendations to provide for burden-sharing and effective cooperation between the Security Council, the ICC and the AU.

The four articles speak to each other in their ability to either trace ontologies of the modern order or embed law within it as the basis for legal reform. They take stock of ‘the political’ in international criminal law, whether by reviewing the tense relationships between political organs such as the UNSC or the AU, examining the political constituency involved in law-making, or by exploring the effects of an international judicial intervention in the domestic political arena. Benson and Tladi similarly take the Security Council’s involvement in ICC prosecutions as a key point of tension and both depart from an understanding that the law should be protected from politics, with the law cast as the ‘grass’ easily ‘trampled’ by the power play of politics. Discernable within both pieces is a sense of dismay that the judicial process has been thwarted by political posturing. In contrast, the pieces by Kendall and Jennings illustrate that that which is political and that which is legal may not be so easily separated. In her case study, Sara Kendall illustrates how the judicial intervention has significantly altered the political realities on the ground, while Jennings outlines how with the establishment of the ICTY in 1993, the Security Council gained law-making power, leading to the establishment of an entire legal system (i.e., the ICTY Rules of Procedure and Evidence) without reference to sovereignty as the constitutional basis that had previously dominated the law. The approaches taken in the articles in this special issue are consistent with the divide in the political and intellectual stakes in the field. A productive space of engagement is the space in between engaged action and scholarly analysis in which *the political* can be reconceptualised through new ontologies for defining the law’s work.

This collection of essays clarifies that law is about the establishment of a social order, and social norms – whether formalized or not. As a manifestation of originary design, it exists through force, coercion, and through mundane forms of practice and serves as a mechanism of social control. In recognizing the precarious constitution of law as deeply political, we take seriously the contemporary crisis in the social order by mapping some of the considerations at the root of legal inequality. The issue offers ways to rethink the workings of Article 16 of the Rome Statute and the ontological basis for the law’s power. Through these insights we aim to offer a critical lens through which to make sense of the presence of the ICC in Africa and Africa’s socio-legal and popular

engagement with the ICC and its international partners, including the UNSC. But we insist that such an analysis cannot happen without embedding the discussion in the ontological logics of legal drafting histories, the production, enactment and application of the law as the domains of sovereign decision-making, as well as the reality of the workings of the international order. These processes are part of the play of power and have real consequences for the workings of democracy and equality in contemporary life. Foregrounding the play of power and strategies for rethinking its manifestation – especially in contemporary postcolonial Africa – involves the recognition that particular histories have contributed to the founding violence of law's history in colonial Africa. In this light, the essays both deconstruct the problem of the law and search for ways that legitimately functioning institutions can be reconceptualised to reflect new ontologies of law's potential.

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