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# Global constitutional order and the deviant other: reflections on the dualistic nature of the ICC process

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## Abstract

The purpose of this article is to offer some reflections on how to interpret the International Criminal Court (ICC)'s fractious relationship with Africa in the context of the historical lineage of a dual structure of the global constitutional order and further scrutinize its implications for life cycles of the international norm. First, we begin by setting out the ICC process (norm emergence) led by middle power and global civil society during the early post-Cold War period. We then scrutinize the limits of this new normative order by focusing on its dualistic nature, as well as the asymmetrical relation between the Global North and the Global South, in particular African countries. Finally, we reexamine the remaining injustice issue inherent in the liberal normative order by paying attention to structural problems such as the predatory capitalism behind the serious humanitarian crisis, which international judicial interventions seem to have superficially mask.

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# 1 Introduction

The purpose of this article is to examine a dual structure of the global constitutional order and its transformation mainly from non-Western (postcolonial) and deconstructive (poststructural) perspectives by focusing on the case of the International Criminal Court (ICC) Process. In other words, I try to offer some reflections on *how to interpret the ICC's fractious relationship with Africa in the context of the historical lineage of a dual structure of the global constitutional order*, which is a main research question, and further scrutinize *its implications for life cycles of the international norm*.

Although global constitutional order is a deeply contested concept, I tentatively define it as a system in which international norms, including that of rule of law, form the international community underpinned by a hegemonic core value system, such as freedom, equality, autonomy, and human dignity.<sup>1</sup> While the global constitutional order has been constructed based upon 'universal' liberal values, it has been constructed and maintained through the exclusion of the deviant other. As Derrida's claim 'law (*droit*) is essentially deconstructible' suggests (Derrida, 1990), the system of law has no foundation and always requires an outsider (such as the outlaw) for its *ad hoc* foundation; for example, 'humanity' has been constructed by de-humanizing absolute others or evils. In short, the global constitutional order tends to accompany such a dual structure of inside/outside.

As the past academic literature suggests, we can notice this sort of a dual structure in the history of an international society. For example, at the end of the 19th century, there was a dual structure in global constitutional order wherein an international society (*societas gentium*) sharing norms such as *jus gentium* had emerged against the other, e.g., the so-called barbarian or savage colonial subject. In other words, international society or anarchical society had been constructed through its external relation with outsider others such as the Native Americans in 'the New World' or the Ottoman Empire. Although this structure shared Westphalian rules (the sovereignty doctrine, and, in particular the principle of noninterventionism) within the family of states, it had the logic of imperialism lying outside it. As Anthony

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1 Regarding similar definitions refer to Koskeniemi (2007) and de Wet (2006).

Angie, Marti Koskenniemi, and Siba N’Zatioula Grovogui clearly point out, sovereignty was improvised out of the colonial encounter (Grovogui, 1996; Koskenniemi, 2002; Anghie, 2004, p. 6). Edward Keene also highlighted the importance of the dualistic nature of the world order while criticizing Hedley Bull’s *The Anarchical Society* as follows:

Bull’s chief mistake was to underestimate the dualistic nature of order in world politics. – Bull’s work provides a description of only one of these: the pattern of order that developed in the European states-system, through relations between European rulers and nations. He almost completely ignored the other pattern of order, which developed roughly simultaneously in the colonial and imperial systems that were established beyond Europe. (Keene, 2002, p. xi)

Gerry Simpson described the dualistic nature of the world order as a combination of sovereign equalities and legalized hierarchies. According to Simpson, an understanding of sovereignty is incomplete without a full appreciation of the way legalized hierarchies (i.e., liberal anti-pluralism and legalized hegemony) structure sovereignty, modify sovereign equality, and produce judicial sovereignty (Simpson, 2004, p. 9). A new liberal anti-pluralism had now been drawn to the idea of separating the globe into zones. That is, the democratic-liberal or decent society of states operated in a sphere of cosmopolitan law and the failed state/outlaw state subsisting in the state of nature (Simpson, 2004, p. 283). In this recent context of anti-pluralism, some states are labeled as criminal states, undemocratic states, or deviant regimes by major powers. Accordingly, their sovereignty is restricted and becomes the objective for international interventions because their domestic governance conditions do not meet minimal international standards. During the post-Cold War era, regimes that defied core international norms and created harmful consequences (through acts of terrorism, serious human rights abuses, pursuits of weapons of mass destruction, and outright territorial aggression) were labeled as rogue states or renegade regimes and their deviant behaviors were punished by the hegemony-led international community (Nincic, 2005). Here, we can notice a dual-standard system in the international criminal justice (Zolo, 2009, p. 30).

The Office of the Prosecutor has sought to bring charges against 31 individuals since the ICC began operating in 2002 up until the of 2016, and all these cases have involved African nations (Cruvellier, 2016). In this context, it is easy to point out the existence of a dual structure in the current global form of law, which is an asymmetrical relation between the Global North and the Global South. In a certain sense, as neo-Gramscian scholars point out, global constitutionalism plays a complementary role in justifying the global inequality through political liberalism (Gill, 2002). Here, we can notice some historical continuity in the dual character of the international normative order since the age of imperialism. We can observe the arbitrary labeling and liberal anti-pluralism of the global constitutional order even in the case of the ICC process, which seems to use the exclusionary logic of liberal empire derived from encounters with strange, backward, or barbarian others too (Mehta, 1999). Faced with such an unfair situation,<sup>2</sup> African countries including South Africa, Burundi and Gambia have already announced that they will withdraw from the ICC on October 2016 (Allison, 2016).<sup>3</sup> In fact, leaders have adopted a strategy calling for a collective withdrawal from the ICC at the African Union summit on January 2017 (Escritt, 2017). As it seems that global constitutionalism is beginning to lose its legitimacy, we need to situate current situation of the international normative order as being in phase C (the, increasing illegitimacy of norms) of the norm cycle rather than phase A (the emergence of norms) or phase B (norm cascades or

2 There are some academic arguments that deny unfairness (Smeulders *et al.*, 2015). However, it just claims that many African countries are party to the ICC statute, unlike that of Asian countries (including Iraq, Myanmar, and Pakistan) while international crimes are likely committed there and are therefore targeted. That claim only seems to justify the reason behind African countries trying to withdraw from the ICC.

3 Although South Africa and Gambia have revoked their decision to withdraw from the ICC on March 2017, African distrust with ICC seems to remain intact. The disparity between African cases and situations elsewhere in the world appear imbalanced. As Bassiouni pointed out, 'Suffice to mention Bashar al-Assad and his senior military leaders as well as Vladimir Putin and his senior military leaders have been involved in the death of over 500,000 civilians in Syria, in what is clearly crimes against humanity, and that of war crimes that also generate 6 million refugees and internally displaced persons, but are beyond the scope of the most elementary justice. Refer to Franck Kuwunu, "ICC: Beyond the threats of withdrawal", Africa Renewal Online, May-June 2017. [<http://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>]; M. Cherif Bassiouni, 'Concerning the ICC Withdrawal Problem', ICC Forum.com, June 2017. [<http://iccforum.com/withdrawal> (2 December 2017, date last accessed)].

institutionalization), as per the Fig. 1. Conventional liberal constructivism has focused upon the progressive development process of international norms as the norm life cycle (Finnemore and Sikkink, 1998). However, it has tended to ignore the decay process that may sometimes derive from the inherent contradictions of political liberalism, including the dualistic nature of normative order. In this article, we will examine the latter issue, mainly from the critical and postcolonial perspective.

In what follows, we begin by setting out the ICC process (norm emergence) led by middle power sand global civil society during the early post-Cold War period. We then scrutinize the limits of this new normative order by focusing on its dualistic nature, as well as the asymmetrical relation between the Global North and the Global South, in particular African countries. Finally, we reexamine the remaining injustice issue inherent in the liberal normative order by paying attention to structural problems such as the predatory capitalism behind the serious humanitarian crisis, which international judicial interventions seem to have superficially masked.

## 2 Global constitutionalism led by middle power-NGO coalitions

As per the sociological constructivist approach toward deviant behaviors (Becker, 1963; Kitsuse and Spector, 1987), the act of labeling by major powers may lead to the construction of international problems

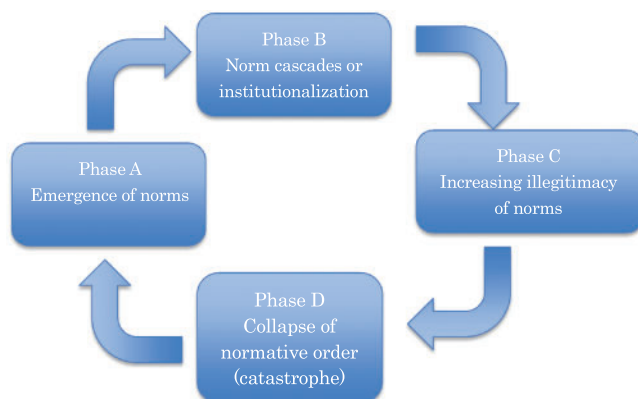


Figure 1 Cycle of international normative order.

and making of international norms. Generally speaking, the international normative and institutional order constructed by major powers (in particular, the hegemony) tries to normalize deviant regimes through socialization. Deviant regimes that resist normalization may be punished and be intervened upon to enforce regime changes. In other words, the diffusion of the international norms might be the way in which the principles of the domestic order of the hegemony are projected onto others in international society. In this way, the global constitutional order tends to reflect the basic principles of the hegemonic political community, such as liberalism and the rule of the law. For the formation of the global liberal constitutional order, major wars including the World War II and the Cold War were crucial junctures in which challenges by deviant regimes such as Fascism and Communism were completely crushed, directly or indirectly.

However, the end of the Cold War differed from that of other major wars in the sense that there was no postwar order settlement such as the Vienna settlement (1815), the Versailles settlement (1919), or the settlement of 1945 (Ikenberry, 2000). Following the end of the Cold War, was so-called world disorder without postwar order design, represented by some chaotic situations such as civil wars in former Yugoslavia and Rwanda during the 1990s. Globalization of violence gradually led to so-called global civil war including the war on terror, in particular following 9/11 in 2001. On the other hand, there were new normative challenges such as the institutionalization of international criminal courts the International Criminal Courts for the former Yugoslavia, the International Criminal Court for Rwanda, the International Criminal Court and internationalized criminal courts at Sierra Leone, East Timor, Kosovo, and Cambodia (Romano *et al.*, 2004). There were also cascades of transitional justice occurring in response to serious human rights abuses in civil wars or under repressive authoritarian regimes (Sikkink, 2011). The interesting point here is that instances of global constitutionalism (e.g., the negotiating process of the Rome Statute of the International Criminal Court) have been promoted by middle powers and NGOs rather than by major powers. This suggests that diffusion of constituent power transformed the international constitutional order formed by the hegemony into a decentered global constitutional order. This occurred during the early post-Cold War period.

Although the end of the Cold War gave birth to a geopolitical vacuum that triggered conflicts, it also led to the creation of political opportunities for middle powers and NGOs to construct a normative order. In the case of the Ottawa Process to ban landmines as well as the Convention on Cluster Munitions, middle power-NGO coalitions played a crucial role in the negotiation of each convention (Short, 1999; Rutherford, 2003; Bolton and Nash, 2010; ). Although NGOs such as the International Campaign to Ban Landmines perform fact-finding research, provide technical expertise, lobby governments, and mobilize public opinion about the issue, middle powers offer diplomatic support and provide donor funding. In short, the end of the Cold War had given the middle powers-NGOs coalitions more space to operate in the making of the international normative order.

In the ICC process, the middle power-NGO coalition played a significant role (Pace and Schense, 2001; Glasius, 2003, 2006). Since the first proposal by one of the founders of the International Committee of the Red Cross for a permanent international criminal court in 1872, the international community has made many attempts to build an international criminal court. For example, the International Law Commission discussed drafting a statute of an international criminal court following the bitter historical experience of World War II but finally met with setbacks around the mid-1950s (Bassiouni, 1998). The end of the Cold War provided an opportunity for realizing this idea once again. This is a just necessary but not sufficient condition for new norm emergence.

For the making of new norms regarding protection of human rights, the international community sometimes needs tragedies to provide historical lessons. Walter Benjamin described this point in his essay ‘On the Concept of History’:

His face is turned toward the past. Where a chain of events appears before *us*, *he* sees one single catastrophe, which keeps piling wreckage upon wreckage and hurls it at his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise and has got caught in his wings; it is so strong that the angel can no longer close them. This storm drives him irresistibly into the future, to which his back is turned, while the



pile of debris before him grows toward the sky. What we call progress is *this* storm. (Benjamin, 2003 (orig. 1940), p. 392)

Ironically, the genocides in the civil wars in former Yugoslavia and Rwanda during the 1990s were ‘one single catastrophe that keeps piling ruin upon ruin’ and provided moral progress in various ways, such as through the momentum of the ICC process. In the words of the English School, the traumatic memory about the massive scale of human rights abuses became ‘the solidarist moment’ for an international society of states to construct institutions for the protection of civilians beyond the national boundary (Cronin, 2003, p. 202). According to Bruce Cronin, the purpose of the ICC is ‘to promote the principles of human rights, the rule of law, nonaggression, and individual accountability, all liberal values in a liberal international society (Cronin, 2003, p. 207)’.

It should scarcely need saying that some agents must exist for making use of the solidarist moment. In the case of ICC process, NGOs as well as ‘like-minded states’ including Australia, Canada, the Netherlands, and Norway became a significant driving force (Bassiouni, 1999, p. 455). During the first stage of the ICC process, the International Law Commission made the first draft for an international criminal court in 1993 and proposed a final version incorporating comments from governments in 1994. Responding to the commission’s recommendation, the UN General Assembly convened a preparatory committee to review the commission’s final draft to finalize it until 1998 (Benedetti and Washburn, 1999). In the several sessions of the preparatory committee (PreCom), the NGO Coalition for an International Criminal Court and its supporting NGOs such as Amnesty International, Human Rights Watch, and the Lawyers’ Committee for Human Rights played a leading role in developing a draft treaty through advisory and consultative roles with governments.

By lobbying state representatives and writing expert documents, the Coalition succeeded in influencing the various kinds of aspects of the Statute. One of its successful achievements was in giving the prosecutor the right to investigate cases using his or her own initiative. As article 15 of the Rome Statute stipulates that the prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court, global civil society has succeeded

in persuading many states that an independent prosecutor is desirable and achievable, despite resistance from major powers (Glasius, 2006, p. 59–60). In addition, the insertion of the clause on gender crimes into the treaty is also a victorious achievement of NGOs. Following the experiences at the International Tribunal of the former Yugoslavia and the International Tribunal of Rwanda, the Women's Caucus for Gender Justice succeeded in inscribing women's concerns into article 7(g) of the statute by defining 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' as crimes against humanity, despite opposition from pro-family religious or conservative groups (Glasius, 2006, pp. 77–93).

Without the involvement of these NGOs, these achievements could not been realized. In other words, global civil society represented by NGOs fills in gaps arising from a democratic deficit in the international decision-making process (Glasius, 2006, p. 113). As liberal intellectuals made a positive assessment, it seems that the middle power-global civil society coalition succeeded in promoting the rule of law in a multilateral framework to end the vicious cycle of impunity and to restrain the arbitrary rule through unjust violence. For Mary Kaldor, who estimates the influence of transnational civil networks on international treaty-making very highly and who situates global civil society as an answer to war, the ICC is of special importance in strengthening the international humanitarian law (Kaldor, 2003, pp. 96, 156). David Held also perceives the foundation of the ICC as one growing aspiration for the international law and justice that seeks to reframe human activity and entrench it in law, rights, and responsibilities (Held, 2004, pp. x–xi). However, as some scholars from the realist perspective or the non-Western postcolonial perspective have pointed out, there are some limits associated with the ICC challenge. In the next section, we turn to this point.

### 3 Limits of the new normative institution regulating the outlaw

Throughout the ICC process, the idea of individual criminal accountability for human rights violations came to be applied even to state officials. The interesting point here is that major powers are reluctant

or sometimes resistant toward the trend of globalization of fair retributive justice that is represented by the ICC. In particular, the United States has tried to undermine the ICC's foundation through various measures to protect its own citizens and its vested interest as a permanent member of the UN Security Council from the jurisdiction of the Court in accordance with American exceptionalism. Though Clinton signed the Statute on the evening of 31 December 2001, the Bush administration, which took office a few weeks later, revoked the signature. On the other hand, the United States has pressured many states to reach bilateral non-surrender agreements or bilateral immunity agreements (BIAs) (Smith and Smith, 2009, pp. 37–39). BIAs provide immunity to American service personnel, preventing them from being extradited by Member States to the ICC. This is done with reference to Article 98 of the Rome Statute. Article 98 provides that 'ICC may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity'. In short, the ICC cannot request extradition of an accused criminal from a state if that state has other conflicting obligations under the international law. The United States has secured >100 BIAs. Sometimes, this has occurred through the threat to cut economic or military aid.

In addition, a month after the Statute's entry into force in 2002, President Bush signed into law the American Service Members' Act (APSA), which prohibits agencies of the US Government from cooperating with the Court and authorizes the use force to free any US citizens detained or imprisoned by or on behalf of the Court (Schabas, 2007, pp. 24–32). Furthermore, the Bush administration announced that it would veto all future Security Council resolutions concerning peacekeeping and collective security operations until the Council adopted a resolution that would exclude members of operations from the jurisdiction of the Court in 2002. The United States then succeeded in pressuring the UN Security Council to unanimously adopt a resolution that granted immunity from prosecution by the ICC to United Nations peacekeeping personnel from countries that are not party to the ICC (S/RES/1422). However, the United States's opposition to the

ICC was flagging, which might have been noticed in virtue of its decision to not attempt to renew the Security Council resolution regarding immunity. This is in part due to exposed human rights abuses including torture at Abu Ghraib prison by US military personnel, which caused serious damage to its image and resulted in it being described as a rogue state (Chomsky, 2000; Prestowitz, 2003). The election of Barak Obama as a new president in 2008 softened the US opposition, but the United States could not ratify the Rome Statute due to its being blocked at the Senate.

The US opposition to the ICC indicates difficulties that the international normative order is now faced with. As some realists criticize, the strategy of prosecution of prosecuting perpetrators of atrocities and genocide according to universal standards without powerful actors may be both ineffective and irrelevant (Snyder and Vinjamuri, 2003, p. 5–6). What makes the situation worse is that attempting to implement universal standards of criminal justice in the absence of political and institutional preconditions risks weakening norms of justice, which might lead to the decay of the international normative order. In this sense, the US opposition toward the ICC and its attempt to rule by force as a rogue state seemed to jeopardize its foundation.

If we see this emerging international normative order from the post-colonial perspective, we can find another problem with it. Some scholars call it the ICC's Africa Problem (Dersso, 2016). Although the international normative order cannot control the major powers effectively, it seems to be able to regulate weak powers like African countries selectively. As mentioned before, although major powers including the United States are shielded from prosecution, the Office of the ICC only brought charges against African individuals during the first decade of the ICC. Since the Rome Statute entered into force in July 2002 up to the end of 2013, the Office of the Prosecutor has begun to conduct investigations into eight situations upon referrals by States Parties or by the UN Security Council, or through its own initiative with the judge's authorization. Of eight situations:

1. four were self-referred by State Parties: Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali;
2. two were referred by the UN Security Council: Darfur (Sudan) and Libya; and

3. two investigations were opened by the Prosecutor *proprio motu*: Kenya and Cote d'Ivoire (Werle *et al.*, 2014, p. 16).

All of the ICC's prosecutorial interventions were exclusively in Africa. Thus, the tension between the ICC and African countries has grown higher year by year. For example, at an AU summit in 2013, the Ethiopian Prime minister and then the Chairman of the African Union, Hailemariam Desalegn, stated that 'the intention of establishing the ICC was to avoid any kind of impunity but now the process has deteriorated into some kind of race-hunting' (Werle *et al.*, 2014, p. 2). In cases where situations were referred to the ICC by the UN Security Council or were investigated by the Prosecutor *proprio motu*, the international community seems to have delegitimized some deviant regimes in the African continent by criminalizing their leaders. This was seen as a form of 'judicial politics' lacking universal justice.

According to Article 17 of the Rome Statute, if a state is 'unwilling or unable to genuinely carry out the investigation or prosecution', the ICC shall have the power to exercise its jurisdiction over persons for the most serious crimes like genocide, crimes against humanity, war crimes and crime of aggression, referred to in the Statute. In other words, under the pretext of being complementary to national criminal jurisdictions, the ICC can judicially intervene in failed states that are 'unwilling or unable to genuinely carry out the investigation or prosecution'. Failed states that are 'unwilling or unable to genuinely carry out the investigating or prosecution' are situated as deviants in the family of states. Their position is quite similar to 'the barbarian society that does not meet the standard of civilization' in international society during the age of imperialism (Gong, 1984). As empires had a mission to civilize barbarian societies then, the international community has a responsibility to protect civilians (R2P) instead of failed states that do not now meet the requirements of sovereign states (ICISS, 2001). In the same way, the international community has a responsibility to prosecute serious perpetrators to stop vicious cycle of impunity by implanting a rule of law there instead of failed states that are 'unwilling or unable to genuinely carry out the investigating or prosecution'. However, there are big disparities between the ideal aims and its real functioning. For example, the ICC cannot prosecute the case of Abu Ghraib and other violations of international humanitarian law by the

United States and other major powers while it prosecuted only Africans. It seems that the ICC has targeted less powerful individuals under the restraint of the *realpolitik* (Chazal, 2016, pp. 24–26). We can observe the existence of asymmetrical power relations behind the one-way humanitarian judicial intervention from the global North to the global South.

As far as the judicial interventions rely upon asymmetrical power relations, their operations have become selective, arbitrary and unfair, which becomes to look like victor's justice based on the 'dual (double)-standard' (Zolo, 2009, pp. 27–31; Schabas, 2010). The jurisdiction of the ICC has not applied to Western countries that are actively engaged in Africa. As we notice selectivity and unfairness in the case of the application of R2P to Libya, the rhetoric for de-territorializing political responsibility has tended to be abused in covering up the true intentions of those intervening (like their geopolitical motivations). This has led to a crisis of legitimacy in the international normative order. In addition, the case of *Prosecutor v. Omar Al Bashir* in Darfur, Sudan has meant that prosecution of political leaders sometimes hinders peace building because these leaders are the same persons who are called upon as key interlocutors to engage in a peace process that will lead to the signing of a peace agreement and ensure its implementation (Murithi, 2014, p. 182–183). This is partly the reason African countries declined to arrest Al Bashir when he travelled there. Although Africans, who were both leaders and activists, played a crucial role in the formation of the ICC as well as the like-minded group, the following non-compliance of African countries is clearly undermining the foundation of the ICC.

In addition, while the legal approach to reassign guilt committed by collectives to individuals on the basis of retributive justice tends to render invisible the root causes of outlaw violence and distributive justice at the global level (Mani, 2002, p. 167), it is sometimes utilized as a tool in political games and this makes the political situations in the country more complicated and absurd; this trend can be observed in the case of Kenya and Uganda. Following Kenya's post-election violence in 2007–8, Uhuru Kenyatta and William Ruto, who had expected to use the ICC to settle scores against political rivals including Raila Odinga, and who had urged the ICC to intervene immediately while not knowing that they themselves would be arraigned before the court,

were indicted for crimes against humanity as the ICC's jurisdiction in respect of Kenya was invoked *proprio motu* by the prosecutor. When both were elected as Kenya's President and Deputy President, respectively, in the 2013 presidential election, they tried to persuade voters to believe that such an indictment was a neocolonialist plot by taking them back to the period before independence by appealing to their nationalism against the West (Materu, 2014, p. 220). This suggests that political leaders in Africa show varying attitudes toward the ICC, which are affected by how the ICC has actually impacted or is likely to impact on them.

In the case of situations that are self-referred by a state party in Africa, prosecutions are more likely to be entangled in political games. This is because; state parties try to delegitimize their enemies (such as the anti-government armed forces) by accusing them of criminal activities while seeking political settlement (stability) or reconciliation rather than retributive justice. The case of Uganda is such a case of 'judicial politics'. In December 2003, the President Museveni of Uganda referred the jurisdiction for investigating criminal offenses committed by the Lord's Resistance Army (LRA) to the prosecutor of the ICC following the prolonged civil conflict in northern Uganda, particularly the Acholi region, which began in 1987. Reacting to the referral, the ICC issued arrest warrants against LRA leader and Joseph Kony and his top five commanders as suspects for crimes against humanity in 2005. The Uganda government gained very worldly benefits from ICC intervention by succeeding to reduce LRA to a criminal group and make the government side's violence invisible. As Adam Branch pointed out, 'it appears that the ICC has effectively granted the Ugandan government impunity for its legacy of violence in northern Uganda in a case of double standards and the politicized use of complementarity, whereby international mechanisms are used to deal with the state's enemies, while the state is allowed to prosecute – and above – itself (Branch, 2011, p. 189)'. It looks like another victor's justice.

On the other hand, the Museveni government had adopted the Amnesty Act in 2000 for Ugandans involved in acts of a war-like nature in the country. In fact, a Ugandan high court judge issued a ruling pronouncing that amnesty under local law remained available to all LRA members, including those indicted by the ICC. In addition, Museveni asked the prosecutor to withdraw the arrest warrants in 2007



but the ICC refused to suspend or withdraw them, which became a factor in the breakdown in the peace process. Although the Uganda government had referred the situation to the ICC in the first place, it promoted a local reconciliation process in accordance with ‘traditional’ Acholi beliefs and denied the primacy of international law over national law. The Uganda government is interested in promoting Acholi ‘traditional’ justice precisely because ‘traditional’ justice guarantees state impunity (Branch, 2011, p. 175).

While the retributive justice conducted by the ICC has become entangled in political games by the Uganda government, the ICC intervention has made the conflict harder to resolve. As anthropologist Kamari Maxine Clarke pointed out, ‘the complexities of Uganda’s relationship to the ICC bring into focus the power of international law to separate political beings from ‘victims’, thus making the latter the subjects of the court’s political control (Clarke, 2009, p. 146)’. Faced with this kind of situation, we need to query what is actually in the interests of ‘victims’. Behind the triumph of the ‘tribunalization of African violence’ (Clarke, 2009, pp. 94–96) alongside the specters of death and victimhood, we notice the absolutely asymmetric power relation between the Global North and the Global South. As I mentioned above, the liberal legal approach to re-assigning guilt committed by a collective on an individual in accordance with retributive justice tends to make invisible root causes of outlaw violence and distributive justice at the global level. Next, we rethink such a problem including the limits of the liberal legal approach while examining the case of the Democratic Republic of the Congo (DRC).

#### 4 Injustice inherent in the liberal international normative order, leading to a legitimacy crisis

As we saw, all of the eight situations referred to by the ICC were related to the African countries: Uganda, the DRC, the Central Africa Republic, Mali, Darfur (Sudan), Libya, Kenya, and Côte d’Ivoire. We need to pay attention to asymmetric power relations between the Global North and the Global South in context of the socioeconomic positions within the capitalist world system. According to the *Human Development Report 2016*, most have very low Human Development Index values apart from Libya and Kenya. The Human Development



Index ranks are 102 (Libya), 146 (Kenya), 163 (Uganda), 165 (Sudan), 171 (Côte d'Ivoire), 175 (Mali), 176 (the DRC), and 188 (the Central Africa Republic) respectively among 188 countries (UNDP, 2016, pp. 198–201). If we check the global distribution of income over time, the share of Sub-Saharan Africa has more than doubled from 15% (1980) to 36% (2000), and is still rising (UNDP, 2005, p. 36). One in every two people in Sub-Saharan Africa is now located in the poorest 20% of the world's income distribution. The structural poverty problem exists behind the serious humanitarian crises in some conflict-ridden Sub-Saharan African countries.

International judicial interventions are not only *ex post facto* responses to these problems. In addition, they also tend to postpone their solutions by 'conniving the root causes of gross human rights abuses' as Adam Branch also points out. The ICC would not investigate 'the invisible perpetrators' – the Western donors, arms merchants, supporters of dictatorships, multinational corporations, and international financial institutions who were involved in African conflicts (Branch, 2011, p. 212). It seems that the ICC is being employed merely as an instrument to manage and contain the 'uncivilized' effects of neoliberal global inequality in accordance with liberal-legalist rhetoric. According to Antonio Franceschet, who adopts the critical model of 'rule of law' against both the Westphalian model and the liberal-legalist model – 'the ICC is a function of changing perceptions of how the rule of law related to larger problems of global inequality. The promise of individual criminal responsibilities and accountability fits in the post-cold war and neoliberal world order, a context in which inequalities are increasing and becoming more pervasive. The relationships among a neoliberal order, inequalities, and the massive violations of rights that have occurred in the post-cold war era are often masked (Franceschet, 2004, p. 24)'. In other words, the way in which the ICC seeks selective individual criminal responsibility tends to mask the deeper structural problems that drive armed conflicts, such as struggles over natural resources and land disputes.

The so-called 'Africa's World War (Prunier, 2009)<sup>4</sup>' around the DRC – the First Congo War (1996–97) and the Second Congo War

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4 Regarding the detail historical process of the First Congo War and the Second Congo War, refer to Reyntjens (2009); Lemarchand (2009); Prunier (2009). According to Prunier, the

(1998–2003) – is one of the typical cases in which ethnic factions (the Hema and the Lendu) have waged uncontrolled genocidal civil warfare with neighboring countries (Uganda and Rwanda) and multinational corporations (AngloGold Ashanti and Metalor Technologies) to control the rich mineral resources like gold, diamonds, copper, and coltan. While an estimated three million people were killed in these protracted civil wars, a ton of gold worth approximately US\$9 million and other rich mineral resources were illegally extracted and exported by armed networks from the northeast corner of the DRC ([Human Rights Watch, 2005](#)). The Panel of Experts on Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, which the UNSC set up, revealed the fact that transnational business networks as well as criminal groups linked to the armies of Rwanda, Uganda and Zimbabwe and the DRC built up a self-financing war economy centered on mineral exploitation ([UNSC, 2002](#)). On the other hand, there has been a large flow of arms mainly from surplus stock in Eastern Europe and the Balkans to the DRC and neighboring countries like Rwanda and Uganda ([Amnesty International, 2005](#)). In short, greed-ridden armed networks made profits by making and utilizing the outlaw situation present in civil wars and some joined in by taking arms for their grievances. Mary Kaldor described this as a ‘new form of warfare’ waged by armed networks of various kinds of actors including diaspora groups in neighboring states, militias, organized criminal groups, mercenaries, government soldiers,

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Rwandese genocide in 1994 and its consequences did not *cause* the implosion of the Congo basin and its periphery. It acted as a catalyst, precipitating a crisis that had been latent for a good many years and that later reached far beyond its original Great Lakes locus ([Prunier, 2009](#), p. xxxi). Lemarchand explained the dynamics of violence in central Africa as follows. ‘The central pattern that occurs time and again is one in which ethnic polarization paves the way for political exclusion, exclusion eventually leading to insurrection, insurrection to repression, and repression to massive flows of refugees and internally displaced persons, which in turn become vectors of further instability ([Lemarchand, 2009](#), p. 31).’ Reyntjens gave us the following additional explanation. ‘The exclusion of the Rwandan Tutsi after 1959 led to invasion by the RPF, which in turn led to anti-Tutsi violence and eventually genocide. After the RPF’s victory, scores of Hutu left for Zaire, from where they attempted to recapture power. Transboundary ethnic alliances exacerbated the conflict, which escalated to become a regional war that ignored national borders. The current exclusion of Hutu (and indeed many Tutsi) in Rwanda may well cause a similar scenario in the years to come ([Reyntjens, 2009](#), p. 279)’. In addition, we need pay an attention to the fact that the international community acquiesced Tutsi-led RPF’s invasion of the DRC, which triggered Africa’s World War, partly due to the pricking of the conscience for not being able to stop the genocide in Rwanda in 1994.

and multinational corporations (Kaldor, 2003, p. 119–120). This ‘new form of warfare’ forced many civilians to face serious humanitarian crises and be left to die as *homo sacer*.

As American ABC TV news program on the war in the DRC gave the title ‘Heart of Darkness’ in 2002 (Dunn, 2003, p. 4), the serious humanitarian disaster in the DRC reminds us of Joseph Conrad’s novel. But the darkness of Africa’s World War does not represent premodern backwardness or primitive barbarism (deviance) alien to the West. That darkness has derived from the negative consequences of Western imperial dominations and interventions; brutal Belgium colonial domination, the assassination of Lumumba and the installation of the Mobutu dictatorship by the West during the Cold War, and now the looting of rich mineral resources by transnational-armed networks including multinational companies. In other words, the chaotic situation in the DRC is a negative imprint of European modernity. As Kevin C. Dunn pointed out, ‘over a century of Western representations and practices have produced the current situation in central Africa. This is because discourses and imagery on the Congo’s identity have directly influenced political policies toward the Congo. Representing the Congo as a primitive, chaotic, “heart of darkness” has made certain things happen in the political world.’ (Dunn, 2003, p. 173).

In the same way, the ‘heart of darkness’ image of the DRC has influenced the way that international judicial interventions operate. As Clarke pointed out, the case of Lubanga (*The Prosecutor v. Thomas Lubanga Dyilo*) was a show trial that tried to depict a few savage warlords as responsible perpetrators in the context of a moral economy based upon victims’ – pitiful child soldiers – justice (Clarke, 2009, pp. 89–116). The Pre-trial Chamber I of the ICC issued an arrest warrant against Thomas Lubanga Dyilo, a national of the DRC in 2006, detained him in the same year, and charged him for war crimes involving conscripting, enlisting, and using children under the age of 15 years in a rebel force under his command in 2007. Lubanga was sentenced to a total of 14 years of imprisonment in 2012 and was finally transferred to a prison facility in the DRC to serve his sentence in 2015.

Lubanga had served as commander-in-chief of Union des patriots congolais (UPC)’s armed military wing, Forces patriotiques pour la libération du Congo (FPLC), which was dominated by the Hema ethnic group. Although there had been more serious crimes including mass

murder, rape, mutilation, and torture in civil wars in the Ituri region of the eastern part of the DRC, the ICC's first trial was proceeding exclusively on counts of his charge of conscripting about 300 children under the age of 15 years into the FPLC. Although the case of Lubanga fulfills an important expressive role in denouncing the conscriptions, enlistment, and use of child soldiers, thereby enhancing the reach of international criminal law, its related discursive practices tend to mask the structural conditions of serious humanitarian disaster by depicting Lubanga as savage, and child soldiers as victims.<sup>5</sup> Nerida Chazal and Adam Pocrnic examine how Eurocentric human rights discourses, which locate the West as a morally superior savior that saves victims from savages in Africa, are reproduced in the international campaign against LRA's use of child soldiers (Chazal and Pocrnic, 2016). We can notice the similar operation of Eurocentric human rights discourses pitting savages, on the one hand, against victims and saviors, on the other (Mutua, 2001), which is also the case for Lubanga. As Chazal and Pocrnic pointed out, the desire to present moral clarity through rendering complex conflicts into a simple story of good and evil seems to provide little in the way of substantive solutions for real armed conflicts (Chazal and Pocrnic, 2016, p. 108).

Although the International Criminal Tribunal for Rwanda (ICTR) was created in 1995 by the UNSC in response to the genocide in Rwanda in 1994, the ICTR had no meaningful impact as an instrument for deterring atrocities in later civil wars in the DRC. In the same way, although the DRC government referred the situation there to the ICC's Office of the Prosecutor in 2004, while Thomas Lubanga Dyilo was arrested in the DRC in 2006 and was put in jail, the chaotic situation continued in the eastern part of the DRC, which tells us that legal deterrence did not work under some conditions.<sup>6</sup> In addition, as Clarke

5 Imagining child soldiers simply as victims cannot detract from the reality of *youth volunteerism*, in which significant numbers of children voluntarily join armed forces. In addition, 'within the *Lubanga* case, a hierarchy of victims has emerged on matters of participation. The child soldiers fall outside the legal definition of victim and, hence, have no participatory status in proceedings on the charges of unlawful enlistment, conscription, or use (Mark A. Drumbl, 2012, pp. 13, 160)'.

6 Despite various layers of different perceptions, it is important that the AU, a powerful player in the region, plays a crucial role to strengthen the negative perception of the ICC as ineffective as well as unfair (Clarke *et al.*, 2016, p. 440). Scholars are divided on the question of ICC deterrence effectiveness. While we can observe that legal deterrence is ineffective in

sharply noted, ‘at the dawn of the ICC’s history, its special focus on child soldiers and preoccupation with African indictments is a response to and exacerbates stereotypes of an Africa that is politically fragile, legally inept, and economically volatile. The child soldier identity serves, in many ways, as a metonym for childhood. This new example of paternalization heralds the incorporation of the rule of law into the continuing history of institutional protectionism, legal and constitutional intervention, and the management of African resources by new humanitarian regime (Clarke, 2009, p. 115)’. In sum, the ICC process tried to specify the savage others’ individual responsibility for using child soldiers by emphasizing command responsibility, which had the unintended consequence of systematic elision of the root causes propelling violence and the reproduction of the dual structure of the global constitutional order (Clarke, 2010, 2011). Although emphasizing the need to correct the wrongs, a gap between the rhetoric and reality seemed to widen in the ICC process, which might have led to a legitimacy crisis.

## 5 Concluding remarks

Hegemonic social forces, while excluding or normalizing the non-Western deviant other, have constructed the global liberal constitutional order. Generally speaking, the liberal domestic orders of the hegemony and its fundamental values have been projected on to the international normative order. On the other hand, the international normative order attempted to normalize deviant others through socialization, or to exclude them. During the early post-Cold War era, global constitutionalism (through institutions such as the ICC) were promoted by middle powers and NGOs rather than major powers, which tried to justify the international judicial interventions taken toward failed states that are ‘unwilling or unable to genuinely carry out the investigation or prosecution’. As some have pointed out, there has been a qualitative change with the rise of a global or imperial form of law that promotes new sovereignty as well as a multiplicity of moral entrepreneurs.

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some cases, there may be some indirect positive effects of the ICC on reducing egregious human rights violations in other cases. Regarding counter-arguments such as ICC deterrence works under some conditions like ratification of the ICC statute, refer to Jo and Simmons (2016) and Appel (2016).

However, the fundamental characteristics of the international normative order, as an absolute asymmetric relation between the Global North and the Global South as well as the neoliberal capitalist system, remain intact.

Although liberal conventional constructivists applaud the ICC process as a successful outcome of justice cascades, it still lacks a system of enforcement to assist in the investigation, prosecution, and adjudication. In addition, there are some inherent contradictions in the liberal international constitutional order, that reproduce a dual structure between an international society sharing norms, and the savage others or deviants. Related to a continuing dual structure, we also need to pay attention to the way neoliberal governmentality resonates with the state of exception that brings about outlaw situations (Tosa, 2009). If outlaw situations such as humanitarian disasters are by-products of the contradictions of the hegemonic system, the failure to respond fairly to them (like selective international interventions or symbolic sacrifice of a few individuals without interrogation of root causes) may bring a legitimacy crisis to the international normative order itself, as African revolt threatens the ICC's legitimacy. Furthermore, as the recent turbulent political situation in the US suggests, if the hegemony became a rogue state or a spoiler for the global constitutional order, we may be faced its decay sooner or later. As Derrida points out, 'the states that are able or are in a state to make war on rogue states are themselves, in their most legitimate sovereignty, rogue states abusing their power (Derrida, 2005, p. 102)'. As the normative restraint for the behaviors of the most powerful states weakens, the state of exception, including the so-called war on terror, is becoming more normal. Normalizing of 'the state of exception' may lead not only to the collapse of the international normative order itself, but also to a new catastrophe in the future. In short, there is no guarantee that linear moral progress will continue. *Pace* conventional constructivists like Sikkink, the international liberal normative order does not always follow the linear moral progress pattern because of its inherent contradictions, as the case of the ICC process suggests.

Finally, the setback in the ICC reminds us of Foucault's well-known remarks concerning the function of *failed* penal system. 'For the observation that prison fails to eliminate crime, one should perhaps substitute the hypothesis that prison has succeeded extremely well in

producing delinquency, a specific type, a politically or economically less dangerous — and, on occasion, usable — form of illegality; in producing delinquents, in an apparently marginal, but in fact centrally supervised milieu; in producing the delinquent as a pathologized subject. The success of the prison, in the struggles around the law and illegalities, has been to specify a ‘delinquency’ (Foucault, 1997, p. 277).’ In the same way, the *failed* ICC process may succeed to reproduce the dual structure of the global liberal constitutional order by continuing to specify the new deviant other.

## References

- Allison, S. (2016) ‘African revolt threatens international criminal court’s legitimacy’, *The Guardian*, 27 October 2016.
- Amnesty International (2005) *Democratic Republic of Congo: Arming the East. AFR 62/006/2006*. London: Amnesty International.
- Anghie, A. (2004) *Imperialism, Sovereignty, and the Making of International Law*. Cambridge: Cambridge University Press.
- Appel, B. (2016) ‘In the shadow of the International Criminal Court: does the ICC deter human rights violations’, *Journal of Conflict Resolution*, doi: 10.1177/0022002719939101.
- Bassiouni, M. C. (1998) ‘Historical survey: 1919-1998’, in M. Cherif Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History*, pp. 11–15. New York: Transnational Publishers.
- Bassiouni, M. C. (1999) ‘Negotiating the Treaty of Rome on the establishment of an International Criminal Court’, *Cornell International Law Journal*, 32, 443–469.
- Becker, H. S. (1963) *Outsiders: Studies in the Sociology of Deviance*. London: Free Press of Glencoe.
- Benedetti, F. and Washburn, J. L. (1999) ‘Drafting the International Criminal Court Treaty: two years to Rome and an afterword on the Rome Diplomatic Conference’, *Global Governance*, 5, 1–37.
- Benjamin, W. (2003 (orig.1940)) ‘The concept of history’, in Howard Eiland and Michael W. Jennings (eds), *Walter Benjamin Selected Writings Volume 4 1938-1940*, pp. 389–400. Cambridge, MA: The Belknap Press of Harvard University Press.
- Bolton, M. and Nash, T. (2010) ‘The role of middle power-NGO coalitions in global policy: the case of the Cluster Munitions Ban’, *Global Policy*, 1 (2), 172–184.
- Branch, A. (2011) *Displacing Human Rights: War and Intervention in Northern Uganda*. Oxford: Oxford University Press.



- Chazal, N. (2016) *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity*. New York: Routledge.
- Chazal, N. and Pocrnic, A. (2016) 'Kony 2012: intervention narratives and the saviour subject', *International Journal for Crime, Justice and Social Democracy*, 5 (1), 98–112.
- Chomsky, N. (2000) *Rogue States: The Rule of Force in the World Affairs*. Cambridge, MA: South End Press.
- Clarke, K. M. (2009) *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*. Cambridge: Cambridge University Press.
- Clarke, K. M. (2010) 'Rethinking Africa through its exclusions: the politics of naming criminal responsibility', *Anthropological Quarterly*, 83 (3), 625–651.
- Clarke, K. M. (2011) 'The rule of law through its economies of appearances: the making of the African Warlod', *Indiana Journal of Global Legal Studies*, 18 (1), 7–40.
- Clarke, K. M., Knottnerus, A. S., and de Volder, E. (2016) 'Epilogue: perceptions of justice,' in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice*, pp. 437–444. Cambridge: Cambridge University Press.
- Cronin, B. (2003) *Institutions for the Common Good: International Protection Regimes in International Society*. Cambridge: Cambridge University Press.
- Cruvellier, T. (2016) 'The ICC, Out of Africa', *The New York Times*, 6 November 2016.
- Derrida, J. (1990) 'Force of law: The "Mystical Foundation of Authority"', *Cardoso Law Review*, 11(5–6), 920–1045.
- Derrida, J. (2005) *Rogues: Two Essays on Reason*, translated by Pascale-Anne Brault and Michael Naas. Stanford: Stanford University Press.
- Dersso, S. A. (2016) 'The ICC's Africa problem: a spotlight on the politics and limits of International Criminal Justice', in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice*, pp. 61–77. Cambridge: Cambridge University Press.
- de Wet, E. (2006) 'The International Constitutional Order', *International and Comparative Law Quarterly*, 55, 51–76.
- Drumbl, M. A. (2012) *Reimagining Child Soldiers in International Law and Policy*. Cambridge: Cambridge University Press.
- Dunn, K. C. (2003) *Imagining the Congo*. New York: Palgrave Macmillan.
- Escrutt, T. (2017) 'African states consider mass withdrawal from International Criminal Court', *The Globe and Mail*, 27 January 2017.
- Finnemore, M. and Sikkink, K. (1998) 'International norms dynamics and political change', *International Organization*, 52(4), 887–917.



- Foucault, M. (1997) *Discipline and Punishment: The Birth of Prison*, translated by Alan Sheridan. New York: Vintage Books.
- Franceschet, A. (2004) 'The rule of law, inequality, and the International Criminal Court', *Alternatives*, 29, 23–42.
- Gill, S. (2002) 'Constitutionalizing inequality and the clash of globalizations', *International Studies Review*, 4 (2), 47–65.
- Glasius, M. (2003) 'Expertise in the cause of justice: a global civil society influence on the statute for an International Criminal Court', in Marlies Glasius, Mary Kaldor, and Helmut K. Anheier (eds), *Global Civil Society 2002 (Global Civil Society Yearbook)*, pp. 137–168. Oxford: Oxford University Press.
- Glasius, M. (2006) *The International Criminal Court: A Global Civil Society Achievement*. London: Routledge.
- Gong, G. W. (1984) *The Standard of 'Civilization' in International Society*. Oxford: Clarendon Press.
- Grovogui, S. N'Z. (1996) *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-determination in International Law*. Minneapolis: University of Minnesota Press.
- Held, D. (2004) *Global Covenant: The Social Democratic Alternative to the Washington Consensus*. Cambridge: Polity.
- Human Rights Watch (2005) *The Curse of Gold: Democratic Republic of Congo*. New York: Human Rights Watch.
- ICISS (2001) *The Responsibility to Protect*. Ottawa: International Development Research Centre.
- Ikenberry, G. J. (2000) *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars*. New Jersey: Princeton University Press.
- Jo, H. and Simmons, B. A. (2016) 'Can the International Criminal Court deter atrocity?' *International Organization*, 70, 435–475.
- Kaldor, M. (2003) *Global Civil Society: An Answer to War*. Cambridge: Polity.
- Keene, E. (2002) *Beyond the Anarchical Society: Grotius, Colonialism, and Order in World Politics*. Cambridge: Cambridge University Press.
- Kitsuse, J. I. and Spector, M. B. (1987) *Constructing Social Problems*. New York: Aldine de Gruyter.
- Koskenniemi, M. (2002) *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge: Cambridge University Press.
- Koskenniemi, M. (2007) 'Constitutionalism as mindset: reflections on Kantian Themes about International Law and Globalization,' *Theoretical Inquiries in Law*, 8(1), 9–36.
- Lemarchand, R. (2009) *The Dynamics of Violence in Central Africa*. Philadelphia: University of Pennsylvania Press.

- Mani, R. (2002) *Beyond Retribution: Seeking Justice in the Shadows of War*. Cambridge: Polity.
- Materu, S. F. (2014) 'A strained relationship: reflections on the African union's stand towards the International Criminal Court from the Kenyan experience', in Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (eds), *Africa and the International Criminal Court*, pp. 211–228. The Hague: Asser Press.
- Mehta, U. S. (1999) *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought*. Chicago: The University of Chicago Press.
- Murithi, T. (2014) 'Between political justice and judicial politics: charting a way forward for the African Union and the International Criminal Court', in Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (eds), *Africa and the International Criminal Court*, pp. 179–193. The Hague: Asser Press.
- Mutua, M. (2001) 'Savages, victims, and saviors: the metaphor of Human Rights', *Harvard International Law Journal*, 42 (1), 201–245.
- Nincic, M. (2005) *Renegade Regimes: Confronting Deviant Behavior in World Politics*. New York: Columbia University Press.
- Pace, W. and Schense, J. (2001) 'Coalition for the International Criminal Court at the preparatory commission', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 705–734. New York: Transnational Publishers.
- Prestowitz, C. (2003) *Rogue Nation: American Unilateralism and the Failure of Good Interventions*. New York: Basic Books.
- Prunier, G. (2009) *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*. Oxford: Oxford University Press.
- Reyntjens, F. (2009) *The Great African War: Congo and Regional Geopolitics, 1996–2006*. Cambridge: Cambridge University Press.
- Romano, C. P. R., Nollkaemper, A., and Kleffner, J. K. (2004) *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*. Oxford: Oxford University Press.
- Rutherford, K. R. (2003) 'Post-cold war superpower? Mid-size state and NGO collaboration in banning landmines', in Kenneth R. Rutherford, Stefan Brem, and Richard A. Matthew (eds), *Reframing the Agenda: the Impact of NGO and Middle Power Cooperation in International Security Policy*, pp. 23–38. Westport, CT, Praeger.
- Schabas, W. A. (2007) *An Introduction to the International Criminal Court*, 3rd edn. Cambridge: Cambridge University Press.
- Schabas, W. A. (2010) 'victor's justice: selecting situations at the International Criminal Court,' *The John Marshall Law Review*, 43, 535–552.
- Short, N. (1999) 'The roles of NGOs in the Ottawa process to ban landmines', *International Negotiations*, 4, 481–500.

- Sikkink, K. (2011) *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*. New York: W. W. Norton.
- Simpson, G. (2004) *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*. Cambridge: Cambridge University Press.
- Smith, C. A. and Smith, H. M. (2009) 'Embedded realpolitik? Reevaluating United States' opposition to the International Criminal Court', in Steven C. Roach (ed.), *Governance, Order. and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, pp. 29–53. Oxford: Oxford University Press.
- Smeulers, A., Weerdesteijn, M., and Hola, B. (2015) 'The selection of situations by the ICC: an empirically based evaluation of the OTP's performance,' *International Criminal Law Review*, 15, 1–39.
- Snyder, J. and Vinjamuri, L. (2003) 'Trials and errors: principle and pragmatism in strategies of International Justice', *International Security*, 28 (3), 5–44.
- Tosa, H. (2009) 'Anarchical governance: neoliberal governmentality in resonance with the state of exception', *International Political Sociology*, 3 (4), 414–430.
- UNDP (2005) *Human Development Report 2005*. New York: UNDP.
- UNDP (2016) *Human Development Report 2016*. New York: UNDP.
- UNSC (2002) 'Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo. S/2002/1146'.
- Werle, G., Fernadez, L. and Vormbaum, M. (2014) 'Introduction: Africa and the International Criminal Court', in Gerhard Werle, Lovell Fernadez, and Moritz Vormbaum (eds), *Africa and the International Criminal Court*, pp. 1–10. The Hague: Asser Press.
- Zolo, D. (2009) *Victors' Justice: From Nuremberg to Baghdad*, translated by M.W. Weir. London: Verso.