The historical irreconcilability of international law and politics and its implications for international criminal justice in Africa

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Introduction

This paper attempts an analysis of the history and purposes of international law, its problematic interaction with international politics and the effects thereof on transitional justice and international criminal law in Africa. At the heart of its thesis is the assertion that irreconcilable results proceed from a paradoxical interaction that plays out thus: while politics begets law, law's role is to restrain political discretion. This paradox is then applied to the subject that is the very core of the current international law regime, the aim to eliminate the role of war as a last resort option in international politics and replace it with an obligation to seek judicial resolution of disputes as the ultimate form of pacific international relations.

This paper is in two main parts. The first is an historical overview of the interaction of international law and politics and how international law views its role in politically charged controversies. The second part focuses on the most debated question in transitional justice: international criminal justice. Having concluded that international law and politics remain irreconcilable, this latter part questions whether African objections to head of state accountability for mass atrocities and the setting up of parallel institutions constitute a coherent application of the role of politics in international law. We also question whether African attempts to inversely use politics to restrict law can succeed.

The problematic nexus of law and politics

The discipline of law[2] draws its predictability from its texts (constitutions, treaties, statutes, policy objectives of state organs) and longstanding legal principles that guide judicial interpretation. In politics, predictability is dictated by local[3] perceptions, and these can be as many, as diverse, and as intertwining as the shifting socio-economic and cultural voting blocks in a polity. Despite their stark differences, law and politics are inextricably linked. Georges Abi-

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[2] To borrow from the title of the 1979 book by Lord Alfred Denning.

[3] O'Neill, T.P., Hymel, G., '*All Politics Is Local' and Other Rules of the Game,* Times Books, 1993.

Saab points out that "… changing the law, any law, partakes of legislation, which is not a purely legal but an *eminently political activity*."[4]

If the influence of politics is undeniable in the law-making process, then what of the converse? Is the influence of law on politics similarly undeniable or even desirable?[5] If politics influences law-making, law once made, should it not be expected that such law would influence politics?

International law is, more than its municipal counterpart, acutely aware of the power of politics over it, so much so that it formally recognises that the understanding of laws[6] and the practice[7] of those who enact international legislation – the states – will determine its meaning and effect. In this sense, the power of politics extends beyond the law-making process and continues to shape, and even completely alter meaning of legal texts after formal law-making is complete.

International law is a creature of international relations, just as national law is of national politics. Politics bears law precisely to bring order and predictability to *itself*. It is therefore both understandable and baffling that international law and the order it seeks to bring to politics is confused for international relations and its endless vagaries.

It is probably for this reason that former president of the International Court of Justice (ICJ), Rosalyn Higgins, aptly calls international law, a problem-solving process – if not a process with problems.[8] While a fuller treatment of this phenomenon is beyond the scope of this paper, a few examples from international law's foremost[9] legislation will suffice. On its adoption in 1945, the Charter of the United Nations envisioned a UN military force to undertake Chapter VII peace enforcement to be drawn from the armed forces of its members[10]. This "UN Army" never came to be, and 68 years later, the closest entity to this concept, the DRC Intervention Brigade,

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[4] Abi-Saab, G., 'Membership and Voting in the United Nations' in [H Fox (ed)] *The Changing Constitution of the United Nations* British Institute of International & Comparative Law, London, 1997, p. 19. [emphasis mine]

[5] "for in the absence of a magistrate (*dandadharabhave*), the strong will swallow the weak; but under his protection, the weak resist the strong." Kautilya, *The Arthashastra,* Rangarajan, L.N., (ed) Penguin Books India, 1992.

[6] Vienna Convention on the Law of Treaties, Articles 31.2-3a.

[7] Vienna Convention on the Law of Treaties, Article 31.3b. Also, on legally binding state practice as constituent of customary international law, see, *North Sea Continental Shelf (Germany/Denmark, Netherlands),* Judgment, ICJ Reports 1969, para. 77.

[8] Higgins, R., *Problems and Process: International Law and How We Use It*, 1995.

[9] See Article 103 of the Charter of the United Nations, that declares UN Charter obligations to be superior to all other international obligations.

[10] Articles 42-47 of the Charter of the United Nations. In noting the differences between the Covenant of the League of Nations and the Charter of the United Nations, James Crawford observes the outlawing of war and strengthening of collective security structures chiefly through a restricted veto power. *Id*., 'The Charter of the United Nations as a Constitution' in *The Changing Constitution of the United Nations*, pp.3-4.

was created.[11] It is noteworthy for our later discussion that the initiative of member states of the Southern Africa Development Community (SADC) played a decisive role in the UN Security Council's creation of this brigade[12]. On the other hand, Chapter VI peacekeeping[13], which was not intended under the UN Charter[14], has flourished since the quick response to the 1956 Suez Canal Crisis. The ICJ later cemented the legality of peacekeeping in 1962.[15]

The second example occurred in 1950. When the Soviet Union walked out on deliberations on the Korean crisis to protest Taiwan's seating in China's stead on the Security Council,[16] they hoped their absence would be a viable diplomatic solution to deny the Council their "concurring vote."[17] To counter these well-timed abstentions, the Council adopted the practice of a "present and voting" standard, an extra-textual qualification to the understanding of the explicit "concurring votes," thus denying the Soviet Union its veto-by-absence understanding. This view was also later cemented by the ICJ in 1971.[18]

It should not be lost on us either that while the status of the United Nations as an international organisation was a given *ab initio* in international relations, the same is not true in international law. The UN only gained legal recognition of its international personality[19] in 1949[20], thus

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[11] S/RES/2098 of 28 March 2013 creating an intervention brigade under MONUSCO to neutralise rebel groups in eastern DRC—until 31 March 2014. S/RES/2147 of 28 March 2014 renewing the mandate of MONUSCO and its intervention brigade until 31 March 2015.

[12] See Institute for Security Studies, 'South Africa and the UN Intervention Brigade in the DRC' 24 April 2013, http://www.issafrica.org/iss-today/south-africa-and-the-un-intervention-brigade-in-the-drc [Accessed August 6 2014].

[13] The term "peacekeeping" does not exist in the Charter of the United Nations. Peacekeeping operations have been created by the UNSC as subsidiary organs under the generously worded Article 29 of the Charter of the United Nations. See Schweigman, D., *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice,* Kluwer Law International, The Hague, 2001, p. 48.

[14] Article 36.1 of the Charter of the United Nations speaks of the Security Council recommending "appropriate procedures and methods of adjustment". See also Article 37.2.

[15] *Certain Expenses of the United Nations* (Advisory Opinion) ICJ Reports 1962, p. 151.

[16] Schweigman, D., *The Authority of the Security Council,* p. 48.

[17] Article 27.3 of the Charter of the United Nations.

[18] *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, p.22. See also Wood, M., 'United Nations Security Council' *Max Planck Encyclopedia of Public International Law* (www.mpepil.com) para.11; Schweigman, D., *The Authority of the Security Council,* pp. 47-48.

[19] Refers to the status of an entity as a legal person under international law. "A subject of international law is an entity possessing international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims; and (b) to be responsible for its breaches of obligation by being subjected to such claims." Crawford, J., *Brownlie's Principles of Public International Law,* 8th Edition, Oxford University Press, 2012, p. 115.

[20] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) ICJ Reports 1949, p. 174. In curious legal drafting, the United Nations is actually declared established by the last paragraph of its Charter's preamble, *not* in any substantive article. It has since become customary to clearly establish and vest international personality of an organisation in its treaty's first substantive provisions. See Article 1 of the Charter of the Organisation of African Unity (1963); Article 2 of the Constitutive Act of the African Union (2000). An African

inaugurating the continuing entrenchment of international organisations as subjects of international law. States[21] and international organisations, as subjects of international law are still being defined. In explaining how international law simply does not know what international organisations are, Jan Klabbers observes that while "we may, in most cases be able to recognise an international organisation when we see one, […] it has so far been quite impossible to actually define such organisations in a comprehensive way".[22]

This enhanced role of politics in law – rather *enhanced recognition*, for I dare venture to add that the same pertains in municipal law, but only with far less recognition – can be seen as the corollary of the principle of sovereign equality.[23] Sovereign equality is what gives international law its horizontal nature, that is, it is the governed who create their own laws, and therefore, can only be bound by consent. Municipal law adopts a more vertical logic, where those governed are bound by laws without having to consent to them.

The interplay between politics and law, and the attendant ramifications for their respective scholars and practitioners, raises questions of disciplinary boundaries. For instance, the question of whether a court would be departing from its proper judicial character in determining legal questions of political import has vexed courts, both national[24] and international[25] for long. The ICJ's view is worth quoting at some length:

> It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that *most*

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international organisation that may share the UN's history of progression into international personality is the International Conference on the Great Lakes Region.

[21] Their creation, traits, continuing existence and extinguishing, especially as international law has outlawed the use of force in relation to the last category, continue to draw much debate in international law. See generally, *Larsen v Kingdom of Hawaii,* Arbitration Award of 5 February 2001; Crawford, J., *The Creation of States in International Law,* 2nd edition, Oxford University Press, 2006.

[22] Klabbers, J., *An Introduction to International Institutional Law*, Cambridge University Press, 2002, p.3-4, 7. He notes the European Union, the OSCE and GATT as examples of organisations whose status has been questioned, *de jure*.

[23] Article 2.1 of the Charter of the United Nations.

[24] *Marbury v Madison*, 5 US 137 (1803). "It is emphatically the province and the duty of the judicial department to say what the law is."

[25] *Status of Eastern Carelia*, PCIJ, 23 July 1923, Series B, No. 5, p. 29: "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court". Also, *Admission of a State to the United Nations (Charter, Art. 4),* Advisory Opinion, ICJ Reports 1948, p. 57; *Competence of Assembly Regarding Admission to the United Nations* (Advisory Opinion) ICJ Reports 1950, p. 4, p.6; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, p. 171, para. 14; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, p. 87, para. 33; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 13; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004 (I), p. 145, para. 16-17. In fact, the ICJ has expressed this view in just about every advisory opinion it has been requested to determine, highlighting the need to constantly clarify the nexus of and distinction between law and politics.

> *interpretations of the Charter of the United Nations will have political significance*, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.[26]

No proper court wishes to be seen as straying from the apolitical. Yet, no court exercising jurisdiction over the lawfulness of acts of state, whether national or international, can hope to fulfill its charge without "political significance".

Politics creates law in order to restrict itself

The creation of permanent bodies of some judicial character is an international law-making motif used by international politics *to restrain itself*. The 1899 creation of the Permanent Court of Arbitration[27], the Permanent Court of International Justice in 1919 and the International Court of Justice in 1945, stand testament to international law's principal goal: the pacific settlement of disputes, or in the first words of the UN Charter, "to save succeeding generations from the scourge of war [and its] untold sorrows". This task, pre-1899, was the sole responsibility of diplomacy, a function that indubitably lies with the executive power.[28] That this responsibility has been thus shifted in certain respects,[29] by the states *themselves*, to organs of judicial character,[30] is itself telling of the capacity of politics to solely "save succeeding generations."

Again, we must reiterate: politics bears law with a view to regulating itself. It would be both behaviour unbecoming and a great disservice to the rule of law were a competent court to shun this duty. In discussing the political ramifications of the exercise of judicial authority, the ICJ recalls, "A distinction should thus be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute *may wish to attribute*, in their mutual relations, to an advisory opinion of the Court…"[31]

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[26] *Certain Expenses Opinion*, p.155. [Emphasis mine].

[27] "The PCA was established by the 1899 Convention for the Pacific Settlement of International Disputes, concluded at The Hague during the first Hague Peace Conference. The 1899 Convention was revised in 1907 at the second Hague Peace Conference." http://www.pca-cpa.org/showpage.asp?pag_id=1037 [Accessed 10 August 2014].

[28] In 1796, Edmund Burke's described diplomacy as the "conduct of negotiations between officials of different countries to achieve their foreign policy objectives without recourse to war". Kickbusch, I., *et al* (Eds.). *Global Health Diplomacy: Concepts, Issues, Actors, Instruments, Fora and Cases*. pp. 1-2.

[29] Diplomacy's currency remains evident in peace negotiations. The distinction here is that, prior to 1899, failure of diplomatic negotiations would result in war. Now, such failure is *required* to result in the filing of a case before a competent court or specially created arbitral tribunal. See our discussions below on territorial disputes in Africa and cases filed at ICJ and arbitral tribunals.

[30] Article 36 of the Charter of the United Nations.

[31] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion, ICJ Reports 1999, p. 62, para. 25 [emphasis mine]. See also*, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, ICJ Reports 1950, p. 71.

In fact, the ICJ hastens to reiterate that, rather than shun the determination of a legal question due to its political ramifications, it is precisely because of the *prominence of politics* in a situation that makes it *particularly necessary*[32] to obtain impartial judicial authority. By contrast, when parties submit matters to the Court, where no legal dispute exists, such matters are duly pointed out[33] and excluded from determination.[34]

The interplay between law and politics described above has led some to wonder whether international law truly exists as a discipline. Does the law simply regulate what is being done by social actors (and therefore be but a description of society) or does it dare to assert new, presumably higher norms (and therefore be removed from the reality of social life whence it comes)?[35] This manifests itself in international law[36] and particularly its branches that relate to transitional justice, in the sovereignty-community divide. To what extent *ought* international structures exercise powers against the grain of their creator-members?[37] Or more precisely, do states exercise unfettered discretion to determine the validity of powers exercised by international structures?[38] In practice, it would seem that unfettered discretion against international intrusion on domestic jurisdiction has been "eroded and emptied of substance."[39]

War by judicial means

Since the issuance of the Lieber Code in 1863,[40] various means and methods of war have progressively been outlawed by international humanitarian treaties and custom. It is instructive that the Lieber Code and the St Petersburg Declaration,[41] the earliest in contemporary corpus of international law on war, were created at the initiative of presidential and military

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[32] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, p. 87, para. 33, reiterated in *Nuclear Weapons* Opinion, p. 226, para. 13.

[33] *Larsen v Kingdom of Hawaii,* Arbitration Award of 5 February 2001, para.11.3-7, 12.12-19.

[34] *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, para.53, 59.

[35] The former and latter views, respectively, effectively make international law a descriptive sociology or branch of ethics with little practical effect. Keohane, R.O., 'International Relations and International Law: Two Optics' *Harvard International Law Journal,* Vol.38, 1997, pp.487-502, cited in Klabbers, *An Introduction to International Institutional Law*, p.307.

[36] Klabbers, *Introduction to International Institutional Law*, p.308

[37] Klabbers, *Introduction to International Institutional Law*, pp.60-81; Ginther, K., 'Article 2.7' in *The Charter of the United Nations: A Commentary,* Simma, B. *et al*, (eds) 2nd Edition, Vol. 1, Oxford University Press, pp.154-71.

[38] African Union Peace and Security Council, "Communiqué of the 142nd Meeting," July 21, 2008, AU Doc. PSC/MIN/Comm.(CXLII); African Union Peace and Security Council, "Communiqué of the 175th Meeting," March 5, 2009, AU Doc. PSC/PR/C Comm.(CLXXV); African Union Peace and Security Council, "Communiqué of the 142nd Meeting,"; African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, AU Doc. Assembly/AU/13(XIII), July 3, 2009.

[39] Ginther, 'Article 2.7', p.171.

[40] Instructions for the Government of Armies of the United States in the Field, General Order № 100, the Lieber Code.

[41] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes, Saint Petersburg, 29 November/11 December 1868.

authorities that recognised that brutality in war was politically inexpedient.[42] Not content to leave such weighty decisions to political discretion, states sought out the binding walls of law around themselves. It is probably in the prohibition of war and its brutality that international law is often both most ambitious and least potent.[43]

Radosa Milutinovic has observed that two decades after the end of hostilities in the former Yugoslavia, its successor republics continue to wage war – "by judicial means."[44] It is here asserted that the *judicial waging of war* is precisely the corollary of the century long effort to institutionalise judicial (pacific) settlement of disputes and outlaw – if not oust – the former role of war in international relations.[45]

Consider how many more wars would have been waged in Africa had recourse to war to settle territorial disputes, even under the guise of the only permissible ground for use of force - self-defence,[46] not been prohibited in no uncertain terms by international law.[47] Rather than resort to war, 16 African states have referred 12 territorial disputes to the ICJ[48] since 1982: six by mutual [special] agreement[49]; five without specific mutual agreement[50]; and one that was

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[42] Wishing to preserve political legitimacy to govern the seceding southern states *after* the Civil War, US president Abraham Lincoln had the Lieber Code drawn up to restrain his forces, and avoid alienating southern populations. In 1867, Russian military authorities invented "a bullet which …[would] explode on contact with a soft substance. As such the bullet would have been an inhuman instrument of war. The Russian Government, unwilling to use the bullet itself or to allow another country to take advantage of it, suggested that the use of the bullet be prohibited by international agreement." http://www.icrc.org/ihl/INTRO/130?OpenDocument [Accessed 11 August 2014].

[43] "The elimination of war by international law was a guiding ideal of the League of Nations", an ideal that oft seemed to flow "in a veritable river of hope". Jessup, P.C., "A Half-Century of Efforts to Substitute Law for War", *Recueil des Cours*, Vol. 99 (1960), pp. 3, cited in Thurer, D., *International Humanitarian Law: Theory, Practice, Context*, The Hague, 2011, p.45.

[44] Milutinovic, R., 'War Goes On – By Judicial Means' in *International Justice Tribune* No. 165, 4 April 2014, p.1. In reference to ; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*, Judgement, ICJ Reports 2003, p.7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, ICJ Reports 2008, p. 412

[45] "War is a continuation of politics by other means". General Philipp Gottfried von Clausewitz, *On War,* 1832. Diplomacy, we reiterate, has *not* lost its essential currency in pacific settlement of disputes (ICJ, *Tehran case,* para.91), but only its exclusive mandate. See notes 28 and 29 above.

[46] Article 51 of the Charter of the United Nations.

[47] "…border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law." Ethiopia-Eritrea Claims Commission "Partial Award *Ius Ad Bellum* - Ethiopia's Claims 1-8", para.10 http://www.pca-cpa.org/showpage.asp?pag_id=1151 [Accessed 11 August 2014].

[48] Here we only list those territorial disputes determined by the ICJ, although noting the use of arbitration by states in such matters.

[49] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p. 18; *Frontier Dispute (Burkina Faso/Mali)*, Judgment, ICJ Reports 1986, p. 554; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p. 6; *Kasikili/Sedudu Island (Botswana/Namibia)* Judgment, ICJ Reports 1999, p. 1045; *Frontier*

withdrawn by mutual agreement of both parties[51] upon further successful diplomatic negotiations.

This records stands in stark contrast to the use of force elected by Eritrea[52] in its border disputes with Yemen in 1996 and Ethiopia 1998-2000, disputes which were eventually legally resolved in arbitration.[53] The implementation of the Ethiopia-Eritrea Boundary Commission Award has remained stalled to date, leading the President of the Commission to decry the lack of progress in the demarcation process, indicating that progress required that the parties relax certain rigid positions.[54] This case highlights once again, the nexus between law and politics. The law can safely be said to have done its part, with politics now clearly playing obstacle.[55]

This instance can also be contrasted with the Iran-US Claims Tribunal, established bilaterally to resolve commercial disputes arising from the diplomatic fallout in the aftermath of the Islamic Revolution. While in international relations, Iran and the US are known to publicly express hostility towards each other, in international law, their collaboration in the claims adjudication programme is exemplary. Despite some misgivings,[56] US claimants have received over 2.5 billion US dollars in awards of compensation from Iran[57] and an estimated 1 billion US dollars has been received by Iranian nationals from the US. Established in 1981 and still in operation,

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Dispute (Benin/Niger), Judgment, ICJ Reports 2005, p. 90; *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013.

[50] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1985, p. 192; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment, ICJ Reports 1991, p. 53; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon)*, Judgment, ICJ Reports 1999, p. 31; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 303; most recently, on August 28 2014, Somalia "instituted proceedings against Kenya before the ICJ, with regard to 'a dispute concerning maritime delimitation in the Indian Ocean'." ICJ, Press Statement of 28 August 2014, No.2014/27.

[51] *Maritime Delimitation between Guinea-Bissau and Senegal*, Order of 8 November 1995, ICJ Reports 1995, p. 423.

[52] Eritrea was duly found to have unlawfully resorted to use of force. See Ethiopia-Eritrea Claims Commission "Partial Award *Ius Ad Bellum* - Ethiopia's Claims 1-8", para.10 http://www.pca-cpa.org/showpage.asp?pag_id=1151 [Accessed 11 August 2014].

[53] *Award of the Eritrea/Yemen Arbitral Tribunal in the First Stage - Territorial Sovereignty and Scope of the Dispute,* October 9, 1998; *Award of the Eritrea/Yemen Arbitral Tribunal in the Second Stage - Maritime Delimitation*, December 17, 1999; Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between Eritrea and Ethiopia*, 13 April 2002.

[54] http://www.pca-cpa.org/showpage.asp?pag_id=1150 [Accessed August 14 2014].

[55] *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, para.53.

[56] The US Court of Appeals of the Second Circuit found a Tribunal Award against a US corporation unenforceable in the US in *Iran Aircraft Industries v Avco Corp*, a position that the Tribunal did not countenance in *Decision in Case A27 (Islamic Republic of Iran v United States of America* 34 Iran-US CTR 41. See Pinto, C., 'Iran-United States Claims Tribunal' *Max Planck Encyclopedia of Public International Law,* November 2005 (www.mpepil.com), para.53.

[57] Christopher, W., Mosk, R.M., 'The Iranian Hostage Crisis and the Iran-US Claims Tribunal: Implications for International Dispute Resolution and Diplomacy' *Pepperdine Dispute Resolution Law Journal*, Vol. 7 [2007], Iss. 2, Art. 1, p.171.

the Tribunal has decided over 3,986 cases and only 17 major claims between the governments are pending.[58] The Tribunal is the longest running claims tribunal in history and until the establishment of the UN Compensation Commission, was also the largest claims adjudication program in history.[59] It has made significant contributions to public international law and international commercial law,[60] despite having been created to adjudicate between probably the most notorious East-West foes in international relations.

Respect for human dignity is also greatly enhanced by the preference for judicial determination over resort to the use of force. This can be seen in the case of Kenya-Somalia territorial disputes. Unlike in 1967 when Somalia elected a war to resolve its territorial claims with Kenya in the *Shifta War,* in 2014, it has elected to sue Kenya at the ICJ for resolution of disputes over maritime delimitation including the continental shelf. Such pacific dispute settlement *may very well* bear greater fruit for Somalia's sovereign rights. It also evidently is far more valuable for civilians as judicial determination of disputes does not involve destruction of life and property and the human rights violations that occur in armed conflict or counter-insurgency operations.[61]

Irreconcilable results and the ACJHR Criminal Chamber

Transitional justice follows brutal conflicts or the demise of oppressive regimes, periods during which large scale human rights violations occurred.[62] It brings together a wide range of international law branches to attempt *a political project* of establishing stable and just post-conflict societies. These branches are: humanitarian law that fetters political and individual discretion on when and how to engage in armed conflict; human rights law that further guarantees human dignity in 'peacetime' and offers redress to victims[63] and criminal law to call to account those who disregard these laws' "intransgressible norms"[64].

It is this latter branch of international law relating to transitional justice that has attracted heated debate, with African political and thought leaders portraying the International Criminal

[58] Pinto, 'Iran-United States Claims Tribunal', para.78.
[59] Christopher and Mosk, 'The Iranian Hostage Crisis', p.171. Christopher and Mosk trace the history of claims adjudication programmes since the 1794 US-British Jay Treaty. *Id*., pp.170-71.
[60] Pinto, 'Iran-United States Claims Tribunal', para.79. Christopher, Mosk, 'The Iranian Hostage Crisis', p.173.
[61] See generally, Report of the Truth Justice and Reconciliation Commission of Kenya, 2013 on the *Shifta War* and Wagalla massacre in northern Kenya.
[62] Sirleaf, M.V.S., 'Beyond Truth and Punishment in Transitional Justice' *Virginia Journal of International Law* Vol. 54, No. 2, p. 226.
[63] "The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for reparation of damages resulting from the acts of the states responsible". Inter-American Court of Human Rights, *Velasquez Rodriguez v Honduras*, (Merits) Judgement of 29 July 1988, para.134.
[64] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

Court (ICC) as a Western imperialist institution that has targeted Africans or jeopardised national reconciliation and peace processes.[65] From a political point of view, the nationality of ICC suspects and location of most ICC situations are evidence of a certain prejudice on the ICC's part.

As we have seen above, international law sees its role as *particularly necessary* in matters where politics is prominent, intervening with a view to imposing the order and predictability that politics itself had created *prior*[66] to the dispute in question. Politics will unceasingly be prominent in international criminal law as this law *only exercises* "jurisdiction over persons for the most serious crimes of international concern".[67] By their very definition, these crimes: genocide, war crimes, crimes against humanity and crime of aggression, *cannot* be committed by lowly citizens, but persons of significant political influence.[68] For this reason, traditional immunities for high state officials are explicitly exempted.[69] In order to preserve any guilty conduct of such highly placed persons as exclusively individual, the Rome Statute precludes individual criminal responsibility from affecting state responsibility under international law.[70]

But the above arguments are legal ones and only make sense in law. Political analyses view this matter differently. For instance, Thabo Mbeki and Mahmood Mamdani have challenged the desirability of the current model of application of criminal liability in transitional justice in Africa, asserting that "Courts are ill-suited to inaugurating a new political order after civil wars; they can only come into the picture after such a new order is already in place."[71] The above logic is both doubtful and indisputable, depending on which side of *the law-politics nexus* one stands.[72] Post conflict political exigencies are not unique to Africa, as we saw with the origins of

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[65] See African Union decisions in note 38 above.

[66] Prior criminalisation of conduct is *necessary* for the legality of criminal law itself. Much of the critique against the International Military Tribunal of Nuremberg established by the London Charter (8 August 1945) flows from the view that it exercised *ex post facto* criminal law.

[67] Rome Statute of the International Criminal Court, Article 1.

[68] In addition, the international crimes themselves arise from large scale violations pitting various socio-political groups in a polity. Suspects may remain highly popular and viewed as heroes in their communities long after the conflict has ended [Remarks by Baron S. Brammetz, Chief Prosecutor of the ICTY on 13 August 2014 at Strathmore University, Nairobi, on the former Yugoslavia situation].

[69] Rome Statute, Article 27. Also, Article 28.

[70] Rome Statute, Article 25 (4).

[71] 'Courts Can't End Civil Wars' *New York Times*, 5 February 2014, http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html?hp&rref=opinion&_r=0 [Accessed 17 August 2014].

[72] Three days prior to the publication of the Mbeki-Mamdani commentary, US Supreme Court Justice Anthonin Scalia, citing Cicero's *inter arma enim silent leges* (during war, the law is silent), publicly admitted that the US Supreme Court was wrong in its 1944 decision *Korematsu v US* to endorse internment camps for Japanese-Americans in Hawaii. http://www.theblaze.com/stories/2014/02/04/justice-scalia-you-are-kidding-yourself-if-you-think-world-war-ii-style-internment-camps-will-never-happen-again/ [Accessed 3 August 2014].

the Lieber Code earlier. Can political expediency therefore ever be reconciled with the restraining nature of law, especially considering that transitional justice is a political project?

It is our contention that law and politics, from their entrenched disciplinary fortresses, cannot be reconciled on this question. It is political processes that create laws and courts to enforce them. Once created, however, such courts *will* act upon their granted jurisdiction and nothing more. For instance, from the law's point of view, the ICC simply cannot act against certain Western personalities as their states have not granted it jurisdiction, while it does for African states that did so. In any case, the preference of judicial authority over political discretion in international law is a motif that far predates contemporary international criminal law and Africa was well advised of this[73].

In the particular case of African official objections to the ICC and the setting up of parallel structures, the Abi-Saab truism and the irreconcilability of law and politics will remain. Once the proposed criminal chamber of the African Court of Justice and Human Rights (ACJHR) comes into operation, just like the ICC, it *will not* countenance political debates on the desirability of granting *functional immunities*[74] to heads of state and government and senior state officials. Nor can it be expected to accept cogent arguments on the dangers of amalgamating such diverse and "incompatible" competences in an unwieldy court, the 'all or nothing" ratification options for Africa's diverse states and the danger of watering down the human rights mandate of the existing African Court on Human and Peoples' Rights through an overemphasis on the criminal jurisdiction.[75] Neither will it attempt to sequence its actions based on valid but extra-judicial political exigencies,[76] unless its treaty is amended to so provide.

The amendments of June 2014 to the proposed Court's protocol seem to prove right some of the above arguments. For instance, the General Affairs and Human Rights chambers of the proposed new court have three judges each, compared with the International Criminal Law section that will boast of nine judges (Pre-trial 1, Trial 3 and Appellate 5).[77]

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[73] The urgent campaign by the US to conclude the so called Article 98 Agreements ought to have at least served this purpose. See generally Cotton, D.H., Odongo, G.O., 'The Magnificent Seven: Africa's Response to US Article 98' *African Human Rights Law Journal* Vol. 7, No. 1 2007, pp. 1-34.

[74] See AU Doc EX.CL/846(XXV), 20-24 June 2014, para.26.

[75] Viljoen, F., 'AU Assembly Should Consider Human Rights Implications before Adopting the Amending Merged African Court Protocol' *AfricLaw* 23 May 2012; du Plessis, M., 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes' Institute for Security Studies Paper No. 235, June 2012.

[76] Murithi, T., *Sequencing the Administration of Justice to Enable the Pursuit of Peace: Can the ICC play a role in complementing restorative justice?* IJR Policy Brief, No. 1, June 2010.

[77] The diversity of judges and impartiality ramifications thereof are central to the legitimacy of international courts. See Dannenbaum, T., 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed' *Cornell Journal of International Law* Vol.45, 2012.

As regards immunities, it may be that such court may deem it fit to exercise its judicial discretion and understand the late decision to add the functional immunities qualification to the formulation of Article 46A*bis* to mean the commission of the crimes under its jurisdiction cannot possibly be among the functions of state and therefore attract no immunity. In the unlikely event of this proposed criminal court being so bold, such court would likely *still* find itself incompetent "during their tenure of office", unless the state's domestic law specifically rejects any such immunity.[78]

Like the ICC, the proposed International Crimes Chamber of the ACJHR *will not* repair the entirety of refugees, IDPs, and other victims of the atrocities that constitute international crimes of genocide, crimes against humanity or war crimes. Its victim lists will be limited to the appropriately narrow confines of criminal law[79], which will identify select events on specific dates and times in the formal indictment at the expense of the entirety of atrocities and counter-atrocities. Such is criminal law and any deviation from this narrow confine *may constitute a violation of the rights of the accused.*

Even more problematic are the sheer multiple layers of possible victimhood for the newly created African international crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources. Such categories of victimhood have never been considered by a supra-national criminal court.

Any African prosecutions bearing political significance can be reasonably expected to trigger a resurgence of the corrosive inter-African state accusations of interference prevalent in the OAU era. Take the proposed African international crime of corruption for instance. Given that systemic corruption (including organisational capacity and political sway of suspects) can be seen as a central feature of repressive African states and therefore a transitional justice concern,[80] could an African criminal court address this crime without falling into the ICC trap of

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[78] For instance, given the Constitution of Kenya's subjugation of all state power to the Constitution, the Executive would appear to have no authority to exercise its foreign affairs power under Fourth Schedule Part 1 (1 and 2) and Part 2(5.e) towards such a provision in contravention of the Constitution, which expressly outlaws immunity for the senior-most state officials and makes reasonable suspicion of having committed international crimes grounds for their impeachment (Articles 143 (4); 145 (1) (b); 150 (1) (b) (ii); 152 (6) (b); Article 181 (1) (b). In any case, such a treaty would appear to be unlawfully ratified as such ratification *should* offend Article 2(6). In this thinking, and assuming fulfillment of conditions set forth by Articles 46(1) and 47 of the Vienna Convention on the Law of Treaties, such court may find Article 46A*bis* inapplicable to Kenya.

[79] Ojwang, J.B., *The Common Law, Judges' Law: Land and Environment before Kenyan Courts,* Strathmore University Press, Nairobi, 2014, p. 21.

[80] KNCHR, *The Human Rights Dimensions of Corruption,* Conference Report 2006; Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' *International Journal of Transitional Justice*, Vol. 2, 2008, 266-291, discusses the invisibility of economic inequality and structural violence, which can be seen as manifested in entrenched corruption in the African context. See also Laplante, L.J., 'Transitional Justice and Peace

politicised machinations? Will not African states prefer to deal with such matters domestically and probably even non-judicially?

One only has to imagine the possibility of an ACJHR corruption case against a former Ethiopian state official in a grand hydropower project to see the possibility of accusation of an Egyptian underhand or a corruption case against a former Gambian official in a River Gambia bridge project to see possible accusations of Senegalese hegemonic influence. Similar accusations against Senegal could also be foreseen for a former Gambian official's hypothetical indictment for mercenarism or unconstitutional change of government for allegedly supporting separatist movements in the Casamance. If a former Kenyan or Ethiopian official is prosecuted for any alleged violation of international humanitarian law in these countries' military adventures in Somalia or alleged corruption in the grand Lamu Port project (LAPPSET), are not similarly politically motivated accusations of Somali machinations plausible?[81] Clarifying the boundaries of law and politics in such matters will demand of the proposed African court years of cautious jurisprudential development, which will leave victims, both human and state, as exasperated with this African court as they are now with the ICC and African truth commissions[82].

As counseled by Frans Viljoen[83] it may have been wiser to leave the criminal, general public international law and human rights law jurisdictions separate, and have each branch of international law execute its mandate with clarity. The multifaceted approach of the Americas may be instructive for Africa here. The range of transitional justice tools employed in Latin America have included national and regional peace and transition processes[84] and truth commissions[85] that worked to preserve the right to truth. Certain countries have attempted

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Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' *International Journal of Transitional Justice*, Vol. 2, 2008, 331–355.

[81] The above examples assume existence of jurisdiction *ratione temporis.*

[82] Sirleaf, 'Beyond Truth and Punishment in Transitional Justice'.

[83] Viljoen, 'AU Assembly Should Consider Human Rights Implications before Adopting the Amending Merged African Court Protocol' (note 72 above).

[84] See generally, the Esquipulas Agreements I of 25 May 1986 (UN Docs A/40/1119 and S/18106 of 28 May 1986) and II of 7 August 1987 (UN Docs A/42/521 and S19085 of 31 August 1987).

[85] Argentina (National Commission on the Disappearance of Persons, 1983); Bolivia (National Commission of Inquiry into Disappearances, 1982); Chile (National Commission for Truth and Reconciliation, 1990; National Commission on Political Imprisonment and Torture, 2003); Ecuador (Truth and Justice Commission, 1996; Truth Commission, 2007); El Salvador (Commission of Truth, 1992); Grenada (Truth and Reconciliation Commission, 2001); Guatemala (Commission for the Historical Clarification of Human Rights Violations and Acts of Violence which Caused Suffering to the Guatemalan People, 1997); Haiti (National Commission for Truth and Justice, 1995); Panama (Truth Commission, 2001); Paraguay (Truth and Justice Commission, 2003); Peru (Truth and Reconciliation Commission, 2000); Uruguay (Investigative Commission on the Situation of Disappeared People and its Causes, 1985 and Peace Commission, 2000) http://www.amnesty.org/en/international-justice/issues/truth-commissions [Accessed 13 October 2014].

criminal prosecutions[86] while human rights cases, including questions on the legality of amnesty laws[87] continue to work their way up the national and Inter-American human rights systems, close to three decades after transitions began.

If Mbeki and Mamdani are correct that courts are ill-suited to inaugurating new political orders, then the AU must surely have chosen to disregard their counsel by the proposed creation of the expanded ACJHR with jurisdiction over international crimes. If Viljoen is right that merged courts are prone to work poorly hence their hitherto non-creation in international law, then the AU has also chosen to disregard this counsel too. If Tim Murithi's assertions that criminal courts can be organised to sequence, not with terms of office of suspects but with the progress of the peace and reconciliation process itself, then surely such counsel too was disregarded. If Abdullahi An-Na'im is right that there are no pre-determined phases of transition that societies ought to undergo, and that the current transitional justice model perpetuates the linear progression to "civilisation"[88], then the creation of ACJHR criminal mandate does nothing but affirm that linear model, to the detriment of African peoples and their states.

It is difficult to see what school of political or legal theory therefore informs current AU political action in legislating international crimes. The AU's current attempt to use politics to make international law that *expands* political discretion rather than lock in political manouvering in hard law[89] seems ill fitting to the history of the interaction of these disciplines.

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[86] Burt, J.M, 'Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations' *International Journal of Transitional Justice*, Vol. 3, 2009, 384–405; 'Efrain Rios Montt & Mauricio Rodriguez Sanchez before the national courts of Guatemala' *International Justice Monitor* http://www.ijmonitor.org/efrain-rios-montt-and-mauricio-rodriguez-sanchez-background/ [Accessed October 13 2014].

[87] *El Mozote Massacre v El Salvador,* IACtHR, 25 October 2012; *Gomes Lund et al. v Brazil,* IACtHR, 24 November 2010; *Gelman v Uruguay,* IACtHR, 24 February 2011.

[88] *Id.,* 'Editorial Note: From the Neocolonial 'Transitional' to Indigenous Formations of Justice' *International Journal of Transitional Justice*, Vol. 7, 2013, p.198.

[89] Moravcsik, A., 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' *International Organization* 54, 2, Spring 2000, pp. 217-252.