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FICTIONS OF JUSTICE

This compelling volume takes up the challenge of documenting how human rights values are embedded in a new rule of law regime to produce a new language of international justice that competes with a range of other religious and cultural formations. It explores how declarations of "justice," like "law," have the power to bury the normative political apparatus within which they are embedded, thereby obscuring the processes of their making. The book demonstrates how these notions of justice are produced as necessary social fictions – as fictions that we need to live with. By examining the making of the Rome Statute for the International Criminal Court in multiple global sites, the application of its jurisdiction in sub-Saharan Africa, and the related contestations on the African continent, the author details the way that notions of justice are negotiated through everyday micropractices and grassroots contestations. Among these micropractices are speech acts that revere the protection of human rights, citation references to treaty documents, the brokering of human rights agendas, the rewriting of national constitutions, demonstrations of religiosity that point out the piety of religious subjects, and ritual practices of forgiveness that involve the invocation of ancestral religious cosmologies. By detailing the rendering illegible of certain justice constructs and the celebration of others, the book journeys through the problem of incommensurability and the politics of exclusion in our social world. In an attempt to pay attention to the diverse expressions of justice within which theories of legal pluralism circulate, the author ends by calling for a critical transnational legal pluralism. This approach takes seriously the role of translation and the making of fictions of meaning as they play out in unequal relations of power.

Kamari Maxine Clarke is a professor of anthropology at Yale University and a research scientist at the Yale Law School. Her areas of research explore issues related to religious nationalism, legal institutions, international law, the interface between culture and power, and their relationship to the modernity of race and late capitalist globalization. Her recent articles and books have focused on transnational religious and legal movements and the related production of knowledge and power. They include *Mapping Yoruba Networks: Power and Agency in the Making of Transnational Communities* (2004) and *Globalization and Race: Transformations in the Cultural Production of Blackness* (2006). Her forthcoming titles are *Testimonies and Transformations: Reflections on the Use of Ethnographic Knowledge* and *Mirrors of Justice: Law and Power in the Post–Cold War Era*. Professor Clarke has lectured throughout the United States, Canada, and parts of Europe, Africa, and the Caribbean on a wide range of topics. She is Director of the Center for Transnational Cultural Analysis and Chair of the Yale Council on African Studies.

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FICTIONS OF JUSTICE

The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa

Kamari Maxine Clarke
Yale University

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Dedicated to the late Chima Ubani,
Nigerian human rights leader,
killed under controversial circumstances

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PREFACE

"Eine Idee deren Zeit gekommen ist [This is an idea whose time has come]!" exclaimed Mr. Heimler,[1] a diplomatic host at the New York City–based German Mission to the United Nations (UN). He had taken his place at the speaker's platform to express appreciation for the establishment of the International Criminal Court (ICC) – the first permanent international tribunal with the jurisdiction to try those who commit the worst crimes against humanity. With a room full of people from various countries, and with characteristic diplomatic resilience, he explained, "Today, July 1, 2002, the ICC has come into force as the first permanent international court responsible for adjudicating crimes against humanity, war crimes, genocide, and, when defined, the crime of aggression." He continued, "As you know, this was no small feat. Today the ICC stands as an expression of the will of two-thirds of the world's nations, representing the shared dream of universal personhood."

After establishing the profundity of the moment – the achievement of legal precepts emanating from an international text holier in its supranational institution because it was seen as being untouched by the *tainted* hands of potentially corrupt governments – the German diplomat began welcoming ministers of ambassadorial offices from around the world. He acknowledged a range of diplomatic staff, legal advisors, political analysts, representatives from nongovernmental organizations (NGOs), and guests, then invited us all to share with him the satisfaction of witnessing the realization of two visions of international justice: an institutional dream and a moral dream, both connected to achieving individual freedom for all. He honored those who, in the hope of bringing to fruition the institutional dream, had been involved in the UN Diplomatic Conference held in Rome, Italy, in July 1998. In celebrating this journey, he spoke of the multiple levels of networking, governmental negotiations, lobbying, and advocacy efforts that had been carried out by states, as well as by more than a thousand NGOs from around the world. These efforts, he explained, had later led to the

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requisite ratification of the Rome Statute, establishing the ICC by sixty like-minded states, thereby signaling another victory in the struggle for international human rights.[2] Unlike human rights instruments (e.g., the UN Human Rights Council, Inter-American Court of Human Rights, European Court of Human Rights), often seen as "soft law" and lacking "teeth," the Rome statute and its antecedents were seen as "hard law," "clean" forms of justice that emanated from treaties, conventions, and various supranational texts as opposed to human rights declarations or principles. They were the only international adjudicatory mechanisms with the institutional potential to actually exert force on a rogue government, a warlord, or a perpetrator of crimes against humanity. This was seen as a victory for the institutionalization of the *Rule of Law!*[3]

Those listening with me in the audience on that celebrated day were told that the second dream, the moral dream, represented the ideal of the universal rights of victims. With the help of the ICC, victims of the worst crimes, regardless of national citizenship, would now be able to access justice and compensation from the world community. Embedded in a language of protest against national sovereignty, which was represented as stunting human progress, the message of the spokespeople for the ICC was one of the moral good of widespread entitlements for all the world's members, an imperative for the prosperity of humankind.

This day, like many others, was fueled by the seduction of human rights rhetoric and its link to the "rule of law" as the new mechanism by which world peace could finally be achieved. Speeches by subsequent guest speakers resounded with similar themes. Various state diplomats and NGO representatives assured us that in making possible the success of the ICC, they were pledging to further the dream that humanity would one day be free from all forms of criminal violence. They proclaimed their institutional and moral commitments to precepts of fairness and equality for all, concluding that world peace was possible along this particular path to justice and through international cooperation among states. In so doing, speakers drew from a line of thought that has its roots in the Western Enlightenment political philosophy of John Locke, David Hume, and Jean-Jacques Rousseau – a line of thought that includes the idea that the equality of all humans is promised by the progression from state sovereignty to its eradication. Such conceptions of "human rights" and "rule of law" presume that in the process of guaranteeing freedoms and classifying rights and entitlements, all peoples will come to share similar visions for what true liberty and equality should be. Such conceptions also presume that the struggles that result in the

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commission of the "worst crimes against humanity" are without reason or historical motivation, that in contemporary democratic regimes there exists a level playing field for democratic governance, and that all people strive for the same goals of individual agency and freedom. These are among the presumptions that this book is dedicated to challenging. It explores the ways by which paths to "justice" are actually vigorously produced and become contested domains. They are neither universally embodied in a uniform conception of individual rights nor do they exist as one of many pluralities of justice-making domains. Rather, justice-making domains are made in increasingly complex regimes of truth that circulate in transnational forms of connectivities and exclusions. Understanding how they become acceptable as "justice," as normative mandates through which institutional victories are celebrated, involves understanding their creation not simply in "local" contexts but in the uneven transnational relations through which justice is shaped.

Based on more than six years of data collection in five world regions and including insights gathered during observations of the making of the Rome Statute of the ICC, the research for this study comprises a multisited and transnational ethnography in a post–Cold War, post-9/11 context. My analyses detail the ways by which cultural representations of the universality of human rights and the rule of law inform particular legal measures, as well as the ways by which cultural interpretations of justice contravene those rationalities and, instead, inform other insurgencies. By examining the historical and political imaginaries underlying the forms of utopianism that shape a world of emergent human entitlements, I ask how people envision a world of hope and justice and examine the convergences and divergences in those constructions. In this regard, I trace various micropractices and their instruments of justice-producing regimes – their regulatory structures, procedures of reasoning, governmental strategies, interpretive and moral priorities, and political economies of practice – and examine how they contribute to the shaping of practices that structure the spectacularity of justice tribunals and of various other religion-based judiciaries, such as Islamic Sharia courts, as well as of Ugandan truth and reconciliation ceremonies.

I began this project in 1998, during the cresting wave of truth and reconciliation commissions and ad hoc tribunals, including the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. I was inspired by the prospects for

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global change suggested by NGOs and by the shift toward international institutions as supplemental to mechanisms of civil and economic governance. To understand the accelerated development of the budding international criminal law movement, I decided to document the making of the ICC. From 1998 to 2006, I attended diplomatic meetings at the UN Preparatory Commissions (known as PrepComs) in New York City, as well as related UN Assembly of States Parties meetings in The Hague. In an attempt to understand the imparting of new legal knowledge, I attended a range of training courses for domestic criminal lawyers in The Hague and various other European sites (in Ireland, France, the United Kingdom), as well as NGO-driven human rights trainings in Banjul, The Gambia; Montréal, Canada; and in Lagos and Abuja, Nigeria. These programs provided an opportunity to observe the making of new brokers of the law – prosecutors and defense attorneys, judges, and freshly minted graduates of law and politics who converged to engage in what was a significant retooling of legal knowledge and resources. These transnational meetings and interactions led to new articulations of rights transported to local sites, but their presence was not always welcome or easily integrated into local formulations. It was these local and national forms of friction with transnational spheres of justice making that were of special interest to me in African contexts because of their engagement with reforming violence-laden regions through the threat of international law. Yet it was clear that there existed incommensurate relationships that were difficult to articulate outside of the problematic hierarchies of Western knowledge. It was also clear that even the transnational logic that shaped the moral and ethical underside of justice aspirations was, at times, so divergent that understanding difference meant going beyond legal pluralism and, certainly, well beyond relativist thinking. This was not simply because of the unequal spheres of power operative in international lawmaking but also because these justice-making spaces are today so transnational that their justice aspirations often represent trajectories that are themselves shaped by international institutions, diasporic communities hoping to revive traditional mechanisms, and various philanthropic agendas to train and support local infrastructures. The revitalization of the truth and reconciliation rituals in Uganda, known as *mato oput*, is one such example; the return of Islamic criminal Sharia in Northern Nigeria is another.

In an attempt to understand these transnational forms of connectivity to seemingly "local" practices as they relate to the making of "traditional" justice, I spent the summer of 2002 in Nigeria,

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documenting the revival of Islamic Sharia, and parts of the summer of 2007 in Uganda, exploring the revival of northern Ugandan traditional justice forms. It became evident that understanding the revival of these seemingly "traditional" practices, especially as they were being deployed in the face of the encroachment of international criminal justice regimes, meant understanding claims of Ugandan and Nigerian membership in larger transnational institutions, imaginaries, and political economies. In the case of Nigerian challenges over incommensurate conceptions of justice, it meant rethinking not only the relationship of Islamic revivalists to the secular state but also that between prominent Nigerian advocates for the criminal Sharia and their aspirations of membership in a larger world of Islamic devotion and justice technologies. At times, this reality made the revitalization of the criminal Sharia in Nigeria even more radical than their various Islamic contemporaries in Pakistan, Egypt, and Iran. Faced with these transnational aspirational forces, Nigerian NGOs working on rule of law projects became even more inventive and insistent on the significance of instituting particular forms of universal human rights principles in Nigeria. In Uganda, it meant rethinking the webs of NGO and donor streams being deployed to support the strengthening of Ugandan judiciaries and traditional mechanisms in a bid to develop grassroots solutions to deep-seated problems.

I spent the second part of the summer of 2002 in The Gambia, West Africa, attending the African Commission for Human and People's Rights and collecting data from interviews with various commissioners, claimants, and NGO participants about the challenges of implementing human rights principles in war-torn and transitional regions. This experience made clear that the language of individual and human rights central to many of the European human rights training sessions I had attended the summer before (together with a range of national prosecutors and defense attorneys interested in becoming international criminal prosecutors) was quite differently conceptualized in African contexts. The differences ranged from varied articulations of the rights of the citizen to their understandings of the duties to the community and to the preservation of "traditional culture." These conceptions were as locally articulated and as internationally shaped through institutions such as the African Commission on Human and Peoples' Rights as they were by Joseph Konrad's 1902 desire to distinguish and render primitive and unchanging *African* ways from those of the *West*. This dynamic is similar to what V. Y. Mudimbe (1994) referred to as the "idea of Africa"

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and what Achille Mbembe referred to as *African self-making*. Today, however, the "idea" of Africa is that of a repository of "holistic and pure cultural practices" that is in need of preservation or intervention, faced with an even more aggressive claim to cultural, traditional, and religious rights. Ironically, these assertions, in some cases articulated as "duties to preserve their culture and community," are even more pan-African and transnational in their aspirations than those in the Global North. But, like the rise of the rule of law movement, the revival of "traditional" justice mechanisms is part of the same processes of constructing the ideals of justice through which to build a more equitable world. What distinguished these various human rights movements in African regions from those in Europe and America is what characterizes the central intervention of this book – a different power of mobilization, international influence, and general fields of possibility, and a difference in access as a result of political inequalities.

In an attempt to make sense of these inequalities, I returned to Nigeria during the summers of 2003, 2004, and 2005 in search of an understanding of legal plurality in relation to its manifestation in various social disparities. I traveled among Islamic religious communities in the Nigerian north and worked with and among various people attempting to reform the new Sharia criminal codes. During this three-year period, as I also documented the simultaneous growth of the international criminal law movement, violent strife between Christians and Muslims and the reinstatement of the strict Sharia penal code led to widespread global attention to the controversies of cultural differences – often represented by the press as "Islamic barbarism" in the administration of criminal justice. Visiting the newly instituted Sharia courts, with new jurisdictional powers over criminal matters, I journeyed with Nigerian Muslim human rights lawyers and members of various networks of human rights NGOs working on the defense of what they referred to as "victims of the Sharia" – men and women awaiting amputation of limbs for theft or death by stoning for the crime of adultery.

In attempts to understand further these multiplicities of justice in the context of uneven fields of transnational power in other African regions, I conducted surveys in northern Uganda and hired a team of researchers that worked with me to interview stakeholders of the peace negotiations in the Ugandan north – victims of war, refugees, judicial–spiritual leaders, and perpetrators of violence – struggling to make sense of the ICC presence and what that meant for brokering peace in the

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region. Finally, I collected preliminary data in the Democratic Republic of the Congo (DRC) to understand regional struggles and the consequent violence there that had led to some of its countrymen being the first charged by the ICC's lead prosecutor with various crimes against humanity. With the ICC and the Charles Taylor trial before the Special Court for Sierra Leone and the Thomas Lubanga Dyilo trial underway, my research team and I attended hearings in The Hague to make sense of the significance of the rule of law as it was playing out in sub-Saharan African contexts of violence and displacement.

Yet, as I collected data, it became clear that the ICC paradigm, increasingly prominent on the world's stage, was at odds with the struggles over sovereign decision making in such a large part of sub-Saharan Africa, and that violence around the world seemed, if anything, to be on the increase. It also became clear that the mission of the ICC was not necessarily to end violence by providing the mechanisms for redistributive justice, but to execute punishment, thereby setting in place a symbol for the deterrence of unjustified killing. As I began writing, the networks of violence as constituted by rebel factions and the disenfranchised continued throughout the world. ICC investigations into crimes against humanity focused not on the networks that enable and foster such violence – the complicity of transnational arms dealers and oil barons engaged in resource extraction – but on local cases, local sites, and individual people held responsible for the mass violence committed by a community of actors. This ranged from violence in Uganda, the DRC, the Sudan, and the Central African Republic. During the course of this writing, the controversies over ICC jurisdiction and the violence in Uganda and the Sudan became central to the identity of the court. Now, as I complete this work, violence around the world has grown exponentially and includes Israeli bombings of innocent Palestinians in the Gaza and Palestinian acts of violence against undeserving members of the Israeli public; America's occupation of Afghanistan and Iraq; ongoing state-sponsored capital punishment in America and a rise in the general prison population[4]; Islamic uprisings and their related fatwas that call worshippers to fulfill their duty and defend the Prophet Muhammad; and suicide bombings not only in Israel, the Middle East, and Pakistan but also in the United States, the United Kingdom, Spain, Kenya, Somalia, Tanzania, and Turkey. These events make clear that violent contemporary struggles and their forms of adjudication and procedures for procuring justice are deeply constituted

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within sociohistorical, cultural, economic, ideological, and praxeological constellations within which power is brokered internationally and globally. Today, these struggles reflect conflict over resources, land, and politics that is closely related to control over the power to declare "just wars" as reflective of legitimate acts of violence, to interpret the meanings of justice, and, when all else fails, to impose the spectral force of law or the divine claims of authorial religious dictates.

Thus, it is becoming more important than ever to recognize the changing legacies of imperial forces – from colonial forms of external occupation to self-regulating forms of governmentality – and to examine their inconnections to the ways in which emergent justice regimes are legitimized and managed alongside violence in ways that exceed articulations of pluralism. It is here – in the sometimes tiny spaces between the making of justice and the making of violence – that some of those who were once victims of colonial rule are increasingly becoming participants in the defence of sovereign power and the search for *traditional* answers. As this book explores, despite its claim to end impunity, it is critical to understand that ICC international intervention as the solution to African violence is seen as problematic by many on the African continent who would normally be supportive of the ICC. Those unhappy with the court's African focus are often identified in the rule of law literature as anti-human rights or as misguided. However, the validity of their concerns about the ICC – chief among them that such prosecution stops short of addressing the root causes of violence – makes this project even more intellectually radical, in that it insists that we explore how it could be that a literature on the rule of law and human rights can be so uninterested in grappling with such root causes in the first place.

I am not suggesting that, because of the shortcomings of the ICC–human rights movement and its inability to address root forms of social inequality, we should abandon their various projects altogether; surely, in the midst of violence, torture, pain, loss, and death, initiatives that provide deterrents and aspire for redistributive measures leave open the possibility for imagining a new world. Nevertheless, we can do it better. What is necessary is a critical approach to rethinking the growth of the rule of law movement from a range of social locations – not just through the deterrence of crime by instilling the fear of prosecution or the reform of "Third World" African, Iraqi, Ugandan, Afghani, or Islamic religious-based constitutions. Just as important is a rethinking

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of criminal responsibility in relation to those countries that are making arms available to warlords or the way we understand rule of law secularism and the implications for the ways that its products travel or do not travel. It involves reorienting our own locations in the production of knowledge – and rethinking even the terms of brokering "justice," interrogating how it is defined, articulated, and sometimes not rendered visible. In mainstream articulations of justice – shaped by the history of the liberal project, built alongside national state formations – the making of justice is the making of institutional interventions to repair infractions against society after the commission of crime. Seen in relation to the ICC context, it is acts of violence and their criminal classification and legal mobilization that enable such justice making. In Ugandan Acholi contexts, justice involves similar attempts to classify the infraction and mobilize the forces – spiritual and corporal – necessary to produce reconciliation. Yet as this book demonstrates, the production of "justice" is a process through which social fictions are made. Through this process, its making may conform to our aspirations and our imaginaries, but it may also offend them. Although it often becomes manifest as an objective truth, it is actually an effect rather than a stable entity. Its effects can guide what is socially possible, but through its exclusions, it can also be productive of social disenfranchisement and thus of violence.

This book is about apparitions of justice, fictions of justice – the transnational processes of mounting, circulating, sustaining, and contesting its invocation with a victim in the shadows. The reality of justice as socially produced in these conditions does not make it less real. Its study highlights the material effects of its powerful constructs in motion, making it more important than ever to detail the way its normative underpinnings are produced. Thus, inspired by the reality that today there is tremendous diversity in the legal structures of "justice" on the African continent, the reality is that the little untouched village that inspired so much of the scholarly approaches to cultural relativism of the past, and that continues to drive legal pluralism of the present, is no more. The modernity of transnational justice making is "at large," and Islamic Sharia revivalism, Ugandan *Acholi*, and Rwanda *Gachacha* reconciliation mechanisms, often celebrated as "traditional," are as much a product of modernity as they are of local imaginaries. By questioning how we balance the claims of cultural, ethnic, and religious rights against the claims of international justice making and by asking

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whether international human rights actors further aggravate locally circumscribed problems, even as they intend to engage in capacity-building initiatives, my hope is that scholars and practitioners, leaders, and political visionaries will articulate revisionist instruments through which to broaden the scope of current approaches to the rule of law. This involves recognizing the extent to which they are both products of transnational processes and, therefore, require complex transnational solutions. In this regard, I write this book with the hope that the human rights moral principles that shape emergent rule of law formations can be deployed to reorder the contemporary foundations of capitalist globalization that are part of the root causes of violence that international tribunals are called to punish.

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ACKNOWLEDGMENTS

I am fortunate to have conducted this research at such an opportune moment, and in this context, I must acknowledge that no book is written alone or based on a uniform set of experiences. The people and roads informing this work represent an ongoing journey and not an endpoint. The framework for this book took shape while I was doing course work at the Yale Law School, and it was completed during a generous one-year sabbatical leave from teaching at Yale University. There is a luxury that accompanies the writing of any book, whether accomplished at one's leisure while on sabbatical or while entrenched in teaching and other administrative obligations. This luxury can be construed as the power of time – that is, the ability to isolate events and analyze them without having to expend the bulk of one's time on matters of mere survival. In my case, writing such a book under the auspices of one of the world's leading law schools compels me to make explicit the luxuries of deconstructing and critiquing – in contexts so distant from the violence with which the book is centrally concerned – the problems with justice and human rights institutions. It is precisely within such spaces of privilege, spaces from which the export of human rights norms originate, that we must reflect on the realities of inequality and the limitations of those norms, for which the points of departure are often epistemologically different from those elsewhere.

There are many people at the Yale Law School whom I must thank for their input and feedback on this project. First, Michael Reisman was central in encouraging me to pursue the study of international law in an effort to make sense of the deep meanings related to the reorganizations of the "New World Order." I thank him for his encouragement, support, and provocation. Others at the Yale Law School were similarly supportive, and I thank them for their direction and teaching: Jack Balkin, Amy Chua, Marjan Damaska, Oona Hathaway, Harold Koh, Judith Resnik, Peter Schuck, James Silk, and James Whitman. I am appreciative of the students of the Islamic Reading Group, as well as those whose communities I entered, for their support. Special thanks to those

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