BETWEEN *NOMOS* AND NATURE

THE INTERNATIONAL CRIMINAL COURT'S GARDEN AS A CRITICAL LEGAL *TOPOS*

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This article studies the architectural design of the new ICC courthouse complex that was constructed in The Hague in 2015. It focuses on the design's defining element: a hanging garden that contains seedlings from all of the Court's member states. It analyses the garden as a topos *that establishes a powerful and paradoxical relation between nature and culture,* physis, *and* nomos. *Using Giorgio Agamben's critique of sovereignty, it evaluates the constitution of the International Criminal Court. The article combines existing theories of the garden as a space that mediates power (Aben and de Wit 2001) and as a critical space (Foucault 1986) in an analysis of legal institutions. It finds that the garden defining the ICC's courthouse architecture is both a sign of the radically democratic potential of its jurisdiction and where that potential sadly falters and sovereign violence is reintroduced into the ICC's order.*

INTRODUCTION

December 2015 saw the completion of the new International Criminal Court (ICC) in The Hague, The Netherlands. The ICC is an international tribunal with jurisdiction to prosecute individuals for international crimes such as genocide, war crimes, and crimes against humanity. According to the Preamble to the Rome Statute, the multilateral treaty that founded the Court and provides its procedural and substantive law, its main mission is to "put an end to impunity" for crimes "of concern to the international community as a whole".[1] The Court effectively seeks to counter the legal irresponsibility of heads of state and

1 "The Rome Statute," accessed 23 February 2017, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, 1.

other state representatives who escape punishment under their own national laws because they have the power to make exceptions to those laws. Whereas international law had formerly only considered states as legal subjects, the Rome Statute successfully established a principle of international criminal responsibility for individuals.

Enacted in 2002 with the entry into force of the Rome Statute, the Court first held proceedings in a large former office building of a Dutch telecommunications company that was adjusted to the Court's needs. In 2007 the Assembly of Member States, the Court's governing body, agreed that after five years of relative success the institution deserved a building that would "reflect the character of the International Criminal Court".[2] A design competition was launched, and the winning architects, the Danish firm Schmidt Hammer Lassen, were commissioned to start realizing plans for a courthouse that would represent the institution of international criminal law to the public. The defining element of the complex's design, as seen from the outside, is a garden that clads the main building, the Court Tower, with seedlings from each of the institution's member states. The design was realized at the site of the former Alexanderkazerne, military barracks in the outskirts of the city of The Hague, and is close to what is known as The Hague's 'International Zone'. This area also hosts the Peace Palace, the ICTY, EUROPOL, the World Forum, and other international institutions. The ICC has held proceedings there since its official opening in 2015.

The ICC's constitution was contested from the start and has become increasingly vulnerable in recent years. Important powers, including the United States, China, and Russia, have never signed up for participation. Recently, a number of states including South Africa, Burundi, and the Philippines announced their intention to withdraw from the Rome Statute, often in response to the Court's investigations of political violence in their state.[3] The African Union even debated withdrawing in its entirety. It accused the ICC of having a bias

2 "Report on the Future Permanent Premises of the International Criminal Court," accessed 23 February 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-16_English.pdf.

3 Hannah Ellis-Petersen, "Rodrigo Duterte to pull Philippines out of international criminal court," *The Guardian*, 14 March 2018, https://www.theguardian.com/world/2018/mar/14/rodrigo-duterte-to-pull-philippines-out-of-international-criminal-court-icc.

against Africa; until January 2016 the Court had only investigated situations on the African continent, whereas political violence also takes place in many other member states.[4] Only in recent years has it undertaken investigations elsewhere.[5]

Given the Court's vulnerable constitution, and the Assembly's statement that the design of the new courthouse for the ICC should 'reflect' the character of that institution, the question arises: How does the design's defining element, the hanging garden, reflect the ICC as the institution that administers international criminal law? How can it be read for the problems the Court is facing in vesting and maintaining its power to punish individuals' transgressions of international law?

Various scholars have reflected on the way that courthouse architecture bears meaning for the law, both as an abstract 'sign' for the demarcation between the orderly fashion of law and its procedures and the "chaotic swarm of a world of everyday events",[6] and for the way individual courthouse architecture reflects on a specific legal regime, as for example in Fischer Taylor's study of the *Palais de Justice* in Paris, France, and Leif Dahlberg's study of a lower level and appellate court in Stockholm, Sweden.[7] However, these studies have not yet considered how courthouse architecture may also reflect on the nature of legal power, that is, on the problem of sovereignty, or how it may function as a means of studying that institution critically. In this article I do this by studying the design of a specific courthouse, that of the ICC. Both its defining element, the garden, and the nature of the jurisdiction, international criminal law, raise specific questions concerning sovereignty.[8]

To address these questions, I will analyse images of the architectural plans for the Court in order to consider how the ICC's courthouse garden and landscape design reflect on the problem of sovereignty that constitutes the ICC as a court of international criminal law. The garden traditionally mediates between a

4 Associated Press in Addis Ababa, "African leaders plan mass withdrawal from international criminal court," *The Guardian*, 31 January 2017, https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court.

5 "Situations and cases," *International Criminal Court,* accessed 5 December 2018, https://www.icc-cpi.int/pages/situations.aspx.

6 Piyel Haldar, "In and Out of Court: On Topographies of Law and the Architecture of Court Buildings," *International Journal for the Semiotics of Law* 7 (1994), 186.

7 Katherine Fischer Taylor, *In the Theatre of Criminal Justice: The Palais de Justice in Second Empire Paris* (Princeton: Princeton University Press, 1993), and Leif Dahlberg, *Spacing Law and Politics: The Constitution and Representation of the Juridical* (London: Routledge, 2016).

8 The garden has so far been considered as a metaphor in relation to law, e.g. Daniela Carpi, "The Garden as the Law in the Renaissance: A Nature Metaphor in a Legal Setting," *Pólemos* 6 (2012), 33–48, and Eve Darian-Smith, "Legal Imagery in the 'Garden of England'," *Indiana Journal of Global*

given human order and the dangerous wilderness that surrounds it, figuring as a symbol for the relationship between culture and nature, between human order and what human order seeks to control. As a *topos*, then, I argue that the garden reflects on the nature of power, and especially the power to establish and maintain order, to distinguish order from disorder, and to establish limits between them, both temporally — through the myth of original wilderness — and spatially — through the demarcation of a territory with borders. In his book, *Homo Sacer*, the Italian philosopher Giorgio Agamben considers how the distinction between *nomos* and *physis*, order and nature, or 'right' and 'might', traditionally structures what in legal theory is called sovereign power.[9] Sovereign power is the absolute power that constitutes a state. One of the mechanisms in which it is expressed is in the criminal trial, as the institution of the state's power to punish those who transgress its laws of conduct, or its established social order or *nomos*. However, in itself, that very power to punish is one form in which sovereign power inscribes in the *nomos* a violence which, according to Agamben, belongs to the sphere of *physis*.

The ICC, as an institution, struggles with a specific problem of sovereignty. The international order, which in the twentieth century has taken the form of assemblies of sovereign states such as the United Nations (UN), is not established as a sovereign order. It does not intend to constitute a form of absolute power. It does, however, seek to impose limitations on the exercise of sovereign power by individual states, through multilateral treaties on the rules of warfare and the use of weapons, for example. The ICC developed out of twentieth-century attempts to establish judicial mechanisms for the settlement of disputes between states, and to give force to those treaties by countering impunity for transgressions by signatory states. As such, it wields a power to punish that resembles one expression of the sovereign authority that structures nation states. The crucial question for the Court, then, is how to balance a respect for national sovereignty with the exercise of power needed to maintain the order of international criminal law.

Legal Studies 2 (1995), 395–412. In this article, however, I study the garden not as a textual or visual instance, but as a space, a *topos*. I am less interested in the meaningful associations the garden establishes as a (textual) image, but rather in the topological questions raised by the garden as presenting a particular spatial logic, and in the symbolism of the design choices of this specific garden for the institution it 'decorates', the ICC.

9 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 35.

The ICC can be seen as an institutional answer to attempts to establish war crimes tribunals, such as the initiative to put Kaiser Wilhelm I on trial after the First World War, the Nuremberg Trials, and Tokyo Military Tribunals, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, and especially addresses critiques of the legitimacy of such attempts. In contrast to what came before, the ICC seeks to establish a legitimate and balanced new order as a court that derives its jurisdiction from the consent of member states that participate of their own free will, that prosecutes and rules on the basis of written law (the Rome Statute), and that also has thoroughly codified legislative procedures. The permanent character of the Court, in contrast with the *ad hoc* tribunals that preceded it, effectively produces an international community of accountable individuals through the free and willing subjection of states to its power. The question is, however, if this free and willing subjection at the international level solves or precludes the problem of sovereign violence that structures the power of national criminal courts.

This defining element of the Court's juridical 'architecture' is reflected in the element of its architecture that this article discusses: the hanging garden, which consists of plants from all of the member states under the Rome Statute. In my reading of this element of the ICC's new courthouse architecture, I analyse how the garden can be read as a reflection of the Court's ambiguous constitution and the special problem of sovereignty it faces. I take theories of the garden as a *topos*, from Aben and de Wit's *The Enclosed Garden* and Michel Foucault's essay, "Of Other Spaces", as an invitation to approach the Court, and the kind of power it wields, topologically and critically, and to consider the relation the Court vests between *nomos* and *physis*, positive 'right' and natural 'might'. This reading allows me to argue for the urgency of understanding law not only as 'text' or as 'image', as has been done in the field of law and literature, but also as 'space' or 'spatial'. In other words, I propose that approaching law as landscape, not only metaphorically but *topologically*, may be informa-

tive about the power relations of a particular legal institution, in this case the ICC, and its project of countering impunity for breaches of international law.

THE GARDEN AS TOPOS AND SYMBOL OF SOVEREIGN POWER

The design of the new permanent premises for the ICC in The Hague relies heavily on a garden motif. The defining element of the design is a parterre garden that starts at ground level and rises up, cladding the Court Tower in an enclosed and enclosing hanging garden. This parterre garden is planted with seedlings of plants and flowers from each of the ICC's member states.[10] A frontal perspective drawing of the Court projects the premises as making an incision into the coastal dune landscape that continues to the sides and to the back of the buildings, as indicated by the single line that strikes through the sketch.[11] The image shows a garden that surrounds the premises on the ground level and encapsulates the Court's main building, where it is enclosed by a glass wall.[12]

Schmidt Hammer Lassen's visualizations project the main building as reflecting or harbouring forest growth and plants in what looks like a greenhouse construction that separates the inside of the building from the outside.[13] The building's central hall is imagined as an open place in this natural growth that admits sunlight, while trees also provide shade.[14] The building is closed yet transparent, due to its glass construction. A plaza with plants and trees in front of the Court is open to the public.[15] The visualized vegetation near the building consists not only of trees, but also of plants, flowers, and blooming shrubs that create a colourful and lush arrangement. The cladding continues up the building, as can be seen in the visualization of the courtroom which is located a few floors above ground level and opens up to a view of the dune landscape and the sea behind the bench.[16] The plants figure as a frame for the window. The ceiling is made of glass panes opening up to the sky above. The garden is oriented vertically, but also connects to the horizontal nature of the

10 Rose Etherington, "International Criminal Court by Schmidt Hammer Lassen," 8 March 2010, accessed 23 February 2017, https://www.dezeen.com/2010/03/08/international-criminal-court-by-schmidt-hammer-lassen/.

11 Schmidt Hammer Lassen, "The International Criminal Court," accessed 27 December 2018, http://www.shl.dk/the-international-criminal-court/.

12 Ibid.

13 Rose Etherington, "International Criminal Court by Schmidt Hammer Lassen," 8 March 2010, accessed 23 February 2017, https://www.dezeen.com/2010/03/08/international-criminal-court-by-schmidt-hammer-lassen/.

14 Ibid.

15 Ibid.

16 Ibid.

surrounding landscape. It connects the built environment of the courthouse to the supposedly wild, open landscape of the dunes and the sea. The design thus also emphasizes the Court's natural surroundings, an area of dunes that connects the Court's premises to the North Sea, which lies to the north-west. The shape and size of the buildings, and the way they are positioned, imitate the landscape of the surrounding dunes. The ICC's project website states how the overall form "can be seen as an undulating composition of volumes on the horizon, reminiscent of the dune landscape".[17] Although not clearly visible in the drawings, what appears in a rendered photograph of the finished building is indeed a landscape design of artificial dunes that blends the building with the landscape to the north of the Court, the dunes that lie between the city and the North Sea.[18] These artificial dunes project an image of what lies outside of the Court Tower hanging garden's enclosure: a potentially dangerous and barren natural environment. The garden is intended, by the Assembly of States Parties who initiated the project of the courthouse and by the architects, to represent the ICC as an institution. The question is, then, what does this garden construction represent about the Court? In order to answer this question, a prior question must be addressed: What kind of *topos* is a garden in the first place? In what way might it represent a form of power also at play in the constitution of law and processes of adjudication?

The garden that encapsulates the Court Tower, and is itself encased in glass, resembles the form of the archetypical garden, the medieval *hortus conclusus.* In their book, *The Enclosed Garden*, Rob Aben and Saskia de Wit trace the historical development of this garden type and discuss its logic as a specific kind of place and space, a *topos*.[19] Etymologically, the word 'garden' refers to an enclosure, the English *geard* meaning a construction of plaited twigs, a woven fence, while the French *jardin*, from the Vulgar Latin *gardinus*, means 'enclosed'.[20] As an enclosure the garden shuts out nature, while at the same time representing and collecting it within itself, in ordered form. It at once excludes nature, and brings it into view. It represents the infinite outside in

17 ICC Permanent Premises Project Website, "Design," accessed 20 July 2018, https://web.archive.org/web/20170227220533/http://www.icc-permanentpremises.org/design.

18 Schmidt Hammer Lassen, "The International Criminal Court," accessed 27 December 2018, http://www.shl.dk/the-international-criminal-court/.

19 Rob Aben and Saskia de Wit, *The Enclosed Garden: History and Development of the Hortus Conclusus and its Reintroduction into the Present-day Urban Landscape* (Rotterdam: 010, 2001), 17. For a discussion of the *hortus conclusus* as a literary figure (rather than a type of garden design), and for the gendered implications of this figure, see Liz Herbert MacAvoy, ed. "The Medieval *Hortus conclusus*: Revisiting the Pleasure Garden." Special issue, *Medieval Feminist Forum: A Journal of Gender and Sexuality* 50 (2014).

20 Ibid., 10.

finite form. As such, Aben and de Wit argue, the garden is a "paradox".[21]

Gardens have traditionally assumed the task of mediating between a natural and a built environment. The enclosed garden, especially, functions as an intermediary between nature and culture. According to Aben and de Wit, the enclosed garden establishes a vertical hierarchy. The space of the garden is closed off with high walls that archetypically connect the earth and the sky, and seek to protect that connection from the dangers and violence that emanate from the vast wilderness surrounding it.[22] As a microcosm, the enclosed garden projects the macrocosm as a similarly enclosed system, a totality which the garden as a structure claims it is possible to represent and thus control. The garden expresses the power to cultivate nature, to establish order, and to maintain that order in contrast with the natural wilderness and potential violence they exclude.

The same relationship between nature and culture expressed in the *topos* of the garden has structured theoretical debates about law and governance. In *Homo Sacer*, Agamben considers a tradition of discussions in philosophy and jurisprudence of the Greek concept of *nomos*, and the antithetical relationship it establishes between law and violence. Traditionally, *nomos* was named the power that divides violence from law, "the world of beasts from the world of men", or nature from culture.[23] As such it was opposed to the principle of *physis*, which is understood as 'nature', but also as 'violence' and natural might, the power that comes with physical strength. The Sophists, Agamben writes, preferred *physis* (nature), which for them was anterior to any political form, to *nomos*. Their thought influenced theories of natural law into the Middle Ages. The modern political theorist Thomas Hobbes, by contrast, identified the state of nature with an anarchical violence between all: violence that justifies the power of the sovereign to establish a state that excludes nature, a *nomos*.[24] According to Hobbes' myth of the origins of sovereign power proposed in his book *Leviathan*, with the constitution of the state, the state of nature becomes

21 Ibid., 10.

22 Ibid., 22 and 25.

23 Agamben, *Homo Sacer,* 25.

24 Ibid., 35.

exterior to society. The sovereign draws a limit, both temporally and spatially, between the order of the law and the state of nature. The state of nature becomes at once an (albeit mythical) precursor to the state and the sphere that lies beyond its borders. Yet, paradoxically, the state of nature also survives, namely in the person of the sovereign.[25] Whereas society consists in the exclusion of the state of nature and the violence that defines it, that exclusion, Agamben shows in his reading of Hobbes, cannot but have taken place through violence: the violence through which the sovereign constitutes himself. The constitution of a separation between nature and law can only happen through force, through the violence that characterizes nature, and takes the form of an 'exception' to the law that is thereby being established. In other words, the act or decision that constitutes law, in fact violates it. "Sovereignty," Agamben argues throughout the book, consists of "a state of indistinction between nature and culture, between violence and law".[26]

That state of indistinction is a paradox, according to Agamben, and he argues that this paradox can best be understood topologically, as a relationship between spheres or zones. Schematically, Agamben draws the relationship between order and nature as two spheres, nature and culture, that first appear distinct, but through the figure of the sovereign, the constitution of the state, one turns out to be included in the heart of the other.[27] As the power that mediates between nature and culture, the sovereign thus renders the two indistinct in his own person. This paradox of the distinction between nature and culture that can only be expressed in a figure that, in fact, blurs that very distinction, can also be traced in the topology of the garden, and especially in the logic of the act of cultivating, of gardening. The separation that the garden's enclosure establishes between cultivated and wild nature can only exist because the violence of wilderness that the garden excludes — what Agamben refers to as 'the world of beasts' — was also necessary to establish that garden. By implication, the garden contains a reference to that kind of violence at its heart, a violence that is repeated in every act of cultivation, be it the act of

25 Ibid., 35.

26 Ibid., 35.

27 Ibid., 38.

weeding, pruning, or sowing. The construction of a wall, and the cultivation of plants, can be seen as violent acts necessary to create and maintain order. Because of its topology, however, and the paradoxical relation it vests between inside and outside, nature and culture, the garden also invites reflection. In "Of Other Spaces", Michel Foucault considered the garden as a type of space that he calls *heterotopia*, an 'other' place or space.[28] *Heterotopias* are places that relate to society in such a way that they represent, contest, or invert it.[29] Foucault proposes a theory of counter-sites, spatial configurations that reflect the social, i.e. that work as cultural mirrors. Mirrors, Foucault proposes, are simultaneously real and mythical; they are in real space and project a virtual space. Because of this double and contradictory nature, they can question certain cultural practices that appear before them, and thus provoke reflection. The *heterotopia* effectively puts society at a critical distance from itself. According to Foucault, the garden is "perhaps the oldest example of these heterotopias that take the form of contradictory sites", and that has the capacity to juxtapose in a single place several sites, even several conceptions of space or different scales.[30] The garden is not only a built reality, but also contains projections of spatial abstractions, such as the universe or totality, and spatial fantasies about order, balance, and harmony. Because of the contradictions between built reality and projected virtuality, it is a space that unhinges itself, much like the mirror; in other words, the garden is a *critical* space.

How might we consider the *topos* of the garden, a sign of sovereign power and a critical space in that it puts society at a reflective distance from itself, as a critical *topos* for the specific problem of sovereignty that structures the ICC? In order to consider this, I will now analyse the features of the ICC's courthouse garden in the context of its specific jurisdiction.

THE ICC'S FANTASY OF A DEMOCRATIC COMMUNITY OF STATES

What becomes clear from studying the history of the *hortus conclusus* is that

28 Michel Foucault, "Of Other Spaces," *Diacritics* 16 (1986), 22–27.

29 Ibid., 24.

30 Ibid., 25.

gardens rarely stand by themselves. Although discussed as thing in their own right, the enclosed gardens studied in Aben and de Wit always connect to and supplement a building, for example monasteries, castles, palaces, villas, or after the rise of cities, an urban built environment. They also imply a person or institution that enacts the power to cultivate what the garden stands for — the Church, for example, or land ownership and capital. This supplementary function makes the garden bear meaning in how it reflects on the institutions it is connected to, how it reflects on an owner or cultivator as being someone with the power to create order out of, or in the midst of, the chaos that surrounds them, which seems to be the garden's most important representational or symbolic function. I suggest that the garden, as a space in itself and as a supplementary space, produces a double mirror; in supplementing a building, gardens are not just mirrors in relation to "all other spaces that remain" in Foucault's terms (i.e. to spatial abstractions like 'the universe' and 'totality') they also mirror the institution they supplement as relating to those abstractions, and project fantasies about order and balance, for example, onto the image of that institution.[31]

The ICC's garden is not one for taking a stroll. Protected as it is by a glass construction, a kind of greenhouse, and given how it grows up against the walls of the Court Tower, the garden is an object of contemplation from which the general public remains removed. Different from the gardens Aben and de Wit analyse, the ICC's hanging garden is not only enclosed by walls, it enacts the enclosure; it is itself the wall. As such, the garden can be said to protect and fortify the Court Tower from the potential chaos of the outside world, as does the wall in the topology of the enclosed garden. It does so by protecting or fortifying what the wall consists of: the assembly of seedling plants from member states to the Rome Statute. The garden thus figures the limit, the primary conditions, of the ICC's jurisdiction: the fact that states willingly sign and ratify the Rome Statute so as to participate in and subject themselves to the order of international criminal law it establishes. It addresses not so much

31 Ibid., 25.

the general public, not the city stroller looking for a place to withdraw from the urban environment, but rather it addresses representatives of member states. The garden reflects something in which member state representatives may recognize themselves, namely, that they are part of a particular constitution, a composition of states that make up a normative social order and a form of political community.

In *Homo Sacer*, Agamben considers how sovereign power is constitutive of a polis, a political community.[32] Criminal law lays down the ground rules for such communities; it establishes a normative social order by determining transgressive behaviour. The punishment of transgressions of the law maintains that social order and is calculated to have a deterrent effect. One of punishment's primary goals is didactic; it makes an example of the one who broke the rule so as to confirm that rule. According to the logic of the rule of law, those rules are transparent to the law's subjects: they are written down and can thus be known.

In the same spirit, the Rome Statute provides the body of rules to which signatory states subject themselves. That law, then, establishes a social order, which in this case consists of state representatives. The Court only has jurisdiction, according to its Statute, over individual state representatives. Yet, unlike at the level of the nation state — in which individuals are forced to become subjects to a legal regime for the mere fact of being born in a particular state, and which forces the state or sovereign to be the sign and guarantor — at the international level, states are free to sign the law, the Rome Statute, should they wish to subject themselves to it, and there is no sovereign power to enforce that subjectivity, neither the beginning of it, nor the sustenance of it. States are as free to sign up to the Rome Statute as they are to withdraw from it. While a member state is signed up, however, the Court has the power to investigate, prosecute, and punish its representatives for breaches of international law. As such, it does exercise the kind of punitive power that at the national level

32 Agamben, *Homo Sacer*, 2-3.

maintains a sovereign order. That means that a state that signs the Rome Statute gives up some of its sovereignty, but in doing so confirms its sovereignty as well.

Participation in the Rome Statute also allows a state to participate in the Assembly of States Parties, the Court's legislative body, and to contribute to the Court's offices. Judges and other officials of the Court come from any of the member states and are elected by the Assembly. As such, the community of subjects to the Court's normative order legislates and judges itself. Member states thus participate equally in the Court and legislation has a democratic form, comparable to legislation mechanisms in the UN. That democratic form also reflects the intended democratic nature of the Court's punitive power. The Court Tower's hanging garden can be seen as a representation of this equality between member states, as each state gets an equal share in the garden's natural growth. It can be seen as a representation of states' freedom in subjecting themselves to the Court and symbolizes that freedom as constitutive of the Court's power. As the garden protects the Court Tower, the logic of participation protects the Court's democratic intentions. The garden can be said to be a symbol of the ICC's fantasy of a radically democratic international community, of a community of nation states that willingly and freely make their representatives accountable, i.e. a publicly self-critical community.

THE EXCEPTIONAL ORGAN

Yet when we compare the Court's figurative architecture, the garden and its expression of a radically democratic community, and the fantasy of equality between states in their subjection to a common social order, to the architecture of the Court's jurisdiction as laid down in the Rome Statute, it appears that one element corrupts the 'for us by us' logic of that fantasy. This is an element that remains painfully absent from the hanging garden, because it cannot be captured in the form of a native seedling. In the part of the Statute

that concerns the Court's jurisdiction, a set of articles defines who can refer situations for investigation and thus initiate prosecution. The articles stipulate some ground rules for the exercise of the Court's jurisdiction. Article 11, for example, limits jurisdiction temporally (jurisdiction "*ratione temporis*"): the Court may only investigate situations with respect to crimes committed after the Rome Statute's "entry into force" (i.e. after 2002), or after a particular state in which a crime was committed signed and ratified the Rome Statute.[33] Article 12 states that the Court has jurisdiction over states which have become Party to the Statute, or if a State that is not a Party to the Statute accepts the Court's jurisdiction by formal declaration.[34] Article 13 mentions the parties that may refer a situation to the Court:

> Article 13
> Exercise of jurisdiction
>
> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
>
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
>
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.[35]

Beside State Parties, the Court's free and willing members, and the ICC's Prosecutor, who is elected by an absolute majority vote in the Assembly of States Parties, the article introduces a third party with the right to refer situations to the Court: the UN Security Council. It also refers to another body of law to legitimate that right: the Charter of the UN. Furthermore, whereas the State

33 "The Rome Statute," 11.

34 Ibid., 11.

35 Ibid., 11.

Parties' right of referral is limited by Article 14 to situations under the jurisdiction of the Court, that is, to situations in State Parties and within the "*ratione temporis*" stated in Article 12, the Security Council's right of referral is not restricted by those limitations. The Security Council may refer situations in states regardless of whether they are party to the Rome Statute. That means that, in contrast to the intended limitations on the Court's jurisdiction by the condition of free and willing membership, the Statute creates the possibility of making an exception, and thus the potential to overrule the freedom of states to subject themselves to the Court's jurisdiction. The Security Council may refer situations to the Court in states that do not have the complementary privilege of having a democratic vote in international criminal legislation.

In the same set of articles concerning the Court's jurisdiction, the Security Council is granted another exceptional right:

> Article 16
> Deferral of investigation or prosecution
>
> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.[36]

Article 16 renders the Security Council the only party with the right to veto an investigation or prosecution. Although that right is limited to a period of twelve months, the possibility of renewal renders the right of deferral limitless if the Security Council decides to keep requesting it. That right of deferral effectively gives the Security Council the power to overrule the Prosecutor in the exercise of their democratically granted powers to start a procedure, and the States Parties in maintaining the order they to which they have democratically estab-

36 Ibid., 12.

lished and subjected themselves. In other words, it establishes a supra-sovereign body: a body that is more sovereign than others.

The UN Security Council is one of the UN's main organs. Created after the Second World War together with the United Nations as a whole, it is charged with the task of maintaining international peace and security. It consists of fifteen members, five of which have a permanent seat: China, France, Russia, the United Kingdom, and the United States (the powers that came out of World War II as victors). Ten seats are taken up by rotating, temporary members elected from the UN member states. Only the Security Council's permanent members have the infamous right of veto; they can prohibit any substantive Security Council resolution from entering into force, regardless of the result of voting procedures. As the Security Council decides on crucial matters such as peacekeeping missions and the admission of new member states, that right of veto can have significant consequences. In his book on the international order, *Rogues: Two Essays on Reason*, Jacques Derrida has called the Security Council the 'roguish' element in an otherwise democratic project.[37] The power embodied by those World War II victors that became permanent members of the Security Council is not legal power: it is not constrained by law, or 'right', rather, it is 'natural might', a combination of physical, military, and economic strength. Given the number of cases which the Security Council has discussed but decided not to refer to the ICC — examples include the situations in Syria, Sri Lanka, and Gaza — the question arises if the relationship between the two bodies does not effectively politicize the Court; referral becomes a question of protecting friends and prosecuting enemies for those states 'permanently' in the Security Council.

Translated to the logic of the courthouse garden, the Rome Statute introduces a power in the constitution of the Court that radically disturbs the equality between the community of member states who willingly hold themselves accountable. That power is associated with, yet cannot be represented by, the

37 According to Jacques Derrida: "Universal democracy, beyond the nation state and beyond citizenship, calls in fact for a supersovereignty that cannot but betray it. The abuse of power, for example that of the Security Council or of certain superpowers that sit on it permanently, is an abuse from the very beginning, well before any particular secondary abuse. Abuse of power is constitutive of sovereignty itself", Jacques Derrida, *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford: Stanford University Press, 2005), 101-102. In a footnote to that passage, Derrida discusses the Security Council's attempts to forestall the establishment of the ICC, which took place as he was writing the book. Amongst other parties, the US found the Court's jurisdiction threatening. The US went so far as to install a federal law, 'The American Service-Members' Protection Act,' also known as the 'Hague Invasion Act,' which authorizes the US President to use 'all means necessary' to release US or allied personnel from detention on behalf of the ICC. The US request for a permanent deferral of actions by peacekeeping forces, granted by the Security Council, effectively exempts interventions, such as took place under the name of the 'War on Terror', from the Court's jurisdiction.

garden and the assembly of native seedlings, since it is not a national power. Although the Security Council is made up of states that could potentially be party to the Rome Statute and thus subject to the ICC's jurisdiction, as an organ of the UN it cannot fall under the ICC's jurisdiction (or become a member under the Rome Statute). Consequently, not only the Rome Statute's member states, but also all recognized states, are potentially exposed to the ICC's punitive power; all states may also be protected from such exposure, should it suit the 'permanent' members of the Security Council. As such, the Court exposes itself to a power that blurs its order of positive right with a form of natural might that compromises its independence and impartiality, as well as its intentions of being based on a democratic constitution.

In *Homo Sacer*, Agamben writes that modern sovereignty not only decides on the distinction between *nomos* and nature, nor only maintains an element of nature at the heart of its *nomos*, but rather it blurs the possibility of distinguishing between nature and *nomos* altogether. According to Agamben, the mechanism of the 'exception' by means of which the sovereign has the power to temporally or spatially suspend the law, and which traditionally explains sovereignty as the supreme power, has become the norm in modern politics. It is precisely this power to suspend the law which enabled some nation states in the course of the twentieth century to organize genocides: the kinds of atrocities that, for others, elicited dreams of a legal institution that could impose limits on national sovereignty and hold accountable those who decide to commit such atrocities. However, the legal institution that developed out of that dream, the ICC, now appears to be compromised by that same power, a power that unhinges the fantasy of balance and equality that structures the architecture of the ICC's courthouse garden.

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