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“The Dark Corners of the World”: International Criminal Law & the Global South

John Reynolds & Sujith Xavier[†]

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*In the dark corners of the world lurks the future of armed conflict. ... The real threat to humanity on several levels is bred in the fields of lawlessness in the third world. ... Conflicts in these dark corners are evolving into uncivilized events.*¹

1. Introduction

In the spring of 2011, following the publication of a UN report detailing potential international crimes committed in the Sri Lankan conflict,² representatives from Tamil communities converged on the Hague to call for action by the International Criminal Court. Maheswaran Ponnampalam, chairman of the Tamil Danish Association, spoke of activists who had cycled over a thousand kilometres to join the demonstrations: ‘It took them 18 days to get here by bike, but they made it. We have sent multiple letters to the prosecutor of the ICC asking for action. We never got a response. That’s why we are here.’³ Since 2009, from the streets of Chennai to the highways of Toronto, Tamil voices in their tens of thousands have been united across core/periphery lines by a repeated rallying cry: international criminal accountability for war crimes committed by Sri Lankan state forces in their onslaught against the Liberation Tigers of Tamil Eelam.⁴ Palestinian civil society too has, for some time now, pinned similar hopes of redress for Israeli military atrocities and colonisation on the International Criminal Court, and has pushed its political and diplomatic representatives to pursue the transfer of jurisdiction to the Hague.⁵

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¹ D. Crane, ‘Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts’, 37 *Case Western Reserve Journal of International Law* (2005-2006) 1, at 3-4.

² *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, UN Doc. SG/SM/13791-HR/5072, 31 March 2011.

³ Maheswaran Ponnampalam, chairman of the Tamil Danish Association, quoted in M. Winters, ‘Tamils Demand Justice in Hague Protest’, *Radio Netherlands Worldwide*, 18 May 2011.

⁴ See, for example, CBC News, ‘Toronto Tamils slow traffic in latest Sri Lanka protest’, 16 March 2009; C. Davies and A. Topping, ‘Tamils protest at diamond jubilee lunch over Sri Lanka president’s presence’, *The Guardian*, 6 June 2012; ‘Protest in Chennai against war crimes against Tamils in Sri Lanka’, *Asian News International*, 28 March 2013.

⁵ See, for example, Palestinian Boycott, Divestment and Sanctions National Committee, ‘Palestinian civil society welcomes the findings and recommendations of the UN Fact Finding Mission on Israeli

Such impulses from the global South to appeal to liberal rule of law sensibilities reveal both the allure and the pitfalls of public international law's criminal responsibility project. The allure is encapsulated in the illusion of universality, promises of accountability and deterrence, and a documented chronicle of history bearing the imprint of legal legitimacy.⁶ The pitfalls lie in international criminal law's historically contingent doctrines and embedded political and economic biases; its instrumentality and selectivity.⁷ In the outlook of international criminal prosecutors like David Crane, the global South is an unruly space to which the rule of law must be delivered as part of the newfangled civilising mission. International criminal law, in that sense, is aligned with an imperial discourse devoted to imposing "good governance" techniques and free market ideology.⁸

Despite this, self-determination and popular movements in Palestine, Sri Lanka and elsewhere continue to be enticed by international criminal law as a potentially emancipatory project. Our aim in this article is to peer inside the structural and ideological anatomy of the international criminal law enterprise—as a mechanism of political economy in addition to global governance—from a vantage point of the global South. The national liberation struggles in Palestine and Sri Lanka, representative of the barbarity implicit in Crane's "dark corners of the world" metaphor, offer a window for this examination.

We begin in section two by reflecting broadly on discourses of international criminal law and its exponents as they relate to the global South. Section three then proceeds to explore one particularly contentious issue in the politics of international criminal law – that of selectivity. The role of the UN Security Council, in creating international tribunals and referring cases to the International Criminal Court, offers one window into the politics of inclusion and exclusion when it comes to who, and what, is ultimately prosecuted. The final section asks whether, given certain embedded colonial features, the premise and promise of international criminal justice can—for the global South—be anything more than illusory, or whether, drawing on

settlements', 15 February 2013; Al-Haq and Palestinian Centre for Human Rights, 'Al-Haq and PCHR call on ICC Prosecutor to move forward on 2009 Palestinian Declaration', 4 October 2013.

⁶ M. Cherif Bassiouni, 'World War I: The War to End All Wars and the Birth of a Handicapped International Criminal Justice System', 30 *Denver Journal of International Law & Policy* (2002) 244.

⁷ O. Okafor & U. Ngwaba, 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections', 9 *International Journal of Transitional Justice* (2015) 90.

⁸ Kamari Clarke, 'The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord', 18 *Indiana Journal of Legal Studies* (2011) 7.

TWAIL (Third World Approaches to International Law) perspectives, a “decolonisation” of international criminal justice might be conceivable.

2. International Criminal Justice Discourses & the Global South

International law’s criminal justice project has been a distinctly western venture. Its crystallisation at Nuremberg was ‘an expression of a peculiarly American legal sensibility’.⁹ The irony of Nuremberg, in seeking to claim the moral high ground following military victory over the Nazis and by holding Nazism’s particular brand of racial supremacy to legal account, ‘was that the adjudicating states either condoned (or practiced as official policy) their own versions of racial mythologies’.¹⁰ There was no question of a similar normative conception of criminal accountability attaching to British and French violence in the colonies, or to the subjugation of native Americans and African Americans in the United States.¹¹

Third World jurists were wise to such selectivity and structural biases from the outset. India’s Judge Radhabinod Pal was the most prominent among a range of Asian and Latin American voices of scepticism; his 1,235-page dissent from the judgment of the Tokyo Tribunal denounced the Japanese prosecutions as ‘vindictive retaliation’¹² and colonialism by the war’s victors. With the atomic bombing of Japan and acts of colonial aggression and annexation by Western powers exempted from any form of judicial scrutiny, Pal maintained that the Tribunal was structurally incapable of being just.¹³ He was sharply critical of the decision by the Allied Powers to mandate the Tribunal to retroactively prosecute previously undefined crimes. This, Pal asserted,

⁹ K. Anderson, ‘Nuremberg Sensibility: Telford Taylor’s Memoir of the Nuremberg Trials’, 7 *Harvard Human Rights Journal* (1994) 281, at 289.

¹⁰ M. Mutua, ‘Never Again: Questioning the Yugoslav and Rwanda Tribunals’, 11 *Temple International & Comparative Law Journal* (1997) 167, at 171.

¹¹ P. Seed, *Ceremonies of Possession in Europe’s Conquest of the New World 1492-1640* (Cambridge University Press, 1997) at 16-40; Bruce G. Trigger & Wilcomb Washburn, ‘Native Peoples in Euro-American Historiography’ in Bruce G. Trigger & Wilcomb Washburn, eds, *The Cambridge History of the Native Peoples of the Americas* (Cambridge University Press, 1996) at 61-81.

¹² *United States et al. v. Araki Sadao et al.*, International Military Tribunal for the Far East, Dissident Judgment of Justice Pal (Kokusho-Kankokai, 1999), at xxi.

¹³ Y. Tanaka, T. McCormack & G. Simpson, ‘Editors’ Preface’ in Yuki Tanaka, Tim McCormack & Gerry Simpson, eds, *Beyond Victors Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011) xxvii.

brought international law back to its colonial foundations and its facilitation of conquest.¹⁴

The more contemporaneous proliferation of international criminal law since the 1990s has emerged in a distinct political context in terms of core/periphery relations: “post”-colonialism and formal sovereign equality; purported universality of legal norms; economic exploitation and structural inequalities configured in less overt forms and obscured behind the masks of aid and development.¹⁵ Against this backdrop, demands for international justice – across political, economic and environmental spectra – are often seen as emanating from an aggrieved global South. The response from Northern sites of power has typically been to create controlled, technical expert-driven international institutions. This has come to include criminal tribunals for the purposes of addressing the conduct of war and the perpetration of direct physical violence, amongst other tools of transitional justice.¹⁶

The two *ad hoc* tribunals were initially viewed suspiciously from the global South, with the Rwanda Tribunal seen as a tokenistic corollary of its Balkan counterpart. The creation of International Criminal Tribunal for Rwanda had been rendered unavoidable only by the immediate Yugoslav precedent and belated western guilt over the Rwandan genocide. Fast forward a decade to the emergence of the permanent international criminal court, however, and support for that enterprise from states and civil society on the African continent, in particular, was markedly more enthusiastic. Swift and widespread ratification of the Rome Statute bore witness to that. In seeking to explain why, contrary to expectations in Rome, the Court was so warmly embraced by states from Africa, international criminal law scholars framed its lure in opposition to other international institutions that had proved unwilling or unable to address African concerns. In this telling, ‘they turned to a new experiment in global justice that did not seem to be characterized by the traditional dialectic of north and south, rich and poor, first world and third world, Great Powers and

¹⁴ Justice Pal states: “When international law will have to allow a victor nation thus to define a crime at his will, it will [...] find itself back on the same spot whence it started on its apparently onward journey several centuries ago”; *Ibid.*, at 23-24.

¹⁵ K. M. Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009); see V. Nesiiah, ‘Local Ownership of Global Governance’, in this symposium.

¹⁶ J. Alvarez, ‘Alternatives to International Criminal Justice’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009).

everyone else. The Court appeared genuinely egalitarian in structure and profoundly fair in conception.’¹⁷

Appearances, of course, can be deceptive. The role given to the Security Council implied a preservation of pre-existing power dynamics and amounted to little more than ‘a rusty façade’ to shield the permanent members from exposure to jurisdiction, prompting Immi Tallgren to ask from the outset: ‘Are we not just writing yet another chapter to the stale story of the Strong and the Weak in international law?’¹⁸ And yet, while actual progress in prosecuting even the weak has been stilted at best since the coming into force of the Rome Statute in 2002, the progress narrative around the International Criminal Court remains irrepressible. Remarks framing international criminal law as ‘the most profound current aspect of international law’¹⁹ are as commonplace now as they were at the Rome Conference. An inversion of sorts in global North-South dynamics around the court has also occurred, however. While the United States has abandoned its initial reticence and warmed to the project somewhat, the African Union’s love for this latest chapter in ‘the new tribunalism’²⁰ is turning notably cold. This has been fuelled by unmistakable selectivity and geographic bias, whereby the investigation and prosecution of Africans is resoundingly more palatable and expedient for Western powers than that of Canadian, British or Israeli officials.

From a moment of apparent convergence between calls for justice from the global South and the materialisation of a “hard” international criminal law, what has emerged is a project that reveals and reproduces much of the international legal terrain’s embedded colonial architecture. In both its normative and institutional conceptualisations, and now its functioning in practice, international criminal law opens itself up to some obvious critiques from a TWAIL perspective. Foremost among them, is the question of who is prosecuted, and by whom. The fact of some

¹⁷ W. Schabas, ‘The Banality of International Justice’, 11 *Journal of International Criminal Justice* (2013) 545, at 548. Alternate explanations for the high level of ratifications by African states include the desire to signal their human rights credentials to, and in some cases to satisfy the explicit conditions of, foreign donors.

¹⁸ I. Tallgren, ‘We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court’, 12 *Leiden Journal of International Law* (1999) 683, at 695.

¹⁹ D. Forsythe, ‘“Political Trials”? The UN Security Council and the Development of International Criminal Law’, in W. Schabas et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013), at 475.

²⁰ T. Skouteris, ‘The New Tribunalism: Strategies of (De)Legitimation in the Era of International Adjudication’, 17 *Finnish Yearbook of International Law* (2006) 307.

“self-referrals” from African jurisdictions has not carried sufficient resonance as to overcome the sense of an expert class²¹, the professional centre, administering justice to the periphery. Despite concerted work by civil society organisations and social movements to push the Office of the Prosecutor to act on allegations against British forces in Iraq, Canada’s treatment of Afghan detainees, or the crimes of western allies in Israel and Colombia, the International Criminal Court’s reputation remains tarnished by a failure to cast its prosecutorial net beyond Africa.

The colonial intimations of that relationship were epitomised in the image of former Prosecutor Luis Moreno Ocampo emerging from his helicopter on the green plains of the Democratic Republic of the Congo sporting the starchiest of white suits.²² Makau Mutua’s “savage-victim-saviour”²³ triangulation is instantaneously evoked; Ocampo the embodiment of the crusading knight in shining linen on hand to save disempowered victims from the savagery of their own.²⁴ He has not been alone in this ideological expedition. David Crane, the first prosecutor of the Special Court for Sierra Leone, in situating himself at ‘the cutting edge of international law with all its professional excitement at the legal, political, and diplomatic levels’, is forthright in acknowledging the role of his institution in ‘imposing white man’s justice upon third world conflicts’.²⁵ In a moment of profound introspection, he asks whether ‘the international justice we seek to impose’ is the same justice that ‘the victims of a third world conflict seek’,²⁶ and concedes some hard truths:

We simply don’t think about or factor in the justice the victims seek. ... We approach the insertion of international justice paternalistically. I would even say with a self-righteous attitude that borders on the ethnocentric. ... We consider our justice as the only justice. ... We don’t contemplate why the tribunal is being set up, and for whom it is being established. ... After set up,

²¹ B.S. Chimini, ‘Prolegomena to a Class Approach to International Law’, 21 *European Journal of International Law* (2010) 57; S. Xavier, ‘Theorising Global Governance Inside Out: A Response to Professor Ladeur’, 3 *Transnational Legal Theory* (2012) 268.

²² Preserved for posterity on the cover poster of Barry Stevens’ 2011 documentary, *Prosecutor*. See also D. Saunders, ‘International Law Should Not Be a White-Suited Hero’, published in *The Globe and Mail* as ‘Ocampo’s Crusades Tainted the Idea of International Justice’, 25 February 2012.

²³ M. Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’, 42 *Harvard International Law Journal* (2001) 201.

²⁴ This is notwithstanding Ocampo’s Argentinean nationality and role as Assistant Prosecutor in the 1985 “Trial of the Juntas”, which is illustrative of the ways in which global South elites are implicated in international institutional imperialism, and of the fact that being an international lawyer from the Third World does not mean one will necessarily engage in a TWAIL praxis.

²⁵ D. Crane, ‘White Man’s Justice: Applying International Justice after Regional Third World Conflicts’, 27 *Cardozo Law Review* (2006) 1683, at 1683-1684.

²⁶ *Ibid.*, at 1685.

we don't create mechanisms by which we can consider the cultural and customary approaches to justice within the region.²⁷

While acknowledging this paternalism, self-righteousness and ethnocentrism, Crane at the same time indulges in it, arguing that any endeavour to contemplate local or regional alternatives to white man's justice 'runs smack into a brick wall when considering locally, culturally oriented justice vis-à-vis Africa, a continent led by a brotherhood where the rule of law is a tool by which to seek and maintain power'.²⁸ This may appear cynical to his audience, the former Special Court prosecutor warns, but: 'it is true from my perspective and experience living and working at the edge of the world—West Africa.'²⁹ Oscillating between respect and revile for west African culture, Crane, in a quintessentially Orientalist rendition, goes to some length to emphasise his credentials and expertise on the region: 'As a student of West African culture, with a graduate degree in West African Studies, I traveled to Sierra Leone with an appreciation of the rich and vibrant culture of the region and factored that into my general and prosecutorial strategy'.³⁰

What that entails, apparently, is an understanding of west Africa (in its entirety) as 'a lawless land ... a region that has never really known the rule of law'.³¹ It is in the global South, Crane's "dark corners of the world", that this lawlessness breeds real and imminent threat to what "we" understand as humanity and civilisation.³²

Fertilized by greed and corruption, what grows out of these regions of the world are terror, war crimes, and crimes against humanity. Conflicts in these dark corners are evolving into uncivilized events. They appear to be less political and are more criminal in origin and scope. [...] Respect for the law of armed conflict decreases or disappears entirely in this new type of warfare as the involvement of the criminal element increases. ... These dark corners become havens for these criminal elements.³³

²⁷ *Ibid.*, at 1686.

²⁸ *Ibid.*, at 1686.

²⁹ *Ibid.*, at 1686.

³⁰ *Ibid.*, at 1685.

³¹ D. Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts', 37 *Case Western Reserve Journal of International Law* (2005-2006) 1, at 2, 8.

³² On the 'we' of international criminal law, see I. Tallgren, 'We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court', 12 *Leiden Journal of International Law* (1999) 683.

³³ D. Crane, 'Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts', 37 *Case Western Reserve Journal of International Law* (2005-2006) 1, at 4.

The framing of Third World conflicts as apolitical, of course, elides the impact of imperial and neoliberal world-systems dynamics on underdeveloped regions that are exploited for their natural resources, and allows for a technocratic response based on simple criminality/legality binaries.³⁴ Crane himself though appears to run into contradictions even in attempting to deploy this reductive discourse. He claims that the ‘corruption so endemic in these societies that fosters a *healthy* lack of respect for institutions of any kind’, and invokes Louis Brandeis to underline that ‘[i]f we desire respect for the law we must first make the law respectable’.³⁵ In his ensuing discussion, however, Crane offers nothing to suggest that he actually does see a certain wariness of institutionalised structures as healthy, nor does he entertain Brandeis’ notion of the law’s potential respectability deficit in the context of Sierra Leone and Liberia. Quite the contrary: lack of respect for the law and for institutions is the powder keg that ignites criminality and warmongering in the region. The rule of law is the only satisfactory extinguisher: ‘at the end of the day, the citizens of a war torn region *must* come to understand three things related to the law, that it is fair, that no one is above it, and that the rule of law is far more powerful than the rule of the gun’.³⁶ This idealised rule of law stands in marked contrast to the state of nature depicted by the prosecutor in the trials of Revolutionary United Front leaders, whereby Sierra Leone is the setting for ‘a tale of horror, beyond the gothic into the realm of Dante’s inferno’.³⁷

Given the failure of the African sovereign state, the international criminal institution offers the only viable answer. Thus, following the semblance of an apparently sensible approach to local engagement (albeit couched in management speak³⁸), as both practitioner and scholar Crane abstains from any attempt to consider alternatives to the imposition of justice from above. Instead, his concern is with the politics and public relations of how best to counter populist claims of colonialism:

³⁴ K. Clarke, ‘The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord’, 18 *Indiana Journal of Legal Studies* (2011) 7.

³⁵ D. Crane, ‘Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts’, 37 *Case Western Reserve Journal of International Law* (2005-2006) 1, at 4 (emphasis added), quoting Louis D. Brandeis, *The Brandeis Guide to the Modern World* (Alfred Lief ed., 1941), at 166.

³⁶ *Ibid.*, at 8. Emphasis added.

³⁷ Transcript, *Sesay, Kallon, and Gbao* (SCSL-04-15-T), Trial Chamber, 5 July 2004, at 19.

³⁸ ‘Get out and listen to the citizens of the region. Interface with them.’ D. Crane, ‘White Man’s Justice: Applying International Justice after Regional Third World Conflicts’, 27 *Cardozo Law Review* (2006) 1683, at 1687.

African leaders can easily manipulate popular thinking by loudly declaring that the justice being imposed (and threatening the status quo or a leader's power) is "white man's justice," playing upon the fears of colonialism as a way of excusing the rampant corruption and impunity that is Africa, particularly West Africa. This is a real problem and without the careful consideration by all of us on how best to come up with practical ways to counter the "white man's justice," claims by cynical African politicians, and others, establishing the rule of law permanently there will be illusory.³⁹

In advocating 'the imposition of international justice norms in an African context',⁴⁰ Crane's vision of justice is, ultimately, what he unashamedly describes as white man's justice, implemented through the universalising discourse of international norms. 'At the end of the day, Africans will have to decide on how best to tackle corruption and lack of good governance'; if they fail to accept the norms imposed, however, 'Africa will move backwards and become the shanty town of the global community'.⁴¹ While Crane may be at the more extreme (or honest) end of the spectrum of Eurocentric paternalism, his stance is representative of much of the disciplinary thinking and world-views that have underpinned the development and operation of international criminal institutions.

In his dissection of selected witness testimony at the Special Court for Sierra Leone, legal anthropologist Gerhard Anders points to the soliciting of certain witnesses by the prosecution that tended 'to represent the accused persons as absolute evil, and Africa as primitive and lawless'; that 'spoke to a deep-seated Western fascination for Africa's "savagery" and "primitivism"'.⁴² Certain events were deliberately highlighted in the prosecution's witness examination, even though they occurred outside the territorial and temporal jurisdiction of the court, 'because they resonated with entrenched Western stereotypes of African "culture"'.⁴³ Anders notes that Crane's depictions of the "dark corners of the world" evokes a distinctly Conradian image of Africa as 'one of the dark places of the earth'⁴⁴; the exemplary

³⁹ D. Crane, 'White Man's Justice: Applying International Justice after Regional Third World Conflicts', 27 *Cardozo Law Review* (2006) 1683, at 1686.

⁴⁰ *Ibid.*, at 1687.

⁴¹ *Ibid.*

⁴² G. Anders, 'Testifying about "Uncivilized Events": Problematic Representations of Africa in the Trial against Charles Taylor', 24 *Leiden Journal of International Law* (2011) 937, at 940-942.

⁴³ *Ibid.*, at 946.

⁴⁴ J. Conrad, *Heart of Darkness* (William Blackwood & Sons, 1902), at 4.

‘racialized dualism of white/dark’.⁴⁵ Conrad’s exploration of colonialism is, of course, not simply black and white; Marlow’s dual voices in *Heart of Darkness* (one denouncing colonialism, the other idealising it) find echoes in international criminal law’s own dualism (universality versus selectivity) as well as Crane’s vacillation between respect and repugnance for native Sierra Leone. Here, ‘the corrupting effects of colonialism at both personal and political level’⁴⁶ are mirrored in the effects of being an international criminal law professional discharging the vestiges of colonial justice.

The reality of western universalism has been a significant part of the story of the African Union reconsidering its relationship with the International Criminal Court.⁴⁷ The primary focus of the October 2013 Extraordinary Session of the Assembly of the African Union was Africa’s Relationship with the International Criminal Court. The session culminated in a decision which expressed a number of the African Union’s concerns around the Court and called for, amongst other things, the setting up of a contact group of the African Union Council to engage with the UN Security Council members ‘on all concerns of the AU on its relationship with the ICC, including the deferral of the Kenyan and Sudanese cases’.⁴⁸ Certainly, the narrative of international criminal law as an imperial or colonial imposition has been co-opted to a certain degree by post-colonial elites, as evidenced in the African Union discourse generally, and the moves of specific national leaders and institutions.⁴⁹ That the African Union requests were promptly rejected in November 2013 by the Security Council, however, brings into sharp focus once more the Council’s operative role in relation to the International Criminal Court.

⁴⁵ V. Nesiha, ‘Placing International Law: White Spaces on a Map’, 16 *Leiden Journal of International Law* (2003) 1, at 4.

⁴⁶ A. Anghie & B.S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’, 2 *Chinese Journal of International Law* (2003) 77, at 100.

⁴⁷ This has not been the only stimulant, however, with the ICC serving in some instances as a site for domestic politics and self-interests to be pursued, as exemplified in the Kenya situation, as well as the African Union making pointed legal arguments over questions of head of state immunity. See A. Kiyani, ‘Al-Bashir & the ICC: The Problem of Head[s] of State Immunity’, 12 *Chinese Journal of International Law* (2013) 467.

⁴⁸ Extraordinary Session of the Assembly of the African Union, Addis Ababa, 11-12 October 2013, Decision no. 1: Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1.

⁴⁹ See, for example, L. Mullen, ‘Kenya Lawmakers Approve Motion to Withdraw from ICC’, *Jurist*, 5 September 2013.

3. Selectivity, Geopolitics and the International Criminal Court

Contemporary international criminal justice institutions, according to the standard narrative, grew out of geopolitical dynamics and the desire, or the need, to adequately address mass human rights violations.⁵⁰ International prosecutions did not become a workable possibility until the thawing of the Cold War freeze at the UN Security Council. The outcomes of judicialisation have been predictably inconsistent; there is a drive to prosecute some of those responsible for some atrocities, but by no means all. Concerns over selectivity have manifested in response to the inherent exclusivity involved in the creation of country-specific *ad hoc* tribunals, as well as politically contingent approaches to prosecution at the International Criminal Court.

This underlying contestation informs the very nature of each criminal institution as much as it shapes the relations amongst them. Highly contested decisions taken by these institutions exemplify the challenges of developing any kind of truly “international” criminal law. In this sense, little has changed since the post-World War II military tribunals, when Georg Schwarzenberger argued that the idea of international criminal law was a contradiction in terms, and that unless or until it found a way around natural self-interests, it would remain an expression of global power politics.⁵¹ Indeed, the idea of Nuremberg as the birthplace of an international criminal law is belied by the fact that the big four war-victorious powers appointed a prosecutor each, rather than the tribunal epitomising any sense of a global community of nations acting collectively.

Turning to the International Criminal Court and the formal structures set up by its Statute, a highly contingent process now exists where some situations are subjected to investigation and prosecution while others are not. The North-South dynamics at play can be discerned by zeroing in on what has been included and excluded from those situations before the Court. Questions around how situations are referred to the International Criminal Court, how the Court takes jurisdiction over situations, and how the Prosecutor’s discretion is exercised, are pivotal.

⁵⁰ For expositions of the rationale for prosecution, see, for example, D. Orentlichert, ‘Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime’, 100 *Yale Law Journal* (1991) 2539.

⁵¹ G. Schwarzenberger, ‘The Problem of an International Criminal Law’, 3 *Current Legal Problems* (1950) 263.

Currently, the Court is actively seized of nine situations in which investigations and or prosecutions are underway, and the Court is pursuing upwards of 20 cases, all of which involve African states and indictees. A number of these were self-referrals by African state parties, as successive Prosecutors have been at pains to point out in defending the Court against claims of geographic and racialised bias. The Office of the Prosecutor further initiated two *proprio motu* investigations of its own volition, in Kenya and Côte d'Ivoire. As such, the critique that the International Criminal Court operates as a European court to prosecute Africans, rudimentary as it may be, is supported by practice.

Our present focus, however, is on the Security Council's particular role and its prerogative power to refer a situation to the Court. The Statute has concretised three trigger mechanisms to activate the Court's jurisdiction over particular situations in Article 13. In instances where the Prosecutor utilises her *proprio motu* powers, she must first conclude that there is a reasonable basis to proceed and she must seek authorisation of the Pre-Trial Chamber under Article 15(3) of the Statute. In instances of State Party and Security Council referrals, the Prosecutor must conduct a preliminary investigation and she can determine that there is no basis to proceed as set out by Article 53 for a whole host of reasons. But her decision not to proceed is subject to review by the Pre-Trial Chamber in instances of state and Security Council referrals. With a Security Council referral, the preconditions of jurisdiction envisioned by Article 12 of Statute become acutely controversial.⁵² As such, there is an embedded hierarchy in the Statute's trigger mechanisms, at the top of which sit Security Council referrals. The drafters of the Statute placed the Security Council at the apex because of its "quasi-constitutional" powers within the public international legal system stemming from the UN Charter.⁵³ Arguably, such referrals are therefore considered to be the most authoritative. The politics of these types of referrals is thus significant.

Two of nine situations in the Court's docket relate to non-party states that have been referred by the Security Council. For illustrative purposes, we will juxtapose these two referrals of situations, in Sudan and Libya, with two other

⁵² C. Safferling, *International Criminal Procedure* (Oxford University Press, 2012) at 89; A. Cassese, *International Law, 2nd edition* (Oxford University Press, 2008) at 399.

⁵³ See generally B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International, 1998).

potential situations, in Palestine and Sri Lanka, that were brought to the Security Council's attention by UN authorities, without the recommended referral resulting.

A. Two Referrals: Sudan & Libya

The impetus towards the Security Council referral of the situation in Darfur to the International Criminal Court originated in the creation of the International Commission of Inquiry on Darfur in 2004. Acting under its UN Charter Chapter VII powers, the Security Council had adopted Resolution 1564 asking the Secretary-General to establish a commission of inquiry, analogous to the ICTY and ICTR commissions of inquiry. The commission was asked to investigate the violation of human rights and international humanitarian law, and to determine whether acts of genocide had been perpetrated by parties to the conflict. The Commission found that serious violations of human rights and international humanitarian law had been committed, although not acts of genocide, and recommended that the 'Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to Article 13(b) of the ICC Statute'.⁵⁴ In March 2005, the Security Council referred the situation in Darfur to the Prosecutor in Resolution 1593,⁵⁵ which did not explicitly rely on Article 13(b) of the Rome Statute but specified that the referral was rooted in the Council's Chapter VII powers.

The Darfur Commission of Inquiry argued that the UN Security Council through its Chapter VII powers could make the referral to the International Criminal Court despite Sudan not being a state party. Sudan had previously taken the initial step of signing the Rome Statute but did not ratify it, and in 2008 informed the Secretary-General that: 'Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000'.⁵⁶ In this light, the Security Council referral mechanism can be seen as an extension of a form of purported universal jurisdiction.

The Darfur referral culminated in the 2007 arrest warrants against Ahmad Harun, Sudan's then Minister of State for Humanitarian Affairs, and Ali Kushayb, alleged leader of the Janjaweed militia. In 2009, the Court's Pre-Trial Chamber issued

⁵⁴ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc. S/2005/60, 25 January 2005, at 5, 145-149, 162.

⁵⁵ SC Res. 1593, 31 March 2005.

⁵⁶ Sudan, Depositary Notification: Rome Statute of the International Criminal Court, UN Doc. C.N.612.2008.TREATIES-6, 26 August 2008. The language of this communication mirrored that of the "unsigned" of the Rome Statute by the United States in 2002.

the first arrest warrant against a sitting head of state, Sudanese President Omar al-Bashir, triggering an inevitable backlash against international humanitarian agencies in Sudan, as well as ongoing debates over immunity and overreach by Ocampo in the exercise of his missionary mentality to prosecution.

The popular uprising of early 2011 in Libya was met with violent crackdown by the Gaddafi regime. The UN Human Rights Council established a International Commission of Inquiry on Libya with the mandate to investigate human rights violations and international crimes and ‘to make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable’.⁵⁷ The Security Council referred the situation in Libya to the International Criminal Court in Resolution 1970,⁵⁸ and soon thereafter authorised air and naval intervention—to be effected by the north Atlantic powers and their Gulf allies—in Resolution 1973.⁵⁹ Upon receiving the referral in March 2011, the Office of the Prosecutor immediately opened an investigation. By June 2011, the Trial Chamber issued the requested arrest warrants for Muammar Gaddafi (with the case against him subsequently terminated following his death), Saif Gaddafi and Abdullah al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya in February 2011, through the state apparatus and security forces. The swiftness with which the investigations, indictments and warrants came—in the context of the coercive referral of a state to which access was limited—is in marked contrast to other situations, including those involving consenting states, where preliminary examinations have trundled on for years and have yet to reach a point of determination.

The referral and the attempts of the International Criminal Court to proceed against Saif Gaddafi and al-Senussi have been marred by wrangling with the post-Gaddafi Libyan authorities (and much paternalistic discourse from the Office of the Prosecutor), who assert their own ability and willingness to prosecute the crimes. Libya challenged the admissibility of the cases before the International Criminal Court, successfully in al-Senussi’s case⁶⁰ and unsuccessfully in Saif Gaddafi’s case.⁶¹

⁵⁷ Human Rights Council Res. S-15/1, ‘Situation of human rights in the Libyan Arab Jamahiriya’, UN Doc. A/HRC/S-15/1, 25 February 2011, § 11.

⁵⁸ SC Res. 1970, 26 February 2011.

⁵⁹ SC Res. 1973, 17 March 2011.

⁶⁰ Decision on Admissibility – Abdullah Al-Senussi, *Gaddafi and Al-Senussi* (ICC-01/11-01/11 OA 6), Appeals Chamber, 24 July 2014.

This discrepancy was ostensibly grounded in the notion that Libya's ability to prosecute the respective cases was differentiated, at least partially, by the (internationally recognised) government having control over the Tripoli detention facility in which al-Senussi was being held, but not that of Saif Gaddafi in Zintan.⁶² This indicates a very simplistic, if not flawed, understanding on the part of the Court of the situation left behind by NATO in Libya, one far more complex and fragmented than a government/opposition binary.

From a geopolitical perspective, the Security Council Darfur and Libya referrals explicitly excluded the Court's personal jurisdiction over nationals of non-party states outside Sudan and Libya, respectively, for any acts or omissions arising out of military operations authorised by the Council itself.⁶³ The Security Council referred jurisdiction to the International Criminal Court over Sudanese and Libyan natives, but not the intervening military forces. In the Libyan case for example, US troops were involved in the NATO intervention. The implicitly racialised dual standards are clear. While the technical legal capacity of the Security Council to do this has been challenged in commentary,⁶⁴ there has been no suggestion of the Security Council's wishes being challenged by the Court. Russian calls for the International Criminal Court to investigate alleged NATO war crimes in Libya,⁶⁵ for instance, have been predictably ignored.

B. Two Non-Referrals: Sri Lanka and Palestine

While aspects of the protracted Sri Lankan ethnic conflict continue to grind on, state forces defeated the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers) in 2009. There was upwards of 70,000 civilian casualties in the months leading up to the climax of the violence in May of that same year. The UN Secretary-General and the former Sri Lankan President, Mahinda Rajapaksa, agreed to a commitment to redress and accountability. The Secretary-General subsequently appointed a Panel of Experts to advise him on accountability for the violation of international human rights

⁶¹ Decision on Admissibility – Saif Al-Islam Gaddafi, *Gaddafi and Al-Senussi* (ICC-01/11-01/11 OA 4), Appeals Chamber, 21 May 2014.

⁶² On questions of “local ownership” in the context of Libya complementarity debates, see V. Nesiah, ‘Local Ownership of Global Governance’, in this symposium.

⁶³ SC Res 1593, 31 March 2005, § 6; SC Res 1970, 26 February 2011, § 6.

⁶⁴ See, for example, R. Cryer, ‘Sudan, Resolution 1593, and International Criminal Justice’, 19 *Leiden Journal of International Law* (2006) 195.

⁶⁵ D. Bosco, ‘Russia to ICC: investigate NATO’, *Foreign Policy*, 18 May 2012.

and humanitarian law during the final phase of the war. The Panel's recommendation calls for the establishment of an independent international mechanism to monitor the Sri Lankan Government's initiation of accountability proceedings to investigate the alleged violations and to collect evidence of past crimes. The recommendation, however, perhaps surprisingly, does not explicitly suggest recourse to the International Criminal Court.⁶⁶ And despite demonstrable evidence from the Panel's report of the commission of war crimes and crimes against humanity by the parties to the conflict, international criminal justice mechanisms have not been engaged.

With Sri Lanka not being party to the Rome Statute, the only possibility of operationalising the International Criminal Court's jurisdiction is through a Security Council referral. As the hostilities came to a devastating conclusion in 2009, the Security Council could only muster a meek press statement, condemning the LTTE for its acts of terrorism over many years and demanding their surrender. While expressing concern at reports of continued use of heavy calibre weapons by state forces in areas with high concentrations of civilians, the Security Council emphasised the 'legitimate right of the Government of Sri Lanka to combat terrorism.'⁶⁷ Questions of accountability and impunity have not been addressed since then. In March 2014, the UN Human Rights Council requested the UN High Commissioner for Human Rights 'to undertake a comprehensive investigation' into alleged international crimes 'with a view to avoiding impunity and ensuring accountability'.⁶⁸ International human rights organisations⁶⁹ and the Tamil diaspora⁷⁰ remain eager about the prospect of "delivering justice" and "ending impunity" in Sri Lanka,⁷¹ but a Security Council referral to the International Criminal Court remains beyond the horizon of likely developments.

In the case of Palestine, the 2009 "Goldstone Report" of the Fact-Finding Mission commissioned by the UN Human Rights Council, returned findings that the

⁶⁶ *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, UN Doc. SG/SM/13791-HR/5072, 31 March 2011, Recommendations 1B.

⁶⁷ Security Council Press Statement on Sri Lanka, UN Doc. SC/9659, 13 May 2009.

⁶⁸ Human Rights Council Res. 25/1, UN Doc. A/HRC/RES/25/1, 9 April 2014.

⁶⁹ Amnesty International, *No Real Will to Account: Shortcomings in Sri Lanka's National Plan of Action to Implement the Recommendations of the LLRC*, ASA 37/010/2012, 30 August 2012.

⁷⁰ K. Navaratnam, 'Post-conflict Sri Lanka needs Canadian R2P', *Embassy*, 28 March 2012; H. Sivalingham, 'Canada can help Sri Lanka', *The Sun*, 17 January 2013.

⁷¹ S. Xavier, 'Looking for "Justice" in all the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?' in D. Bass and A. Amarasingam (eds), *Sri Lanka: The Struggle for Peace in the Aftermath of War* (Hurst/Oxford University Press, 2014).

Israeli military deliberately targeted civilians and destroyed civilian infrastructure during its Operation Cast Lead offensive against the Gaza Strip in 2008-2009.⁷² The Report recommended that the Security Council refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to Article 13(b) of the Rome Statute.⁷³ No referral was made, despite the analogous nature of the findings and recommendations of the Fact-Finding Mission with other UN commissions that have resulted in the creation of *ad hoc* tribunals or referral to the International Criminal Court.

The Office of the Prosecutor also played its role in deflecting the possibility of an investigation into the situation in Palestine. Following the termination of Israel's bombardment of the Gaza Strip in 2009, the Palestinian Authority submitted a declaration to the Registrar of the International Criminal Court accepting the jurisdiction of the Court, under Article 12(3) of the Rome Statute, over international crimes committed in Palestine since the Court came into operation on 1 July 2002.⁷⁴ Whether the Court could accept jurisdiction was considered to hinge on the question of Palestine's status – whether it could be considered a state for the purposes of the Rome Statute. An elaborate consultation process undertaken by the Office of the Prosecutor – in which it organised roundtables with NGOs and practitioners, pursued extensive and substantive engagement with the Palestinian legal team and instigated a dialogue with scholars and legal authorities (resulting in the investment of huge amounts of time and resources from all parties on the understanding that this was a genuine and serious process of discovery) – lasted for more than three years.⁷⁵ The sum result of this process was two perfunctory paragraphs in a short statement issued by the Office of the Prosecutor in April 2012, one of the last acts of Ocampo's tenure, declaring that it could not decide on Palestine's competency to grant jurisdiction

⁷² 'While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.' *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 15 September 2009, § 1883.

⁷³ *Ibid.*, § 1969(e).

⁷⁴ International Criminal Court (Press Release) 'Visit of the Minister of Justice of the Palestinian National Authority, Mr. Ali Khashan, to the ICC', 22 January 2009. The transfer of jurisdiction dating back to 2002 would grant the Court the potential to investigate the situation in the West Bank and Gaza on a broader temporal and geographic scale than solely the crimes committed during Operation Cast Lead.

⁷⁵ See further M. Kearney and J. Reynolds, 'Palestine and the Politics of International Criminal Justice' in W. Schabas, Y. McDermott, and N. Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013), at 407.

under Article 12(3). Palestine's statehood was subsequently recognised by the General Assembly in 2012,⁷⁶ giving cause to Palestinian civil society organisations to petition Ocampo's successor, Fatou Bensouda, to proceed *proprio motu* on the basis of the 2009 Article 12(3) declaration. She indicated she would not do so without either Palestinian ratification of the Rome Statute, or a new Article 12(3) declaration.⁷⁷ On the back of much campaigning by Palestinian civil society, the Palestinian authorities eventually did both ratify the Statute and submit an Article 12(3) declaration in January 2015,⁷⁸ precipitating an obligatory preliminary examination of the Office of the Prosecutor. As noted above though, there is no guarantee that this will result in a full investigation.

Beyond the mechanics by which jurisdiction is triggered, and the inevitable manoeuvring of the Security Council's permanent members to protect their allies in Sri Lanka, Israel and elsewhere, there are also legitimate fears that even if the International Criminal Court were to investigate these situations, it would not work to the advantage of Tamils or Palestinians. The institutions of international criminal justice have displayed scant desire to offer any political-legal antidotes to the symptoms of imperial relations, whether in Kosovo or Sierra Leone, Libya or Afghanistan.⁷⁹

Indeed, if it is the case that the international criminal law project—like international law more generally—has reproduced colonial legacies more than it has challenged them, why do Tamils and Palestinians and a diversity of anti-colonial peoples, social movements and rights activists continue to place faith in international criminal law institutions as sites of progressive potential? What is there to suggest that crude stereotypes of African savagery would not be replicated in the form of similarly racialised depictions of Tamils and Palestinians in international criminal trials, for instance, as barbarous terrorists?

⁷⁶ International Criminal Court (Office of the Prosecutor) 'Situation in Palestine' (3 April 2012).

⁷⁷ F. Bensouda, 'The Truth about the ICC and Gaza', *The Guardian: Comment is Free*, 29 August 2014.

⁷⁸ State of Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014; State of Palestine, Accession to the Rome Statute of the International Criminal Court, Depositary Notification, UN Doc. C.N13.2015.TREATIES-XVIII.10, 2 January 2015.

⁷⁹ Kamari Clarke, 'The Rule of Law Through Its Economics of Appearances: The Making of the African Warlord', 18 *Indiana Journal of Legal Studies* (2011) 7.

4. The Decolonisation of International Criminal Justice?

The first formal Third World Approaches to International Law conference took place in 1997.⁸⁰ That same year, Mutua published what can be read as an early TWAIL appraisal of the *ad hoc* tribunals.⁸¹ Many of the concerns expressed by Mutua over the nature of international criminal justice remain as valid today as they were then; some even more so in relation to the inability or unwillingness of the international criminal law project to grapple with underlying causes of conflict or unsettle global market forces. Mutua did not foresee the pace at which the prosecutorial enterprise would crystallise as a central feature of the international legal landscape, however. In particular, his claim that a permanent International Criminal Court was unlikely and unviable was quickly overtaken by developments in practice. Given the biases that have revealed themselves in the Court's operations, reflection on the engagement with international criminal law by actors in the global South is warranted. This entails questions for those social movements and civil society organisations in the South that retain a faith in the emancipatory potential of criminal accountability.

There is no single answer to the question of why self-determination movements such as the Palestinians or the Tamils have articulated support for international criminal accountability processes. Such peoples and movements are obviously not monolithic in character. For some within them, there are pragmatic reasons to invest in international criminal law – as a deterrent and means of protection against further atrocity, as a form of retribution against the adversary, or in pursuit of international legitimacy. For others, it is simply the case of a lack of viable emancipatory alternatives. It is a frustrated turn to legal outlets after civil disobedience and political insurrection against the violence of the state or the occupier have failed, or a reflection of the limited avenues available to a self-determination cause some fifty years after the heyday of national liberation and Third World decolonisation. For others again, the engagement of international criminal institutions is a form of tactical intervention, an instrumental move that feeds into a broader anti-imperial strategy. Much of the faith placed in international justice by activists in the global South, however, has been underpinned by a *bona fide* commitment to

⁸⁰ K. Mickelson, 'Taking Stock of TWAIL Histories', 10 *International Community Law Review* (2008) 355.

⁸¹ M. Mutua, 'Never Again: Questioning the Yugoslav and Rwanda Tribunals', *Temple International & Comparative Law Journal* (1997) 167.

international law and its unrealised potential. In the Palestinian context there is a tendency ‘to ascribe a positive quality to international law and thus quarantine it from any colonial practice through the familiar device of the law/politics binary’. This type of practice allows for the retention of ‘a quiet confidence in the idea of law as a weapon of the weak that would work better if only it could be implemented more effectively.’⁸²

This enforcement deficit argument is an incomplete view of law, however. In his prose, Mahmoud Darwish captures the more nuanced dichotomy between law’s content and its form:

You consider the law. How innocent we were to think the law is a vessel for rights and justice! The law here is a vessel for what the ruler wants, or a suit that he orders to his own measure. I have been in this country even before the state that negates my existence came into being. You realize once again that justice is a hope that resembles an illusion if it is not supported by power and that power transforms the illusion into a reality.⁸³

Darwish evokes the structural factors and design selectivity at play in, for example, the role given to the Security Council by the Rome Statute. For peoples in the global South, the hope of international justice has not been supported by the type of power needed to transform the illusions of resource redistribution, racial equality or reparations into reality. Arguably, international criminal justice has been little different. Despite its overt structural biases, however, little room has been left in mainstream and even critical legal discourse to challenge the presupposition that there must be an international criminal law. When considering what the radical response ought to be in such a situation, the obvious answer might appear to speak in favour of abandoning or dismantling the institutions of international criminal law altogether.

Where such calls have come, they have tended to come from those writing from Marxist or anarchist perspectives in the global North. But for writers like Patricia Williams, there is a critical race element upon which critique of law is contingent. Williams’ suggests that ‘[r]ights [international law, international criminal law etc] feels new in the mouths of black people. It is still deliciously empowering to say. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of

⁸² M. Burgis-Kasthala, ‘Over-Stating Palestine’s UN Membership Bid? An Ethnographic Study on the Narratives of Statehood’, 25 *European Journal of International Law* (2014) 677, at 691.

⁸³ M. Darwish, *Journal of an Ordinary Grief* (*Yawmiyyât al-Huzn al-‘Âdî*, 1973; I. Muhawi trans., Archipelago, 2010), at 102.

power and no power”.⁸⁴ She notes the reliance on the law as mean to construct one’s identity and formulate one’s demands and rights. This is ultimately rooted in the anxieties that stem from histories of racial subordination, exclusion and violence.

For peoples traditionally excluded from the sites of international justice and subjected to imperial violence coupled with impunity, deconstructionist critiques of international criminal law from the academies of the North (and rhetorical denouncements from the post-colonial elites of the South) may not speak to their social and political agendas. While TWAIL scholarship is still perhaps underdeveloped when it comes to international criminal law specifically, there is much we can draw from its broader engagement with field of international law, and its internal reflections and debates.

TWAIL has retained a ‘surprisingly reformist agenda’⁸⁵ through its reluctance to depart from the arena of international law. For TWAIL’s critical reconstructionists, the potential of international law lies in its transformation from below. International law can be deployed as both shield (against the ongoing impacts of colonial relations) and sword (in tactical pursuit of progressive or anti-imperial struggle). It is Williams’ magic wand of the oppressed and marginalised. There is also the sense that TWAIL’s duality of engagement with international law—of both resistance and reform—coalesce in such a way that there is a possibility to first provide the necessary break and rupture and then to generate a praxis of (new, or different) universality.⁸⁶ In this instance, there is a turn to what may superficially seem like the old in arguing for the emancipatory potential of international law, as the early post-colonial Third World jurists did. But underneath lies a radical shift to reflect on the existing dynamics of power and politics of the everyday life of international law.⁸⁷ For Bhupinder Chimni, the reconstruction must take place at different registers, including at the personal and the ethical.⁸⁸

⁸⁴ Patricia J. Williams, *The Alchemy of Race and Rights* (London: Virgo Press, 1993) at 164.

⁸⁵ L. Eslava and S. Pahuja, ‘Between Resistance and Reform: TWAIL and the Universality of International Law’ 3 *Trade, Law & Development* (2011) 103, at 105.

⁸⁶ *Ibid.*

⁸⁷ L. Eslava, *Local Space, Global Life The Everyday Operation of International Law and Development* (Cambridge University Press, 2015).

⁸⁸ B.S. Chimni, ‘The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi’s Hind Swaraj or Indian Home Rule’ 23 *European Journal of International Law* (2012) 1159.

Here then we must consider what radical engagement with the field of international criminal law, in a bid to transform, subvert or reconstruct—to decolonise—that field, might look like. Can social movements have the impact on international criminal law that they have sought to have in other fields of international law?⁸⁹ Are international criminal tribunals sites where ‘counter-systemic logics’⁹⁰ can be exploited and tactics of rupture⁹¹ deployed in such a way as to instrumentalise law as part of broader socio-political struggles for emancipation from want. Is there space ‘to take advantage of the content of international law to mitigate the effects of its form’?⁹²

In keeping with the dual engagement paradigm of both resistance and reconstruction, a decolonisation of international criminal justice might be plausibly conceived on two distinct, but not necessarily contradictory, registers. This does not detract from earlier TWAIL interventions that seek to promote national prosecutions of alleged war criminals in domestic courts either.⁹³ On the reconstructionist register, redressing three prevailing selectivities⁹⁴ is paramount: the geographic or group-based selectivity of situations investigated; the operational selectivity of existing crimes prosecuted; and the material selectivity of conduct criminalised.

From a Third World perspective, meaningful transformation when it comes to situation selectivity essentially implies the investigation of crimes committed by global North forces and their allies in the global South. This would in turn require a rupture of some description in the referral mechanisms, including the role of the Security Council, at the design and operational levels.

The operational questions of which crimes are then prosecuted in those situations can also be subjected to a potential reconstructionist approach. Although

⁸⁹ B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003).

⁹⁰ S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, 2007), at 144.

⁹¹ J. Vergès, *De la stratégie judiciaire* (Minuit, 1986).

⁹² R. Knox, ‘Marxism, International Law, and Political Strategy’ 22 *Leiden Journal of International Law* (2009) 413, at 436.

⁹³ A. Anghie & B.S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’, 2 *Chinese Journal of International Law* (2003) 77; S. Xavier, ‘Looking for “Justice” in all the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?’ in D. Bass and A. Amarasingam (eds), *Sri Lanka: The Struggle for Peace in the Aftermath of War* (Hurst/Oxford University Press, 2014).

⁹⁴ For a detailed typology and analysis of selectivity in international criminal law, see A. Kiyani, ‘Group-Based Selectivity & Local Repression’ in this symposium.

very much a continuation of the lineage of Eurocentric laws of armed conflict and human rights law, the content of international criminal law does offer certain norms that, when framed in the post-colonial context, can counter and criminalise contemporary colonial practices. For example, despite the doctrinal limitations associated with war crimes with its murky elements of proportionality and necessity that are susceptible to the so-called fog of war, parts of the normative content of international criminal law do speak to more systemic elements of colonial projects. Forcible population transfer and apartheid are marked out as crimes against humanity under the Rome Statute. Article 8(2)(b)(viii) of the Statute also prohibits the settlement of occupied territory by an occupying power. As such, settler colonialism in a context of occupation is rendered criminal. The purpose of this provision is set out in the commentary to Article 49(6) of the Fourth Geneva Convention from where it originates: ‘It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race.’⁹⁵ Although this exhibits a wilful blindness to colonisation by European powers outside the context of the Second World War, it nonetheless has a relevance to the land policies and territorial expansions of the present. Such settler-colonialism is central to concerted and well-documented Israeli policy in the West Bank (as well as the Golan Heights), and has the potential to be prosecuted were the International Criminal Court to seize itself fully of the situation in Palestine. This is certainly central to the thinking of Palestinian activists and officials, in their attempt to claim “local ownership” of the process.⁹⁶ Similar practices are emerging within the context of post-war Sri Lanka as successive governments forcibly resettle segments of the population from south to north. If the decolonisation of international criminal law is to have a chance of proving its emancipatory possibility, then, it might start with the prosecution of contemporary crimes of colonisation.

⁹⁵ J Pictet, (ed.), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958), at 283.

⁹⁶ V. Nesiiah, ‘Local Ownership of Global Governance’, in this symposium. When Palestinian officials suggested that the first matter they wanted the ICC to investigate was Israel’s settlement activity, international criminal lawyers were quick to point out that this form of local ownership is not allowed for. See Kevin Jon Heller, ‘Unfortunately, the ICC Doesn’t Work the Way Palestine Wants It To’, *Opinio Juris*, 18 January 2015, available at <http://opiniojuris.org/2015/01/18/palestine-really-no-idea-icc-works>.

While this might at least begin to get at some of the land control and migration issues that go to the structural conditions underlying scarcity and inequality, crimes rooted in the Geneva Conventions will remain limited to traditionally defined and bracketed armed conflict settings. Any meaningful reconstructionist approach to international criminal law will need to go further, to the material selectivity of the acts criminalised at the design level:

if international criminal law is to take seriously the project of international criminal *justice* — even if only to prevent further “atrocities” — it must move beyond its fixation with political and military actors and start to address the economic context of armed conflict ... to address the legality of sanctions regimes; the role of structural adjustment and austerity programs imposed by international financial institutions; the competition between China and Western states for access to resources in third states; or the propriety of reparations for slavery and colonialism.⁹⁷

It is clear that the “core crimes” catalogue of genocide, crimes against humanity and war crimes (plus aggression) are rooted in a restricted conceptualisation of violence. These crimes cannot any address many of the collective interests of global South peoples or the structural violence of economic coercion, resource extraction, global wealth distribution and enforced impoverishment. In addition, there is arguably no clear normative basis in international criminal law for limiting the definition of crime in this way;⁹⁸ for constructing the victim of child soldier recruitment as more deserving than the child victim of structural adjustment.

Why is mass starvation or grotesque inequality less odious a scourge or more imaginable an atrocity than the crimes currently being prosecuted? This production of law is not a neutral process but reflects choices and historical patterns in the development of international law that have tended to marginalise global South voices and interests. This was evident over the course of the International Law Commission (ILC)’s attempts from the 1950s to the 1990s to define and normatively root an expanded list of international crimes. A minority of global North states (that consistently supported or abstained from condemning South African apartheid) maintained their conservative opposition to the inclusion of crimes such as apartheid, colonialism, and foreign intervention. On account of this, by the end of the process,

⁹⁷ A. Kiyani, ‘A Third World Approach to International Criminal Law: Towards a Critical Criminal Normativity’ [reference? // forthcoming?].

⁹⁸ *Ibid.*

the ILC's set of 12 crimes had been whittled back down to the four core crimes now included in the jurisdiction of the ICC.

The subject-matter jurisdiction proposed for the International Criminal Law Section of the African Court of Justice and Human Rights does gesture towards redressing this, covering a more expansive list of crimes, some of neocolonial character, including mercenarism, corruption, money-laundering, and illicit exploitation of natural resources.⁹⁹ A judicial model such as this cannot avoid substantively mimicking the European template, however, much as post-colonial political formations failed to think beyond the European nation-state model. Decolonisation necessitates decolonising of the mind, and of language.¹⁰⁰ The decolonisation of the field of international criminal justice will remain profoundly difficult because of the inescapable historical baggage of rule of law civilising missions, and the homogeneity of international legal language.

Ultimately, in any event, international criminal accountability is not an emancipatory end in itself for marginalised peoples or self-determination struggles in the global South. The prosecution of colonial crimes could never be more than a tactical hook to be pursued as part of a broader anti-colonial strategy. In that sense, strategic options on the second register of engagement, that of deeper resistance to the field of international criminal law in its current guise, must be considered in parallel to the reconstructionist agenda sketched above. This would involve a de-subjectification of the global South from Northern legal cultures and a delinking from global governance structures, drawing on Latin American resistance to the architecture of international investment law, for example, and from the evolving organic intellectual traditions of indigenous social movements, alter-globalisation and decoloniality.¹⁰¹ Here, the continued and concerted subjection of the field of international criminal justice to postcolonial thought and TWAIL perspectives is essential.

⁹⁹ Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Doc. EX.CL/846(XXV), Annex 5, 15 May 2014, Article 28.

¹⁰⁰ Ngũgĩ wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature* (Heinemann, 1986).

¹⁰¹ See, for example, W. Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Duke University Press, 2011).