

'The Dark Corners of the World'

TWAIL and International Criminal Justice

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Abstract

Despite international criminal law's historically contingent doctrines and embedded biases, Third World self-determination movements continue to be enticed by international criminal justice as a potentially emancipatory project. This article seeks to peer inside the structural anatomy of the international criminal law enterprise from a vantage point oriented to the global South. It reflects broadly on discourses of international criminal law and its exponents as they relate to the global South, and explores one particularly contentious issue in the politics of international criminal law — that of operational selectivity. Redressing such selectivities as they arise from geopolitical biases is an important first step for any reconstruction of the field of international criminal justice. The article emphasizes, however, the need to also look beyond the problems of unequal enforcement, to reconceptualize the forms of violence criminalized at the design level. We ask whether, given certain colonial features, the premise and promise of international criminal justice can — for self-determination struggles or anti-imperial movements in the global South — be anything more than illusory. Drawing on the perspectives of Third World Approaches to International Law (TWAIL), the article concludes with some thoughts on what 'TWAILING' the field of international criminal justice might entail.

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

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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.

1. Introduction

In the spring of 2011, following the publication of a United Nations (UN) report detailing potential international crimes committed in the Sri Lankan conflict,² representatives from Tamil communities converged in The Hague to call for action by the International Criminal Court (ICC). 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 the culmination of the conflict in 2009, Tamil demonstrations from Chennai to Toronto have repeatedly called for international criminal accountability for the alleged war crimes⁴ committed by Sri Lankan state forces in their onslaught against the Liberation Tigers of Tamil Eelam (LTTE).⁵ Much of Palestinian civil society has too, for some time now, pinned similar hopes of redress for Israeli military atrocities⁶ and colonization⁷ on the ICC, and pushed its political and diplomatic representatives to pursue the transfer of jurisdiction to The Hague.⁸

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 expectations of a documented chronicle of history bearing the imprint of legal legitimacy.⁹ The pitfalls lie in

- 2 *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, 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, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, *supra* note 2; International Crisis Group, *War Crimes in Sri Lanka*, Asia Report No. 191, 17 May 2010; Human Rights Watch, ‘We Will Teach You a Lesson’: *Sexual Violence against Tamils by Sri Lankan Security Forces*, 26 February 2013.
- 5 See, for example, ‘Toronto Tamils slow traffic in latest Sri Lanka protest’, *CBC News*, 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.
- 6 See generally *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 15 September 2009; *Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, UN Doc. A/HRC/29/52, 24 June 2015.
- 7 See *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63, 7 February 2013.
- 8 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 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.
- 9 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.

international criminal law's historically contingent doctrines and embedded political and economic biases; its instrumentality and selectivity.¹⁰ In the outlook of some 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 civilizing mission. This echoes the views of liberal Western diplomats that 'the laws of the jungle' still distinguish the 'more old-fashioned kinds of states outside the postmodern continent of Europe', such that '[t]he conception of an international criminal court is a striking example of the post-modern breakdown of the distinction between domestic and foreign affairs.'¹¹ International criminal law, in that sense, is aligned with an imperial discourse devoted to imposing 'good governance' techniques and free market ideology.¹²

Despite these vertical impositions of globalization, self-determination struggles and social movements in Palestine, Sri Lanka and elsewhere continue to be enticed by international criminal justice 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 — which we understand as a mechanism of political economy as well as global governance — from a vantage point oriented to the global South. The liberation struggles in Palestine and Sri Lanka, representative for many of the barbarity implicit in Crane's 'dark corners of the world' metaphor, offer a window for this examination.

We begin in Section 2 by reflecting broadly on discourses of international criminal law and its exponents as they relate to the global South. Section 3 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 ICC, offers one window into the politics of inclusion and exclusion when it comes to who, and what, is ultimately prosecuted. Redressing such operational selectivities as they arise from geopolitical biases is an important first step for any reconstruction of the field of international criminal justice. We emphasize, however, the need to also look beyond the problems of unequal enforcement, to reconceptualize the forms of violence criminalized at the design level. The final section asks whether, given certain embedded colonial features, the premise and promise of international criminal justice can — for self-determination struggles or anti-imperial movements in the global South — be anything more than illusory. Drawing on the perspectives of *Third World Approaches to International Law (TWAIL)*, the article concludes with some thoughts on what 'TWAILing' the field of international criminal justice might entail.

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

11 R. Cooper, 'The Post-Modern State', in M. Leonard (ed.), *Re-Ordering the World: The Long-term Implications of 11 September* (Foreign Policy Centre, 2002) 11, at 13, 16.

12 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.

2. International Criminal Justice Discourses and the Global South

International law's criminal justice project has been a distinctly Western venture. Its crystallization at Nuremberg was 'an expression of a peculiarly American legal sensibility'.¹³ The irony of Nuremberg, in seeking to claim the moral high ground following military victory over the Nazis 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'.¹⁴ 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.¹⁵

Third World jurists were wise to such selectivity and structural biases¹⁶ 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'¹⁷ and imperialism by the war's victors. With the atomic bombing of Japan and acts of imperial aggression and annexation by Allied powers exempted from any form of judicial scrutiny, Pal maintained that the Tribunal was structurally incapable of being just. He was sharply critical of the decision by the Allies to mandate the Tribunal to retroactively prosecute previously undefined crimes. This, Pal asserted, brought international law back to its colonial foundations and its facilitation of conquest.¹⁸

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.¹⁹ Against this backdrop, demands for international justice —

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

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

15 P. Seed, *Ceremonies of Possession in Europe's Conquest of the New World 1492-1640* (Cambridge University Press, 1997), at 16–40; B. Trigger and W. Washburn, 'Native Peoples in Euro-American Historiography', in B. Trigger and W. Washburn (eds), *The Cambridge History of the Native Peoples of the Americas* (Cambridge University Press, 1996), at 61–81.

16 On the nature of structural bias in the institutions (and language) of international law, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005 reissue), at 600–615.

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

18 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.

19 K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009).

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 international institutions that are controlled, technical and expert-driven. 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.²⁰ The outcomes of judicialisation have been predictably uneven. There is a drive to prosecute some of those responsible for some atrocities, but certainly no practical push towards geopolitical egalitarianism in who or what is prosecuted.

This underlying contradiction 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.²¹ Indeed, the idea of Nuremberg as the birthplace of an international criminal law is belied by the fact that the four major war-victorious powers appointed a prosecutor each, rather than the tribunal epitomizing any sense of a global community of nations acting collectively.

The two foundational ad hoc tribunals in the 1990s were viewed suspiciously from a Third World perspective,²² with the International Criminal Tribunal for Rwanda seen as a tokenistic corollary of its Balkan counterpart: its creation had been rendered unavoidable only by the immediate Yugoslav precedent and belated western guilt over the Rwandan genocide.²³ Concerns over selectivity have manifested in response to the inherent exclusivity involved in the creation of such country-specific ad hoc tribunals, as well as politically contingent approaches to prosecution within them. The International Criminal Tribunal for the former Yugoslavia declining to investigate NATO military operations in Kosovo offered a clear example of this, raising for TWAIL scholars 'disturbing questions about the neutrality and objectivity of this Tribunal'.²⁴ The various special courts, hybrid tribunals and

20 J. Alvarez, 'Alternatives to International Criminal Justice', in A. Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009).

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

22 For a sceptical reading of the ICTY and the general dangers of individual accountability initiatives 'becoming, simply, the reproduction of the civilizing mission and victor's justice', see A. Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2 *Chinese Journal of International Law (CJIL)* (2003) 77, at 91–92.

23 As Cassese explains: '[S]ensitive to the criticisms that the establishment of the ICTY represented yet another illustration of the disproportionate attention paid to the problems of Europe vis-à-vis the developing world, the international community was also anxious to establish a Tribunal for Rwanda so as to assuage its conscience and shield itself from accusations of double standards.' A. Cassese, *International Criminal Law* (Oxford University Press, 2003), at 339.

24 Anghie and Chimni, *supra* note 22, at 91.

extraordinary chambers established since then, while presented as collective initiatives, have nonetheless predominantly focused on prosecuting weak or pariah regimes in the global South. In this sense, the Third World critique of international criminal law extends beyond those expositions that focus only on the ICC's preoccupation with Africa.

In the initial emergence of the permanent International Criminal Court, however, support for the enterprise from states and civil society on the African continent in particular was markedly 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 appeal 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 everyone else. The Court appeared genuinely egalitarian in structure and profoundly fair in conception.'²⁵

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?'²⁶ 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 ICC remains almost irrepressible. Remarks framing international criminal law developments as 'the most profound current aspect of international law'²⁷ 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 come to see the ICC as a useful tool in its soft power armoury, the African Union's love for this latest chapter in 'the new tribunalism'²⁸ is turning 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 British, Canadian or Israeli officials.

25 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.

26 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 (LJIL)* (1999) 683, at 695.

27 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.

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

From a moment of apparent convergence between calls for justice from the global South and the materialization 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 conceptualizations, 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 'self-referrals' from African jurisdictions has not carried sufficient resonance as to overcome the sense of an expert class,²⁹ the professional centre, administering justice to the periphery. Despite concerted work by civil society organizations 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 alleged crimes of Western allies in Israel and Colombia, the ICC's reputation remains marked by the fixation of its prosecutorial lens on Africa through its first 15 years of operation.³⁰

The colonial intimations of that relationship were epitomized 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 starchest of white suits.³¹ Makau Mutua's 'savage-victim-saviour'³² 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.³³ 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

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

30 The South Ossetia investigation that was sanctioned by the Court's Pre-Trial Chamber in early 2016 [Decision on the Prosecutor's request for authorization of an investigation, *Situation in Georgia* (ICC-01/15), Pre-Trial Chamber 1, 27 January 2016] marks the first ICC investigation outside of the African continent, and has its own geopolitical dynamic in which 'investigating Russian conduct captures that broader, if not always helpful, international narrative condemning Russian aggression.' Mark Kersten, 'Why is the International Criminal Court stepping out of Africa and into Georgia?' *The Washington Post*, 5 February 2016.

31 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.

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

33 This is notwithstanding Ocampo's Argentinean nationality and role as Assistant Prosecutor in the 1985 'Trial of the Juntas'. It 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.

world conflicts.’³⁴ 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’,³⁵ 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, we don’t create mechanisms by which we can consider the cultural and customary approaches to justice within the region.³⁶

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.’³⁷ 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.’³⁸ Oscillating between respect and revile for west African culture, Crane, in a quintessentially Orientalist-style rendition, goes to some length to emphasize 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.’³⁹

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.’⁴⁰ It is in the global South, Crane’s ‘dark corners of the world’, that this lawlessness breeds real and imminent threat to what ‘we’⁴¹ understand as humanity and civilization.

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.⁴²

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

35 *Ibid.*, at 1685.

36 *Ibid.*, at 1686.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*, at 1685.

40 Crane, ‘Dancing with the Devil’, *supra* note 1, at 2, 8.

41 On the ‘we’ of international criminal law, see Tallgren, *supra* note 26.

42 Crane, ‘Dancing with the Devil’, *supra* note 1, at 4.

The framing of Third World conflicts as apolitical, of course, elides the impact of contemporary imperial and neoliberal world-systems dynamics on 'underdeveloped' regions that are exploited for their natural resources (as well as denying the internal political contestations that often stem from historical phenomena of colonial economic exploitation, political subjectification and border fabrication), and allows for a technocratic response based on simple criminality/legality binaries.⁴³ 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 ... 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.'⁴⁴ In his ensuing discussion, however, Crane offers nothing to suggest that he actually does see a certain wariness of institutionalized 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.'⁴⁵ This idealized rule of law stands in marked contrast to the state of nature depicted by Crane in his Prosecution statements during the trials of the 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', populated by 'dark shadows' and 'hounds from hell'.⁴⁶

Given the failure of the post-colonial African state in this narrative, the international criminal institution is presented as the only viable answer. Thus, following the semblance of an apparently sensible approach to local engagement (albeit couched in management speak⁴⁷), 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 legal imperialism:

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

43 Clarke, *supra* note 12.

44 Crane, 'Dancing with the Devil', *supra* note 1, at 4 (emphasis added), quoting Louis D. Brandeis, *The Brandeis Guide to the Modern World* (Alfred Lief ed., 1941), at 166.

45 *Ibid.*, at 8. Emphasis added.

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

47 'Get out and listen to the citizens of the region. Interface with them.' Crane, 'White Man's Justice', *supra* note 34, at 1687.

'white man's justice,' claims by cynical African politicians, and others, establishing the rule of law permanently there will be illusory.⁴⁸

In advocating 'the imposition of international justice norms in an African context',⁴⁹ Crane's vision of justice is, ultimately, what he unashamedly describes as white man's justice, implemented through the universalizing 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'.⁵⁰ 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', and that 'spoke to a deep-seated Western fascination for Africa's 'savagery' and 'primitivism'.⁵¹ 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"'.⁵² 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'⁵³ and the exemplary 'racialized dualism of white/dark'.⁵⁴ This imagery is echoed in the critiques of black lawyers engaged as defence counsel in international criminal trials, who have argued that the West's 'persistent idea of Africa being the Dark Continent, uncivilised' has rendered international criminal justice as a platform to 'teach these darkies about the rule of law'.⁵⁵

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 idealizing it) find echoes in international criminal law's own dualism (universality versus selectivity) as well as Crane's vacillation between regard and dismay for native Sierra Leone. Here, 'the corrupting effects of colonialism at both personal and political level'⁵⁶ are mirrored in the effects of being an

48 *Ibid.*, at 1686.

49 *Ibid.*, at 1687.

50 *Ibid.*

51 G. Anders, 'Testifying about 'Uncivilized Events': Problematic Representations of Africa in the Trial against Charles Taylor', 24 *LJIL* (2011) 937, at 940-942.

52 *Ibid.*, at 946.

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

54 V. Nesiiah, 'Placing International Law: White Spaces on a Map', 16 *LJIL* (2003) 1, at 4.

55 Courtenay Griffiths QC, quoted in T. Black, 'Let's Teach These Darkies About the Rule of Law', *Spiked*, 29 May 2012.

56 Anghie and Chimni, *supra* note 22, at 100.

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 ICC.⁵⁷ This was the primary focus of the October 2013 Extraordinary Session of the Assembly. 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'.⁵⁸ The narrative of international criminal law as an imperial imposition has without doubt 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.⁵⁹ That the African Union requests were so swiftly rejected in November 2013 by the Security Council, however, brings into sharp focus once more the Council's governmental role in relation to the ICC.

3. Selectivity, Geopolitics and the International Criminal Court

The North–South dynamics playing out through the International Criminal Court can be discerned by zeroing in on what has been included and excluded from those situations subjected to investigation and prosecution before the Court. Questions around how situations are referred to the Court, how the Court takes jurisdiction over situations, and how the Prosecutor's discretion is exercised, are pivotal. The fact that Western powers have not been subject to this jurisdiction is no accident or anomaly. Robin Cook, British Foreign Secretary under the Blair administration at the time of the ICC's negotiation and establishment, represented the Western diplomatic viewpoint clearly: 'this is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States'.⁶⁰

57 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 of State Immunity', 12 *CJIL* (2013) 467.

58 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.

59 See, for example, L. Mullen, 'Kenya Lawmakers Approve Motion to Withdraw from ICC', *Jurist*, 5 September 2013, at <http://www.jurist.org/paperchase/2013/09/kenya-parliament-approves-motion-to-withdraw-from-icc.php> (visited 24 June 2016).

60 Quoted in J. Graubart and L. Varadarajan, 'Taking Milosevic Seriously: Imperialism, Law, and the Politics of Global Justice', 27 *International Relations* (2013) 439, at 439.

By 2016, the ICC had become actively seized of 10 situations in which investigations and/or prosecutions are underway, almost 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 racialized bias. In practice, however, such self-referrals by ‘weak’ states have primarily operated as a mode of capitalizing on the state-centrism of international law for the purposes of delegitimizing internal opponents and replicating patterns of exclusion and othering in the post-colonial context.⁶¹ The Office of the Prosecutor has shown itself happy to indulge this by not investigating the government of any self-referring state to date. The Office of the Prosecutor further initiated two *proprio motu* investigations of its own volition, in Kenya and Côte d’Ivoire.

Our present focus, however, is on the Security Council’s particular role and its power to refer a situation to the Court. Such Security Council referrals are one of the three trigger mechanisms set out in Article 13 of the ICC Statute by which the Court’s jurisdiction over a situation can be activated, and are distinct from *proprio motu* investigations and state party referrals. The Pre-Trial Chamber’s oversight of the Prosecutor’s *proprio motu* powers is a clear indication that this is the least powerful trigger mechanism. The drafters of the Statute envisaged state party and Security Council referrals as more authoritative. As such, there is arguably an implicit hierarchy in the Statute’s jurisdictional trigger mechanisms. For a Security Council referral, uniquely, the preconditions of nationality based or territorial jurisdiction otherwise required by Article 12 of the Statute do not apply.⁶² The Security Council effectively has ‘quasi-constitutional’ powers stemming from Chapter VII of the UN Charter and Articles 13 and 16 of the Rome Statute.⁶³ The politics of Security Council referrals as particular grounds of ICC jurisdiction are thus significant.

Two of the 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 potential situations, in Palestine and Sri Lanka, that were brought to the Security Council’s attention by UN authorities, without the recommended resulting referral. These particular geopolitical selectivities are demonstrative of broader TWAIL claims as to the ways in which colonial legacies and imperial interests continue to structure the operation of international law.

61 P. Menon, ‘Self-Referring to the International Criminal Court: A Continuation of War by Other Means’, 109 *AJIL Unbound* (2016) 260.

62 C. Safferling, *International Criminal Procedure* (Oxford University Press, 2012), at 88–90; A. Cassese, *International Law* (2nd edn., Oxford University Press, 2005), at 456–458.

63 Cassese, *ibid.*, at 456–458. See generally B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International, 1998).

A. Two Referrals: Sudan and Libya

The impetus towards the Security Council referral of the situation in Darfur to the ICC originated in the creation of the International Commission of Inquiry on Darfur in 2004, which 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'.⁶⁴ The Security Council did so in Resolution 1593,⁶⁵ specifying that the referral was rooted in the Council's Chapter VII powers. In this light, the Security Council referral mechanism can be seen as extending a form of purported universal jurisdiction. The referral led to arrest warrants being issued by the ICC for a number of accused, including Sudanese President Omar al-Bashir. While the Commission of Inquiry had found no basis to conclude that acts of genocide were committed in Darfur, the United States insisted on declaring that genocide had in fact occurred — arguably for the dual purposes of deflecting attention from the nature of its war on Iraq at the time, and to lend weight to calls for humanitarian intervention in Sudan.⁶⁶ In bringing his missionary verve to the ICC's prosecutorial strategy, Ocampo was determined to indict al-Bashir for genocide. This triggered an inevitable backlash against humanitarian agencies in Sudan when the indictment was issued, as well as ongoing debates over immunity and overreach by the ICC.

In Libya, the UN Human Rights Council established a similar International Commission of Inquiry in the context of the Gaddafi regime's crackdown on the 2011 popular uprising.⁶⁷ The Security Council referred the situation in Libya to the ICC in Resolution 1970,⁶⁸ and soon thereafter authorized air and naval intervention — to be effected by the north Atlantic powers and their

64 *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. The Darfur Commission of Inquiry argued that the UN Security Council through its Chapter VII powers could make the referral to the ICC 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'. 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.

65 SC Res. 1593, 31 March 2005.

66 See, for example, S. Fake and K. Funk, *The Scramble for Africa: Darfur—Intervention and the USA* (Black Rose Books, 2009); M. Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (Three Rivers Press, 2010); M. Mamdani, 'The Politics of Naming: Genocide, Civil War, Insurgency', 29 *London Review of Books* (2007) 5. For an illuminating personal reflection on the 'error' of 'pounding the drum of "genocide" in the context of Sudan, see also A. de Waal, 'Writing Human Rights and Getting It Wrong', *Boston Review*, 6 June 2016.

67 The Commission's mandate was 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'. 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.

68 SC Res. 1970, 26 February 2011.

Gulf allies — in Resolution 1973.⁶⁹ The Office of the Prosecutor immediately opened an investigation: ‘the ICC flew into Libya on the wings of the NATO bombers’⁷⁰, plunging itself into a scenario designed to extend beyond the mandated responsibility to protect civilians into a self-appointed ‘responsibility for regime change.’⁷¹ Within three months, in 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 for the ICC 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 ICC to proceed against Saif Gaddafi and al-Senussi have been marred by wrangling with the post-Gaddafi Libyan authorities, who assert their own ability and willingness to prosecute. Libya challenged the admissibility of the cases before the ICC, successfully in al-Senussi’s case⁷² and unsuccessfully in Saif Gaddafi’s case.⁷³ This discrepancy was ostensibly grounded in the notion that Libya’s ability to prosecute the respective cases was differentiated, at least partially, by Libya having control over the Tripoli detention facility in which al-Senussi was being held, but not that of Saif Gaddafi in Zintan. In a context of two competing governments (where the government in Tripoli was not the one recognized by Western states) and numerous other groups exercising control in different parts of the country, this indicates a very simplistic view by the Court of the situation left behind by NATO in Libya, a situation far more complex and fragmented than a simple government/opposition binary. The mutually reinforcing nature of the relationship between the ICC and the Security Council was emphasized again in December 2014, with the Court this time referring Libya back to the Security Council, after issuing a non-compliance finding against the Libyan government for failure to transfer Saif Gaddafi to the Hague⁷⁴ (notwithstanding the fact, as noted above, that the Court itself had previously determined that the Libyan government did not have control over him).

Also significant, from a geopolitical perspective, is that the Security Council’s Darfur and Libya referrals explicitly excluded the Court’s personal jurisdiction

69 SC Res. 1973, 17 March 2011.

70 V. Nesiiah, ‘Libya, Impunity, and the International Criminal Court’, *Jadaliyya*, 28 June 2012.

71 A. Çubukçu, ‘The Responsibility to Protect: Libya and the Problem of Transnational Solidarity’, 12 *Journal of Human Rights* (2013) 40, at 43.

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

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

74 Decision on Non-Compliance, *Gaddafi* (ICC-01/11-01/11), Pre-Trial Chamber I, 10 December 2014.

over nationals of non-party states outside Sudan and Libya, respectively, for any acts or omissions arising out of military operations authorized by the Council itself.⁷⁵ In effect, the Council referred jurisdiction to the ICC over Sudanese and Libyan natives, but not certain intervening military forces — in the Libyan case, for example, the United States troops involved in the NATO intervention. The prejudicial dual standards are clear. While the technical legal capacity of the Security Council to do this has been challenged in commentary,⁷⁶ there has been no suggestion of the Security Council's wishes being challenged by the Court. Calls for the ICC to investigate alleged NATO war crimes in Libya,⁷⁷ 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 effectively defeated the LTTE, or 'Tamil Tigers', in 2009. There were up to 40,000 civilian casualties in the months leading up to the climax of the violence in May 2009.⁷⁸ 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 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, perhaps surprisingly, does not explicitly suggest recourse to the ICC.⁷⁹ 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 operationalizing the ICC'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 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 emphasized the 'legitimate right of the Government of Sri Lanka to combat terrorism.'⁸⁰ Questions of accountability and impunity have not been

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

76 See, for example, R. Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', 19 *LJIL* (2006) 195.

77 D. Bosco, 'Russia to ICC: investigate NATO', *Foreign Policy*, 18 May 2012.

78 *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, *supra* note 2, § 137.

79 *Ibid.*, Recommendation 1B.

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

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.’⁸¹ International human rights organisations⁸² and the Tamil diaspora⁸³ remain eager about the prospect of ‘delivering justice’ and ‘ending impunity’ in Sri Lanka,⁸⁴ but a Security Council referral to the ICC 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 Israeli military deliberately targeted civilians and destroyed civilian infrastructure during its Operation Cast Lead offensive against the Gaza Strip in 2008–2009.⁸⁵ The Report recommended that the Security Council refer the situation in Gaza to the Prosecutor of the ICC pursuant to Article 13(b) of the Rome Statute.⁸⁶ 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 referrals to the ICC.

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 ICC 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 2002.⁸⁷ 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 organized roundtables with NGOs and practitioners, pursued extensive and substantive engagement with the Palestinian legal team and instigated a dialogue with scholars and legal

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

82 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.

83 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.

84 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).

85 ‘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*, *supra* note 6, § 1883.

86 *Ibid.*, § 1969(e).

87 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.

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.⁸⁸ 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 under Article 12(3).⁸⁹ Palestine's statehood was subsequently recognized by the General Assembly later in 2012, giving cause to Palestinian civil society organizations 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.⁹⁰ 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 2015,⁹¹ 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, there are also legitimate grounds to suspect that even if the ICC were to investigate these situations, it may not work to the broader strategic advantage of the Tamil or Palestinian self-determination movements. The focus of international criminal justice on individual responsibility forecloses the field's ability to tackle the more structural implications of colonisation⁹² — from the fragmentation of indigenous communities and the line-drawing of unnatural boundaries⁹³ to the othering of racialized communities in public discourse. Between a narrow individual accountability mandate and a desire to go with the flow of global geopolitics, the institutions of international criminal justice have been unable or unwilling to offer antidotes to the symptoms of imperial relations, whether in Kosovo or Sierra Leone, Libya or Afghanistan.⁹⁴ But if it is indeed the case that the international criminal law project — like international law more generally — has reproduced colonial legacies more than it has challenged them,

88 See further M. Kearney and J. Reynolds, 'Palestine and the Politics of International Criminal Justice' in Schabas, et al., *supra* note 27, at 407.

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

90 F. Bensouda, 'The Truth about the ICC and Gaza', *The Guardian*, 29 August 2014, at <https://www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine> (visited 24 June 2016).

91 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.

92 Clarke, *supra* note 12.

93 O. Okafor, 'Re-Defining Legitimacy: International Law, Multilateral Institutions and the Problem of Socio-Cultural Fragmentation Within Established African States' (PhD Thesis, University of British Columbia, Faculty of Law, 1998); M. Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', 16 *Michigan Journal of International Law* (1994) 1113.

94 Clarke, *supra* note 12.

the fact that Tamils and Palestinians and a diversity of Third World peoples, social movements and rights activists continue to place hope in international criminal law beseeches us to consider its counter-hegemonic potential from a TWAIL perspective.

4. TWAILing International Criminal Justice?

The first formal Third World Approaches to International Law conference took place in 1997.⁹⁵ That same year, Mutua published what can be read as an early TWAIL appraisal of the ad hoc tribunals.⁹⁶ 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 crystallize 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 very quickly overtaken by developments in practice. Given the biases that have revealed themselves through that Court's design and operations in the intervening period, renewed and continued reflection on international criminal law from a TWAIL perspective is warranted. This includes questions for those social movements and civil society organizations in the global South that retain a faith in the emancipatory potential of criminal justice.

There is no single answer to the question of why self-determination movements of peoples 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 elements 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, armed struggle or political insurrection against the violence of the state or the occupier have failed, or a product of the limited avenues available to a self-determination cause some 50 years after the heyday of Third World national liberationism. For some of the more politically attuned legal interventions, the engagement of international criminal institutions is a purely tactical intervention, an instrumental move that feeds into a broader anti-imperial strategy; law as means rather than ends. Whereas in other senses the hope placed in international justice by activists in the global South has been underpinned by a bona fide commitment to the rule of (international) law, and a faith in its

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

96 Mutua, *supra* note 14.

unrealized potential. In such legal activism, there can be 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 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'.⁹⁷

This enforcement deficit argument is an incomplete view of law, however, and fails to fully capture the dichotomy between law's content and its form. For peoples in the global South, the hope of global justice has not been accompanied by the type of power needed to transform the aspirations of resource redistribution, racial equality or reparations into reality. Not enough space has been opened up in mainstream and even critical legal discourse to challenge the presupposition that there must be an international criminal law, despite its systemic biases.⁹⁸ 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. But for writers like Patricia Williams, there is a critical race element upon which critiques of concepts of 'law', 'rights' or 'justice' are contingent. Williams suggests that "[r]ights" 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 power and no power.⁹⁹ She notes the reliance on the law as a means to constructing one's identity and formulating 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 that is invariably coupled with impunity, deconstructionist critiques of international criminal law from the academies of the North (and rhetorical denunciations from the post-colonial elites of the South) may not speak to their social and political agendas. While TWAIL scholarship is still finding its collective voice when it comes to international criminal law specifically,¹⁰⁰ there is much we can draw from its broader engagement with the field of public international law, and its internal reflections and debates.

TWAIL is said to have retained a 'surprisingly reformist agenda'¹⁰¹ 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

97 M. Burgis-Kasthala, 'Over-Stating Palestine's UN Membership Bid? An Ethnographic Study on the Narratives of Statehood', 25 *EJIL* (2014) 677, at 691.

98 G. Baars, 'Making ICL History: On the Need to Move Beyond Pre-fab Critiques of ICL', in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014), at 196.

99 P. Williams, *The Alchemy of Race and Rights* (Virgo, 1993), at 164.

100 See, for example, the symposium introduced in J. Gathii, 'Introduction to Symposium on TWAIL Perspectives on ICL, IHL, and Intervention', 109 *AJIL Unbound* (2016) 252.

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

(against the ongoing impacts of colonial relations) and sword (in tactical pursuit of progressive or anti-imperial struggle). It can evoke, in this sense, Williams' magic wand of the oppressed and marginalized. There is also the sense that TWAIL's duality of engagement with international law — of both resistance and reconstruction — coalesce in such a way that there are possibilities to first provide the necessary break and rupture, and then to generate a praxis of (new, or different) universality.¹⁰² 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 in the everyday life of international law.¹⁰³ For Chimni, the reconstruction must take place across multiple layers, including the personal and the ethical.¹⁰⁴

Here then we must consider what radical engagement with the field of international criminal law — in a bid to transform, subvert or resist that field from a Third Worldist perspective — might look like. Can social movements have the impact on international criminal law that they have sought in other fields of international law?¹⁰⁵ Are international criminal tribunals sites where 'counter-systemic logics'¹⁰⁶ can be exploited and tactics of rupture¹⁰⁷ deployed in such a way as to instrumentalize law as part of broader socio-political struggles for emancipation from economic exploitation? Is there space 'to take advantage of the content of international law ... to mitigate the effects of its form?'¹⁰⁸ With such questions in mind we will attempt to conclude with some thoughts on what might be conceived of as Third World approaches to international criminal justice. Where Michelle Burgis-Kasthala offers a valuable exegesis of the TWAIL methodological moves that could enrich international criminal law as an academic field,¹⁰⁹ we seek to build on that by sharpening our focus on what 'TWAILING' international criminal justice might entail for the institutional and operational aspects of the field. We do so mindful of TWAIL's parallel engagement paradigms of both resistance and reconstruction, and identify three broad registers across which such engagement might be pursued (in concert or independently): redressing operational selectivities; reconceptualising material jurisdiction; and resisting more fundamentally the

102 *Ibid.*

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

104 B.S. Chimni, 'The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi's Hind Swaraj or Indian Home Rule', 23 *EJIL* (2012) 1159.

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

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

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

108 R. Knox, 'Marxism, International Law, and Political Strategy', 22 *LJIL* (2009) 413, at 436.

109 M. Burgis-Kasthala, 'Scholarship as Dialogue? ICL, TWAIL and the Politics of Methodology' in this symposium.

idea of individualized criminal liability as the dominant paradigm of transitional justice.

On the first (reconstructionist) register, rectifying two basic selectivities¹¹⁰ is paramount: the geographic or group-based selectivity of situations investigated by the ICC, and the operational selectivity of existing crimes prosecuted. From a TWAIL perspective, meaningful transformation when it comes to situation selectivity would, in simple terms, begin with the investigation of crimes committed by global North forces and their allies in the global South. This may in turn require a recalibration of the ICC's referral and deferral mechanisms, including the role of the Security Council at the design level. It also necessitates a greater consciousness on the part of international criminal law institutions of the ongoing geopolitical ramifications of imperialism, as well as a rupture of the civilising mission attitudes that continue to permeate those institutions (even if with a degree more subtlety than was the case in the rhetoric of Crane or Ocampo). This could herald a shift when it comes to choices over which situations to prioritize in the context of finite resources.

The operational questions of which crimes are then prosecuted in those situations can also be subjected to a reconstructionist approach. Although very much a continuation of the lineage of Eurocentric laws of armed conflict¹¹¹ and human rights law,¹¹² the content of international criminal law does offer certain norms that, when framed in the post-colonial context, can counter and criminalize contemporary colonial practices. For example, despite the ways in which 'the laws of war, from their inception, were subtly designed to exclude non-European peoples from their protection',¹¹³ 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 Article 7 of the Rome Statute. Article 8(2)(b)(viii) of the Statute also prohibits the settlement of occupied territory by an occupying power. As such, the very structure of 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

110 For a detailed typology and analysis of selectivity in international criminal law, see A. Kiyani, 'Group-based Selectivity and Local Repression: The Custom and Curse of Selectivity' in this symposium.

111 F. Mégret, 'From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'', in A. Orford (ed.), *International Law and Its Others* (Cambridge University Press, 2006) 265.

112 M. Mutua, 'Human Rights and Powerlessness: Pathologies of Choice and Substance', 56 *Buffalo Law Review* (2008) 1027.

113 Mégret, *supra* note 111, at 268.

population and endangered their separate existence as a race.’¹¹⁴ Although this exhibits a wilful blindness to colonisation by European powers outside the context of Nazism and the Second World War, it nonetheless has a relevance to the land policies and territorial expansions of the present. Such settler-colonialism is intrinsic to concerted and well-documented Israeli policy in the West Bank,¹¹⁵ and has the potential to be prosecuted were the ICC to seize itself fully of the situation in Palestine. This is certainly central to the thinking of Palestinian activists and officials, in their endeavour to assert a form of agency in the process.¹¹⁶ 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 international criminal law is to have a chance of proving any emancipatory potential, then, it might start with the prosecution of contemporary crimes of colonization. The exercise of jurisdiction over situations such as Palestine or Sri Lanka would give the ICC meaningful opportunities to do so.

Secondly, and perhaps more importantly, a TWAIL perspective would prescribe reconceptualization of the material conduct and structures that are criminalized in the first instance. While the existing population transfer crimes — were they to be prosecuted as crimes against humanity in the context of the colonial present — might at least begin to get at some of the land control and migration issues that go to the structural conditions underlying socio-economic inequality, where they are rooted in the Geneva Conventions they will remain limited to traditionally defined and bracketed settings of armed conflict and belligerent occupation. Any meaningful reconstructionist approach to international criminal law will need to go beyond the problems of unequal enforcement and operational selectivity to the essence of the actions and forms of violence criminalized at the design level. If international criminal law is to take seriously its claim to be part of a project of global justice, it must at some point begin to tackle the economic contexts of war, exploitation and scarcity: ‘to reconsider the boundaries of criminalization’ and question, for example, ‘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.’¹¹⁷ Instead, the ‘core crimes’ catalogue of genocide, crimes against humanity and war

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

115 See, for example, International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136.

116 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 agency is not allowed for. See K.J. Heller, ‘Unfortunately, the ICC Doesn’t Work the Way Palestine Wants It To’, *Opinio Juris*, 18 January 2015, available online at <http://opinio-juris.org/2015/01/18/palestine-really-no-idea-icc-works/> (visited 24 June 2016).

117 A. Kiyani, ‘International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion’, 47 *NYU Journal of International Law & Politics* (2015) 129, at 200.

crimes (plus aggression) remain rooted in a more restricted conceptualization of violence. These crimes cannot address many of the collective interests of global South peoples that are impacted by the structural violence of economic coercion, resource extraction, global wealth distribution and enforced impoverishment, nor in many instances the slow violence meted out by the toxic remnants of certain weaponry. Yet the definition of international crime is limited in such ways, arguably without clear normative foundation.¹¹⁸

So why is the victim of child soldier recruitment constructed as more deserving than the child victim of structural adjustment? Why is socially produced mass starvation or grotesque inequality less odious a scourge or more imaginable an atrocity than the crimes currently being prosecuted? The production of law in this way is not a neutral process but reflects choices and historical patterns in the development of international legal practice that have tended to relegate the significance of socio-economic inequality and marginalize global South voices and interests.¹¹⁹ This was evident over the course of the International Law Commission'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 apartheid¹²⁰) maintained their conservative opposition to the inclusion of crimes such as apartheid, colonial domination, foreign intervention and severe environmental damage.¹²¹ These interventions forced 'serious departures from the ILC's principled approach to developing a coherent normative understanding of the conduct that constituted the most serious international crimes' and produced instead a scenario reflective of 'Western interpretations of Nuremberg, on the basis that the status quo served their interests.'¹²² By the end of the process, as a result, 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, leaving the list 'both normatively discordant and pragmatically archaic.'¹²³

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

118 *Ibid.*, at 132–133.

119 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

120 For a full account of this, see J. Reynolds, 'Third World Approaches to International Law and the Ghosts of Apartheid', in D. Keane and Y. McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar, 2012), at 204–209.

121 See, for example, International Law Commission, 'Draft Code of Crimes Against the Peace and Security of Mankind: Comments and Observations Received from Governments', UN Doc. A/CN.4/448, 1 March 1993. As Kiyani notes: 'The United States, United Kingdom, and Netherlands were the strongest opponents, complaining not that the language of the provisions should be redrafted or refined in particular ways but that the new prohibitions should be completely removed.' Kiyani, *supra* note 117, at 148.

122 Kiyani, *supra* note 117, at 150.

123 *Ibid.*, at 203.

exploitation of natural resources.¹²⁴ While this might offer the beginnings of the direction that a more TWAIL-oriented system might take, it remains a judicial model that cannot avoid substantively mimicking the European template, much as post-colonial political formations failed to think beyond the European nation-state model. In this sense, TWAILing the field of international criminal justice with a purely reconstructionist agenda will remain profoundly difficult because of the inescapable historical baggage of rule-of-law civilizing missions, and the homogeneity of international legal language and forms.

The third register which must be engaged, therefore, is that of resistance in a deeper sense to the proliferation of the international criminal law project. Ultimately, international criminal accountability is not an emancipatory end in itself for marginalized peoples or self-determination struggles in the global South. Since ‘criminal prosecution can only grapple with the most basic aspects of colonialism and its residue’,¹²⁵ the prosecution of colonial crimes would merely be a tactical hook to be pursued as part of a broader anti-colonial strategy. In that sense, strategic options on the register of resistance to the field of international criminal law in its current guise must be considered in addition to the reconstructionist agenda sketched above.

This is in keeping with TWAIL interventions that seek to prioritize local remedies and domestic prosecutions,¹²⁶ as well as with the need to continuously think about whether non-criminal processes will often or ultimately offer a better path towards the objectives of deterrence, reparation, truth and reconciliation. It would also envisage a de-subjectification of the global South from Northern legal cultures and a delinking from vertical global governance structures. Here, a TWAIL approach to international criminal law can draw, for example, on the experience of Latin American states and transnational environmental and human rights movements in resisting the architecture of international investment law and beginning to build alternatives to the global North’s corporate-friendly international arbitration mechanisms.¹²⁷ Deference to the particular priorities, concerns, lived experiences and cultural histories of the South, especially as they relate to land and resources, can only engender more holistic and communal understandings of justice. Resistance from the periphery to the Hague’s hegemony as the centre of international justice would benefit from the evolving organic intellectual traditions of indigenous social movements, alter-globalization and decoloniality.¹²⁸ This can open space for the recognition and inclusion of non-Western epistemologies and legal cultures — on their own terms, and in contrast to Crane’s reductive stereotypes of Third World incivility — and prepare the ground for top-down

124 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.

125 Kiyani, *supra* note 117, at 162.

126 Anghie and Chimni, *supra* note 22; Xavier, *supra* note 84.

127 See, generally, M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015).

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

criminal processes to ultimately give way to anti-colonial sensibilities and indigenous notions of justice and restitution. Toward this end, continuing and deepening the exposure of international criminal justice to TWAIL perspectives is essential.

