

INTERNATIONAL CRIME  
AND THE POLITICS OF INTERNATIONAL CRIMINAL THEORY

by

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## Abstract

This dissertation responds to the dissonance between international criminal law's utopian visions and the challenges posed by its implementation. While holding great promise, international criminal law remains a novel and unstable discipline, contested as being under-theorized and/or deferential to political and economic power. These arguments attack the substance and structure of international criminal law, undermining claims as to its effectiveness and even sustainability.

In responding to these challenges, this dissertation uses postcolonial theory and Third World Approaches to International Law (TWAIL) to address central questions of criminal law theory. The goal of this dissertation is to develop a plausible normative framework for international criminal law. This normative framework will provide a platform for critiquing existing norms and practices, as well as the basis for alternative understandings of international criminal law, and potential responses to these problems that are normatively coherent and consistent with the goals of international criminal law.

This dissertation offers five inter-related conclusions. First, it demonstrates the utility of TWAIL as a methodological and theoretical frame for studying international criminal law. Second, it argues for a broader and more normatively consistent understanding of what constitutes an international crime. Third, it offers a justification for extraterritorial punishment that accounts for state sovereignty as an important interest. Fourth, it explains why the selective application of international criminal law undermines this justification, and how this might be remedied in both normative and practical terms. Fifth, it identifies the potential disruptions international criminal law poses to general public international law, and explains why these challenges may undermine the long-term goals and viability of the field.

## Preface

This dissertation is original, independent work by the author, Asad Ghaffar Kiyani. A version of Chapters 1 and 2 has been accepted for publication [Asad G Kiyani, “International Crime and the Politics of International Criminal Theory” (2015) 47 *New York University Journal of International Law & Politics* (*forthcoming*)]. A version of Chapter 5 has been published [Asad G Kiyani, “Al-Bashir & the Problem of Head of State Immunity” (2013) 12 *Chinese Journal of International Law* 467].

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## Dedication

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# **Introduction:** International Crime, Punishment, and the Third World

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## I. THE EXISTENTIAL DILEMMA OF INTERNATIONAL CRIMINAL LAW

This dissertation seeks to problematize international criminal law (ICL) as an object of scholarly study and as a tangible practice. My interest in ICL is rooted its promise and its instability. ICL pledges to reduce the prevalence of international crime, end impunity for those responsible for those crimes, and help societies transition from conflict and chaos to stability and security. Yet these idealistic visions have been confounded by a profound set of challenges – that ICL is under-theorized;<sup>1</sup> that it tries to do too much;<sup>2</sup> that, at its heart, it is actually profoundly illiberal.<sup>3</sup> These normative arguments aim squarely at the structure of ICL, and are supplemented by more particularized arguments attacking specific elements of ICL practice: the way the International Criminal Court (ICC) extends its jurisdiction to states that have not ratified its statute; the ongoing failures to prosecute corporate actors for their pervasive and contributing presence in and around atrocity-generating armed conflicts; the

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<sup>1</sup> Mark Drumbl, “A Hard Look at the Soft Theory of International Criminal Law,” in Leila Nadya Sadat and Michael P Scharf, eds, *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff Publishers, 2008) 7.

<sup>2</sup> Mirjan Damaška, “What is the Point of International Criminal Justice?” (2008) 83 Chicago-Kent LJ 329.

<sup>3</sup> Darryl Robinson, “The Identity Crisis of International Criminal Law” (2008) 21 Leiden J Int’l L 925.

myopic prosecutorial focus on individuals from weak states, especially Africa; the specter of the Security Council looming behind so much of ICL; the incoherence of sentences for international crimes; and the dubious quality of evidence used to support many convictions at international criminal tribunals. The challenges are wide-ranging and mundane, narrow and profound, hitting every aspect of ICL.

This is the fundamental predicament of ICL: that every action – every indictment, every investigation, every trial – threatens an existential challenge to the discipline itself. ICL’s continual transgressions of cognizable (albeit not impermeable) boundaries between international and local, individual and state, sovereignty and accountability, take on new impetus as ICL seeks to assign individual responsibility for acts and decisions that are both personal and structural.

Every aspect of the discipline is open to challenge. It is not just a question of whether an international criminal tribunal (ICT) follows the rules, but why *those* rules are to be enforced, why *that specific* ICT exists in the first place, who else it does or does not prosecute, and what states have an interest in the particular case being decided. Responding to these challenges requires looking beyond the problems of enforcement to a more comprehensive, contextualized understanding of international criminal law.

## II. AN INTERDISCIPLINARY APPROACH

This dissertation aims to offer just such an explanation, albeit without attempting to address every possible challenge, or every aspect of the criminal law. A basic theory of criminal law would explain (1) what conduct constitutes international crimes, (2) the moral justification for punishment, (3) why certain institutions are entitled to punish (4) what

individuals and entities should be held criminally liable, and, (5) the amount and type of punishment they should suffer.<sup>4</sup> Although there is simply not enough room to respond to them all, this dissertation takes seriously each of these challenges to ICL as both existential and episodic critiques of the field, as well as the defenses against them offered by practitioners, scholars and supporters of the international criminal justice project. Chapters One and Two are mainly concerned with the first and fourth points – the questions of what constitutes a crime, and what entities or actors should be held responsible. The remaining chapters focus on the second and third points - the justification for international punishment, and what institutions may enact punishment. This dissertation conceives of these issues as problems of bridging international criminal law: connecting international and domestic criminal law regimes, and exploring the relationship between sovereignty and the exercise of extraterritorial jurisdiction. They attract special attention here because they directly implicate questions about the broader relationship between states and international institutions, the balance of power in international relations, and lie at the core of existential challenges to ICL.<sup>5</sup>

As a step towards addressing these concerns, this dissertation offers a Third World Approach. It recognizes that certain issues have repeatedly presented themselves in ICL, that ICL has traditionally been directed at certain states and certain parties within those states,

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<sup>4</sup> Jeffrie Murphy, “Does Kant Have a Theory of Punishment?” (1987) 87 Columbia LR 509.

<sup>5</sup> Which should not imply the irrelevance of sentencing to the study of ICL, or to TWAIL analyses thereof. The actual punishment levied in the name of ICL is of course tremendously important, but is less concerned with the public international law issues raised by the first four points. At the same time, discussions around sentencing and punishment are instructive for considering the relationship between local and global penal practice and concepts of justice. See, e.g., Ralph Henham, “The Philosophical Foundations of International Sentencing” (2003) 1 JICJ 64 (that context is crucial to understanding the propriety of sentences), S Beresford, “Unshackling the Paper Tiger – The Sentencing Practices of the ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda” (2002) 1 Int’l Crim LR 33, and Mark Drumbl, “Punishment, Postgenocide: From Guilt to Shame to *Civis* in Rwanda” (2002) 75 NYU LR 1221.

and that it has often given effect to a limited set of interests. It also situates the advent of modern international criminal institutions and international criminal rules and norms in the post-Second World War, decolonization context. ICL is therefore not a silo apart from but a field that both influences and is influenced by developments in international relations and international law. As will be shown, many of the existential challenges levied against ICL reflect the dynamics of the evolving postcolonial international system, and any attempt to explain and redress these challenges must be embedded in this context. At the same time, the principles of criminal law theory cannot be ignored, as they themselves have become important sites of contestation.

This dissertation thus adopts the insights of postcolonial study and Third World Approaches to International Law (TWAIL), and fuses them with central questions of criminal law theory in an attempt to develop a plausible normative framework upon which to build ICL. It translates political or socio-legal concerns about ICL into vital aspects of a *critique* of ICL and as integral elements of a *theory* of ICL. In this understanding, ICL cannot be understood apart from the international context in which it has grown. The development of ICL rules and institutions took place in an international environment where states, both individually and as groups, were often acting with regard to their own self-interests or shaping the world in their own self-image, and so the history of public international law is as important as the history of ICL itself.

TWAIL is used for several reasons. First, as the ICC is currently only prosecuting situations in Africa, it seems appropriate to consider whether a theoretical approach that is driven by a particular view of the historical relationship between colonized and colonizing states, and a similar mistrust of international institutions, can provide any particular insight

into the norms and systems that underpin the exercise of international criminal jurisdiction. Second, the concerns outlined by the TWAIL critique put forth here seem to parallel or overlap with other scholarly criticisms of ICL. These other critiques address important aspects of the ICL system, without claiming a specifically TWAIL analysis, but instead relying on particular conceptions of fairness, justice, or the norms of the criminal law. Third, states and observers that argue against some or all aspects of the international criminal system often adopt arguments that coincide with a TWAIL analysis of ICL, regardless of whether the states themselves are considered part of the ‘Third World’ or not. Suspicions of the ability to pierce state sovereignty mirror concerns about less powerful states and peoples being dominated by more powerful states and supranational institutions. Those that mistrust the norms projected by ICTs reflect TWAIL concerns about the supposed universality of those norms (such as certain trial procedures, or even trials themselves) and their desirability in specific cultural and political contexts (where peace remains fragile, or where alternative response mechanisms might be appropriate). Where states make these critiques, it matters less if the individuals who make up the bureaucracies of these states are sincere in their complaints, for the fact remains that these criticisms have great political currency, and have been adopted by states and international organizations alike (especially in Africa). In this way, TWAIL addresses itself toward the concerns of postcolonial scholars, criminal law theorists, and a number of important actors involved in the ICL system.

A theory of international criminal law must therefore account for ICL as an interdisciplinary phenomenon. This dissertation attaches concerns about race, politics, geography and ethnicity to normative claims about international and criminal law, making connections that demonstrate the relevance of TWAIL and postcolonial theory to developing

a coherent theory of ICL. These alternate approaches thus act as methodological tools for deconstructing current theories and practices of ICL, as well as core principles for reconstituting the same. In this way, this dissertation remains a law dissertation. It seeks to connect legal theory to legal method so as to ask questions about the law of international crime. The deconstructive and reconstructive tasks it sets itself are always centred on the law, the coherence of legal norms and their theoretical foundations, the effects of putting those norms into practice. Echoing Ratner and Slaughter's introduction to international legal methods, this dissertation seeks to "establish what the law is, where it might be going, what it should be, why it is the way it is, where the scholar and practitioner fit in, how to construct law-based options for the future, and whether it even matters to ask those questions."<sup>6</sup> In this sense, this dissertation also provides a riposte to the Ratner and Slaughter. While the symposium on methods that they introduced initially excluded TWAIL, this dissertation demonstrates the salience and vitality of TWAIL as a theory and method of international law by engaging in the same pursuits they identified. Just as Oppenheim argued that American jurists were as influential in the study of international law as their European counterparts,<sup>7</sup> this dissertation shows how TWAIL can and does engage with interdisciplinary and traditional methods of studying international law.

The dissertation makes four important contributions to the literature. First, it identifies important problems in the current theory and practice of ICL, and explains how these concerns are not just complaints about realpolitik, but also attacks on the normative foundations of ICL. Second, and relatedly, it offers not only a TWAIL critique of ICL, but

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<sup>6</sup> Steven R Ratner & Anne-Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers" (1999) 93 AJIL 291, 292-293.

<sup>7</sup> Lassa Oppenheim, "The Science of International Law: Its Task and Method" (1908) 1 AJIL 313.

outlines the contours of a TWAIL theory of ICL. This cannot, for reasons of space, length and indeed complexity, be a complete understanding of every aspect of ICL, but it does confront important questions that are germane to TWAIL, postcolonial study, and criminal law theory: the interests that are protected by current definitions of international crime; the justifications offered for extraterritorial punishment; and the relationship between international criminal institutions, state sovereignty, and the consent-based international system. It is both a critical and a productive enterprise. Third, by engaging with criminal law theory in this manner, this dissertation offers a more methodical TWAIL analysis of ICL than currently exists. Previous efforts in the literature have been trenchant but discrete – identifying the virtues of hybrid tribunals;<sup>8</sup> problematizing assertions of international human rights as a universal panacea for suffering;<sup>9</sup> demonstrating the relevance of TWAIL critiques to international criminal law;<sup>10</sup> reconceiving *jus ad bellum* debates;<sup>11</sup> and, explaining how the trope of novel security threats legitimates imperialist actions<sup>12</sup> – and have yet to systematically confront ICL *qua* criminal law. Finally, it sets out possible future avenues of research for both ICL and TWAIL scholarship: on the theory of international crime; the conceptualization of sovereignty; and on the implications of positioning ICL institutions as institutions of global governance.

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<sup>8</sup> Balakrishnan Rajagopal, “The Pragmatics of Prosecuting the Khmer Rouge” (1998) 1 YB Int’l Hum L 189.

<sup>9</sup> Makau Wa Mutua, “The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa” (1995) 17 Mich JIL 339.

<sup>10</sup> Antony Anghie & Bhupinder Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2 Chinese JIL 77.

<sup>11</sup> Usha Natarajan, “A Third World Approach to Debating the Legality of the War in Iraq” (2007) 9 Int’l Community LR 405.

<sup>12</sup> Obiora Okafor, “Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall LJ 172.

### III. A THIRD WORLD APPROACH TO INTERNATIONAL CRIME AND PUNISHMENT?

In its most simplified form, this dissertation applies a TWAIL perspective to the problem of international crime and punishment. By engaging with, as opposed to abandoning, the international criminal law project, this dissertation adopts a moderated critical perspective. It deconstructs key tenets and practices of ICL, while at the same time pointing to plausible, coherent, and productive reformulations. It is a critical project, but not wholly so, and thus - in addition to its main argument - offers reflections not only on the discipline of ICL, but on TWAIL as a mode of critique and analysis.

In this respect, this dissertation is both indebted to but detached from most TWAIL studies, of international law in general and of ICL. Paradigmatic TWAIL scholarship has focused on economic inequality, and the conditions of self-determination in decolonized states. Though he never referred to himself as such, Bedjaoui's call for a New International Economic Order (NIEO) was arguably one of the first pieces of TWAIL scholarship.<sup>13</sup> Professors Abi-Saab and Sornarajah have themselves dissected the nature of the international community,<sup>14</sup> international arbitration and foreign investment laws,<sup>15</sup> and contemporary scholars such as Anghie have turned their attention to the work of the International Centre for Settlement of Investment Disputes (ICSID). Of course the Bretton-Woods institutions have been severely critiqued for their role in economic policy, and so too have the political and

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<sup>13</sup> Mohamed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979).

<sup>14</sup> Georges Abi-Saab, "Newly Independent States and the Rules of International Law- An Outline" (1962) 8 *Howard LJ* 95, and Georges Abi-Saab, "Whither the International Community?" (1998) 9 *EJIL* 248 (on the relationship between an international law of coexistence and laws of cooperation).

<sup>15</sup> M Sornarajah, "Power and Justice in Foreign Investment Arbitration" (1997) 14:3 *J. Int'l Arbitration* 103; M Sornarajah, *The International Law on Foreign Investment* (2d ed) (Cambridge: Cambridge University Press, 2004).

economic local elites that benefit from these international programs. Throughout TWAIL's emergence there has been a focus on the deprivation of the ordinary Third World person and peoples, and in particular how the political and economic exclusions they suffer are the product of deliberate lawmaking and policy efforts that privilege certain interests and actors at the expense of others. In this way, TWAIL has often overlapped with the wide spectrum of analyses on the political left.

In the context of a world in which material inequality still directly affects the lives of some of the most marginalized peoples of the world, a critical analysis of international criminal justice may seem somewhat out of step with a perspective that claims to prioritize the ordinary people whose lives are affected by international law. After all, traditional understandings of international crime — genocide, war crimes, crimes against humanity, and aggression — seem like exactly the sort of conduct one would want to respond to with international legal mechanisms. Humanitarian concern is as much a part of ICL as it is of TWAIL, and there is something counter-intuitive about the reticence with which this dissertation approaches ICL. Given the continued pervasiveness of international crimes, the growth in ICL — in its judicial institutions, its jurisprudence, its professional corps, its jurisdictional reach — should be welcomed.

Yet an instinctual desire for international criminal justice should not efface its relationships to other aspects of the international system. Compartmentalizing ICL as a set of legal responses to particular categories of crime detaches it from the context within which the field has developed, and been applied. Whatever benefits it may offer, international criminal law serves as an appropriate object of critical study precisely because it is a growth industry that is becoming normalized in discourse and application. As ICL becomes less an episodic

phenomenon administered by the victors of armed conflict, and more an independent means of regulating atrocities as they occur — often before a conflict is definitively won or lost — it becomes more important to confront how its institutions and norms shape the world for better or worse, and how ICL intersects with general international law and the system of international relations to produce the dark sides of its virtue.

ICL has a material impact on how the Third World is understood. The stories it tells — about what is an international crime, about how certain atrocities came to be, about who is responsible, to what degree, and for what acts — not only shape popular understandings of the world, but legitimize policies that react to these accounts. The cases prosecuted by the International Criminal Tribunal for Rwanda (ICTR) tell some part of the Rwandan genocide of 1994, but little of the preparatory acts that took place in the preceding years;<sup>16</sup> the revenge killings by Tutsis against Hutus after the Rwandan Patriotic Front’s invasion from Uganda;<sup>17</sup> and, of course, the profoundly disturbing choice of the international community, certain powerful states, and the United Nations to not intervene to stop the 1994 genocide.<sup>18</sup> Nor does it tell the story of colonial occupation, ethnic division of the country, and the traumas of

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<sup>16</sup> Helen M Hintjens, “Explaining the 1994 genocide in Rwanda” (1999) 37 *J Modern Afr Stud* 241, 247 (“The regime in power in the 1990s, along with its regional and international allies, was fully responsible for the genocide of 1994”); and, Linda Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide*, 2d ed (New York: Zed Books, 2009).

<sup>17</sup> *Report of the Secretary-General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of Congo*, UN Doc. S/1998/581 (29 June 1998) (describing the reprisals as crimes against humanity).

<sup>18</sup> As noted in Rwandan objections to the ICTR. UNSC Meeting Record, UN Doc S/PV.3453 (8 Nov. 1994), 13 – 15. See, generally *Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda*, UN Doc S/1999/1257 (16 Dec. 1999).

decolonization.<sup>19</sup> Similarly, through its cases, the International Criminal Tribunal for the former Yugoslavia (ICTY) can narrate atrocity, but it cannot tell the stories of post-Cold War structural adjustment programs and the associated breakdown of societal relations that dovetailed so neatly with stirring political forces.<sup>20</sup>

Trials are about more than just stories, of course. They can serve, and are often justified on the basis of, instrumental goals that they directly or indirectly pursue. International criminal trials are popularly seen as deterrent mechanisms, preventing future atrocity through their clear condemnations of certain conduct and punishment of offenders. This dissertation asks who is deterred, and how, when justice is so partial in what it chooses to criminalize, and who it chooses to prosecute. As international criminal justice so frequently focuses only on say African perpetrators of violence, it ignores their foreign enablers. That it so frequently focuses only on military leaders, it ignores the businessmen selling them weapons that will be used in atrocities, and the corporations whose exploitation of natural resources in conflict zones gives the military leaders the money to buy those foreign-made and foreign-sold arms in the first place.

Yet trials are often not even necessary to ICL. The NATO-led bombing campaign of Libya was enabled in part by its ability to describe the Libyan regime as a criminal one,<sup>21</sup>

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<sup>19</sup> Many authors identify what Mamdani describes as the ‘logic of colonialism’ in the central division between Hutu and Tutsi that was identified and then formalized by colonial powers, and which continued post-independence. Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism & the Genocide in Rwanda* (Oxford: James Currey, 2001), 34; Melvern, *supra* note 16, at 7 – 15; and, Hintjens, *supra* note 16, at 252–254 (noting that the shift to a cash crop-based colonial economy, as well as the ‘tidying up’ of complex webs of social relations, and the proxy conflict between Flemish and Walloons cemented a dichotomous Hutu-Tutsi divide where highly sophisticated interactions and identities had once ruled).

<sup>20</sup> See José Alvarez, “Rush to Closure: Lessons of the Tadić Judgment” (1998) 96 Mich LR 2031, 2054 – 2055, and Susan L Woodward, *Balkan Tragedy: Chaos and Dissolution After the Cold War* (Brookings Institution Press, 1995).

<sup>21</sup> Barack Obama, David Cameron and Nicolas Sarkozy, “Libya’s Pathway to Peace”, *New York Times* (14 Apr 2011) (noting that the ICC was “rightly investigating the crimes” committed by the Gaddafi regime).

whose leadership was quickly indicted by the ICC for war crimes and crimes against humanity. Western air warfare was vital in ensuring the military defeat of the Gaddafi regime; it was also crucial to the country's descent into a chaotic war between a multitude of armed factions, and the power vacuum that they and the notorious ISIS/ISIL are attempting to fill.<sup>22</sup>

International criminal law obscures as much as it illuminates; it passes judgment on people and actors involved in conflict, definitively declaring who and what are culpable for the suffering to which we bear witness. Thus to study ICL is to study the structural preoccupations of the international community, including the economic forces and agents that enable international crime. It is to study in granular detail the intense suffering that ICL often acts in deference to or even in service of, instead of ameliorating that suffering. It is to study our shared stories of the world, stories sanctified by law, and their impacts. Indeed, we study it because it is *law*, which justifiably or not retains a powerful grip on international imagination and discourse. International legal processes and declarations possess an immense authority, particularly in a world where the multiplicity of voices arguing for one position or another lacks the gravitas of international courts and international judgments. Law has power; legal institutions are loci of power; and legal norms its arbiters. And whenever TWAIL encounters power, no matter how benevolent it may seem, it does and should ask how this power is developed, applied, and instrumentalized.

In this light, many excellent TWAIL scholars remain suspicious of ICL's aims, its means, its universalist prescriptions, and of course its selective enforcement. After the

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<sup>22</sup> See Mieczystaw P Boduszyński and Duncan Pickard, "Libya Starts from Scratch" (2013) 24:4 J Democracy 86, 92 – 96; *Al-Qaeda in Libya: A Profile*, Report Prepared by the Federal Research Division, Library of Congress (Aug. 2012), 7 – 11; and, *To The Point*, "Libya's Power Vacuum Draws ISIS Closer to Europe" Radio broadcast (19 Feb 2015) KCRW Radio.

Second World War, one could make the case that at least some Western Europeans – those involved in the Axis crimes – had been prosecuted. Otherwise, critics say, international criminal courts and tribunals have by and large prosecuted individuals who make up the Other: people from the Balkans; Rwandan Hutus and Tutsis; Sudanese, Ugandans, Kenyans, Cambodians, Sierra Leoneans and Ivorians — these are the people who have been indicted and prosecuted by various ad hoc and permanent international criminal mechanisms. This preoccupation with peoples of the Global South is a clear warning sign for TWAIL scholars, who themselves are preoccupied with the position of those same peoples, and their states, in the international legal order. For TWAIL scholars, there is much that needs to be explained in light of this apparent preference for the non-Western criminal, which is the starting point from which many argue the poor fit between ICL and the people over whom it exercises jurisdiction. Continuities abound with TWAIL critiques with other aspects of public and private international law, including international human rights law, and these apparent similarities sow seeds of suspicion as to the utility of ICL, and the intentions of its framers and arbiters.

International law's defects are thereby identified by TWAIL scholars as filtering into ICL. Without disregarding or minimizing the relevance of these concerns, this dissertation takes a different perspective and considers the field of international criminal justice first and foremost as a problem of *criminal*, not international law. In other words, the primary focus of this dissertation is how the international law problems of ICL — its selectivity, its institutions and their agents, its legalist solutions — are understood through the lens of criminal law theory. It is, as suggested in the next chapter, a study more of the politics of criminal theory than the politics of enforcement. This is not to ignore those concerns about

enforcement, selectivity, and the individuals who animate international criminal justice; rather, it is to translate those concerns and reflect upon them using criminal law theory as a central mode of analysis. Thus, the question becomes not whether selectivity happens, or even *why* it happens, but how the practice of selectivity bears upon ICL as a field of *criminal* law. What does it say about our understanding of the relationship between ICL and the liberal criminal justice practices of the West upon which ICL is modelled? Can the criminal law accommodate such selectivity? Is it simply a question of North-South relations, or can we understand selectivity in different terms if we parse it first as a problem for criminal law? And, what are the implications for our understanding of ICL as the praxis of criminal law?

Practices of selectivity and other facts of the implementation of ICL remain relevant to this dissertation, but so too does the idea that ICL is first and foremost a question of criminal law. This emphasis results in part from the lack of attention paid to it so far by TWAIL scholars, but also from an intuitive understanding, grounded in my albeit brief practical experiences in the Canadian and international criminal systems, that the line between criminal law and other areas of law, or — to borrow the legal pluralist phrase — other modes of social ordering is quite blurred. Criminal law norms are as much expressions of public policy as tax reform, immigration rules, employment insurance, electoral reform, and universal health insurance schemes. Popularly accepted or not, the criminal law does not merely apply *in* society, but regulates and shapes it, through its enforcement, its norms, and the underlying processes of lawmaking. As much as any other public scheme, criminal law offers a vision of the society in which we live; to the extent that TWAIL is concerned with how the international community is built and structured, it must concern itself with the fundamental criminal law norms that are (problematically) enforced.

Importantly, this project also seeks to distinguish itself from a particular deconstructive strand in the emerging school of thought known as Critical Approaches to International Criminal Law (CAICL). ‘Critical’, of course, can mean anything, but in the context of CAICL it often means critiquing the orthodox conception of ICL as an imperfect but well-intentioned and benevolent system of law. An affinity between Critical Approaches and TWAIL is clear — both are suspicious of the claims of moral authority, moral outcomes, and objectivity that are often marched out in support of international criminal institutions. Where this dissertation differs is that it seeks a thicker attachment to ICL in two ways. First, there is a sense among some CAICL (and indeed TWAIL) scholars, regularly repeated at conferences and in private discussions, that the ICL project as it is currently constituted ought to be abandoned. The ICC in particular is singled out as a failure, but similar criticisms are made of the ICTY and ICTR. These institutions have failed to deliver justice to afflicted populations; they have remained selective; they have been instrumentalized in service of military operations; and, are thus irredeemably damaged. While there is validity to many of these critiques, and indeed many of them are adopted in this dissertation, it is not clear that these flaws do or should condemn ICL as a whole. In particular, the impulse to push ICL to the scrap heap — one that largely emanates from scholars or the military and political leaders vulnerable to ICL — overlooks the very real demands for justice that are being made by local, violence-afflicted communities. As is noted in Chapter Four, for example, the ICC has been very selective in its treatment of the Ugandan state’s conflict with the Lord’s Resistance Army (LRA) in the northern regions of Lango and Acholi. Though both sides have committed serious atrocities, the only persons indicted for crimes in that situation are LRA

leaders.<sup>23</sup> Yet when confronted with this obvious selectivity, the claim advanced by many Lango and Acholi is not that the ICC has lost its moral authority and should cease operations, but that the ICC should indict government political and military leaders as well.<sup>24</sup> In other words, the very people that TWAIL seeks to centre in its analysis, the individuals and groups its interests seeks to protect and affirm, are pushing for a result that often stands at odds with critical deconstructions of ICL.

As such, even though this dissertation levies important criticisms against the field, its institutions, and its agents, I do not seek to dismantle the structures of ICL. Yet none of this should be taken as saying it is victims whose demands should govern the actions of international criminal courts or tribunals, or that victims' rights and interests need to be prioritized, or that in making the arguments that follow I represent any particular constituency. Rather, it is to say that abandoning ICL at this stage is to disregard the potential for its reform that is sought by so many who might benefit from it, and it is incumbent on scholars that claim a TWAIL ethos to consider whether and how ICL can be salvaged. It may be that ICL is incapable of meeting the needs or expectations of the populations it seeks to protect, and it may be that its institutions do more harm than good. Nonetheless, this dissertation asks whether a TWAIL perspective can offer meaningful reform – without assuming that ICL or its institutions are essential or inherently benevolent.

The second sense in which I pursue a thicker attachment to ICL is again through the emphasis on criminal law theory, as opposed to public international law studies or the

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<sup>23</sup> As detailed in Chapter 4.

<sup>24</sup> Suggestions by the Acholi Religious and Cultural Leaders in Response to the Request by the International Criminal Court' (Statement, Gulu, 12 November 2004), reprinted in Tim Allen, *Trial Justice: The International Criminal Court and Lord's Resistance Army* (New York: Zed Books, 2006) at 86–7.

intriguing socio-legal analyses increasingly applied to ICL. There is great merit in those approaches, which expose the shortcomings of the discipline and cause us to reconsider our understanding of particular aspects of ICL. Yet if the aim is to sketch out possible reforms or alternative legal norms and structures, then there must be a more sustained engagement with its doctrinal and theoretical aspects. As was recently expressed to me by two South Asian TWAIL scholars, there is a need for “less poetry” and “more law” if actual change is to take place. To parse this concern in slightly different terms, there is a danger that the radical critiques only preach to the choir, without engaging the lawyers and policy makers who shape the actual structures being critiqued. Hence this dissertation addresses the criminal law of international courts and tribunals on its own terms in order to explain why ICL should be reformed in ways that substantially affirm the liberal principles that ground it, instead of merely gilding international courts in the hues of equality and fairness.

In a recent address to an international gathering of TWAIL scholars, Abi-Saab declared TWAIL’s separateness from Critical Legal Studies, saying that while he shares much of the CLS critique, he offers a key difference: “I am for constructive criticism.”<sup>25</sup> Thus TWAIL scholars have a responsibility to deconstruct the law, showing that the rules that look objective and natural in fact reflect particular interests and particular values; they also have an obligation to *reconstruct* the law, by proposing roadmaps and blueprints of alternatives. There are many alternatives and complements to international criminal justice already; truth commissions, reparations, amnesties, local trials and others. This dissertation

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<sup>25</sup> Georges Abi-Saab, *The Third World Intellectual in Praxis: Confrontation, Participation or Operation Behind Enemy Lines*, Closing Keynote - TWAIL Cairo Conference, American University in Cairo (24 February 2015).

seeks the alternatives that lie *within* ICL, and attempts to draw them out by examining ICL as both a problem of international law *and* as a problem of criminal law.

#### IV. STRUCTURE OF THE DISSERTATION

The emphasis on criminal law helps explain why this dissertation is titled “International Crime and the Politics of Criminal Theory”, as opposed to “A Third World Approach to International Criminal Law.” The difference is small but important. Whereas the latter can be problematized as a species of international law, the former emphasizes the criminal law concepts at the core of the ICL project. It also helps explain some of the exclusions in this dissertation.

This project examines ideas of crime in international law; the justifications offered in defense of the harms inflicted by criminal punishment; the relationship between the goals of ICL and the protective shield of state sovereignty. Other vital topics are not considered, except to the extent that they contribute to our understanding of the other issues. For example, vexing questions of attribution — the proper scope of extended liability theories such as joint criminal enterprise, or how corporate criminal responsibility should be formulated in international law — are not considered here. Rather, the emphasis is on a global analysis of the intersections of international law and criminal law in areas that dovetail well with TWAIL analyses of ICL, and that are in some ways fundamental to the establishment of any regime of ICL, whether it involves extended liability doctrines or corporate criminal responsibility or not. In a sense, it is an examination of some of the ‘first principles’ of international criminal justice, an analysis of the basic concepts that shape or explain ICL’s operation. Some will say it could go deeper by, for example, questioning the

very concept of the state and the role it plays in say the ICC's jurisdictional scheme. And there is merit to this question, but the concern is first that critiques of the state and statehood have been made by a number of important and more appropriately skilled scholars, and second that overemphasis on deconstructing the state distracts from how international criminal justice operates in the here and now, in a statist system. Too much attention to the concept of the state risks detaching this analysis from the ongoing reality of ICL that, for at least the foreseeable future, will have to grapple with the state in all its imperfect complexity. Without diminishing the importance of related questions such as liability theory and statehood, this dissertation pares down the range of topics to those it sees as vital and fundamental intersections between international and criminal law.

The first two chapters are devoted to the concept of international crime, and explaining how TWAIL offers more than just a political perspective, but is also compatible with analyses of the criminal law *qua* criminal law. These two chapters – and indeed the dissertation – take the crime of apartheid as their starting point in order to illuminate the contradictions of the field, the modes in which TWAIL might engage with the discipline, and the emancipatory potential of ICL. Apartheid is an illustrative entry point for symbolic and analytic reasons. The near-universal condemnation of apartheid coalesced into a norm prohibiting the practice, and this process played out at the same time as decolonization and as postcolonial states found their voice and began to assert themselves on the international stage. That apartheid was eventually recognized as an international crime seems the logical outcome of a decades-long process that challenged and resisted this colonial relic. Indeed, apartheid is unique in that – unlike other international crimes, which have largely manifested

throughout the world, and between Western and European states and peoples<sup>26</sup> – it arose and was practiced in a specific colonial context. Yet this transition from international outrage to legal prohibition has presented an apparent discrepancy whereby states and scholars alike have resisted the criminalization of apartheid. Symbolically, then, apartheid in international law has powerful resonance for TWAIL scholarship.

Analytically, this examination of apartheid raises four central ideas that persist throughout the dissertation. First, in whose interests are the norms and rules of ICL shaped, and what actors, ideas, and power relationships are protected or challenged by ICL? Second, it asks which sources and epistemologies are privileged in the making of international law, and how the purported neutrality and objectivity of the law obscure both the interests and identities that shape the law. Third, it answers the question of why TWAIL theorists ought to study criminal theory and not just practices of enforcement. Asking why, for example, ICTs only prosecute war crimes practiced by Africans and not Europeans overlooks the prior questions of what is seen as an international crime in the first place, and how. Moreover, it pushes TWAIL scholars to think about the normative challenges that arise from greater criminalization. Finally, the criminalization of apartheid suggests that for all its problems and the approbation heaped upon it, ICL can fit with TWAIL and offer some recourse for marginalized peoples. In other words, the ICL project is one that perhaps should be reshaped rather than abandoned. In this sense, the discussion of apartheid is a microcosm of and launching point for the analyses of sovereignty, punishment, jurisdictional claims, and international institutions that follow.

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<sup>26</sup> Even if one argues that apartheid is or was a feature of indigenous-European settler-colonial relations in North America or Oceania, it was not practiced against Europeans.

I therefore start in Chapter 1 with an entry in the *Oxford Companion to International Criminal Justice*, which describes the criminalization of apartheid in the *Rome Statute*<sup>27</sup> as a political compromise in favour of Third World states, and not the product of legal reasoning. This description of the *Rome Statute*, which presupposes that it was otherwise free from political influence, is deconstructed in detail. After outlining a brief history and the basic principles of TWAAIL, I begin to unpack this claim of scientific lawmaking and measure it against the recent history of defining crimes in ICL. By examining the important work of the International Law Commission as a site for contesting the idea that only certain crimes — of genocide, crimes against humanity, war crimes, and aggression — are worthy of being considered ‘international’ crimes, I show how the political influence/legal engineering narrative is in fact inverted. During the work of the ILC, it was less powerful states that sought a normative definition of international crime, and primarily Western states that resisted initiatives to expand the definition of international crimes. Whereas representatives from weaker states sought a coherent understanding of international crime, powerful states preferred the limited jurisdiction of the status quo, which itself had no clear normative connection. In this way, I point to a central deficiency in ICL from a TWAAIL perspective — it has resisted efforts to systematize understandings of international crime, in large part because doing so would not fit the interests of more powerful states.

Whereas the first chapter delves deeply into the history and definition of apartheid as an international crime, offering a largely critical analysis of the criminalization debate and explaining how the debate turns in part on one’s understanding of how the world is

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<sup>27</sup> *Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

‘postcolonial’, the second chapter starts from apartheid and looks forward. Here, the argument is that apartheid is something of an anomaly in the *Rome Statute* because it criminalizes not just the kinetic violence commonly associated with atrocity crimes, but also legal and social policies that do not demand such bodily harm. Thus the crime of apartheid can address a number of different forms of *structural* violence. I trace the narrow understanding of international crime introduced in Chapter 1 and further identified in Chapter 2, to the history of international human rights law and its translation into a central organizing principle of ICL. Then, I show how this impoverished sense of violence, where there is almost no attention paid to non-kinetic structural violence, does not fit with sociological and criminological understandings of international crime. In particular, it ignores the economic context of international crime — a context that predicts, incentivizes, and sustains international crime. To the extent ICL shares the interest of ordinary people in the suppression and prevention of international crime, it must consider this economic context in greater detail. I conclude by offering a new perspective for approaching ICL, one that fuses the concern for ICL’s coherence as a body of criminal law with TWAIL’s interest in how the discipline functions as part of international law, and its effects on Third World peoples.

In the third chapter, I shift focus from international crime to international punishment, and the question of what justifies international courts intruding upon the otherwise sovereign jurisdiction of national authorities to adjudicate criminal law matters. Building upon the previous chapters’ concern with the *interests* in criminalizing certain conduct (such as apartheid, or pillage of natural resources), I adopt the interest-based theory of punishment. That theory, as outlined by Chehtman, grounds punishment not in desert or utilitarian terms such as deterrence, but in its ability to give effect to the dignity and security of individual

persons and to groups. Unlike traditional justifications such as retribution, deterrence and expressivism, this interest-based theory allows for the recognition of state sovereignty as an interest worth preserving. This interest is shared by weak and powerful states alike, in that it provides a normative explanation from the point of view of criminal law as to why not *every* crime justifies extraterritorial jurisdiction, and as to why complementarity between national, hybrid, regional and international criminal courts is defensible.

Chapter Four continues examining the normative justification of punishment by studying actual punishment practices and directly addressing problems of enforcement. Having established how criminalization recognizes or protects certain interests and not others, and offered an interest-based justification of international punishment that accounts for the special interest that postcolonial states have in preserving their sovereignty, this chapter asks whether the preceding emphasis on interests presents a critical analysis, or whether the malleability of the idea of interests can, as German criminal theorists have warned, ratify illiberal excesses in international law. I argue that thinking about interests allows us to explain why certain contemporary practices are *not* justified. In doing so, I rehabilitate the common complaint of ‘selectivity’ from being condemned as merely a complaint about politics, by developing a typology of different types of selectivity in order to explaining how certain selectivity practices affect the justification of punishment. Detailing the selectivity practices in a number of situations studied by the ICC, including in Uganda, Central African Republic, Côte d’Ivoire, and Libya, I show that even when multiple parties to a conflict engage in substantially similar conduct, one or more of these parties are often not prosecuted for those crimes. This practice of *group-based selectivity* undermines not only the interest-based justification of punishment, but the other traditional justifications —

retribution, deterrence, and expressionism — as well. Unlike selectivity in domestic jurisdictions, which is often marshalled as a defence of international selectivity, group-based selectivity often seems to turn on the group-affiliation of the accused as much the alleged conduct. Moreover, group-based selectivity is doubly problematic from a TWAIL perspective because it does not engage with TWAIL’s problematization of the postcolonial state itself. Instead, group-based selectivity often demands, as in the cases reviewed, that international criminal justice align itself with local power structures that are engaged not only in spectacular atrocities, but more sustained low-level structural violence against the general population. Thus ICL may not only fail to address certain crimes through its selectivity, but actually concretize the criminal conduct it otherwise condemns. Instead of piercing the veil of sovereignty in order to resist the state’s excesses, ICL thus becomes a means for reifying the repressive and even criminal conduct of the postcolonial state.

Whereas the preceding chapters argue for a more expansive approach to international criminal law, in Chapter Five, I change course. Having previously established a general explanation of extraterritorial punishment, this chapter explains the criteria — the ‘preconditions’ — a *specific* tribunal must meet before exercising that power. Many of these preconditions have been hinted at previously; this chapter makes them explicit. It identifies three main categories of preconditions: those related to the technical *capacity* of the tribunals to apply ICL; those related to the ability of ICTs to provide fair trials that are intelligible to the accused, other participants in the trial, and affected communities and observers; and the question of *standing* — the relationship between the tribunal and the situation or populations to be judged. In the second part of the chapter, I build on this question of standing through a detailed case analysis of the ICC. This part examines the Security Council’s referrals of

Sudan and Libya to the ICC, and the subsequent indictments of Omar al-Bashir and Muammar Gaddafi – the two countries’ heads of State. Controversy has dogged these referrals because they ostensibly violate basic principles of international law about immunities and treaties, and because they appear to target weaker states. Scholars cannot agree on the correct legal analysis for these cases. This chapter attempts to resolve the controversy by arguing neither the referrals nor the indictments of heads of State are legally permissible. Importantly, this chapter also offers a reflection on TWAIL and the merits of using formalism and positivist analyses of international law as ways of ‘doing’ TWAIL.

In this way, the focus expands beyond the case at hand to draw together themes raised in the preceding chapters. It analyzes how ICL can – intentionally or otherwise – not only give effect to the specific political interests of certain states, but also reify inter-state hierarchies within ICL. It also discusses how this position alters fundamental norms of public international law, and thus how ICL can thereby act as a non-consensual mode of international lawmaking of the sort postcolonial states have long been wary. This chapter also refers to earlier analysis by considering how the debates about immunity often tarnish certain legal arguments as merely political. Finally, the chapter also examines the danger that the Court’s adoption of legally questionable claims in order to expand its jurisdiction may actually reduce the protection it can offer to ordinary citizens by giving oppressive state elites a legal basis for obstructing or not cooperating with the Court. The doctrinal and positivist analysis of international law undertaken here connects with criminal law theory through the question of preconditions and legal standing to punish. It interfaces with TWAIL by arguing that instead of giving effect to the liberal promise of ICL, arguments in favour of the referrals and indictments paradoxically represent a return to the power imbalances of international

law's past. The concern is that these inequities are given legal imprimatur and thus stripped of their apparent partiality through the decision-making of international criminal courts. This restatement of international law by international courts risks turning those judicial bodies into familiar problematic institutions of global governance, that both reify and import the hierarchy of general international law into ICL.

The dissertation concludes by returning to the question of this project's relationship to TWAIL principles, and particularly the implications of its analysis. The critique offered, and the reforms it implies, are wide-ranging in scope and thus can be challenged on several grounds: feasibility, partiality, and the toleration of increased state-sanctioned violence. The conclusion offers a response to those concerns, and considers the viability of international criminal trials as means for delivering justice, and the possibility of an international criminal law that is simultaneously effective, promotes the values of liberal criminal justice, and is normatively consistent.

# Chapter 1: International Crime and the Politics of International Criminal Theory

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Perhaps international criminal law serves a purpose simultaneously both to reason and to mystify the political control exercised by those to whom it is available in the current ‘international community’. Perhaps its task to naturalize, to exclude from the political battle, certain phenomena which are in fact the pre-conditions for the maintenance of the existing governance....By the decisions that are made by states to include some acts within the jurisdiction of new institutions to try individuals, some other acts and responsibilities are excluded.

Immi Tallgren<sup>1</sup>

## I. INTRODUCTION

Of all the ink that has been spilt in the name of international criminal law (ICL) in recent years, none illustrates the uncertainties and contradictions of the discipline as profoundly as the characterization of apartheid in the *Oxford Companion to International Criminal Justice* as a “so-called crime”, the product of “politics rather than legal

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<sup>1</sup> Immi Tallgren, “The Sensibility and Sense of ICL” (2002) 13 EJIL 561 at 594-595.

engineering”.<sup>2</sup> Others have echoed these concerns, saying the norm represents the triumph of international guilt over “reason”.<sup>3</sup> Its inclusion is “symbolic”,<sup>4</sup> “the use of the law as affirmation, exclamation, or denunciation”,<sup>5</sup> the product of political “brokering” and “lobbying”.<sup>6</sup> If ever there were cause to argue that ICL does not offer a meaningful avenue to global justice, this would seem to be it. Here, apartheid’s singular horrors apparently do not qualify as an international crime and are instead reduced to a special interest of the Third World.<sup>7</sup> Apartheid’s status as a crime is an international handout, an intrusion of pork-barrel politics into the sterile objectivity of international law making.

At the same time, this comment accurately describes the manifold problems embedded in the theory and praxis of ICL: problems of judicial practice, legal interpretation, historiography, sources of law and legal development, and political contestation that transform even self-evident outcomes into unpredictable contingencies. Hence, while apartheid is largely seen as a *moral* wrong, it is unclear whether it is a *criminal* wrong; as

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<sup>2</sup> Alexander Zahar, “Apartheid as an International Crime”, in Antonio Cassese, ed, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 245 at 245–46.

<sup>3</sup> McCormack, otherwise sympathetic to the notion of apartheid as an international crime, nevertheless describes its inclusion in the *Rome Statute* as follows: “[R]eason has never been the sole determinant of multilateral treaty negotiation outcomes.” Timothy LH McCormack, “Crimes Against Humanity” in Dominic McGoldrick, Peter Rowe & Eric Donnelly, eds, *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing, 2004) 179 at 198–99.

<sup>4</sup> Florian Jessberger & Gerhard Werle, *Principles of International Criminal Law*, 3d ed (The Hague: TMC Asser Press, 2014) at 383.

<sup>5</sup> Roger S Clark, “History of Efforts to Codify Crimes Against Humanity”, in Leila Nadya Sadat, ed, *Forging a Convention for Crimes Against Humanity* (Cambridge: Cambridge University Press, 2011) 8 at 25.

<sup>6</sup> Ariel Bultz, “Redefining Apartheid in International Criminal Law” (2013) 24 *Crim L Forum* 205 at 220 – 221.

<sup>7</sup> See also John Dugard & John Reynolds, “Apartheid, International Law, and the Occupied Palestinian Territory” (2013) 24 *EJIL* 867 at 883–84 (the implication behind “politics” rather than “legal engineering” is that “apartheid was retained in the *Rome Statute* merely as a token measure to placate the nations of the global South, for whom apartheid had been an important rallying call around which to make their presence felt in the international legal system following emancipation from European colonial rule.”).

counter-intuitive as it seems, in both theory and practice there is reason to believe apartheid may *not* be an international crime.<sup>8</sup>

That apartheid retains this hazy legal status even decades after its abuses were understood<sup>9</sup> reflects general uncertainties in the broader catalogue of international crimes. The boundaries of that list, currently confined to the four core crimes (war crimes, crimes against humanity, aggression and genocide), rest on unclear normative foundations. No clear basis has yet been articulated for restricting the definition of international crime in this way, and the lack of normative connectivity has translated into definitional ambiguities of the sort encapsulated by the indeterminacy of apartheid.

Rather than define the limits of ICL's material jurisdiction, this chapter problematizes this gap: the claim that on the one hand, apartheid's technical status as an international crime is uncertain, and on the other that if it is a crime, this is the product of a politicized and not a legalist process. It extends postcolonial theory and Third World Approaches to International Law (TWAAIL) into the realm of criminal law theory, inquiring after the mechanisms and norms that define international crimes. Analyzing the history of apartheid's criminalization shows that in fact it was the global South that pushed for greater 'legal engineering' when it came to defining international crimes, and largely Western states who resisted. Thus the

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<sup>8</sup> Paul Eden, "The Role of the *Rome Statute* in the Criminalization of Apartheid" (2014) 12 JICJ 171 (arguing that apartheid did not become a crime under customary international law until the coming into effect of the *Rome Statute*). See also Bultz, *supra* note 6 (arguing that even under the *Rome Statute*, apartheid requires either a narrower *actus reus* or a heightened *mens rea* to be considered a distinct offence in ICL).

<sup>9</sup> See *International Convention on the Suppression and Punishment of the Crime of Apartheid*, GA Res 3068 (XXVIII), Nov. 30, 1973, 28 UN GAOR Supp. No. 30 at 75, 1015 UNTS 243 [*Apartheid Convention*]. Article II of the Convention listed six prohibited practices, summarized as follows: denial of the right to life and liberty of person based on one's racial group; deliberate imposition on a racial group of living conditions calculated to cause its physical destruction; any legislative measures and other measures calculated to prevent a racial group from participation in the political, social, economic and cultural life of the country; dividing the population along racial lines (including through ghettos and prohibition of mixing); labour exploitation of racial groups; persecution of persons because they oppose apartheid.

analysis of apartheid performs two functions. First, it extends to the conception of international crime in more general terms, and argues that if ICL is to make good on its promise of delivering international justice, then we must re-evaluate the modes by which international crimes are defined. As it stands, the relatively impoverished understanding of crime and violence dulls the effectiveness and the normative coherence of ICL. Second, it argues that the narrative of apartheid's criminalization misleadingly and inaccurately casts aspersions on the epistemological contributions and perspectives of the non-West by characterizing the process as a politicized one.

Analyzing the incongruity of apartheid – near universal condemnation coupled with resistance to its criminalization – lays the groundwork for this chapter and this dissertation in four ways. First, while one might expect there to be disagreement about the outer limits of international criminalization, the fact that resistance and contestation can be located at the core of international crime - in respect of conduct that is the subject of near-universal condemnation - suggests that the norms and rules of ICL are less the product of either natural law or rational, quasi-scientific analysis than they are made out to be. It raises the question of whose knowledge is privileged in and validated by the making of international law, a question that connects deeply with postcolonial theory. Second, while crime threatens individual and collective interests, so too does criminalization affect the interests of those who perpetrate crime, a problem that comes into sharp relief in international law where the perpetrators are frequently also the shapers of law. Apartheid by definition is a crime that implicates states as perpetrators, and thus apartheid is a site where interests clearly collide. It challenges scholars to think more explicitly about what interests are recognized in ICL and public international law – whether they be interests in criminalizing certain conduct, in

preserving sovereignty, in empowering international institutions, or living in peace and security. Third, if TWAIL is to advocate for meaningful reform in ICL, it must engage with the theory of criminal law. It is easy to point at unequal enforcement, but the point made throughout this dissertation, starting with the crime of apartheid, is that TWAIL concerns are salient irrespective of ICL's enforcement. To simply focus on why the ICC is Afrocentric in its prosecution of war crimes misses the prior question of what crimes the ICC should be prosecuting in the first place, and how those norms were developed and justified. It matters, for example, that certain conduct is criminalized, and certain conduct is not, but simply explaining that certain states objected out of self-interest does not account for scholarly and philosophical defences of those states' positions. These questions of criminalization are contested on the plains of normative theory, and a TWAIL response must engage with these philosophical questions. Fourth, while the debate about apartheid might signal an indifference to the interests of the marginalized and dispossessed, the fact of apartheid's criminalization points to the anti-colonial possibilities of ICL. As I argue in the next chapter, its criminalization has the potential to recognize a broader range of interests than almost any other international crime, and thus highlights the embedded possibilities and alternative, emancipatory paths that ICL might take – or that TWAIL scholars might push for. The apartheid discussion encapsulates central debates and arguments that are reflected throughout this dissertation, setting the stage for further discussions of punishment, jurisdiction, sovereignty, and global governance.

This chapter draws on these ideas to offer three specific interrelated contributions to the literature in both TWAIL and ICL. First, I deconstruct the claim that TWAIL concerns about the scope and definition of international crimes are somehow partial or specific, and

not more widely relevant. Rebutting the dichotomy of politics versus ‘legal engineering’ and ‘reason’, I address the valorization of law making as a quasi-scientific intellectual practice. The recent history of international criminalization efforts show that international law’s pretensions to universality often require devaluing the experiences of the most marginalized subjects of international law. If “all empires require ideas” and “are built, furthered, [and] justified by advisers and scholars”,<sup>10</sup> then the claim that certain forms of knowledge are rational while others are merely self-interested edifies ICL’s orthodoxy at the expense of its effectiveness and coherence.

Second, by approaching ICL through criminal law theory, this chapter pushes TWAIL beyond its traditional focus on international law and the politics of unequal enforcement. Instead, I apply TWAIL insights to the development of the criminal law norms that ICL enforces, and the philosophical discourse around them. This cross-pollination remains scarce in much of the literature, which sees ICL primarily as a creature of public international law, and focuses on institutional settings, interpretations of international law and statist interactions.<sup>11</sup> In their important contribution to TWAIL/ICL studies, Anghie and Chimni warn of the role of states in “the political dimension of international rule making, interpretation and application”.<sup>12</sup> That concern runs throughout this dissertation, but I also

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<sup>10</sup> Antony Anghie, “On critique and the other”, in Anne Orford, ed, *International Law and its Others* (Cambridge: Cambridge University Press, 2006) 389 at 399.

<sup>11</sup> See, e.g., Sujith Xavier, “Theorising Governance Inside Out: A Response to Professor Lateur” (2013) 3 *Transnat’l Leg Theory* 268 (on regulatory capture of international criminal tribunals); Usha Natarajan, “A Third World Approach to Debating the Legality of the Iraq War” (2007) 9 *Int’l Comm. L. Rev.* 405 (on the influences of international law on the 2003 invasion of Iraq and vice-versa); and, Obiora Chinedu Okafor & Uchechukwu Ngwaba, “The International Criminal Court as a ‘Transitional Justice’ Mechanism in Africa: Some Critical Reflections” (2014) *Int’l J Transitional Just* (DOI 10.1093/ijtj/iju025) (on the misleading conceptualization of the role of the ICC in Africa in monolithic terms).

<sup>12</sup> Antony Anghie & B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflict” (2003) 2 *Chinese J. Int’l L.* 77 at 98.

emphasize the need to examine how this state-based politicization filters down to the supposedly neutral field of criminal law philosophy. Thus, I argue that TWAIL scholars must engage further with the field of criminal law theory, whose apparently objective normative enquiry can unintentionally legitimate parochial understandings of international crime. In this light, the question of unequal enforcement is almost secondary to the ingrained partisanship of the criminal law to be enforced.

Finally, having pointed to difference and divergence, I also seek to restrain TWAIL's critical impulse from radical deconstruction and the relentless criticism that concretizes those differences as unbridgeable chasms. To the extent that TWAIL theorists and scholars of ICL demonstrate a shared affinity for the project of international criminal justice, a greater mutual recognition and interaction is needed. TWAIL and criminal theorists ask important questions of one another, pointing out the subtle wrinkles and folds that hamper the development of a more meaningful, inclusive international criminal justice. If ICL is ever to be truly responsive to its liberal, humanitarian ethos, it must reconcile the important questions posed by these two approaches to the law. Thus I emphasize the need to destabilize what appears to be the anachronistic reassertion of "a curiously secure intellectual order" that compartmentalizes scholars to particular epistemological traditions,<sup>13</sup> instead of encouraging the traversing of self-limiting disciplinary boundaries. Throughout, I point at the nodes of commonality on which collaborative reform and normative development can be based.

In developing these points, the chapter adopts the following structure. The first substantive section outlines key tenets of TWAIL that guide subsequent analysis. The next part contextualizes the 'politics or legal engineering' debate by focusing on the historical

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<sup>13</sup> Anghie, *supra* note 10 at 397.

process by which apartheid was eventually recognized as an international crime. The International Law Commission's (ILC) pioneering work on the Draft Code of Crimes illustrates that politics did contaminate the "legal engineering" of the process, but that it was largely Western political resistance that arrayed itself against the normative task to which the ILC applied itself. In other words, the task of legal engineering was undermined by Western states, not developing ones. I also challenge the notion that the eventual adoption of apartheid as a crime in the *Rome Statute* was purely political, showing again that there was important debate about apartheid's normative contours. Through this historical analysis, I illustrate the falsity of the 'legal engineering' proposition, and demonstrate how its implied devaluation of Third World perspectives — as politicized, subjective or antiquated — demonstrates important continuities with the past.

## II. THE POLITICS OF APARTHEID

The curious suggestion that something codified in law – the prohibition of apartheid – is not in fact a legal norm can apparently be explained by recognizing that its codification is the outcome of politics, and not legal engineering. Three questions thus become central to understanding apartheid's chimerical form: whose politics — or, alternatively, whose legal engineering — drove such a result? What are the implications of describing certain ideas as either this legal engineering or the exertion of political influence? And is legal engineering, which claims an apolitical, mathematics-like construction, even a possibility?

It would seem responsibility lies with those developing countries that have sought to criminalize apartheid for decades. The *Apartheid Convention*, for example, has been ratified

by over 100 states, but no major Western powers.<sup>14</sup> This intransigence was only partly overcome at the Rome Conference when South Africa,<sup>15</sup> on behalf of a group of sub-Saharan states, agitated for apartheid's inclusion in the *Rome Statute*.<sup>16</sup> According to one commentator, it was through "the unassailable moral authority of its own painful national experience" that the South African delegation convinced Rome negotiators to recognize apartheid as a specific crime.<sup>17</sup> Thus it was the politics of these states that subverted the rationalist legal engineering of a developed world that had largely resisted recognizing apartheid as a crime.<sup>18</sup> Here Western states and knowledge are marked as occupying a monopoly over rational and scientific analyses of the law, though, as argued below, such claims to depoliticized study overlook the "historical contingency" of the law, as though law can be developed "in a cultural vacuum".<sup>19</sup>

The history of the anti-apartheid norm, particularly the pivotal work of the International Law Commission (ILC), suggests an alternate reading of the proceedings at Rome. In this understanding, the ILC became the forum for historical contestation of apartheid's status in a world still coming to terms with both decolonization and the post-

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<sup>14</sup> A partial list of states that have not ratified the convention includes: Australia, Belgium, Canada, Denmark, France, Germany, Italy, Japan, the Netherlands, Norway, South Korea, Spain, Sweden, the United Kingdom, and the United States.

<sup>15</sup> The most notable non-party to the Convention is post-apartheid South Africa. While recognizing the importance of the Apartheid Convention, and that it along with other international law documents helped confirm that apartheid was an international crime, South Africa did not ratify the convention in part to maintain its preference for seeking national reconciliation instead of criminal remedies. The Commission noted that had it opted for a criminal prosecution strategy, the path forward for the country might have been very different. *Truth and Reconciliation Commission of South Africa Final Report*, vol 6, ch 5 (Johannesburg: 1998) s 1, paras 18-24.

<sup>16</sup> McCormack, *supra* note 3 at 198-199.

<sup>17</sup> *Ibid* at 198.

<sup>18</sup> Dugard & Reynolds, *supra* note 7.

<sup>19</sup> George Fletcher, "Comparative Law as a Subversive Discipline" (1998) 46 Am J Comp L 683, 700.

Second World War turn to international criminal justice. It is Western states whose politics intruded on the legal scientific pretensions of the ILC, posing objections that made little normative sense. This obstruction fit with political agendas whose primary concern with respect to apartheid was that Westerners might somehow be considered responsible for aiding and abetting the Afrikaner regime in South Africa.<sup>20</sup>

#### **A. Outlining a Third World Approach to International Law**

The (re)narration of this history helps show why postcolonial states and scholars remain skeptical of ICL's rules, norms and practices. As predicted by Edward Said and others, the claim of legal engineering negates the interests of the postcolonial by stigmatizing them as political, as contrasted with the depoliticized, quasi-scientific reasoning of Western scholarship.<sup>21</sup> Using postcolonial theory and TWAIL, this section contests these claims on both a factual level - by examining the very politicized history and output of these processes - and at a theoretical level - by simultaneously decoding the terms and argumentative strategies used to delegitimise that history and output. It squarely confronts the theoretical claims and

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<sup>20</sup> John Reynolds, "Third world approaches to international law: Ghosts of apartheid" in David Keane & Yvonne McDermott, eds, *The Challenge of Human Rights: Past, Present and Future* (Cheltenham, UK: Edward Elgar, 2012) 194 at 210.

<sup>21</sup> Edward Said, *Orientalism* (London: Penguin Books, 2003 [1978]) at 10 ("What I am interested in doing now is suggesting how the general liberal consensus that 'true' knowledge is fundamentally non-political (and conversely, that overtly political knowledge is not 'true' knowledge) obscures the highly if obscurely organized political circumstances obtaining when knowledge is produced. No one is helped in understanding this today when the adjective 'political' is used as a label to discredit any work for daring to violate the protocol of pretended supranational objectivity."). See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005) 5-6 ("[Liberalism] claims to be unpolitical and is even hostile to politics. It claims to provide simply a framework within which substantive political choices can be made. But, as I shall attempt to show, it controls normative argument within international law in a manner which creates ultimately unacceptable material consequences for international life.").

debates that lie at the foundation of what qualifies as an international crime, connecting these positions to postcolonial theory and TWAIL understandings of international law writ large.

A brief exposition of TWAIL will situate the subsequent analysis. Although it would be too narrow to frame TWAIL as *only* the application of postcolonial theory to international law,<sup>22</sup> there are clear and important linkages. As with postcolonial theory, the nomenclature of a *Third World* approach carries certain powerful connotations.<sup>23</sup> Initially, to speak of the Third World meant to speak of what it was not: the group of states unaligned with either the capitalist (First) world or Communist (Second) world, and which had the potential to fundamentally alter the balance if not the structure of international relations: “*Car enfin, ce Tiers Monde ignoré, exploité, méprisé comme le Tiers Etat, veut lui aussi, être quelque chose.*”<sup>24</sup> Reference to the ‘Tiers-Monde’ as opposed to the ‘Troisième-Monde’, meant the worlds were not ranked, but described in terms of their constituent elements and tendencies.<sup>25</sup> Just as France’s l’Ancien Regime of relatively privileged First (clergy) and Second (nobility) Estates was upended by the Third Estate’s demographic majority, the warning of the ‘Tiers-Monde’ was that the massive population of the Third World could eliminate the privileges of

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<sup>22</sup> Eslava and Pahuja identify a number of interrelated foundations for TWAIL, including Marxism, Foucault and Critical Legal Studies, as well as Sub-Altern and Postcolonial Studies. See Luis Eslava & Sundhya Pahuja, “Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law” (2012) 45 J L & Pol in Afr, Asia and Latin America 195 at 198.

<sup>23</sup> One historian reflecting on his past work wrote that the definition of the Third World was so clear in the 1960s that he saw “no need to define it any more precisely than that it was the world made up of the ex-colonial, newly-independent, non-aligned countries.” Peter Worsley, *The Three Worlds: Culture and World Development* 309 (London: Weidenfeld, Nicolson, 1984).

<sup>24</sup> Alfred Sauvy, “Trois Mondes, Une Planète”, *L’Observateur*, (Aug. 14, 1952) at 14, reprinted in (1986) 12 *Vingtième Siècle: Revue d’histoire* 81. The phrase roughly translates as, “After all, this Third World – ignored, exploited, despised like the Third Estate – also wants to be something.”

<sup>25</sup> Through reference to Abbe Sieyès’s 1789 pre-revolutionary pamphlet ‘What is the Third Estate?’. Bo Stråth, *Europe and the other and Europe as the other* (New York: P.I.E.-Peter Lang, 2000) at 163.

the capitalist and Communist worlds.<sup>26</sup> The Third World was really a Third *Way*, advocating for greater inclusion of those peoples traditionally excluded from equal participation in international life.

The key tenets of early TWAIL scholarship pick up on these central ideas:<sup>27</sup> focusing on colonial oppression through international law; exploring the depth of non-European international law; optimism towards the potential inclusivity of modern international law; emphasizing the importance of sovereign equality and non-intervention; and, an understanding that reforms of law and politics would not liberate post-colonial states in the absence of changes in the international economic order. Thus while TWAIL desires distributional changes, it is also focused on a more “fundamental rethinking of international relations”<sup>28</sup> based on experiential commonalities. Indeed, Mickelson argues that common uses of ‘Third World’ – as a quasi-geographic descriptor intermingled with concepts about levels of ‘development’; as the designation of a political coalition; or as a social movement – are marred by their categorical certainty.<sup>29</sup> All these understandings miss the essential element that adoption of the phrase is a mode of self-identification around a historical and continuing experience of both subordination and resistance.<sup>30</sup>

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<sup>26</sup> Vijay Prashad, *The Darker Nations: A Biography of the Short-Lived Third World* (New Delhi: Leftword, 2007) at 25.

<sup>27</sup> Anghie & Chimni, *supra* note 12 at 80-82.

<sup>28</sup> Karin Mickelson, “Taking Stock of TWAIL Histories” (2008) 10 Int’l Community L Rev 355 at 360 [Mickelson, “Taking Stock”].

<sup>29</sup> Karin Mickelson, “Rhetoric and rage: Third world voices in international legal discourse” (1998) 16 Wis Int’l LJ 353 at 356–59 [Mickelson, “Rhetoric and rage”].

<sup>30</sup> Obiora Chinedu Okafor, “Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall LJ 171 at 174.

That the idea of the Third World as a category is imperfect<sup>31</sup> does not affect the fact that some states and crucially many peoples continue to express similar concerns about the international system,<sup>32</sup> even though they occupy different positions within the international sphere. The Third World is not centred around the indivisible homogeneity of its purported constituents but their commonality of experience – of colonialism, of imperialism, and of resistance to both foreign and local oppression – linked through the “multiplicities of intersecting conflicts based upon class, gender, nation, race, region and so on”.<sup>33</sup> To self-identify as part of the Third World, as an individual or an entity, is to make a conscious effort to remedy the material inequality that seems important to notions of the Third World, but to also engage in the process of structural reform that is connected to that inequality in all its forms. This self-identification manages to include all those elements – geography, development, political alignment, and social movements – without prioritizing any of them.<sup>34</sup> The ‘Third World’ is a subjective association with a particular history and goals, more concerned with a historical trajectory of ideas and their consequences than the definable political aspirations of particular nation-states

Invocation of the Third World is therefore invocation of a political context, not an objective site or form.<sup>35</sup> The vast disparities in power and wealth that exist both between and within the states of Africa, Asia and Latin America have erased the Third World’s rigid

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<sup>31</sup> *Ibid.* Okafor notes that many categories are similarly problematic, pointing out the feminist debate over the limits and possibilities of ‘women’ as a group and an analytic.

<sup>32</sup> In what Rajagopal describes as “transnational linkages among the oppressed.” Balakrishnan Rajagopal, “Locating the Third World in Cultural Geography” (1999) 15 *Third World Leg Stud* 1 at 20.

<sup>33</sup> Aijaz Ahmad, “Jameson’s Rhetoric of Otherness and the ‘National Allegory’” (1987) 17 *Soc Text* 3 at 8-9.

<sup>34</sup> Mickelson, “Rhetoric and rage”, *supra* note 29 at 360.

<sup>35</sup> Okafor, *supra* note 30.

geographic demarcations.<sup>36</sup> Attempts to quantify the Third World by reference to specific development criteria or measures of intra- or inter-state economic power have only illustrated the futility of doing so, given that “there are rich and poor people, empowered and disempowered citizens, to be found inside all states and societies in the world”.<sup>37</sup> Rajagopal in fact argues that the ‘Third World as a Third *Way*’ failed to materialize precisely because Third World political elites shared the Western narrative of linear progress and development, and could not conceive of their non-aligned states as acting independently of the First/Second World.<sup>38</sup>

The conscious adoption of ‘Third World’ acknowledges the potency of an alternative to the dominant models of international law and relations. It deliberately associates that potential with the ‘otherness’ of the Third World, as captured through the imagery evoked by the phrase; and a declaration of common (although not uniform) experiences and objectives as both constituting that otherness and directing this alternative. Thus TWAIL has evolved to also critique the *paradigm* of the state,<sup>39</sup> without necessarily critiquing *specific* states.<sup>40</sup> Just

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<sup>36</sup> See Mark Berger, “The End of the ‘Third World’” (1994) 15 Third World Q 257 at 268 (referring to the “‘internationalisation’ of class structure, as ruling élites in the ‘Third World’ and the ‘First World’ become increasingly integrated.”); LS Stavrianos, *Global Rift: The Third World Comes of Age* (New York: Morrow, 1981) at 27 (“The inhabitants of all regions now are becoming subject peoples—that is, peoples subject to the imperatives of the global market economy. With Third World conditions sprouting within the metropolitan centers, the history of the Third World no longer is the history of distant and exotic peoples with whom we have only tenuous contact. It is now an integral part of our own history.”).

<sup>37</sup> BR Tomlinson, “What Was the Third World?” (2003) 38 J. Contemporary Hist 307 at 308. See also Norman Etherington, *Theories of Imperialism: War, Conquest and Capital* (London: Barnes & Noble, 1984) at 272 (adding that this understanding has the advantage of “undermining the self-serving propaganda of ruling elites in many parts of the world who find it highly convenient to attribute all the ills of their people to the legacy of colonialism.”).

<sup>38</sup> These new states formed an “ideological *terra nullius*”, and thereby ultimately aligned their nations with the capitalist or communist worlds. Rajagopal, *supra* note 32 at 16-17.

<sup>39</sup> Anghie & Chimni, *supra* note 12 at 83-84.

as it is difficult to identify the ‘Third World’ in geographic terms, the complexities of inequity, power imbalances, and exploitation cut across the national boundaries that might have once characterized imperial domination.<sup>41</sup> Racial and cultural differentiation remain central to the marginalization of non-Western thought and experience, but geography is no safe measure for identifying the sites, institutions and actors that implement the exclusionary practices of international law. One can see, for instance, how the criminalization of certain conduct might be welcomed by oppressed minorities in diverse regional contexts — say First Nations in Canada, and Tamil populations in Sri Lanka — but resisted by the state authorities that would be implicated in the commission of crimes. This recognition of the ‘South of the North’<sup>42</sup> fractures conceptions of the Third World as a geographically defined space, and of Third World states as unitary entities.

International law’s universal pretensions are interrogated in light of this fragmentation. While a certain degree of harmonization is inevitable and perhaps desirable, TWAIL frowns on attempts to automatically confer universality on legal and non-legal norms and practices simply because they are European in origin, thought, and experience. As suggested in the ILC and *Rome Statute* debates described below, the process of

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<sup>40</sup> *Ibid* at 83 (“One of the major difficulties confronting TWAIL scholars arises precisely because it is sometimes through supporting the Third World state and sometimes by critiquing it that the interests of the Third World people may be advanced.”).

<sup>41</sup> José Alvarez, “My Summer Vacation (Part III): Revisiting TWAIL in Paris” (28 Sept. 2010), online: *Opinio Juris*, <<http://www.opiniojuris.org>> (“[C]ontemporary forms of globalization have rendered geographically based notions of “imperialism” or “hegemony” overly facile in understanding the Gramscian forms of collaboration that now characterize the “Third World” itself.”).

<sup>42</sup> Amar Bhatia, “The South of the North: Building on Critical Approaches to International Law With Lessons From the Fourth World” (2012) 14 *Or Rev Int’l L* 131 (noting in particular that TWAIL’s preoccupation with European colonization and decolonization in Africa and Asia obscures the experiences of indigenous peoples and their unsettled positions in settler-colonial states).

universalization makes all the difference.<sup>43</sup> By extension, TWAIL scholarship aims to make international law more inclusive and participatory<sup>44</sup> by identifying the partiality inherent to traditional understandings of the international legal order.<sup>45</sup> This reformist agenda is premised on an understanding that the historical context of international law and its development have contemporary continuities,<sup>46</sup> and that skepticism is warranted towards even the most apparently benign aspects of international law.<sup>47</sup> Hence the following analysis rejects the premise that projects of international criminalization are intrinsically depoliticized exercises of pure reason or legal engineering.

## **B. The Legal-Political Engineering of Apartheid**

The professed values of objectivity — neutrality, fairness, impartiality, equality — that are intrinsic to the practice of criminal law, help distinguish the norms and practice of criminal law from political preference. The ILC’s attempts to identify and define a new corpus of international crimes, including apartheid, demonstrated the ease with which politics frustrates legal engineering.

In 1947, the United Nations set the ILC the task of “(a) formulat[ing] the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of

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<sup>43</sup> Makau Mutua, “What is TWAIL?” (2000) 94 ASIL Proc 31 at 37-38. See also Rajat Rana, “Symphony of Decolonisation: Third World and Human Rights Discourse” (2007) 11 Int’l J Hum Rts 367 at 375 (arguing for “a multicultural approach and methodology”).

<sup>44</sup> Anghie & Chimni, *supra* note 12 at 94.

<sup>45</sup> Mickelson, “Rhetoric and rage”, *supra* note 29 at 414–15.

<sup>46</sup> *Ibid* at 397.

<sup>47</sup> A skepticism that is also aimed at itself. See Anghie & Chimni *supra* note 12 at 102. Mutua identifies the United Nations and the UN Security Council as particularly indefensible, although it is arguable whether the two would be seen as equally indefensible to others. Mutua, *supra* note 43 at 37.

the Tribunal; (b) prepar[ing] a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a).”<sup>48</sup> In the 1950s, the ILC began attempting to distinguish international crimes from ‘ordinary’ crimes, and include only the most serious as part of the Draft Code of Crimes Against the Peace and Security of Mankind.<sup>49</sup> Political interference from states looking to stymie the project meant work on the Draft Code and its related projects moved glacially. Nonetheless, by the 1980s, the Draft Code managed to engage with the task of differentiating international and ordinary crimes, when the ILC began relying on a surprisingly sophisticated normative standard of ‘extreme seriousness’<sup>50</sup> to identify potential international crimes. Some unidentified states objected, preferring to organize the crimes by the potential penalty, or – as was done at the IMTs – simply by enumerating crimes without regard to connective indicia.<sup>51</sup> Still, the ILC expressly rejected the Nuremberg approach of issuing general principles that did not offer any explanation of why crimes were crimes,<sup>52</sup> and also found the 1954 Draft Code inadequate for its failure to distinguish between different types of international

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<sup>48</sup> G.A. res 177 (II), 21 November 1947.

<sup>49</sup> Crimes that were discarded early on in the process included passport forgery, insulting behaviour toward foreign states, and dissemination of false news. Martin Ortega, “The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind” (1997) 1 Max Planck YB UN L 283 at 286.

<sup>50</sup> *Ibid* at 296–97.

<sup>51</sup> Rep. of the Int’l Law Comm’n, 37th Sess., May 6–July 26, 1985, para 65–67, UN Doc. A/40/10; U.N. GAOR 40th Sess., Supp. No. 10 (1985) [*ILC 1985 Report*].

<sup>52</sup> Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *First Rep. on the draft Code of Offences against the Peace and Security of Mankind*, para 55, UN Doc. A/CN.4/364 (Mar. 18, 1983) (by Doudou Thiam), reprinted in [1983] 2 YB Int’l L Comm 137, UN Doc. A/CN.4/SER.A/1983/Add.1 (Part 1) [*First Report*] (“[M]erely listing criminal acts without relating them to a common principle does not appear to be satisfactory.”). See also Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Third Rep. on the draft Code of Offences against the Peace and Security of Mankind*, paras 4–8, UN Doc. A/CN.4/387 (Apr. 8, 1985) (by Doudou Thiam), reprinted in [1985] 2 YB Int’l L Comm 63, UN Doc. A/CN.4/SER.A/1985/Add.1 (Part 1) [*Third Report*].

crimes.<sup>53</sup> The ILC paid detailed attention to each aspect of the term “crimes against peace and security”, debating not only the factors that tied crimes together, but also whether it should be a unified or disjunctive concept, and the relationship between crimes against peace and the maintenance of international peace and security.<sup>54</sup> Contrary to the claims of the United States,<sup>55</sup> the Commission clearly devoted serious thought to these issues:<sup>56</sup> by distinguishing crimes from mere offences;<sup>57</sup> by recognizing that any new crimes would require further elaboration and definition;<sup>58</sup> and by stating that the Draft Code could not be overly inclusive in its approach.<sup>59</sup> A “conceptual and general definition was virtually indispensable” to the ILC’s task.<sup>60</sup>

Having abandoned the ‘list’ method of Nuremberg and Tokyo in favour of a normatively analytic approach, the Commission returned to the 1954 Draft Code that had sat dormant with the General Assembly until 1978. The new Commission, headed by Special

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<sup>53</sup> *Ibid* at para 18.

<sup>54</sup> *Ibid* at paras 62–65 and 75–78.

<sup>55</sup> *Ibid* at para 23. No suggestions to remedy this alleged deficiency were offered.

<sup>56</sup> The Commission identified a number of important questions to answer with respect to defining crimes for inclusion in the Code: “What is their specific nature? What are their particular characteristics? What is the justification for the special place that they occupy within this category?” *Ibid* at para 25.

<sup>57</sup> Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Fourth Rep. on the draft Code of Offences against the Peace and Security of Mankind*, para 19, UN Doc. A/CN.4/398 (Mar. 11, 1986) (by Doudou Thiam), reprinted in [1986] 2 YB Int’l L Comm 53, UN Doc. A/CN.4/SER.A/1986/Add.1 (Part 1).

<sup>58</sup> *Ibid* at paras 12-13.

<sup>59</sup> Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Second Rep. on the draft Code of Offences against the Peace and Security of Mankind*, paras 46, 70 et seq, UN Doc. A/CN.4/377, (Feb. 1, 1984) (by Doudou Thiam), reprinted in [1984] II(1) YB Int’l L Comm 89, UN Doc. A/CN.4/SER.A/1984/Add.1 (Part 1). [*Second Report*].

<sup>60</sup> Rep. of the Int’l Law Comm’n, 46th Sess., May 2–July 22, 1994, para 112, UN Doc. A/49/10; U.N. GAOR 49th Sess., Supp. No. 10 (1994).

Rapporteur Doudou Thiam, rejected the 1954 Code's notion of 'political crime' as an inadequate criterion.<sup>61</sup> Thiam instead attempted to draw out common elements that connected existing enumerated crimes, exhaustively cataloguing every crime proposed by the 1954 Commission, and every subsequent international agreement that listed a possible international crime.<sup>62</sup> Eventually, the Commission began refining the concept of 'seriousness' as the connective thread. Seriousness was to be evaluated in relation to the evolving state of public conscience,<sup>63</sup> and the subjective and material elements of each crime.<sup>64</sup> A sufficiently serious act could be determined by its character (cruelty, atrocity or barbarity); the extent of its effects; and the intention of the perpetrator.<sup>65</sup> A crime had to result in "a breach of obligations intended to protect the most fundamental interests of mankind": the maintenance of peace; the protection of fundamental human rights; the human environment; and, the right of self-determination of peoples.<sup>66</sup>

From this platform, the Commission began considering in greater detail a radically revised list of serious crimes that might meet the stated criteria. Yet as soon as the ILC had agreed on a set of 12 crimes – including colonialism, apartheid, foreign intervention, and

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<sup>61</sup> *First Report*, *supra* note 52 at paras 38–40.

<sup>62</sup> *Second Report*, *supra* note 59 at para 13.

<sup>63</sup> *Ibid* at para 8.

<sup>64</sup> Subjective elements included the perpetrator's intention, motive or degree of awareness; material elements were assessed in relation to the transgression itself: whether it was against the rights, life or well-being of individuals and groups; public or private property, including cultural heritage and historical interests. *Third Report*, *supra* note 52 at para 49.

<sup>65</sup> Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Fifth Rep. on the draft Code of Offences against the Peace and Security of Mankind*, at 2, UN Doc. A/CN.4/404 (Mar. 17, 1987) (by Doudou Thiam), reprinted in [1987] 2 YB Int'l L Comm 1, UN Doc. A/CN.4/SER.A/1987/Add.1 (Part 1).

<sup>66</sup> *ILC 1985 Report*, *supra* note 51 at para 69.

terrorism – and begun the task of clearly defining them, serious pressure from a small group of Western states<sup>67</sup> compelled the Commission to hack away at the list. 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.<sup>68</sup> Colonialism and apartheid were said to not even exist anymore; their inclusion was “unacceptable”.<sup>69</sup> These objections compelled the ILC to bow to the “perceived dictates of political will.”<sup>70</sup> Thus in 1995, Thiam could only present a “mutilated draft” of the Code,<sup>71</sup> and ultimately only the four ‘core crimes’ survived from the original list of 12.

From the perspective of criminal law theory, the explanations offered for this radical alteration were found severely lacking. The lack of specific reference to apartheid was “inconceivable”;<sup>72</sup> the ‘new’ crimes had been “abandoned...without convincing justification.”<sup>73</sup> The objections were logically and historically fragile. Western states insisted apartheid was a phenomenon that had been successfully quarantined and cured with the fall of the Afrikaner government in South Africa. This ignored the past prevalence of apartheid

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<sup>67</sup> The Draft was sent for comments to 24 states, only two of which were African; none were from Asia. *Comments and observations received from Governments*, UN Doc. A/CN.4/448 (Mar. 1, 1993) and Add. 1 (May 19, 1993), reprinted in [1993] 2 YB Int’l L Comm 59, UN Doc. A/CN.4/SER.A/1993/Add.1 (Part 1).

<sup>68</sup> *Ibid*

<sup>69</sup> *Ibid* at 101.

<sup>70</sup> Rosemary Rayfuse, “The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission” (1997) 8 Crim L Forum 43 at 49.

<sup>71</sup> Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Thirteenth Report on the draft Code of Offences against the Peace and Security of Mankind*, para 3, UN Doc. A/CN.4/466 (Mar. 24, 1995) (by Doudou Thiam), reprinted in [1995] 2 YB Int’l L Comm 33, UN Doc. A/CN.4/SER.A/1995/Add.1 (Part 1) [hereinafter *Thirteenth Report*].

<sup>72</sup> Clark, *supra* note 5.

<sup>73</sup> Ortega, *supra* note 49 at 302.

and similar practices in other parts of Africa, including Namibia, Rhodesia, Mozambique and Angola. And as Thiam noted, even if a crime apparently ceased to exist at some point, there was no guarantee it would not reappear.<sup>74</sup> Those same Western states had generally voted against or abstained from UN resolutions condemning apartheid South Africa; this reluctance only somewhat dissipated even during the anti-apartheid movement's peak in the 1980s.<sup>75</sup>

Confronted by the normative rigour of the ILC's commitment to a philosophical justification for the draft Code, these states were, as noted by more than one member of the ILC, forced to baldly defend their privileges and interests.<sup>76</sup> Gestures were made towards the contested provisions being vague, but these objections contrasted with the positions of other states<sup>77</sup> and seemed token attempts to find a normative basis for political disagreement.<sup>78</sup> The resultant revisions of the Draft Code were serious departures from the ILC's principled approach to develop a coherent normative understanding of the conduct that constituted the most serious international crimes. Instead, this relapse to traditionalism upended the criminal

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<sup>74</sup> See *Thirteenth Report*, *supra* note 71 at paras 13 and 15. His comments were proven prescient through contemporary debates about whether state practices in Fiji, the United Arab Emirates, and Israel/Palestine could also be considered apartheid. See Reynolds, *supra* note 20, at 212-217.

<sup>75</sup> The United States, United Kingdom, Australia, the Netherlands, and Belgium were the five Western states that were both asked to comment on the ILC Draft, and which consistently supported apartheid South Africa in international fora such as the UN. On this record of support, see *ibid* at 205-209. Of this group, the United States, United Kingdom and Netherlands all objected to the inclusion of apartheid as a crime in the Draft Code. They were joined at the ILC by Denmark, Iceland, Norway and Sweden. See *Comments and observations received from Governments*, *supra* note 67.

<sup>76</sup> See Ortega, *supra* note 49 at 299.

<sup>77</sup> Other states, including Western allies such as Australia and Belgium, made similar comments, but also proposed revisions that would accommodate both the concerns about specificity and the intentions of the drafters. *Comments and observations received from Governments*, *supra* note 67.

<sup>78</sup> Especially as the crimes eventually retained in the final draft suffered from the same vagueness problem, as did the statutes of the ad hoc tribunals. See Ortega, *supra* note 49 at 300; and Damien Scalia, "Human Rights in the context of international criminal law: respecting them and ensuring respect for them" in Robert Kolb & Gloria Gaggioli, eds, *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, UK: Edward Elgar, 2013) 575 at 582.

law's claim to depoliticized, normative systematization by adopting Western interpretations of Nuremberg,<sup>79</sup> on the basis that the status quo served their interests.

In this understanding, it is powerful Western states that abrogated the lengthy process of norm development at the ILC, stymying the 'legal engineering' and development of apartheid and other crimes. The insistence on a Nuremberg-based list approach and objection to specific crimes reflected ongoing attempts to exempt Western actors from international legal responsibility for colonialism, domestic institutionalized racism, and the support of apartheid regimes.<sup>80</sup> It continued a trend that Cherif Bassiouni described as attempts "to politicize those efforts that so many had hoped to juridicize".<sup>81</sup> While the recognition of apartheid as an international crime was, as Paul Eden argues, likely not a customary rule of international law at the time,<sup>82</sup> these objections reacted to a nascent shift in this understanding. Apartheid had been characterized as a crime against humanity since at least 1965,<sup>83</sup> recognized as a grave breach of Additional Protocol I to the Geneva Conventions in

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<sup>79</sup> Ortega, *supra* note 49 at 286.

<sup>80</sup> See William Schabas, *An Introduction to the International Criminal Court*, 4th ed (Cambridge: Cambridge University Press, 2011) 108.

<sup>81</sup> In discussing both active interference in and general neglect of the ILC drafting process, Professor Bassiouni noted that "[t]he trend in the U.N., since 1950 and particularly thereafter, has been to politicize those efforts that so many had hoped to juridicize." M Cherif Bassiouni, "The History of the Draft Code of Crimes Against the Peace and Security of Mankind" (1993) 1-2 *Isr L Rev* 247 at 265.

<sup>82</sup> Eden, *supra* note 8.

<sup>83</sup> As declared in a number of UN General Assembly Resolutions, and the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*. See Christopher K Hall, "The crime of apartheid" in Otto Triffterer & Kai Ambos, eds, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Portland, OR: Hart Publishing, 2008) 227 at 227, n 326–27.

1977;<sup>84</sup> and, in between, condemned by nearly a hundred states as a treaty-based crime in 1973.<sup>85</sup>

Instead of apartheid, the 1996 ILC Draft Code included “institutionalized racial discrimination” as a crime against humanity. While Thiam described it as “the crime of apartheid in a more general denomination”,<sup>86</sup> it could not even address “separate but equal” regimes such as those found in the United States.<sup>87</sup> Moreover, even this qualified success was absent from the preparatory drafts that formed the basis for the Rome Conference.<sup>88</sup> Though it is true that South Africa and other sub-Saharan states influenced apartheid’s inclusion in the *Rome Statute*, apartheid’s consideration was first initiated by Mexico and Ireland.<sup>89</sup>

That proposal did not lead to automatic acceptance. Instead, the negotiating process that ultimately defined apartheid was “a relatively protracted one”.<sup>90</sup> It refined the definition

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<sup>84</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), Art. 85(4)(c), June 8, 1977, 1125 UNTS 3.

<sup>85</sup> *Apartheid Convention*, *supra* note 9.

<sup>86</sup> Rep. of the Int’l Law Comm’n, 48th Sess., May 6–July 26, 1996, p. 49, UN Doc. A/51/10; U.N. GAOR 51st Sess., Supp. No. 10 (1996).

<sup>87</sup> Article 18(f) of the Draft Code introduced the restriction that this discrimination must be shown to “seriously disadvantage” a minority, a caveat that would have permitted “separate but equal” regimes in the West. Jean Allain & John R. W. D. Jones, “A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind” (1997) 1 EJIL 100, at 113–14.

<sup>88</sup> In fact, the work of the ILC on the 1996 Draft Code continued in parallel to the task of developing a permanent international criminal court. The Ad Hoc Committee and then Preparatory Committee tasked with developing that court used as a starting point the 1994 ILC Draft Code. That Draft Code made explicit reference to the 1973 Apartheid Convention by annexing its substantive provisions defining the offence of apartheid, per Art. 20(e). The Ad Hoc Committee discussed the possibility of including new crimes in its draft, but by 1996, the Preparatory Committee had clearly removed any such reference. See M Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, vol 2 (Ardsley, NY: Transnational Publishers, 2005).

<sup>89</sup> ‘Third Meeting of the Committee of the Whole’, UN Doc. A/CONF.183/C.1/SR3, 17 June 1998, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) Official Records Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, at 152–53.

<sup>90</sup> McCormack, *supra* note 3 at 199.

of the crime to clarify it was not aimed solely at the Afrikaner regime. By explicitly linking apartheid to other crimes against humanity, it added the flexibility that was missing from the list-based approach of the *Apartheid Convention*.<sup>91</sup> At the same time, it did not stray so far from the treaty by including an intent requirement<sup>92</sup> that helped restrain the reach of the crime<sup>93</sup> – although arguably this constraint was also a result of Western special interest objections led by the United States.<sup>94</sup> Thus, apartheid’s refinement and ultimate definition was derived from the same process of ‘legal engineering’ – rigorous, depoliticized, quasi-scientific analysis – as the other crimes.

Misleading characterizations of apartheid’s inclusion as political and not legal engineering stigmatize the crime and lawmakers, instead of its perpetrators. The process and result are discredited because they are ‘politicized’,<sup>95</sup> contradicting the ideal of the law as engineering – as a scientific enterprise guided by an ethos of objective neutrality.<sup>96</sup> This

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<sup>91</sup> Professor Alain Pellet, one of the drafters of the ILC Draft Codes and Commentaries, expressed concern about the 1991 Draft Code’s incorporation of the 1973 Convention on the basis that it “failed to take account of the intolerable aspect of systematic policies of racial discrimination, no matter where and against whom, they were practised”, and that “...the list was inappropriate, in as much as it probably did not cover all possible acts of apartheid.” *Draft Code of Crimes against the Peace and Security of Mankind: Summary records of the meetings of the forty-third session*, 217, UN Doc. A/CN.4/L.459, reprinted in [1991] 1 YB Int’l L Comm 1, UN Doc. A/CN.4/SER.A/1991/ (Part 1).

<sup>92</sup> That the constituent criminal acts be committed for the purpose of maintaining an apartheid regime. *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 UNTS 90, 37 ILM 1002, art 7(2)(h).

<sup>93</sup> See Timothy LH McCormack & Gerry J Simpson, “The International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions” (1994) 5 Crim L Forum 1, 43–44 (1994) (stating that the intent requirement is narrower than that contained in the *Convention on the Elimination of Racial Discrimination*, which outlaws those effects that result from apartheid, regardless of the perpetrator’s intent).

<sup>94</sup> The United States insisted on the intent requirement in order to preclude international jurisdiction over American white supremacists. McCormack, *supra* note 3 at 199-200.

<sup>95</sup> Said, *supra* note 21; and Koskenniemi, *supra* note 21.

<sup>96</sup> Jerold S Auerbach, “Access to the Legal System in Historical Perspective” in Allen Gershon, ed, *Lawyer’s Ethics* (New Brunswick, NJ: Transaction, 1980) at 29 (“It is of the essence of the professionalization process to divorce law from politics, to elevate technique and craft over power, to search for neutral principals, and to deny ideological purpose.”).

inaccurate narrative further rewrites the historical development of the law, and impugns the intellectual contributions of the non-West by implying the inferiority of a Third World that is committed to opportunistic politics, while developed states engage in the sophisticated intellectual task of ‘legal engineering’. This description wrongly describes the efforts of non-Western scholars, and wrongly presupposes the possibility of ‘legal engineering’.

### C. Defining Aggression

Legal engineering and political preference are not competing ways of approaching a problem, but often coexist and may even be complementary. As Cherif Bassiouni has noted, projects of criminal theory have routinely been subverted by political machination in which powerful states have often played an important role.<sup>97</sup> Apartheid’s refinement in ICL tracks the long-term obstruction of attempts to define – and therefore render justiciable – the crime of aggression. As David Bosco points out, the inability to prosecute aggression favours those powerful states whose technological capabilities mean they are less likely to commit the wide-scale atrocities of stereotypical international crimes, but whose acts of aggression nonetheless have serious consequences:<sup>98</sup> “A criminal approach to conflict that focused on deliberate targeting of civilians — and excluded unauthorized uses of force — was a system that worked decidedly to the major powers’ benefit. Those states in possession of trained, technologically advanced militaries had little need to terrorize civilians.” Indeed, the inability

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<sup>97</sup> Bassiouni, *supra* note 81 at 264 (“[T]here is no international political will to establish an international criminal court, particularly where that court would have jurisdiction over a crime that contains a political dimension, whether it be aggression or Apartheid.”).

<sup>98</sup> David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014) at 166.

to prosecute aggression looms large over both the Iraqi Special Tribunal,<sup>99</sup> and the ICC's re-examination of British troops in Iraq.

While the ILC project on international crimes, including defining aggression, began in 1949, political delays led to the definition of aggression being segregated into a separate committee in 1951. The continuing failure to define aggression meant that the Draft Code of Crimes and Draft Statute for an International Criminal Court could not be considered in 1954. Four special committees and twenty years later, the General Assembly managed to define aggression in political terms, but not create a criminal offence.<sup>100</sup> In a Sisyphean turn, even the ILC work that had apparently been completed in 1954 - on crimes and a criminal court - now had to restart itself under Thiam's leadership.

A similar dynamic presented during negotiations on the *Rome Statute*, when group of some (but not all) Western states and their allies objected to the inclusion and definition of aggression.<sup>101</sup> Delegates could not agree on the definition of aggression; in order to prevent the scuttling of the entire project, they "agreed to disagree"<sup>102</sup> and include the crime in the jurisdiction of the Court but postpone defining it until a future date.<sup>103</sup> That moment came at

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<sup>99</sup> Claus Kreß, "The Iraqi Special Tribunal and the Crime of Aggression" (2004) 2 JICJ 347-352, and Noah Weisbrod, "Prosecuting Aggression" (2008) 49 Harv Int'l LJ 161 at 172.

<sup>100</sup> For brief recapitulations of this history, see Bassiouni, *supra* note 81 at 253-259, and Matthias Schuster, "The *Rome Statute* and the Crime of Aggression: A Gordian Knot in Search of a Sword" (2003) 14 Crim L Forum 1 at 7-9.

<sup>101</sup> See, e.g., David J Scheffer, "The United States and the International Criminal Court" (93) 1999 AJIL 12 at 13, 21; M Cherif Bassiouni & Benjamin B Ferencz, "The Crime Against Peace" in M Cherif Bassiouni, ed, *International Criminal Law*, 3d ed, vol 1, (Leiden: Martinus Nijhoff, 2008) 207 at 242; and, Weisbrod, *supra* note 99 at 170-171.

<sup>102</sup> Grant M Dawson, "Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?" (2000) 19 N.Y.L. Sch. J. Int'l & Comp. L. 413 at 418.

<sup>103</sup> Former Art. 5(2) of the *Rome Statute* read as follows: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision

the Kampala Review Conference in 2010. Though the crime was defined, it was again subordinated to the interests of powerful states – who claimed that they were in fact attempting to depoliticize the Court.<sup>104</sup> Contrary to the usual territorial jurisdiction of the ICC,<sup>105</sup> nationals of non-States parties cannot be charged with aggression, even if committed against a State Party;<sup>106</sup> States Parties may opt-out of the provision;<sup>107</sup> and the power to investigate even aggression between States Parties was subordinated to the Security Council.<sup>108</sup> Indeed, it has been suggested that the Security Council has the ability to control all aggression prosecutions through Articles 13, 15*bis* and 16 of the *Rome Statute*.<sup>109</sup> That this structure has been described as an “ingenious compromise”<sup>110</sup> points to the ambiguities contained within declarations of the ‘legal engineering’ of international crimes.

From the perspective of ICL, the tarnishing of apartheid is doubly confusing. Not only had apartheid clearly been prohibited in international law by the time of the *Rome Statute*,<sup>111</sup> the Draft Statute for an International Criminal Court that eventually became the

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shall be consistent with the relevant provisions of the Charter of the United Nations.” Deleted RC/Res.6, annex 1 (11 June 2010).

<sup>104</sup> Bosco, *supra* note 98 at 164 – 166.

<sup>105</sup> Art. 12(2)(a) of the *Rome Statute*.

<sup>106</sup> Article 15*bis* (5), *ibid*.

<sup>107</sup> Article 15*bis* (4), *ibid*.

<sup>108</sup> Article 15*bis* (6) - (8), *ibid*.

<sup>109</sup> Beth van Shaack, “Negotiating at the Interface of Power and Law: The Crime of Aggression” (2011) 49 *Columbia J Transnat’l L.* 505, 560.

<sup>110</sup> Claus Kreß & Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression” (2010) 9 *JICJ* 1179 at 1204. While acknowledging the difficulty of the task - and its historical importance - the authors further note that “[c]learly there remains considerable room for judicial refinement of the definition” (at 1211).

<sup>111</sup> McCormack & Simpson, *supra* note 93 at 42 (“Apartheid’s status as an international crime has long been undisputed.”).

*Rome Statute* was itself spurred by the criminalization of apartheid. The Apartheid Convention contemplated the establishment of an international court to prosecute the crime, but when a draft text was produced in 1980, the Commission on Human Rights ignored it.<sup>112</sup> Over a decade later, when the UN finally committed the ILC to developing a draft statute for an international criminal court, this abandoned document was one of the drafts from which the work of the ILC — and by extension the *Rome Statute* itself — was launched.<sup>113</sup> Thus the criminalization of apartheid has made a significant contribution to whatever legal engineering has taken place in the development of ICL in recent decades; it has also exposed the political maneuvering that states have engaged in to obstruct that process. In this sense, apartheid is the first truly postcolonial crime, addressing both the suffering of the most marginalized peoples, and exposing the machinations of international law that often appear indifferent to their plight.

#### **D. The “Post” of the Postcolonial World**

These modes of resisting and delegitimizing apartheid’s criminalization were not unique. Over the course of the ILC drafting process, those states opposed to criminalizing apartheid bolstered their position by pointing to the end of minority-rule in South Africa. The change in government was seen as proof that there was no further need to criminalize apartheid, and was cited as additional evidence that the Rome Conference was unduly

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<sup>112</sup> Bassiouni, *supra* note 81 at 263-264.

<sup>113</sup> *International Law Commission Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, ILC, 45th Sess., UN Doc A/CN.4/L.490 (1993).

subordinated to political pressure.<sup>114</sup> Similar historical delineations were employed to counter attempts at criminalizing other conduct, such as colonialism, intervention, and alien domination. Just as apartheid was said to be a relic of the past, colonialism and its ill effects were portrayed as compartmentalized in the 19<sup>th</sup> century.<sup>115</sup> The international community had entered a new, enlightened postcolonial era, where the proposed ‘new’ crimes were antediluvian — historical artifacts whose inclusion in a contemporary document would be redundant.<sup>116</sup> This section explores how the legal engineering/politics claim turns on different understandings of what is signified by the “postcolonial”.

Though the notion that colonial practices have ended is easily refuted,<sup>117</sup> the claim itself represents the significantly divergent ways in which former colonial powers and formerly colonized states understand the postcolonial world order. For the former, the end of direct colonial rule has largely closed the door on colonialism; postcolonial thus means a clean break with the colonial past. For the latter, however, postcolonial simply means all that comes *after* the colonial encounter, and entails a warning about what ensues even after direct rule ends. Here, colonialism is not just an antiquated and repudiated form of governance, but

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<sup>114</sup> Zahar, *supra* note 2 at 246 (“Considering the dubious legal history of the so-called crime of apartheid, as well as the demise of South African apartheid in 1994, it is remarkable that in 1998 a homonymous offence was incorporated as a crime against humanity”).

<sup>115</sup> Ortega, *supra* note 49 at 302.

<sup>116</sup> The United Kingdom, perhaps the most vocal opponent of including the ‘new’ crimes, argued that the ILC needed to “fundamentally reconsider this article in the light of changed international circumstances”; colonialism, for its part, was said to be “of another era”. *Comments and observations received from Governments, supra* note 67 at 101.

<sup>117</sup> Depending on how exactly it is defined, one might see or have recently observed colonialism in a number of locations: settler-colonial practices in Canada, the United States, Australia, and New Zealand; Chinese annexation of Tibet; Turkish seizure of northern Cyprus; the American occupation of Iraq; the Moroccan occupation of Western Sahara; Ethiopian control of the Ogaden region; Israeli occupation of the Golan Heights and Palestinian Territories; Iraqi, Syrian and Turkish occupation of Kurdish territories; and Russian interventions in parts of Georgia, Moldova and Ukraine.

a large-scale political-legal project that has a substantive role in the postcolonial world.<sup>118</sup> Colonialism has largely evolved into a set of neocolonial practices organized around economic concerns,<sup>119</sup> but its effects remain relevant<sup>120</sup> to a number of evolving contexts:<sup>121</sup> territories under home-based rule; territories or populations under settler rule;<sup>122</sup> situations where either or both home-based and settler rule have ended; and situations where neither took hold. Quite apart from the problematic practices of the institutions of colonial rule, the sheer scope and rapid pace of institutional change further exacerbated the destabilizing effects of colonization, and reverberations of these system-wide overhauls echo long after formal decolonization.<sup>123</sup> Indeed, to take ‘postcolonial’ as implying the *end* of colonial practices (as certain Western states did at the ILC) risks inviting their reinstatement in

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<sup>118</sup> Jeannine Purdy, “Postcolonialism: the Emperor’s New Clothes?” (1996) 5 Soc. & Leg. Stud. 405.

<sup>119</sup> See Mohamed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979) at 20; Jean-Paul Sartre, *Colonialism and Neocolonialism*, translated by Azzedine Haddour, Steve Brewer & Terry McWilliams (New York: Routledge, 2001 [1964]) at 87-93 (Neocolonialism is a “disguised imperialism” that depends on the fiction of decolonization, which was in fact only a trade-off between physical and financial domination, and which was sanctioned by business interests in the home territories of colonizers); and, Stavrianos, *supra* note 36 at 167 (arguing that the Third World is itself a product of economic context: “The Third World emerged when Northwest Europe developed a capitalist economy capable of generating a mass trade in necessities as against the traditional restricted trade in luxuries.”).

<sup>120</sup> Putting aside the question of whether colonial rule is superseded by neocolonial practices, Albert Memmi argues that colonial rule has independent, long-lasting effects, including psychological ones, and it is incorrect to equate the decolonization of territory with the decolonization of individual minds. Albert Memmi, *Dominated man: Notes towards a portrait* (New York: Orion Press, 1968) at 88. Edward Said adds that colonialism leads to and leaves behind hierarchies of knowledge and altered social, political and economic structures. Edward Said, “Representing the Colonized: Anthropology’s Interlocutors” (1989) 15 *Critical Inquiry* 205 at 207.

<sup>121</sup> See, e.g., *supra* note 117.

<sup>122</sup> There is an important debate as to whether settler-colonialism is a variant of, or independent from, colonialism. See Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* 13 (New York: Palgrave Macmillan, 2010) (arguing that settler colonialism ought to be “framed *beside* the study of migrations, colonialisms, comparative economics, environmental transformation, “transplanted” European institutional patterns, “frontier” circumstances, and national formation.”).

<sup>123</sup> Karl Polyani, *The Great Transformation: The Political and Economic Origin of Our Time* (Boston, MA: Beacon Press, 1957) at 178 (“Whether the colonist needs land as a site for the sake of the wealth buried in it, or whether he merely wishes the native to produce a surplus of food and raw materials, is often irrelevant...for in every and any case the social and cultural system of native life must first be shattered.”).

alternate forms;<sup>124</sup> the contemporary failure to criminalize certain imperialist conduct would seem to heighten this risk.<sup>125</sup>

Importantly then, the condition of postcoloniality should be seen not as (solely) a temporal marker in the historical timeline, but a mode of understanding and approaching the world — not just (former) colonial powers — after the *initiation* of colonialism. As Onuma suggests, it also remains relevant to populations dominated by non-Western states, and to a geopolitical context where Russia and China remain regional hegemons and global powers.<sup>126</sup> The postcolonial is therefore ‘post’ in the sense that it arises as a result of a historical encounter and set of practices that exemplify the techniques of foreign domination, whether Western or not. As evidenced by Turkish, Chinese or Russian involvement in Cyprus, Tibet and Georgia, the criminalization of colonialism, intervention, and alien domination have contemporary resonance even for non-Western states. What postcolonial theory truly takes issue with then is not the geographic source of the (neo)colonial enterprise, but the patterns of relationships – between institutions, peoples, and ideas – that underpin it. These systems of knowledge, legal practices, and economic and political structures can be employed by Western or non-Western countries and elites, because they are the systems,

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<sup>124</sup> The reversion to the pre-colonial has itself been criticized for its “essentialist and uncritical picture of indigenous traditions [which] can have conservative political effects.” Margaret Kohn & Keally McBride, *Political Theories of Decolonization: Postcolonialism and the Problem of Foundations* (New York: Oxford University Press, 2011) at 153 (discussing Manabendra Roy’s critique of Gandhi’s concept of *hind swaraj*, which he felt uncritically promoted a false sense of India’s moral superiority, instead of equality, to the West).

<sup>125</sup> The question of what conduct ought to be criminalized is addressed in Chapter Two.

<sup>126</sup> Historically, non-Western states were engaged in similar practices prior to European colonialism. See Onuma Yasuaki, “When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective” (2000) 2 J Hist Int’l L 1 at 8 (that “independent human groups or bodies politic whose members shared the egocentric world image coexisted in various regions of the globe”, including Chinese and Muslim ‘civilizational orders’).

practices and structures of privilege.<sup>127</sup> The idea of the postcolonial therefore links pre-colonial resistance to local oppression with anti-colonial and post-colonial resistance to both foreign and home-grown subjugation.<sup>128</sup>

What postcolonial cannot mean is that the pre-colonial is somehow attainable.<sup>129</sup> The advent of colonialism was not an eclipse - fleeting, impermanent and only tangentially relevant as time passes - but a fundamentally disruptive moment. As Fanon warns, there may be recovery, but there can be no return.<sup>130</sup> This is in part because local postcolonial elites often subscribe to the ideological agenda of colonial domination.<sup>131</sup> Even where they have not done so, the danger is that the “rhetoric of reversal...could easily be mobilized by indigenous elites to legitimize their continued exploitation of the masses.”<sup>132</sup> This impossibility of reversion is equally relevant for colonizer as it is for colonized, with the poisonous return of colonial dehumanization to its purveyors,<sup>133</sup> and settler-colonialism’s

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<sup>127</sup> Albert Memmi, translated by Robert Bonnono, *Decolonization and the Decolonized* (Minneapolis: University of Minnesota Press, 2006) at 4 (“In the colonies it was said, sarcastically, that the job of the shims, local leaders recruited from the ranks of the colonized, was to grab the goats by the horns so they could be milked more easily, goats here symbolizing the colonized. The new sheiks, appointed by their government after independence, serve their leaders in that same capacity.”).

<sup>128</sup> Aimé Césaire, translated by Joan Pinkham, *Discourse on Colonialism*, (New York: Monthly Review Press, 2000) (1955) at 43 (“I too talk about abuses, but what I say is that on the old ones—very real—they have superimposed others—very detestable. They talk to me about local tyrants brought to reason; but I note that in general the old tyrants get along very well with the new ones, and that there has been established between them, to the detriment of the people, a circuit of mutual services and complicity.”).

<sup>129</sup> See Memmi, *supra* note 120; and Said, *supra* note 120.

<sup>130</sup> Frantz Fanon, *The Wretched of the Earth*, 3d ed, translated by Constance Farrington (London: Penguin Books, 2001) (1963) 253-54.

<sup>131</sup> See, e.g. Diane Otto, “Postcolonialism and Law?” (1999) 15 *Third World Leg. Stud.* vii at x.

<sup>132</sup> Kohn & McBride, *supra* note 124.

<sup>133</sup> Césaire, *supra* note 128 at 41 (“[C]olonial activity, colonial enterprise, colonial conquest, which is based on contempt for the native and justified by that contempt, inevitably tends to change him who undertakes it; that the colonizer who in order to was his conscience gets in to the habit of seeing the other man as *an animal*, accustoms himself to treating him like an animal, and tends to objectively transform *himself* into an animal. It is this result, this boomerang effect of colonization that I wanted to point out.”).

dislocation of the colonist.<sup>134</sup> The lingering effects of colonialism's structural change, as well as processes of norm development and adoption, continue to mould the postcolonial world.<sup>135</sup> As Spivak and Mignolo note, the end of colonialism begat not decolonization but the "coloniality of power", the continuation of the same regime in hidden forms.<sup>136</sup> Colonialism continues "in the consciousness of formerly colonized peoples, and in institutions imposed in the process of colonization."<sup>137</sup> During and after colonization, law and the legal system have reshaped culture and consciousness, including ideas about property ownership, contracts, crime and punishment, and individual rights and liberties.<sup>138</sup> Yet the adoption of colonial legal architecture is contestable whether it is enabled by foreign or local governance: "Postcolonialism is as much a critique of the indigenous elites of the postcolonial state, who

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<sup>134</sup> Anna Johnston & Alan Lawson, "Settler Colonies" in Henry Schwarz & Sangeeta Ray, eds, *A Companion to Postcolonial Studies* (Malden, MA: Blackwell Publishers, 2000) 360 at 369 ("The crucial theoretical move to be made is to see the 'settler' as uneasily occupying a place caught between two First Worlds, two origins of authority and authenticity. One of these is the originating world of Europe, the Imperium - the source of its principal cultural authority. Its 'other' First World is that of the First Nations whose authority they not only replaced and effaced but also desired.").

<sup>135</sup> See James Thuo Gathii, "International Law and Eurocentricity" (1998) 9 EJIL 184 at 198–99. Even the codification of customary law "was a weapon of present social control rather than a summary of past history" (citing John Lonsdale, "African Pasts in African Futures" in Bruce Berman & John Lonsdale eds, *Unhappy Valley: Conflict in Kenya and Africa, Book One: State and Class* (London, UK: J Currey, 1992) at 209). See also Sally Engle Merry, "Law and Colonialism" (1991) 25 Law & Soc'y Rev 889 at 900 ("[T]he customary law implemented in 'native courts' was not a relic of a timeless precolonial past but instead an historical construct of the colonial period', one whose present instantiation incorporates the inequalities of the colonial era.").

<sup>136</sup> Walter D. Mignolo, "The Geopolitics of Knowledge" in Mabel Moraña, Enrique Dussel & Carlos A. Jáuregui, eds, *Coloniality at Large: Latin America and the Postcolonial Debate* (Durham, NC: Duke University Press, 2008) 225 at 248-249; and Gayatri Chakravorty Spivak, "Neocolonialism and the Secret Agent of Knowledge" (1991) 13 Oxford Literary Rev. 220 (arguing that neocolonialism differs from colonialism in that it is not the return of colonialism but the replacement of colonialism with an imperialism of a different nature, one that is less territorial and more economic; this lack of overt physical presence obscures the ongoing occupation of knowledge production and social domination.).

<sup>137</sup> Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory*, 2d ed (Sydney: Law Book Co, 2002).

<sup>138</sup> Merry, *supra* note 135 at 890–92.

have uncritically embraced modernity and reproduced its hierarchical relations of power, as the elites of Europe.”<sup>139</sup>

In this complex milieu of social, political and psychological forces, acting on both offenders and victims, the Western fear of increased criminal liability for apartheid (or colonialism, aggression, or any other crimes) seems almost misplaced. For one, as the South African preference for a truth commission shows,<sup>140</sup> criminal prosecution can only grapple with the most basic aspects of colonialism and its residue. For societies still coming to grips with these histories, non-criminal processes may be the best way to achieve some degree of social reconciliation and rehabilitation. Moreover, the cross-pollination of colonial interaction and effects dislocates not only the identities of colonizer and colonized, but destabilizes the colonizer/colonized distinction as the paradigmatic divide between the criminally culpable and the criminally targeted. That is, crimes such as apartheid, colonialism and so on are relevant not because they can be wielded against Western states, but because they can be buttresses against such practices whether carried out by foreign or native actors. The dislocation and fragmentation of identity and power mean that these crimes are no longer (if they ever were) the exclusive province of Western actors, and that their criminalization remains salient. In this way, thinking about the postcolonial in terms of defining international crime is a means of recognizing the continuing precarity of Third World peoples even after decolonization.

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<sup>139</sup> Otto, *supra* note 131.

<sup>140</sup> See *Report of Truth and Reconciliation Commission*, *supra* note 15; and Kader Asmal, “International law and practice : dealing with the past in the South African experience” (2000) 15 Am U Int'l LR 1211.

## E. Civilization and the Production of (Postcolonial) Knowledge

In the defence of apartheid as a justifiable legal norm, the inherent contradictions of using the master's (legal) tools to dismantle his house become apparent. So too do the antipodes of postcolonial interventions in international law: while fixating on the outrages of the past can sometimes be paralyzing,<sup>141</sup> it is only through this remembrance that a creative, decolonizing engagement can occur with the present, and a set of tools and practices — including the criminal law — can be developed or reshaped for responding to the colonial encounter and its aftermath.<sup>142</sup>

Thus even though we are in a formally postcolonial world, where the archetypal violence associated with direct European occupation of the Global South has largely dissipated, postcolonial theory, ideas and approaches remain salient. They offer not just a rejection of colonialism, but also a response to the set of arguments that justified it, to the idea that its ill effects expired with or shortly after the end of colonialism, and to the idea that outlooks and epistemologies conditioned by the colonial encounter are no longer relevant after formal decolonization. In this section, I explain how the colonial encounter resonates in the present day through the treatment (or dismissal) of intellectual differences and the associated push for standardized international legal forms and knowledge.<sup>143</sup> Thus criticisms about deploying one's subjective 'moral authority', appealing to international guilt, and

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<sup>141</sup> Frantz Fanon, translated by Richard Philcox, *Black Skin, White Masks* (New York: Grove Press, 2008) (1967) at 178 ("Have I no other purpose on earth, then, but to avenge the Negro of the seventeenth century?").

<sup>142</sup> Homi K Bhabha, *The Location of Culture* (New York: Routledge, 1994) at 63 ("Remembering is never a quite act of introspection or retrospection. It is a painful re-membering, a putting together of the dismembered past to make sense of the trauma of the present.").

<sup>143</sup> Spivak, *supra* note 136.

shearing away from ‘legal engineering’ in order to shape the law are really an attack on a supposedly atavistic form lawmaking that Western scholars have (ostensibly) long disowned.

If the stereotype of colonial deprivation is the physical domination of slavery and disenfranchisement, the primary concern of postcolonial theory is the intellectual aspect of colonialism, the systems of knowledge and belief that support the physical manifestations of colonialism and other similar practices.<sup>144</sup> As alluded to in the previous section, these systems connect the overt injustices of colonial domination with the continuing injustices of the postcolonial world. Thus postcolonial theory is about the liberation of minds<sup>145</sup> as much as bodies, decoding the biases of intellectual disciplines, and making them more inclusive. This means ensuring that non-Western knowledge is included, and recognized as self-sufficient, instead of placing it in a marginal relationship to Western knowledge by describing it as politicized or unscientific. This is not to prioritize one over the other, but to recognize that the validity of non-Western knowledge systems and intellectual practices need not depend on their relationship to Western systems and practices.<sup>146</sup> Hence the description of apartheid as politics but not legal engineering devalues the Third World’s politically sourced norms as inherently deficient in relation to Western scientific ‘reason’. Where the initial objections to including apartheid as an international crime emanated from concern that foreign states would be implicated in the Afrikaner regime, the current contestation of apartheid centres on its normative purity.

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<sup>144</sup> Edward Said, *Culture and Imperialism* (New York: Knopf, 1993) at 8. This also includes the self-abasement that leads the colonized subject to imitate the colonizer. See Mohandas K Gandhi, *Hind Swaraj; or, Indian home rule* (Ahmedabad: Navajivan Pub House, 1938) at 30.

<sup>145</sup> Fanon, *supra* note 130 at 250 (“Total liberation is that which concerns all sectors of the personality.”).

<sup>146</sup> Leela Gandhi, *Postcolonial Theory: A Critical Introduction*, ix – x (Edinburgh: Edinburgh University Press, 1998).

Paradoxically, critiques of Eurocentrism are often uncritically adopted from their European origins without regard to the “epistemic dimension” of the colonial difference that excluded those whose liberation is now sought.<sup>147</sup> Even the defence of apartheid as a justifiable legal norm adopts certain argumentative premises — on the impropriety of subjective decisions, and the possibility of neutrality and legal rationality — to which it responds.<sup>148</sup> It presupposes the prospect of a rationalist, scientific approach to the law. In truth, the criminalization of apartheid only needs to be defended against the slur of ‘politics’ to the extent one believes that the apolitical is even possible, particularly in the context of a prolonged multilateral treaty negotiation. A postcolonial perspective on ICL therefore addresses the notion of law and its study as part of a system of power,<sup>149</sup> and adopts an interdisciplinary approach that recognizes the porous boundaries of disciplines such as law, culture, economics, politics, morality, ethics and environmental studies.<sup>150</sup> Proponents of depoliticization are often blind to both the material effects<sup>151</sup> and privilege they claim<sup>152</sup>

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<sup>147</sup> Mignolo, *supra* note 136 at 231–32. It is not the recognition of difference that is the problem; it is the conversion of those differences “into values and hierarchies” that is oppressive. *Ibid* at 239. See also Bhabha, *supra* note 142 at 68 (“What does need to be questioned, however, is the mode of representation of otherness.”).

<sup>148</sup> Mignolo argues that even emancipatory scholarship (and activism), such as that which defended the rights of native Americans and African-American slaves, left those peoples voiceless, often relying on the “irreducible colonial difference” between “those who participated in building the modern/colonial world and those who have been left out of the discussion.” Mignolo, *supra* note 136 at 231. See also Gyan Prakash, “Introduction” in Gyan Prakash, ed, *After Colonialism: Imperial Histories and Postcolonial Displacements* (Princeton: Princeton University Press, 1995) 1 at 5 (“For at stake is not simply the issue as to whether or not former colonies have become free from domination, but also the question as to how the history of colonialism and colonialism’s disciplining of history can be shaken loose from the domination of categories and ideas it produced.”).

<sup>149</sup> Antony Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5 Soc & Leg Stud 321 (describing the deliberate secularization and distillation of Christian law into the foundational principles of international law as a response to the Spanish interaction with American Indians in the New World).

<sup>150</sup> Mickelson, “Rhetoric and rage”, *supra* note 29 at 397.

<sup>151</sup> Koskenniemi, *supra* note 21.

<sup>152</sup> Auerbach, *supra* note 96.

when they attempt to separate criminal theory from the context in which it is shaped and applied – such as the lived experience of those who suffered under apartheid and other forms of institutionalized racial discrimination.<sup>153</sup>

International law and legal scholarship thus at least partially underpin a broader system of governance that conceptualizes difference in terms that privilege a Eurocentric perspective.<sup>154</sup> Either the difference is said not to exist anymore – as in claims of formal postcoloniality – or it is seen to be in need of remedy – as in claims of politicized reasoning. This conceptual differentiation is articulated in what Chakrabarty describes as the problem of historicism: that knowledge and understanding, particularly in the social sciences, require conceiving of the subject of inquiry as a coherent unit in the process of historical development or perfection.<sup>155</sup> In this teleological progress narrative, human and social development move inevitably through linear stages, with certain societies further ahead and therefore more developed.<sup>156</sup> Time's progress therefore measures “cultural distance”,<sup>157</sup> implying universality to the subject, as well as the subject's ultimate perfection through its progress towards the ideal.<sup>158</sup> This “dynamic of difference”<sup>159</sup> and its implication of

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<sup>153</sup> Whether perpetrated by neocolonial powers, local elites or some combination thereof.

<sup>154</sup> Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (New York: Verso, 1996).

<sup>155</sup> Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought & Historical Difference* (Princeton: Princeton University Press, 2007) 6–11.

<sup>156</sup> Frederic Jameson, *A Singular Modernity: Essay on the Ontology of the Present* (New York: Verso, 2002).

<sup>157</sup> Chakrabarty, *supra* note 155.

<sup>158</sup> *Ibid* at 8–9.

<sup>159</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 4 (“International lawyers over the centuries maintained this basic dichotomy between the civilized and the uncivilized, even while refining and elaborating their understanding of each of these terms. Having established this dichotomy, furthermore, jurists continually developed techniques for overcoming it by formulating legal doctrines directed towards civilizing the uncivilized world. I use the term ‘dynamic of

universality and progress again venerates the modern, developed European modes of knowledge and practice.<sup>160</sup>

In this way, concern about the politicization of apartheid's criminalization – dating back to at least the conclusion of the *Apartheid Convention* – reflects a concern about the introduction of imperfections into international lawmaking, and a reversion to the vestigial: lawmaking as the expression of self-interest. Thus the postcolonial desire to reconsider the colonial encounter through the lens of criminal law — by criminalizing apartheid, for example — is contentious because it pauses the march of progress. The great affront of including apartheid as a crime in the *Rome Statute* is not that it is hard to define, or possibly redundant in the scheme of crimes against humanity, but that it represents a dual failure to either forge beyond the events of the past, or to transcend the role of political concerns in the development of the law. This position sees apartheid's criminalization as suffocating progress by anchoring international law to temporal and methodological antiquities. Yet it remains worryingly indifferent to Lyotard's warning that the claim of rupture is “a way of forgetting or repressing the past, that is to say, repeating it and not surpassing it”.<sup>161</sup>

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difference' to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as 'universal' and civilized and the other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society.”).

<sup>160</sup> Even as the structures of colonialism deliberately foreclosed the possibility of European-style progress in the colonized lands. Césaire, *supra* note 128 at 46 (“[A]t present it is the indigenous peoples of Africa and Asia who are demanding schools, and colonialist Europe which refuses them; that it is the African who is asking for ports and road, and colonialist Europe which is niggardly on this score; that it is the colonized man who wants to move forward, and the colonizer who holds things back.”).

<sup>161</sup> Jean-Francois Lyotard, translated by Barry Don et al, Julian Pefanis & Morgan Thomas, eds, *The Postmodern Explained to Children: Correspondence, 1982 – 1985*, (Sydney: Power Publications, 1992) at 90.

### III. CONCLUSION

One can already see in the ILC process the emergence of a North-South split that pivots on irreconcilable understandings of what it means to be in a postcolonial world. For the North, the colonial encounter and its associated crimes – including apartheid – have been dispensed with; for the South, the colonial encounter only signalled the multiple possible ways in which massive human rights violations might take place. It is a warning of what might come in the future – both from the West and from oppressive non-Western governments alike – as much as it is a fact of history. Thus the need to think critically about what constitutes an international crime and what connects international crimes to one another takes on a greater urgency, and needs to be prioritized over concerns about what reflects poorly on certain states, or threatens their interests by threatening criminal prosecution for unobjectionably immoral acts. An international criminal system that fails to seriously confront this problem risks tolerating other serious international crime.

To suggest that the inclusion of apartheid in the *Rome Statute* is a political choice is to ignore the political choice to initially exclude the same conduct. Claiming that the ordinary process of legal engineering has been hijacked obscures the political preferences embedded in the usual processes of lawmaking. This claim gestures to a normative process – that which was started at the ILC – but elides its theoretical handiwork with the subsequent obstructionism of states that marred the final output. This chapter has first used TWAIL to help expose this politicization by explaining why certain viewpoints were preferred instead of others during the development of certain ICL norms. A central concern with TWAIL has been that its methods are irretrievably politicized. Yet though this statement is true, the inverse is not; non-TWAIL perspectives are not neutral simply because they are “not

TWAIL”. International criminal law is not neutral simply because it has given effect to the preferences of major powers and not to Spivak’s sub-altern. Rather, the politicization of international lawmaking is an everyday phenomenon.

Second, it has illustrated how TWAIL can rebut the accusation that its perspectives are irredeemably tainted in ways that other perspectives are not, by demonstrating that in the case of defining international crimes at least, a TWAIL position would almost certainly have preferred the more normative approach that was adopted (but then abandoned) by the International Law Commission. What this suggests is that the charge of ‘politics’ rests on a faulty premise, in that it implies simply labelling something as political discredits it. Rather, the claim of this chapter is that the real problem lies in the dissonance between claims of neutral ‘legal engineering’ and the underlying political choices that are as important in the shaping of international law. The claim that some analyses are political whereas others are scientific discredits the views and epistemologies of non-Westerners in terms that reflect the colonial concern with civilization. The impossibility of studying law as a natural science is obscured by this politicization of knowledge.

If the ‘pure’ normative position is unattainable, why is the position advocated for in this chapter – and indeed this dissertation – to be preferred? Can it be ‘proven’ that one position is better than any other? The point has been made implicitly, but its task taken up more in Chapter Two, which looks in greater detail at the concepts of international crime and violence built into ICL. It demonstrates that an alternate, TWAIL-attuned perspective better protects the interests that international criminal justice claims to, and makes ICL more effective by addressing some of the normative inconsistencies that cut across contemporary practice. In this way the, analysis of apartheid in this chapter and the next points to reforms

that affirm the liberal principles that animate ICL by uncovering and building upon the possibilities of ICL, including those embedded in and implied by the discipline as it stands. While highly critical of the approach taken with respect to defining crimes, it seeks not to dismantle them but to rehabilitate them. Here, and throughout the dissertation, the crucial step is to combine study of the practice of international law, with the theory of criminal law. In turn, this pushes the analysis to one that considers not just the bare facts of what is criminalized, but how that criminalization fits into the context of the postcolonial world.

## Chapter 2: Structural Deficits in the Concept of International Crime

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[I]f people are starving when this is objectively avoidable, then violence is committed, regardless of whether there is a clear subject-action-object relation, as during a siege yesterday or no such clear relation, as in the way world economic relations are organized today.

Johan Galtung<sup>1</sup>

Göring persecuted the Jews...not only in Germany...but in the conquered territories as well. His own utterances then and his testimony now shows this interest was primarily economic – how to get their property and how to force them out of the economic life of Europe.

Nuremberg Judgment<sup>2</sup>

### I. INTRODUCTION

The previous chapter's examination of apartheid's criminalization in international law addressed the concern that this process was a concession to the special interests of Third World states. This concession was contrasted against the principled legal positions of

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<sup>1</sup> Johan Galtung, "Violence, Peace, and Peace Research" (1969) 6 J Peace Research 167 at 171.

<sup>2</sup> International Military Tribunal (Nuremberg) Judgment 226 (1946), 1 Trial of the Major War Criminals before the International Military Tribunal 171 at 282 (1945) [*Nuremberg Judgment*].

Western states, whose reluctance to endorse the criminal prohibition lay in the supposed normative deficiencies of the rule. Yet as shown in the preceding analysis, this narrative misstates the nature of the ‘legal engineering’ that took place, and the quality and motivations of states’ responses to the proposed criminalization, as evidenced in the ratification of the *Apartheid Convention*, the ILC process, and the Rome negotiations. In truth, the ILC’s move to recognize a number of additional crimes — including apartheid and colonialism — was an important attempt to remedy the normative deficiencies of the Nuremberg-based ‘list’ approach by developing a theoretical definition of international crime. An important aspect of this history is that it was predominantly Western states who resisted this effort, which would have criminalized conduct that was largely committed against the people of decolonizing states, by colonial powers and their local proxies.

This section builds on that history by recognizing that apartheid’s inclusion in the *Rome Statute* actually represents a profound normative step for the discipline. Under the ICC regime, the criminalization of apartheid uniquely criminalizes much more than just apartheid’s violent outcomes. As Werle has suggested, the *Rome Statute* definition of apartheid prohibits all the legal and political frameworks forbidden in the 1973 *Apartheid Convention*.<sup>3</sup> As Hall notes, the *Rome Statute* also recognizes as apartheid the various types of persecution recognized as crimes in previous international criminal trials.<sup>4</sup> Through this

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<sup>3</sup> Florian Jessberger & Gerhard Werle, *Principles of International Criminal Law*, 3d ed (The Hague: TMC Asser Press, 2014) at 384 (2005).

<sup>4</sup> Like Werle, Hall notes that the reference to other crimes against humanity in the *Rome Statute* mean that virtually all of the enumerated acts in the 1973 Convention are included in Article 7; any others are arguably covered by the reference to persecution - which covers a broad range of violent acts and non-violent legal policies and political practices - as a means of committing apartheid. Machteld Boot & Christopher K Hall, “Article 7” in Otto Triffterer & Kai Ambos, eds, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Portland, OR: Hart Publishing, 2008) 227 at 256-266; and Art. II, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, GA Res 3068 (XXVIII), Nov. 30, 1973, 28 UN GAOR Supp. No. 30 at 75, 1015 UNTS 243 [*Apartheid Convention*].

approach, the *Rome Statute* allows for the criminalization of the *structures* of apartheid, and not just the kinetic violence - murder, torture, rape, and detention - that they produce.

Persecution is defined quite broadly, requiring a discriminatory act, based on the victims' group membership, and the intent to cause (and the actual result of) "an infringement on the enjoyment of a basic or fundamental [right]." <sup>5</sup> Persecution can be "*inter alia*, physical, economic or judicial in nature"; <sup>6</sup> the acts themselves need not be inhumane, but "their overall effect must offend humanity in such a way that they may be termed 'inhumane'." <sup>7</sup> Examples of persecutory acts that don't fit neatly with the sense of somatic, personal violence but turn their attention to the broad-based structural violence of Galtung include: constant degradation and humiliation; <sup>8</sup> restrictions on movements and participation in particular professions; <sup>9</sup> compelling certain groups to register with authorities, or publicly

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<sup>5</sup> *Prosecutor v Tadić*, ICTY Trial Chamber Judgment, IT-94-1 (7 May 1995) at para 715.

<sup>6</sup> *Ibid* at 710.

<sup>7</sup> *Prosecutor v Kupreškić*, ICTY Trial Chamber Judgment, IT-95-16 (14 Jan. 2000) at para 622.

<sup>8</sup> *Prosecutor v Blaskić*, ICTY Appeals Chamber Judgment, IT-95-14-A (29 July 2004) at para 155 (persecution included "psychological abuse and intimidation"); *Prosecutor v Stakić*, ICTY Appeals Chamber Judgment, IT-97-24-A (22 Mar. 2006) at para 326 ("constant humiliation and degradation"), and Trial Chamber Judgment, IT-97-24-T (31 July 2003) at paras 807–808.

<sup>9</sup> Nuremberg Judgment, *supra* note 2 at 244—45 and 292 (on ghettoization of Jews, and prohibition of Jews from certain occupations).

identify their group membership;<sup>10</sup> asset seizure,<sup>11</sup> including confiscations, collective fines,<sup>12</sup> and boycotts of businesses.<sup>13</sup>

Persecution formerly required some nexus to an armed conflict, but that is no longer the case in customary international law or the *Rome Statute*. Apartheid similarly has no armed conflict requirement—it only requires the context of institutionalized racial discrimination. As with persecution, that differential treatment carries no demand for personal violence, and includes:

any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association.<sup>14</sup>

The incorporation of this expansive sense of apartheid into the *Rome Statute* reflects a broader understanding of violence than has recently been captured in international criminal justice. It decouples violence from its traditional anchors of armed conflict and bodily harm, and gestures towards the importance of broadly defined fundamental rights violations.

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<sup>10</sup> *Ibid* at 244—45.

<sup>11</sup> *Ibid* at 244.

<sup>12</sup> In 1938, Herman Goering issued a 1 billion-mark fine against all Jewish businesses as a collective entity; the Nuremberg Tribunal declared it a crime against humanity. *Ibid* at 282. See also *Prosecutor v Blaskic*, ICTY Trial Chamber Judgment, IT-95-14-A (3 Mar. 2000), at para 229 (noting that the zonal trials conducting under Control Council Order No. 10 also described the confiscation and liquidation of property belonging to German Jews as part of the persecution of Jews in Germany).

<sup>13</sup> *Attorney-General of the Government of Israel v Eichmann*, Judgment, District Court, 12 Dec. 1961, 36 ILR 5 at para 457.

<sup>14</sup> *Apartheid Convention*, Art. II(c), *supra* note 4.

Taking this newfound breadth as its entry point, this chapter expands its horizons beyond apartheid to critically assess from a Third World perspective the current conception of international crime, violence, and its effects. It uses TWAIL to contest the adequacy of ICL's ability to account for the multifaceted nature of armed conflict and atrocity as a criminological concept. Apartheid is thus an outlier, in that it engages with a wider, structural understanding of violence and crime that is often denied in theoretical discussions of international criminal justice. It thereby interfaces with an area of scholarship that seeks to define the material jurisdiction of ICL at a normative level.<sup>15</sup> Thus it again interposes postcolonial theory and TWAIL into the philosophical debate about the terms and origins of ICL's jurisdictional domain — as opposed to discussions about its enforcement — and the normative justifiability of reforms to the same. This broader understanding of violence gives effect to the interest of Third World peoples in addressing a wider range of conduct than ICL's traditional focus; this interest, it is argued, is one that ought to be shared by all those who see ICL as one means of responding to and suppressing international crime, even in its stereotypical form of 'atrocity'.

The first two sections trace ICL's narrow understandings of violence and crime to historical problems in the priorities of international human rights law. The second section also points at common ground for scholarship that connects TWAIL with criminal law theory, and points at the need to move away from a narrow understanding of international

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<sup>15</sup> One of the chief articulators of these distinctions and normative theories of international crime is Larry May. See Larry May, *War Crimes and Just War* (New York: Cambridge University Press, 2007); Larry May, *Crimes Against Humanity: A Normative Account* (New York: Cambridge University Press, 2005); and Larry May, *Aggression and Crimes Against Peace* (New York: Cambridge University Press, 2008). Others have also attempted to offer normative accounts of international crime. See, e.g., Kirsten Fisher, *Moral Accountability and International Criminal Law - Holding Agents of Atrocity Accountable to the World* (London: Routledge, 2012); David Luban, "A Theory of Crimes Against Humanity" (2004) 29 Yale JIL 85; and, Richard Vernon, "What is Crime against Humanity" (2002) 10 J Pol Phil 231.

crimes as only spectacular atrocities, and not structural violence. The third explains how these deficiencies are reflected in the failure of ICL to seriously address the economic context of international crimes. If international criminal justice is to truly respond to the challenges of the postcolonial world, it must adopt, both in theory and practice, a more comprehensive understanding of violence and crime, and their antecedents and effects.<sup>16</sup>

## II. HUMAN RIGHTS & THE THIRD WORLD

While international human rights and ICL remain distinct in many ways, there is an important degree of overlap between human rights law, the laws of armed conflict, and ICL.<sup>17</sup> Indeed, a striking feature of explanations of what types of conduct constitute international crime, and how those acts ought to be differentiated from ‘ordinary’ domestic crimes, is the common conceptualization of international crime as international human rights ‘atrocities’.<sup>18</sup> In this understanding, punishment for international crimes is really punishment for massive violations of human rights norms. At a general level, this association is intuitive and desirable, for the truly universal application of many human rights norms would

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<sup>16</sup> Finding perhaps unexpected common ground with the Security Council, which – in a statement that has yet to be systematically followed up on – offered the following description of international peace and security in 1992: “The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.” Statement of John Major, President of the Council (UK), UNSC Meeting Record, UN Doc S/PV.3046 (31 Jan. 1992), 143.

<sup>17</sup> What Theodor Meron calls the ‘humanization’ of the law. Theodor Meron, “The Humanization of Humanitarian Law” (2000) 94 AJIL 239. See also Raúl Emilio Vinuesa, “Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law” (1998) 1 YB Int’l Humanitarian L 69; and, Hans-Joachim Heintze, “On the Relationship between Human Rights Law Protection and International Humanitarian Law” (2004) 856 Int’l Rev Red Cross 789.

<sup>18</sup> See, e.g., Steven R. Ratner, Jason S. Abrams & James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3d ed, (New York: Oxford University Press, 2009); Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007); and, Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” (2001) 95 AJIL 7.

undoubtedly be welcome by even ardent critics of the present state of international law.<sup>19</sup> While classical international law helped justify exploitative practices in the Third World, many of which have carried over into other areas of the international law system,<sup>20</sup> the human rights tradition seems more closely aligned with the amelioration of the living conditions of marginalized peoples, including those living in the Third World. Just as the regional delineation and enforcement of human rights norms in Europe has had a successful and catalyzing effect on the intra-state governance in the region – operating, in a way, to ‘civilize’ Europe – the same pattern might be replicated elsewhere. And while ICL is distinct from human rights law, there is clear overlap and ICL may well offer another tool for recognizing, affirming and enforcing international human rights.

Yet there are important problems with the development and implementation of international human rights norms, and their ossification in ICL. As argued below in Part III, the turn to human rights as integral to ICL is, in a way, a turn away from the important and valuable precedents of international humanitarian law and previous international criminal tribunals. While IHL and ICL are obviously imperfect in their own ways, the definition of particular conduct as war crimes (such as pillage) and the prosecution of businessmen and economic actors (at Nuremberg) are important successes to be built upon. That is, while IHL, ICL, and international human rights law are distinct and flawed fields, they can be coupled in meaningful and important ways that build upon the expansive understandings of violence, crime and rights embedded within each. Instead, as argued in Part III, theorists of ICL have

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<sup>19</sup> See, e.g., Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42 Harv Int’l LJ 201, 201-205 (while otherwise critiquing many aspects of international human rights practice, Mutua notes that its practitioners are both “well-meaning”, and the project is driven by “basic nobility and majesty”).

<sup>20</sup> See Diane Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” (1996) 5 Soc & Leg Stud 337, and BS Chimni, “International Institutions Today: An Imperial Global State in the Making” (2004) 15 EJIL1.

begun to adopt a streamlined understanding of human rights as the basis for defining international crime. Counter-intuitively, contemporary linkages of human rights as the central concept around which ICL should be organized undermines the successes of international humanitarian and criminal law by enforcing a narrow set of human rights priorities.

For example, while the prosecutions at the Nuremberg and Tokyo Tribunals arguably constituted a legal response to colonial crimes,<sup>21</sup> this judicial condemnation only occurred when imperial excess challenged Western interests.<sup>22</sup> While German ethnic cleansing in South West Africa was not considered a crime, the transplantation of similar policies to Europe was prosecuted.<sup>23</sup> Conceptually, the failure of German empire overseas and the military defeat of World War One meant Germans saw themselves as both colonizer and colonized.<sup>24</sup> Hitler's response was to argue that overseas imperialism had missed the mark because it had not been sufficiently concerned with racial purity. Nineteenth-century overseas colonialism continued in Nazi imperialism, connected by "the eschatology of ethnic homogeneity over diversity, imperial enlargement over stasis, and *Lebensraum* as the route to biological survival."<sup>25</sup> The Allies were also careful to insist that crimes against humanity could only be committed in the context of an international armed conflict, which precluded

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<sup>21</sup> Carroll P Kakel, *The Holocaust as Colonial Genocide: Hitler's 'Indian Wars' in the 'Wild East'* (Basingstoke: Palgrave Macmillan, 2013) at 60-78.

<sup>22</sup> Aimé Césaire, *Discourse on Colonialism*, translated by Joan Pinkham (New York: Monthly Review Press, 2000) (1955). See also Antony Anghie & BS Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflict" (2003) 2 *Chinese J Int'l L* 77 at 88 (2003).

<sup>23</sup> In particular, South West Africa was an incubator for concepts of German racial science, and the application of eugenics and social Darwinism. See David Olusoga & Casper W Erichsen, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber and Faber, 2010).

<sup>24</sup> Shelley Baronowski, *Nazi Empire: German Colonialism and Imperialism from Bismarck to Hitler* (Cambridge: Cambridge University Press, 2011), 116.

<sup>25</sup> *Id* at 6.

the application of ICL to the practices of Western states with respect to their colonies and domestic minority populations.<sup>26</sup> Those acts were only crimes to the extent they could be linked to an aggressive war.<sup>27</sup> The same process could be seen when the British later insisted on allowing for derogation from human rights norms in times of ‘emergency’. Of course, ‘emergencies’ were crucial tools of managing resistant, nationalist, or otherwise ‘disorderly’ populations around the world:<sup>28</sup> in colonies; in proxy and client states during the Cold War; and even within newly-independent Third World states.<sup>29</sup>

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<sup>26</sup> *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials*, (Washington: US Government Printing Office, 1949) 333 (“[O]rdinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved.”).

<sup>27</sup> *Id* at 331 (“The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war.”); Roger S Clark, “Crimes Against Humanity At Nuremberg” in George Ginsburgs and Vladimir Nikolaevich Kudriavtsev, eds, *The Nuremberg Trial and International Law* (Boston: Martinus Nijhoff, 1999) 177, at 183 (describing the link proposed by the British and Americans as “a severely limiting element”); and, Egon Schwelb, “Crimes Against Humanity” (1946) 23 *Brit YB Int’l L* 178, 193 – 195, (explaining how the Berlin Protocol of October 1945 as “a very important restriction” requiring a nexus with the illegal pursuit of an international armed conflict).

<sup>28</sup> Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* 176–82 (New York: Cambridge University Press, 2003).

<sup>29</sup> See *Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*, Leandro Despouy, Special Rapporteur, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, ECOSOC, UN Doc E/CN.4/Sub.2/1997/19 (23 June 1997), noting that nearly 75% of the world’s population had lived under a state of emergency in the previous 12 years. Paras. 180-181. States of emergencies were often characterized by several anomalies: (1) de facto states of emergency, where rights derogations persisted even when no emergency was declared or where the state of emergency had been lifted; (2) failures to report states of emergency; (3) the routinization of states of emergency over long periods; (4) the institutionalization of states of emergency through legal systems that effectively act in parallel to the normal legal order. *Id* at paras. 115 – 172. The report further notes that anomalous emergencies often have disproportionate impact on vulnerable groups, including victims of armed conflict, minorities, and indigenous populations. *Id* at paras. 173 – 178. The state of emergency can transform the rule of law and become “an instrument for repressing the opposition and dissenters.” *Id* at para. 154. States of emergencies were noted in states as varied as Afghanistan (de facto state of emergency), Rwanda (declared in 1996 by the new Tutsi government to have started with the April 1994 genocide), Israel (state of emergency since 1948) and the Occupied Territories (emergency since 1992), the United States (in response to African-American protests and riots regarding police brutality), Liberia (since 1990) and the United Kingdom (in Northern Ireland).

Thus there is concern that human rights laws are instrumentalized by states as non-altruistic policy tools,<sup>30</sup> through partial enforcement, partial definition, and their linkage to particular political and economic models.<sup>31</sup> Mutua describes this as a Western ‘cultural package’ that includes not just a specific reading of which human rights are important, but a particular conception of democratic and economic governance to enable them.<sup>32</sup> Clarke points out that the ratification of the *Rome Statute* by many Third World states was at least in part the result of extraneous pressures - tied to the provision of foreign aid and the associated satisfaction of good governance requirements.<sup>33</sup> As Sally Engle Merry notes, a certain circularity is embedded herein – the ratification of human rights treaties signal good governance, and thus “where to send foreign aid, where to focus on human rights violators, and which countries offer the best conditions for business development.”<sup>34</sup> Human rights has a Janus-face, where its successes and emancipatory potential co-exist with a disciplinary thrust that often sidelines Third World interests.

The history of the foundational statements of international human rights supports this critique. The so-called ‘International Bill of Rights’ consists of one General Assembly

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<sup>30</sup> Eric Posner, “Martti Koskeniemi on Human Rights: An Empirical Perspective” (U. Chi. Pub. L Working Paper No. 467), available at <<http://ssrn.com/abstract=2414699>>.

<sup>31</sup> Antony Anghie, “Whose Utopia? Human Rights, Development, and the Third World” (2013) 22 *Qui Parle: Critical Humanities & Soc Sciences* 63 at 74–75 (“It is surely not a coincidence that human rights... flourished and expanded in the following decades, the same decades that saw the relentless promotion of neoliberal policies by the international financial institutions in developing countries (well before the 1990s) and the intensification of globalization following the end of the Cold War.”).

<sup>32</sup> Mutua, *supra* note 19 at 237.

<sup>33</sup> Kamari Maxine Clarke, “Power Politics and its Global Shadows: From Margins to Center”, online: <[www.jamesgstewart.com](http://www.jamesgstewart.com)> (20 Feb. 2015) (“Further, many African states joined the ICC treaty system based on the formal and informal pressure of Western states, institutions, and civil society groups. Western state actors tied international treaty participation to monetary lending; signing treaties like the Rome Statute were used as statistical indicators for predicting various state economic outcomes.”).

<sup>34</sup> Sally Engle Merry, “Measuring the World: Indicators, Human Rights, and Global Governance” (2011) 52 *Supp. 3 Cultural Anthropology* S83.

resolution and its two implementing treaties. The informal name is misleading, however, as the two treaties – the *International Covenant on Civil and Political Rights*<sup>35</sup> (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*<sup>36</sup> (ICESCR) – did not enter into force until eighteen years after the General Assembly passed the *Universal Declaration of Human Rights*<sup>37</sup> (UDHR) in 1948.

The timing is important. Since the UDHR arose with the new United Nations when much of the colonized world was still under direct occupation, there was only a limited role for the vast majority of the Third World to play in the shaping of the UDHR.<sup>38</sup> As an illustration, the only African nations involved in either the drafting or ultimate voting on the resolution were British-occupied Egypt, colonial South Africa, and Ethiopia.<sup>39</sup> In his memoirs, John Humphrey, the Canadian architect of the UDHR, laughed off the Chinese suggestion that Humphrey spend six months studying Asian philosophy before attempting a draft Declaration.<sup>40</sup> Instead, the draft was drawn exclusively from Western documents, all but

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<sup>35</sup> *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 UNTS 171, 6 ILM 38 (1967) [hereinafter ICCPR].

<sup>36</sup> *International Covenant on Economic, Social and Cultural Rights*, Dec. 19, 1966, 993 UNTS 3, 6 ILM 360 (1967) [hereinafter ICESCR].

<sup>37</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), at 71, UN GAOR, 3d Sess., 1<sup>st</sup> plen. mtg., Doc A/810 at 71 (Dec. 12, 1948) [hereinafter UDHR].

<sup>38</sup> See, however, Susan Waltz, “Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights” in José-Manuel Barreto, ed, *Human Rights From a Third World Perspective* 353 at 373–74 (Newcastle: Cambridge Scholars Publishing, 2013) (noting that “small states” helped ensure that socioeconomic and women’s rights remained part of the Declaration as against Western opposition).

<sup>39</sup> The drafting committee contained representatives from Australia, Canada, Chile and Lebanon, in addition to the five permanent members of the Security Council. UN Econ & Soc Council [ECOSOC], Comm on Hum Rts, *Letter from the Chairman of the Commission on Human Rights to the President of the Economic and Social Council*, UN Doc E/383 (Mar. 24, 1947) (prepared by Eleanor Roosevelt).

<sup>40</sup> John P Humphrey, “The Memoirs of John P Humphrey, the First Director of the United Nations Human Rights Division” (1983) 5 Hum Rts Q 387 at 403.

two of which were from English-speaking states.<sup>41</sup> There is no telling what might have emerged had Humphrey considered non-Western sources, but the UDHR did not capture the full breadth of global human rights approaches. For example, Chinese understandings of human rights were defined less in absolute individualist terms and more as duties owed to a collective;<sup>42</sup> a similar emphasis on collectivities and the correlation between rights and duties is found in the *African Charter on Human and People's Rights*, whose central tenet is the non-discrimination between individuals and between peoples.<sup>43</sup> That *Charter* also recognizes a number of social solidarity rights (to peace, security, healthy environment, economic and social development).<sup>44</sup>

Even if one accepts the insistence that what the non-West offered were articulations of human *dignity*, and not human *rights* properly defined,<sup>45</sup> there have been clear enumerations of individual entitlements that exceed Western limits because they are shaped by the particular experiences of non-Western individuals and groups. One example is the “radical” statement of women’s rights attached to the People’s Charter through the African Protocol on Women’s Rights,<sup>46</sup> which was the first instrument in international law to explicitly affirm the right to medical abortion, and to call for an end to female genital

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<sup>41</sup> *Ibid* at 406.

<sup>42</sup> Melanne Andromecca Civic, “A Comparative Analysis of International and Chinese Human Rights Law — Universality Versus Cultural Relativism” (1996) 2 *Buff J Int'l L* 285 at 312–14.

<sup>43</sup> B Obinna Okere, “The Protection of Human Rights in Africa and the African Charter on Human and People’s Rights: A Comparative Analysis with the European and American Systems” (1984) 6 *Hum Rts Q* 141 at 145.

<sup>44</sup> *Ibid* at 145–48.

<sup>45</sup> Jack Donnelly, “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights” (1982) 76 *Am Pol Sci Rev* 303 (arguing that neither Islam, Confucianism, Hinduism, Soviet Communism, nor an amalgamated category of “Traditional African Societies” recognizes human rights).

<sup>46</sup> Fareda Banda, “Blazing a Trail: The African Protocol on Women’s Rights Comes Into Force” (2005) 50 *J Afr L* 72 at 73.

cutting.<sup>47</sup> Similarly novel was its conceptualization of violence — as “physical, sexual, psychological, and economic harm”<sup>48</sup> — and its response to specific cultural practices on marriage and divorce, widow abuse, sexual harassment at school and work, and the recognition of women’s vital role in economic systems. Thus while a shared core with mainstream human rights statements is cognizable here, different understandings of human rights conditioned by non-Western cultural histories and the lived experiences of the non-West should cause reconsideration of the universality of the foundational human rights documents.<sup>49</sup>

In particular, the *UDHR* — drafted after the “Wilsonian moment”,<sup>50</sup> and after the liberation of Europe and Asia from the respective tyrannies of Germany and Japan — not only fails to recognize the right to self-determination,<sup>51</sup> but also openly anticipates the continuation of imperial domination through colonialism, protectorates, and mandates.<sup>52</sup> The

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<sup>47</sup> Rose Gawayana & Rosemary Semafumu Mukasa, “The African Women’s Protocol: A New Dimension for Women’s Rights in Africa” (2005) 13:3 *Gender and Development* 42 at 42.

<sup>48</sup> *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, Art. 1(j). Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, Sept. 13, 2000, reprinted in (2001) 1 *Afr Hum Rts LJ* 40.

<sup>49</sup> To borrow the language of Diane Otto, “Rethinking the “Universality” of Human Rights Law” (1997-98) 29 *Colum Hum Rts L Rev* 1. The idea that human rights discourse truly captures non-Western understandings of the most important moral values has been challenged. See Anghie, *supra* note 31 at 74 (“[F]or many minorities and indigenous people, the utopia they sought, and continue to seek, is the old utopia of self-determination, recognition of nationhood, and sovereignty.”).

<sup>50</sup> Woodrow Wilson’s promotion of the right of self-determination after the end of the First World War, and in the lead up to the Paris Peace Conference of 1919, inspiring nationalist movements across the colonial world — movements he later betrayed through his own adoption of the ‘white man’s burden’. See Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anti-Colonial Nationalism* (New York: Oxford University Press, 2007).

<sup>51</sup> Colonial powers rejected a provision that would have explicitly applied the Declaration to all territories, whether independent states or not. Waltz, *supra* note 38 at 376–377.

<sup>52</sup> According to Article 2 of the *UDHR*, the rights contained in it apply regardless of whether the territory concerned is “independent, trust, non-self-governing or under any other limitation of sovereignty.” *Supra* note 37.

Declaration mirrors pre-war sentiments of the civilizing mission, such as French civil liberties groups who, when confronted with the problem of rights for colonized peoples, sought not to eliminate colonialism but to bring colonial subjects up to the standard of the French.<sup>53</sup> Though the content of the UDHR might largely be shared with non-Western cultures, the implementation of human rights internationally has often constructed these norms as being for the benefit of undeveloped nations (and therefore peculiarly Western in origin), while simultaneously presuming the completeness of them, and therefore denying the need to incorporate non-Western conceptions or priorities.<sup>54</sup> The point is not to repudiate international human rights as a field. There are important human rights successes, of course, particularly in regional courts such as the Inter-American Court for Human Rights and, more clearly, the European Court of Human Rights, as well as the use of rights discourse by indigenous peoples.<sup>55</sup> Rather, it is to explain how broader understandings of human rights that appeal to specific Third World concerns and ideas about human rights (and in particular about distributive justice) have been marginalized. The detrimental impact of protecting civil and political rights is not that those rights are protected, but that in enforcing those rights, alternate conceptions and understandings are crowded out.

Refining the *UDHR* through two implementing treaties presented exactly this problem in the Cold War era.<sup>56</sup> The Soviet Union sought one enforceable agreement, whereas

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<sup>53</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010) at 87.

<sup>54</sup> Makau Mutua, "The Ideology of Human Rights" (1996) 36 *Va J Int'l L* 589 at 603-607.

<sup>55</sup> Ronald Niezen, *Public Justice and the Anthropology of Law* (Cambridge: Cambridge University Press, 2010) (on First Nations' peoples of Canada using rights discourse as a strategy for successfully framing political claims).

<sup>56</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 19.

the United States pushed for two treaties, separating economic, social and cultural rights from civil and political rights.<sup>57</sup> This resulted in two documents that differ substantially in their terms of enforcement and therefore the nature and effectiveness of any obligations placed upon states. Whereas the *ICCPR* places clear, immediate and unqualified commitments upon States Parties, the *ICESCR* gives individual states great latitude in determining which aspects of the covenant will be implemented and to what extent.<sup>58</sup>

Opposition to a truly enforceable *ICESCR* stemmed from political concern that the enforcement of such rights would interfere with Western conceptions of liberal, free-market democracy<sup>59</sup> by way of “a socialist manifesto thinly veiled in the language of rights”.<sup>60</sup> This association of rights with political and economic systems continued through charges that “the communist system promised to fulfill economic social and cultural rights but failed to deliver them”,<sup>61</sup> and the view that economic, social and cultural rights are “goals that can only be achieved progressively, not guarantees”.<sup>62</sup> Whereas the doctrine of human rights was

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<sup>57</sup> Beth Lyon, “Discourse in Development: A Post-Colonial “Agenda” for the United Nations Committee on Economic, Social and Cultural Rights” (2002) 10 *Am U J Gender & Soc Pol’y & L* 535 at 539.

<sup>58</sup> Article 2(1), *supra* note 36: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.

<sup>59</sup> Malcolm Shaw, *International Law*, 6th ed, (Cambridge: Cambridge University Press, 2008) at 309.

<sup>60</sup> Barbara Stark, “Economic Rights in the United States and International Human Rights law: Toward an “Entirely New Strategy” (1992) 44 *Hastings LJ* 79 at 81.

<sup>61</sup> Remarks by US Delegate Richard Wall, UN ESCOR, UN Comm Hum Rts , 59th Sess., Agenda Item 10 (Apr. 7, 2003).

<sup>62</sup> UN Econ & Soc Council [ECOSOC], Comm on Hum Rts, *Report of the Open-Ended Working Group on the Right to Development*, UN Doc E/CN.4/2001/26 (Mar. 20, 2001) at 46.

supposed to have arisen in response to the failures of universalist ideologies, it was captured and repurposed as part of a continuing contest between such political-economic “utopias”.<sup>63</sup>

This binary opposition greatly dulled the effectiveness of the *ICESCR*, even though the rights contained within it and the activity of the UN Committee on Economic, Social and Cultural Rights has shown how the effective monitoring and enforcement of those rights can benefit Third World peoples.<sup>64</sup> The *ICESCR* implied positive intervention in order to implement collectivist goals, fitting well with anti-colonial movements for whom “the utopia that still mattered most was postcolonial, collective liberation from empire”,<sup>65</sup> not the prioritization of the individual. To the extent that anti-colonialists are concerned with economic development,<sup>66</sup> weakening the *ICESCR* limited the viability of human rights discourse as a tool for redressing material inequity.

The other problematic feature of this binary opposition is that it often targeted non-Westerners,<sup>67</sup> even after the fall of Communism.<sup>68</sup> Third World resistance to this

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<sup>63</sup> Moyn, *supra* note 53 at 8.

<sup>64</sup> Lyon, *supra* note 57 at 539–40 and 556–57.

<sup>65</sup> Moyn, *supra* note 53 at 85. Moyn describes the distinction as one between ‘human rights’ and the ‘rights of man’.

<sup>66</sup> *Ibid* at 86.

<sup>67</sup> Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at 71–74 (the internationalization of human rights was “designed to improve the condition of human rights in countries other than the United States (and a very few like-minded liberal states)”; Philip Alston, “Appraising the United Nations Human Rights Regime” in Philip Alston, ed, *The United Nations and Human Rights: A Critical Appraisal* (New York: Oxford University Press, 1992) 1 at 1; Rosalyn Higgins, “Opinion: Ten Years on the UN Human Rights Committee: Some Thoughts Upon Parting” (1996) 1 Eur Hum Rts L Rev 570 at 581 (“As for the liberal democracies, their approach has often been that the Covenant [ICCPR] is a splendid document – splendid that is, for the Third World countries and Eastern Europe, where human rights are in urgent need of attention....the impression is often given that the Covenant is really not for them [liberal democracies], because the observance of human rights is fully guaranteed in their countries.”); Department of State, Country Reports for Human Rights Practices for 1985, at 3 (1986), available at <<https://archive.org/details/countryreportson1985unit>>. See also Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals* (New York: Oxford University Press, 1996) at 710-725.

phenomenon was displaced by what Rajagopal describes as liberal processualism and substantivism: the notion that human rights provide a universal solution to the problems of modernity.<sup>69</sup> At the same time, Western states and particularly the United States, engaged in a multi-faceted exceptionalism even in relation to civil and political rights.<sup>70</sup> The attitude was summarized by the distinguished international lawyer Thomas Franck, whose three-volume treatment of human rights in the Third World focused exclusively on civil and political rights, which he described as “that which deals with those fundamental procedural precepts which are the traffic rules of the economic-social-political road to modernization.”<sup>71</sup>

### III. ATROCITY & THE APPETITE FOR CRIMINAL LAW THEORY

This brief history of human rights should not be taken as denying the valence or even the benefits of implementing rights discourse and recognition in the Third World. Nor is it to suggest that Western states are exempt from or have not had their activities curtailed by the operation or recognition of rights. Indeed, one of the remarkable effects of the European Court of Human Rights is that it has been so successful in and committed to enforcing human rights at the regional level, it has alienated even paradigmatically liberal democratic states such as the United Kingdom. Surprised by the robust dedication of the Court, the government

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<sup>68</sup> M Shiviah, “Human Rights and the Third World: Towards a Reassessment of Ideological Dynamics”, 30 *Econ & Pol Wkly* (Nov. 18, 1995) at 2937. Shiviah’s point does not deny that human rights law have shaped Western states as well; rather, that the modes of this interaction are largely consensual in the West, but coercive in the non-West.

<sup>69</sup> Liberal processualism states that human rights are Western in origin but universally self-evident; liberal substantivism that human rights arose first in the West, but are uniquely suited to solving the problems of modernity. Rajagopal, *supra* note 29 at 174–75.

<sup>70</sup> Michael Ignatieff, “Introduction” in Michael Ignatieff, ed, *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 1 at 3–11.

<sup>71</sup> Thomas Franck, *Human Rights in Third World Perspective* (New York: Oceana Publications, 1982) at xv.

of the day has threatened to withdraw from the European Convention of Human Rights.<sup>72</sup> Rather, it is to point at the prioritization in the international sphere of certain rights as pre-eminent, and to thus explain the incorporation of these attitudes in ICL, where apartheid is the conceptual anomaly.<sup>73</sup> Though even critics of the idealization of human rights law acknowledge the field has grown to better accommodate ‘social rights’,<sup>74</sup> and there is a growing movement to regulate the human rights impacts of multinational business,<sup>75</sup> ICL continues to enforce a very narrow set of human rights priorities.<sup>76</sup>

Indeed, courts and commentators argue that this correspondence is a defining characteristic of ICL:<sup>77</sup> ICL is a means of implementing international human rights law;<sup>78</sup> it

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<sup>72</sup> As outlined by Chris Grayling, Secretary of State for Justice, in an undated document entitled “The Conservatives’ Proposals for Changing Britain’s Human Rights Laws” (available online <[https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN\\_RIGHTS.pdf](https://www.conservatives.com/~media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf)>). In media appearances to discuss the proposal, Grayling raised the possibility of withdrawal from the treaty regime if the government’s demands were not met. Nicholas Watt and Owen Bowcott, “Tories plan to withdraw UK from European convention on human rights” (3 Oct. 2014), online: *Guardian*, <[www.theguardian.com](http://www.theguardian.com)>.

<sup>73</sup> Although the crime has yet to be prosecuted at the international level.

<sup>74</sup> Moyn, *supra* note 53 at 223.

<sup>75</sup> As exemplified in the UN Guiding Principles on Business and Human Rights. See *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, Human Rights Council, 17th Sess., UN Doc A/HRC/17/31 (21 March 2011). The Guiding Principles prompted states to begin negotiations on a legally binding instrument to regulate businesses with respect to human rights. See “Human rights and transnational corporations and other business enterprises”, Human Rights Council, 26th Sess., UN Doc A/HRC/26/L1 (23 June 2014); and, “Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights”, Human Rights Council, 26th Sess., UN Doc A/HRC/26/L22/Rev 1 (24 June 2014).

<sup>76</sup> Meron, *supra* note 17 at 227–28 (that international criminal courts will deter human rights atrocities).

<sup>77</sup> *Prosecutor v Kunarac et al*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, (21 Feb. 2001) at para 467 (“Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.”).

<sup>78</sup> Ratner, Abrams & Bischoff, *supra* note 18 at 12. See also Damien Scalia, “Human Rights in the context of international criminal law: respecting them and ensuring respect for them” in Robert Kolb & Gloria Gaggioli, eds, *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham, UK: Edward Elgar, 2013) 575 at 582.

developed to respond to egregious<sup>79</sup> or gross<sup>80</sup> human rights violations; the claims it protects are those of human rights law;<sup>81</sup> and, international crimes should be restricted to acts “that jeopardize the most basic human rights necessary to enjoy any other rights - physical security rights”, and then only when such acts are actualized through “the travesty of political organization.”<sup>82</sup> On these accounts of international crime as human rights atrocity, the material jurisdiction of ICL ought to be further *reduced* to those incidences of spectacular, not structural, violence.<sup>83</sup>

This narrow understanding of crime is problematic in three ways. First, it challenges whether a number of serious non-violent war crimes ought to be prosecuted at all, since they are not linked to the spectacular violence of atrocity crimes. May’s otherwise comprehensive evaluation of the normative justification for war crimes explicitly excludes property crimes, and considers non-violent war crimes an anomaly that he cannot explain.<sup>84</sup> Fisher opposes the continued inclusion in the *Rome Statute* of not only pillage<sup>85</sup> but also other offences such

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<sup>79</sup> Robert Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmhurst, *An Introduction to ICL and Procedure* (Cambridge: Cambridge University Press, 2007) at 9.

<sup>80</sup> David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of ICL” in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Cambridge: Cambridge University Press, 2010) 569 at 574.

<sup>81</sup> *Prosecutor v Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Oct. 2, 1995) at para 58.

<sup>82</sup> Fisher, *supra* note 15 at 24–26. Luban also conceptualizes international crime as crimes of “political violence”. Luban, *supra* note 15 at 576–77.

<sup>83</sup> This phrase is borrowed from Moyn, *supra* note 53 at 223–24.

<sup>84</sup> May, *War Crimes and Just War*, *supra* note 15 at 18.

<sup>85</sup> Not all theorists adopt this position. See, e.g., James G Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York: Open Society Foundation, 2011) (discussing the legal blueprint for prosecuting pillage).

as attacks against cultural property, and destruction of the physical environment,<sup>86</sup> even though those crimes are often integral to both the continuation of armed conflict and the suffering imposed by that conflict.

Second, the emphasis on ‘human rights atrocities’ and attacks on ‘basic security rights’ is also inadequate for responding to structural crimes that are otherwise recognized as deeply grave and the cause of massive suffering. Colonialism, for example, is not an international crime, and while this section began with the optimistic assertion that apartheid under the *Rome Statute* engages with both spectacular and structural violence, others disagree.<sup>87</sup> Here, apartheid *must* be accompanied by bodily harm;<sup>88</sup> the systems of segregation, ghettoization and exclusion that deny equality in voting rights, property ownership, labour guarantees, and a host of other rights and legal protections are not crimes.<sup>89</sup> Non-recognition of these various types of crimes limits the protection and remedies available to those who suffer under them — often the most marginalized people in the Global South.

By extension, this conception remains incapable of accommodating the “slow violence” of which Nixon warns:<sup>90</sup> the “delayed-action casualties”<sup>91</sup> of Gulf War

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<sup>86</sup> Fisher’s response is that these acts should not be seen as international crimes. Fisher, *supra* note 15 at 24.

<sup>87</sup> See, e.g., Paul Eden, *The Role of the Rome Statute in the Criminalization of Apartheid*, 12 JICJ 171, 185 (2014).

<sup>88</sup> *Statute of the International Criminal Court*, art. 7(2)(h), July 17, 1998, 2187 UNTS 90, 37 ILM 1002.

<sup>89</sup> By implication, many of these commentators might say the same for persecution under the Rome Statute.

<sup>90</sup> Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge, MA: Harvard University Press, 2011).

<sup>91</sup> *Ibid* at 211.

Syndrome,<sup>92</sup> and the use of depleted-uranium weapons<sup>93</sup> – the heirs to Agent Orange, Little Boy and Fat Man.<sup>94</sup> No court has yet to consider the criminal implications of creating a radioactive wasteland whose toxic residue contaminates, mutates, and kills for years after the war has ended,<sup>95</sup> or the implications of dormant, unexploded cluster bombs,<sup>96</sup> or even the impact on civilians of international sanctions regimes that often precede military conflict.<sup>97</sup> The costs imposed by these weapons and strategies – in continued casualties, in clean-up, in environmental degradation, in broad-based civilian suffering – are not only immense, but reinforce the material inequities of the international system because the burden of suffering and response is borne by largely impoverished (and largely non-Western) nations, and in particular the most vulnerable populations of those states.<sup>98</sup> The core/periphery distinction

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<sup>92</sup> Which has severe physical effects, and was known in Europe as “Peacekeeper’s syndrome”.

<sup>93</sup> A review of depleted uranium (DU) studies links DU (and DU munitions) to an increased risk of birth defects. Rita Hindin, Doug Brugge, and Bindu Panikkar, “Teratogenicity of depleted uranium aerosols: A review from an epidemiological perspective” (2005) 4:17 *Envtl Health*.

<sup>94</sup> The nicknames given to the nuclear weapons dropped on Hiroshima and Nagasaki, respectively, towards the end of the Second World War.

<sup>95</sup> For example, forty-five years after the use of radioactive weapons in Hiroshima and Nagasaki, the effects of those weapons continue to be linked to excess incidences of various types of cancer among bomb survivors, and brain damage in those who suffered exposure to radiation while *in utero*. See Itsuzo Shigematsu, “Preface: A Review of Forty-Five Years of Hiroshima and Nagasaki Atomic Bomb Survivors” (1991) 32 *J Rad Res Suppl* iii at iii.

<sup>96</sup> Unexploded weapons disproportionately kill children. According to Nixon, 69 percent of victims of unexploded weapons in Afghanistan were under 18; in Iraq, 60 percent were under 15. Nixon, *supra* note 136 at 226.

<sup>97</sup> W. Michael Reisman and Douglas L Stevick, “The Applicability of International Law Standards to United Nations Economic Sanctions Programmes” (1998) 9 *EJIL* 86 (arguing that given their “potential destructiveness”, as in Haiti, international humanitarian law standards — including necessity, proportionality, and targeting principles — ought to apply to the decision to impose sanctions against states).

<sup>98</sup> Nixon notes that the most vulnerable of developed states are also disproportionately affected by the production and use of these weapons. It is Western troops who are exposed to dangerous levels of chemical and radioactive contamination; and it is civilians who live near weapons development and processing plants that suffer the effects of environmental contamination. See Nixon, “Ecologies of the Aftermath: Precision Warfare and Slow Violence” in *Slow Violence and the Environmentalism of the Poor*, *supra* note 136 at 199–232.

therefore marks the production of law, and sanctions the attendant distribution of harm and suffering.

Third, this particular basis for international crime elides the distinction between categories and causes of crimes, and between responding to crimes and preventing them. It is a reactive, post-hoc definition of crime, one that relies on the most obvious stereotypes of violence; it is obsessed with the symptoms of suffering, but does not make meaningful inquiry as to the causes of ‘atrocities’ except to the extent that it wrongly implies, through definition and case-selection, that *only* undemocratic states commit (or permit) these crimes. Reducing the corpus of international crimes to a minimalist reading of international human rights law pre-empts necessary inquiry into the theory of ICL: a coherent normative connection between international crimes, tied to a criminological explanation of what causes those crimes in the first instance.

These problems pose associated challenges — as well as the possibility of fruitful mutual interaction — for both orthodox scholars of ICL and TWAIL interrogators. They first suggest that criminal law scholarship is sometimes too quick to confirm the preoccupation with kinetic violence, notwithstanding the profound suffering caused by other, apparently non-violent conduct.<sup>99</sup> In addition, they emphasize the need for TWAIL scholars to engage in debates about not just the implementation of international criminal justice, but also its normative foundations. If the status of pillage and apartheid as international crimes are threatened, part of the response must be to offer an explanation of what qualifies as an international crime. Otherwise, as seen with apartheid, there is no guarantee that they will be

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<sup>99</sup> It’s worth considering in this respect how one’s subject position — geographic base and cultural context — might affect one’s interpretation of the severity and priority of wide-ranging rights violations that do not involve kinetic violence.

prosecuted when certain important practitioners and scholars regard them as symbolic gestures, political fig-leaves or antiquated anomalies. In doing so, TWAIL scholars must also address the intricacies of defining the specific crime itself. For example, while pillage may be an important legal tool for combatting the exploitation of natural resources during conflict, current definitions of pillage also seem to privilege state actors over non-state actors. This undermines the concept of legal equality that ostensibly underpins both humanitarian law and criminal law.<sup>100</sup> Legal (in)equality and its effects ought to be a pre-eminent concern for TWAIL and ICL scholars,<sup>101</sup> and the differentiation between governments and non-state actors may also disadvantage national liberation struggles that postcolonial theory frequently championed through its support of self-determination and decolonization. These are important issues of criminal theory to be addressed.

Similarly, it is not as simple to say that certain additional conduct — such as the use of depleted uranium weapons, or unfettered international sanctions — causes important harms. In addition to the concept of crime, TWAIL scholars need to also address the attendant normative issues of causation and attribution that bedevil attempts to assign criminal responsibility for this sort of violence. Conspiracy, complicity and joint criminal enterprise have a complex history in international and domestic law, and demand a great deal more attention if the structural violence studied herein is to be given any significance in the criminal law. One key issue here is the lack of global understanding of when – if ever –

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<sup>100</sup> Larissa van den Henrik & Daniëlla Dam-De Jong, “Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict” (2011) 15 *Crim LF* 237, 252 – 255.

<sup>101</sup> See Chapter 4.

corporate criminal responsibility exists, and the terms on which such liability ought to be drawn.<sup>102</sup>

Finally, these problems demand an interdisciplinary study of ICL that transcends the current human rights paradigm, and attends to the histories of violence and normative defensibility of the legal responses marshaled against those histories. As it stands, the emancipatory promise of international human rights law cannot yet decolonize our understanding of international crime and punishment because it clings to antiquated perceptions of violence and suffering, and focuses on individual offenders instead of structures of perpetration. The conceptual centrality of ‘human rights’ to so much judicial and scholarly discussion has rhetorical attractiveness, but – in its current formulation – seems inadequate to the task of accounting for the manifold forms of kinetic and structural violence characterize international crime.

#### IV. THE ECONOMIC CONTEXT OF INTERNATIONAL CRIME

A central problem with conceptualizing international crime in terms of atrocities and political conflict is the general failure to address the economic, social, and cultural factors that contribute to mass atrocity. This is not to say that inequality should be criminalized, or that former colonial and slave-trading powers necessarily owe reparations, but that even if ICL is only concerned with preventing further ‘atrocity’ it must move beyond its fixation

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<sup>102</sup> See, e.g., James G Stewart, “A Pragmatic Critique of Corporate Criminal Theory: Lessons from the Extremity” (2013) 16 *New Crim LR* 261 (that the complexities of crime and corporate activity demand a flexible, not categorical or uniform, approach to corporate criminal and civil liability); Todd Archibald, Ken Jull, and Kent Roach, “Corporate Criminal Liability: Myriad Complexity in the Scope of Senior Officer” (2013) 60 *Crim LQ* (arguing that the Canadian model of attributing liability on the basis of the actions of a senior officer(s) is an appropriate middle ground between “directing mind” concepts and vicarious liability); and, Jennifer A Quaid, “The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis” (1998) 43 *McGill LJ* 67 (arguing for liability determined on the basis of the corporate entity - independent of individual members or officers - as an intentional actor).

with political and military actors and start to address the economic agents that shape the context of armed conflict. One notable exception is the prosecution of German industrialists and businessmen after World War Two – an effort that was so intensive that contemporary scholars have used those prosecutions as a legal blueprint for present-day cases.<sup>103</sup> While the lenient sentences and pardons issued in those German cases have been described as “the hidden victor’s justice of capitalism”,<sup>104</sup> it remains the case that no contemporary ICTs have focused on the connections between socioeconomic context and atrocity in any comparable depth, marginalizing the past successes of IHL and ICL.

For example, the notion of pillage, which criminalizes theft during conflict, has been sparsely applied even in paradigmatic resource-based conflicts, even though the ICTY had stated that pillage includes the “organized seizure of property” and “systematic economic exploitation”,<sup>105</sup> and the International Court of Justice (ICJ) has identified it in the Democratic Republic of Congo.<sup>106</sup> While prosecutors at the Special Court for Sierra Leone (SCSL) alleged that diamond mining formed a key element of the joint criminal enterprise that rebels in Sierra Leone engaged in (and involved actors based in Liberia as well), no rebels were charged with pillage for those crimes. Charles Taylor was eventually convicted

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<sup>103</sup> See Stewart, *supra* note 85.

<sup>104</sup> Grietje Baars, “Capitalism’s Victor’s Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII” in Kevin Jon Heller & Gerry Simpson, eds, *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2013) 163 at 163-64.

<sup>105</sup> *Prosecutor v Delalić et al*, IT-96-21-T, *Trial Judgment*, (16 Nov. 1998), para 590 (cited with approval in *Prosecutor v Blaskić*, ICTY Trial Chamber Judgment, IT-95-14-A (3 Mar. 2000), para 184). No one was convicted under this interpretation at the ICTY.

<sup>106</sup> *Judgement, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Rep. 2005, paras 245 – 246.

of aiding and abetting pillage through the diamond trade,<sup>107</sup> but his was the only conviction issued; curiously, the indictment had been amended to strike all mention of diamonds.<sup>108</sup> Similarly, the ICC has charged pillage in multiple cases, but only in relation to looting of private property from individuals,<sup>109</sup> not systematic economic exploitation such as the trade in natural resources.

The centrality of the economic context of armed conflict is shown in three ways. First, inequality is a *predictor* of armed conflict. Conflict is more likely where there is poverty<sup>110</sup> and income inequality,<sup>111</sup> and internal armed conflicts – which are at the root of virtually every situation the ICC is investigating – are more likely where economic and social well-being is neglected.<sup>112</sup> The probability of conflict rises with the incidence of horizontal

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<sup>107</sup> The original indictment claimed that Taylor traded with Sierra Leonean rebels in order to “access the mineral wealth of Sierra Leone, in particular the diamond wealth of Sierra Leone”. See *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-I-001, *Indictment* (7 March 2003), para. 20, and, SCSL-03-01-PT, *Prosecution’s Second Amended Indictment* (29 May 2007).

<sup>108</sup> Arguably suggesting a problem with the prosecution’s approach to joint criminal enterprise at the SCSL. See Cecily Rose, “Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes” (2009) 7 JICJ 353.

<sup>109</sup> Including in Uganda, Darfur, the Democratic Republic of Congo, and Central African Republic. *Prosecutor v Joseph Kony*, ICC-02/04-01/05-53, *Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005*, (27 Sept. 2005); *Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, ICC-02/05-01/07 *Warrant of arrest for Ahmed Harun*, (17 Apr. 2007); *Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, ICC-02/05-01/07, *Warrant of arrest for Ali Kushayb* (27 April 2007); *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir* (4 Mar. 2009) 7; *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07, *Decision on Confirmation of Charges* (30 Sept. 2008); and, *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* (15 June 2009).

<sup>110</sup> See, e.g. Paul Collier and Anke Hoeffler, “On Economic Causes of Civil War” (1998) 50 Oxford Econ Papers 563 (1998); and Mirjam E. Sørli, Nils Petter Gleditsch and Håvard Strand, “Why is There So Much Conflict in the Middle East?” (2005) 49 J Conflict Resol 141.

<sup>111</sup> Robert MacCullough, “Income Inequality and the Taste for Revolution” (2005) 48 J L & Econ 93.

<sup>112</sup> Gudrun Østby, Ragnhild Nordås and Jan Ketil Rød, “Regional Inequalities and Civil Conflict in Sub-Saharan Africa” (2009) 53 Int’l Stud Q 301 at 301 (“[C]ivil conflict onsets are more likely in regions with the following traits: (1) low levels of absolute welfare in terms of education; (2) strong relative deprivation with regard to

socio-economic inequalities,<sup>113</sup> and this holds whether the inequalities are across an entire country or a particular sub-state region.<sup>114</sup> Relative economic deprivation can lead to a range of violent outcomes, from sporadic clashes to large-scale, organized war.<sup>115</sup> This is not to say that economic considerations will always lead to war,<sup>116</sup> or are found in every armed conflict;<sup>117</sup> only that these factors often play important predictive roles, especially when allied with other group-based understandings of conflict. For example, economic inequity does not have to exist between states in order to be conflict promoting; horizontal intra-state inequality,<sup>118</sup> particularly inequality that corresponds to ethnic difference, will “facilitate mobilization for conflict.”<sup>119</sup> Also, the transplant of Western political and economic systems

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household assets; (3) strong intraregional inequalities; and, (4) combined presence of natural resources and relative asset deprivation.”).

<sup>113</sup> See Frances Stewart, Graham K. Brown & Amim Langer, “Major Findings and Conclusions on the Relationship Between Horizontal Inequalities and Conflict” in Frances Stewart, ed, *Horizontal Inequalities & Conflict: Understanding Group Violence in Multiethnic Societies* (Basingstoke: Palgrave Macmillan, 2010) 285 at 287 (“The probability of conflict occurring rises where socioeconomic [horizontal inequalities] are higher”).

<sup>114</sup> Østby, Nordås, and Rød, *supra* note 112 at 305. The authors studied 354 regions across 22 states in sub-Saharan Africa.

<sup>115</sup> Ted Gurr, “A Causal Model of Civil Strife: A Comparative Analysis Using New Indices” (1968) 62 *Am Pol Sci Rev* 1104 at 1107.

<sup>116</sup> John Kekes argues that war is not the only possible response to resource scarcity, noting that groups can respond in different ways: some change their patterns of living, becoming farmers instead of hunters, or traders instead of growers, or simply accepting poverty. John Kekes, “War” (2010) 85 *Philosophy* 201 at 206. See also Stewart, Brown & Langer, *supra* note 113 at 288 (“We should emphasize that what we (and others) have found are increased probabilities of greater incidence of conflict as [horizontal inequalities] increase. Not all countries with high [horizontal inequalities] experience conflict.”).

<sup>117</sup> Bernard Broody, *War and Politics* (New York: Macmillan, 1973) at 339 (“[A]ny theory of the causes of war in general or any war in particular that is not inherently eclectic and comprehensive...is bound for that very reason to be wrong”).

<sup>118</sup> Horizontal inequality refers to inequalities between “culturally defined groups or groups with shared identities” whereas vertical inequality refers to inequalities among individuals. Frances Stewart, “Introduction” in *Horizontal Inequalities & Conflict: Understanding Group Violence in Multiethnic Societies*, *supra* note 113 at 12.

<sup>119</sup> Østby, Nordås, and Rød, *supra* note 112 at 302.

into ethnically divided societies is “often destabilizing, fomenting ethnic envy and hatred.”<sup>120</sup> When political and economic inequalities parallel one another, the potential for conflict is even higher.<sup>121</sup> The intercession of economic interests in such volatile situations only heightens the intensity of current conflicts, and the probability of future conflict. Where conflict is linked to resource extraction, the odds of a conflict resuming are significantly higher.<sup>122</sup>

These indicators are found with great prevalence in the postcolonial state because of the way they were often nurtured by colonial powers. The process of “overpowering ethnic identity” was integral to the social divides that mark so many contemporary armed conflicts.<sup>123</sup> Economic inequality often parallels these same divisions, and the overall state of deprivation is directly linked to the unidirectional economic exploitation of colonialism.<sup>124</sup>

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<sup>120</sup> Amy Chua, “Markets, Democracy and Ethnicity” (1998) 108 Yale LJ 1 at 6.

<sup>121</sup> Stewart, Brown and Langer, *supra* note 113 at 288–90 (“Where political and socioeconomic HIs are severe and consistent, both leadership and the mass of the population in the deprived group(s) have a motive for mobilization”).

<sup>122</sup> Siri Aas Rustad and Helga Malmin Binningsbø, “A price worth fighting for? Natural resources and conflict recurrence” (2012) 49 J Peace Research 531, 540-541.

<sup>123</sup> Christopher W Mullin and Dawn L Rothe, *Blood, Power and Bedlam: Violations of ICL in Postcolonial Africa* 77 (New York: Peter Lang, 2008). For examples in relation to notable contemporary conflict, see, e.g., Heather J Sharkey, “Arab Identity and Ideology in Sudan: The Politics of Language, Ethnicity, and Race” (2007) 107 Afr Aff 21, 28 – 30 (that the Arabization and north-south divide that spurs conflict in Sudan corresponds to both pre-colonial and colonial-era social hierarchies), and Guma Kunda Komey, “The denied land rights of the indigenous peoples and their endangered livelihood and survival: the case of the Nuba of the Sudan” (2008) 31 Ethnic & Racial Stud 991, esp. 1000-1006 (describing continuities between colonial land dispossession and post-independence land allocation that sparked Arab-Nuba conflict in Sudan); Dwayne Woods, “The Tragedy of the Cocoa Pod: Rent-Seeking, Land and Ethnic Conflict in Ivory Coast” (2003) 41 J Mod Afr Stud 641 (on how migration and citizenship were focal points of political contestation that sparked conflict in Côte d’Ivoire); and, Helen M Hintjens (1999) “Explaining the 1994 genocide in Rwanda” (1999) 37 J Modern Afr Stud 241, 252 – 254 (that colonial restructuring of social relations and the transposition of internal Belgian ethnic contestation were central to Hutu-Tutsi conflict).

<sup>124</sup> Walter Rodney, *How Europe Underdeveloped Africa*, revised ed (London: Bogle L’Ouverture Publications, 1988) at 162. For an example of how this relates to contemporary international crime, see Carol Off, *Bitter Chocolate: Investigating the Dark Side of the World’s Most Seductive Sweet* (Toronto: Vintage, 2007), 95 – 104 (describing how the cocoa industry in post-independence Côte d’Ivoire roughly continued colonial mechanisms of control and French domination of an industry that was central to the conflict in the country).

The very form of the postcolonial state exacerbates the historical experience, with the contrived borders of newly independent countries inculcating political instability through the involuntary integration of disparate ethnic and tribal groups, including groups that were often pitted against one another by the colonial powers who now forced them together.<sup>125</sup>

The implication is that as much as the (mis)treatment of civil and political rights often enables and results from conflict, the (non)affirmation of economic, social and cultural rights also plays an important role, and can increase the likelihood of internal armed conflict. Interestingly, the importation of the cultural package of (civil and political) human rights, democracy and free-market economics has been shown to exacerbate tensions in developing countries.<sup>126</sup> Accordingly, while international criminal tribunals should not criminalize the denial of economic, social and cultural rights, the discipline does need to expand its understanding of the relationship between conflict and broad-based human rights. The insistent linkage of criminal conduct with civil and political rights reflects an inability to come to grips with the socio-economic realities of most postcolonial nation-states, even though ICL is almost exclusively practiced through the bodies and territories of those states. It also simplifies the nuances of complex and long-running conflict. As Mamdani notes, the Darfur conflict mixes in specific local concerns about tribal land allocations, environmental change and migration patterns that have increased pressure on scarce water and cultivable land, and broader north-south political divisions in Sudan.<sup>127</sup> To the extent that the ICC, for example, is largely preoccupied with international crimes in Africa, it must engage with the

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<sup>125</sup> Makau Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry” (1995) 16 Mich J Int’l L 1113.

<sup>126</sup> Chua, *supra* note 120.

<sup>127</sup> Mahmood Mamdani, *Saviours and Survivors: Darfur, Politics and the War on Terror* (Cape Town: HSRC Press, 2009), 231 – 247.

“economic core of the causes of African conflicts”<sup>128</sup> and resist the relegation of economic, social and cultural rights to policy-based “equities”.<sup>129</sup>

The second economic contextual factor in armed conflict is that there is often an economic *incentive* to engage, take sides in, and continue conflict; this incentive influences armed groups, foreign states, and private companies alike.<sup>130</sup> As an example, the use of violence to enable resource exploitation is endemic throughout eastern Congo, whose wildly rich border region makes it attractive to local armed groups, foreign militias, businessmen in neighbouring Uganda, Rwanda, Burundi and Tanzania, and multinational companies. Congolese and foreign armies illegally tax miners, raid mines on a regular basis, or illegally mine resources themselves.<sup>131</sup> Local businessmen, Congolese government officials, militias, armies, and foreign and international businesses combine to form complex networks that illegally extract, smuggle, and export minerals from conflict-ridden zones in the DRC

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<sup>128</sup> This core includes “the high risk of dependence on natural resources; uneven development; and the capture and sharing of rents of the state machinery.” Ali Abdel Gadir Ali, “The Economic Conflicts of Africa: An Overview” (2000) 9 J Afr Econ 235, 242.

<sup>129</sup> See Mutua, *supra* note 54 at 618–19 and accompanying footnotes. Mutua notes that it was not until 1997 that Human Rights Watch decided to engage in a trial project to assess whether the provisions of the ICESCR should in fact be treated as rights.

<sup>130</sup> See, e.g., Päivi Lujala, “The spoils of nature: Armed civil conflict and rebel access to natural resources” (2010) 47 J Peace Research 15, 23 (“For the rebels, the effort and investment infighting may be justified by the chance of winning control over resources located in the area the rebels originate from.”).

<sup>131</sup> UNSC, Committee established pursuant to Resolution 1533 (2004), *Midterm report of the Group of Experts on the Democratic Republic of the Congo*, para 165–68, 194–97, UN Doc S/2013/433 (July 19, 2013) [*UN Panel Interim Report 2013*]. See also Peter Eichstaedt, *Consuming the Congo: War and Conflict Minerals in the World’s Deadliest Place* 145 (Chicago: Lawrence Hill Books, 2011) (“Nkunda’s CNDP militia controlled the area and his village for many years, including the mining. Helicopters brought weapons in and took coltan out,” he says. “The CNDP did not mine the ore, but had the locals dig it. The CNDP then taxed it by taking a portion or demanding money. Ore taken by the miners was trucks to Goma, where it was also “taxed” by the government through fees charged the miners. Everyone made money, including the combatants, and nobody objected.”).

through Uganda, Rwanda, Burundi, and Dubai.<sup>132</sup> This has been a long-standing problem in the DRC, where Canadian mining and mineral companies have been implicated for their role in extracting conflict oil<sup>133</sup> and other resources.<sup>134</sup> Multinational mining companies negotiated mineral deals with rebels worth billions of dollars as they marched on the Congolese capital, abandoning the government in order to secure rights with the rebels.<sup>135</sup> They also helped fund Laurent Kabila's rebellion against Mobutu Sese Seko.<sup>136</sup> These foreign companies "were ready to do business regardless of elements of unlawfulness", participating in trade that was "considered to be the engine of the conflict in the Congo."<sup>137</sup>

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<sup>132</sup> UN SC, Committee established pursuant to Resolution 1533 (2004), *Final report of the Group of Experts on the Democratic Republic of the Congo*, para 159–97, UN Doc S/2012/843 (Nov. 15, 2012) [*UN Panel Final Report 2012*]. Ivory poaching and smuggling are also important to militias and armies. *Ibid* at paras 198–201.

<sup>133</sup> Human Rights Watch, *Ituri: Covered in Blood* 13 (2003). The leader of one local militia involved in a conflict with a rebel group made it clear that awarding drilling concessions depended on who won that conflict: "I have been contacted by the [Canadian-British Heritage Oil Company] people who came to see me. I told them they could only start work in Ituri once I had taken Bunia from the UPC."

<sup>134</sup> Anvil Mining Group, for example, was implicated in summary executions carried out by the Congolese army in the Katanga province, where Anvil was extracting copper, cobalt and silver. UN Org Mission in the Dem Rep Congo [MONUC], *Special Investigation into Allegations of Summary Execution and Other Violations of Human Rights Committed by FARDC in Kilwa on 15 October 2004* (2005).

<sup>135</sup> These companies included American Mineral Fields (based in then-US President Bill Clinton's hometown of Hope, Arkansas) and De Beers, who concluded contracts worth \$3 billion with the rebels led by Laurent Kabila. For its part, De Beers did so even though it had also signed agreements with the government of Mobutu Sese Seko for the same resources. Sam Kiley, *Mining giants sign \$3bn-a-year deals with Zairean rebels*, *The Times* [London], Apr. 22, 1997, at 18. American Mineral Fields paid 'advance taxes' to Kabila, in order "to finance the war still being fought and to secure a date for transactions in the future." Adam Elliott-Cooper, *Congo: 50 years since the death of Lumumba*, *Ceasefire*, (Jan. 14, 2011) <<http://ceasefiremagazine.co.uk/the-anti-imperialist-congo-50-years-since-the-death-of-lumumba/>>.

<sup>136</sup> The companies included American Mineral Fields (AMF), American Diamond Buyers, and Banro Resource Corporation. See Thomas Turner, *The Congo wars: conflict, myth and reality* 39 (2007) ("The war effort of Kabila and his backers was financed to a large extent by these deposits or 'war taxes' paid by AMF and others. AMF even lent an aircraft to Kabila during the war.").

<sup>137</sup> UN SC, Committee established pursuant to Resolution 1533 (2004), *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo*, UN Doc S/2001/357 (Apr. 12, 2001) at 19 [*UN Panel Report 2001*].

While there has been improvement in some areas, the fear “that military actors will move their rackets to mining activities that are not closely supervised”<sup>138</sup> seems to have been realized as gold has become the focus of plunder and smuggling. Large- and small-scale gold mining operations (including gold mined by forced labourers) have funnelled tens of millions of dollars worth of gold out of DRC and to Switzerland, via Uganda.<sup>139</sup> AngloGold Ashanti, another alleged purveyor of ‘blood-gold’, is a major South African mining conglomerate that has provided logistical and financial support to armed groups implicated in war crimes and crimes against humanity in return for gold concessions.<sup>140</sup> Similar displacement of economic emphasis was observed in Sierra Leone. There, the crackdown on the blood diamond trade only shifted armed groups’ emphasis from jewels to timber.

Even where violence is reduced, resource extraction is often deeply riddled with corruption that then threatens further conflict.<sup>141</sup> The vast wealth of Congo flows only to a select few businessmen and politicians “who are exploiting the local population and subverting natural riches for their own private ends.”<sup>142</sup> This stream of prosperity relies on parasitic contracts that contribute almost nothing in taxes or profits to national or local

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<sup>138</sup> *UN Panel Final Report 2012*, *supra* note 132 at para 242.

<sup>139</sup> Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo* (2005).

<sup>140</sup> Ashanti is currently in a joint venture with a government-owned company in the town of Mongbwalu in the Ituri region, though it allegedly gained the concessions through its support of the Nationalist and Integrationist Front (FNI), which used Ashanti-mined gold to pay soldiers and purchase weapons. Ashanti had initially reached out a Rwandan-backed militia, the Union des Patriotes Congolais (UPC), which had itself been in negotiations with the state mining authority. When the Ugandan-backed FNI defeated the UPC, Ashanti switched allegiances and began its “unavoidable” support of the FNI. *Ibid* at 55-56, 65- 66 and 75; and, David Renton, David Seddon & Leo Zeilig, *The Congo: Plunder & Resistance* (New York: Zed Books, 2007) at 199.

<sup>141</sup> Such corruption “can easily create divided allegiances, internal conflict within government departments and the security forces, and ultimately a potential for instability.” Global Witness, *Digging in Corruption: Fraud, abuse and exploitation in Katanga’s copper and cobalt mines* 17 (2006) online: Global Witness, <<https://www.globalwitness.org/sites/default/files/import/kat-doc-engl-lowres.pdf>>.

<sup>142</sup> *Ibid* at 4.

governments, and have nearly bankrupted the state companies that partner with foreign ones in the extractive industries.<sup>143</sup> In Uganda, the war against the LRA enables a different sort of corruption. Since Uganda relies heavily on foreign aid, whose donors largely control spending, the Museveni government has relied on military budgets – justified by the LRA war – whose specifics are necessarily shrouded in secrecy, in order to dispense the political patronage necessary to shore up the Museveni regime.<sup>144</sup> There is thus a political and economic benefit to the continuation of the war that has little to do with military objectives.

Finally, and relatedly, for a growing number of entities — particularly postcolonial states and actors — the *privatization* of conflict is often the only way to sustain it. The involvement of military groups in the plunder of resources in DRC and elsewhere is directly connected to the relative deprivation of the postcolonial state. This complex interplay fuels a different type of war than the stereotypical ethno-religious or political conflicts that ICL often busies itself with. Parties to conflict “rely on their capacity to exploit and commercialize the resources, so such wars become self-financing, self-sustaining, and therefore not readily open to mediation.”<sup>145</sup> In the Congo – as in Uganda,<sup>146</sup> Côte d’Ivoire,<sup>147</sup>

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<sup>143</sup> What Prunier calls “the Great Mining Robbery”. Gérard Prunier, *From Genocide to Continental War: The ‘Congolese’ Conflict and the Crisis of Contemporary Africa* (London: Hurst & Co, 2009) at 319.

<sup>144</sup> Andrew Mwenda, “Uganda’s Politics of foreign aid and violent conflict: the political uses of the LRA rebellion” in Tim Allen & Koen Vlassenroot, eds, *The Lord’s Resistance Army: Myth and Reality* (New York: Zed Books, 2010) 45 at 50–53.

<sup>145</sup> Scott Leckie & Chris Huggins, *Conflict and Housing, Land, and Property Rights* (Cambridge: Cambridge University Press, 2011) at 5.

<sup>146</sup> See notes 156 and 157, *infra*.

<sup>147</sup> Conflict in Cote d’Ivoire has been propelled by the diamond trade and cocoa industry. On cocoa, see, e.g., *Hot Chocolate: How Cocoa Fuelled the Conflict in Côte d’Ivoire*, Global Witness (June 2007), 24 – 40 (detailing how cocoa revenues fund state and non-state military actors, and control over the cocoa industry offers an incentive to prolong the conflict); Carol Off, *Bitter Chocolate: Investigating the Dark Side of the World’s Most Seductive Sweet* (Toronto: Vintage, 2007), 105 – 157 (describing the human trafficking and indentured servitude of labourers on cocoa farms, and the importance of cocoa to armed groups in the region);

Libya<sup>148</sup> and the territory controlled by ISIL<sup>149</sup> – ethno-religious and political contests are often deeply enmeshed with resource extraction and control. Sometimes, as in Darfur, access is at the core of the conflict.<sup>150</sup> Often, the lackluster finances of poor governments and militias inhibit their ability to practice war absent such exploitation.<sup>151</sup>

Foreign armies have used the conflict in DRC as a vehicle for building private wealth.<sup>152</sup> Robert Mugabe used his financial and military support for Laurent Kabila to secure massive logging and diamond concessions for political cronies in Zimbabwe,<sup>153</sup> as did the governments of Namibia and Angola.<sup>154</sup> Rwanda paid for its anti-Hutu intervention in the

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and, Woods, *supra* note 123 (the economic centrality of cocoa made it a focal point for political contestation and ultimately armed conflict). On continuing concern about the role of diamonds, see, e.g., UNSC Resolution 1643 UN Doc S/RES/1643 (15 December 2005) (imposing sanctions on diamond trading after “*recognizing* the linkage between the illegal exploitation of natural resources such as diamonds, illicit trade in such resources, and the proliferation and trafficking of arms and the recruitment and use of mercenaries as one of the sources of fuelling and exacerbating conflicts in West Africa”); *Midterm report of the Group of Experts on Côte d’Ivoire pursuant to paragraph 19 of Security Council resolution 2101* (2013), UN Doc S/2013/605 (14 October 2013), paras. 151 – 152; and, *Final Report of the Group of Experts on Côte d’Ivoire pursuant to paragraph 27 of Security Council resolution 2153* (2014), UN Doc S/2015/252 (13 April 2015), at paras. 162 – 218.

<sup>148</sup> The continuing civil war in Libya pits a variety of tribe-affiliated groups and religious political groups (such as the Libyan Islamic Fighting Group) against one another for control of the country’s vast oil resources. See, e.g., Frederic Wehrey, “The Battle for Libya’s Oil” *The Atlantic* (9 Feb. 2015); Rebecca Murray, “A Tale of Two Governments” *Al-Jazeera* (4 Apr. 2015); and, “An Oily Mess” *The Economist* (11 Apr. 2015).

<sup>149</sup> In recognition of this relationship, the Security Council has imposed sanctions prohibiting trade with ISIL, particularly in oil. UNSC Resolution 2199 (2015), S/RES/2199, (12 Feb. 2015).

<sup>150</sup> Mamdani, *supra* note 127.

<sup>151</sup> Prunier, *supra* note 143 at 336 (“Thus, if war can be carried out only part time because of financial constraints, the combatants sooner or later tend to privatize their action.”).

<sup>152</sup> Turner, *supra* note 136 at 40–41 (“Regardless of the looter, the pattern was the same: Burundian, Rwandan, Ugandan and/or RCD soldiers, commanded by an officer, visited farms, storage facilities, factories and banks, and demanded that the managers open the coffers or doors. Soldiers then removed the relevant wealth and loaded it into vehicles.”)

<sup>153</sup> Renton, Seddon, & Zeilig, *supra* note 140 at 188–89 (noting that it was not a purely government-led venture: “The Zimbabwean state had to cajole an unwilling private sector to back its war.”). Mugabe had supported Kabila both in his initial rebellion against Mobuto, as well as Kabila’s subsequent repudiation of his former Rwandan allies.

<sup>154</sup> *Ibid* at 191.

DRC by establishing forced labour camps and private companies that extracted millions of dollars worth of Congolese coltan every month.<sup>155</sup> The Ugandan Peoples Defence Forces (UPDF) ostensibly attempted to prevent a further genocide in eastern Congo, but began logging timber and extracting gold on a massive and unsustainable scale.<sup>156</sup> Even within Uganda, the LRA conflict has enhanced local corruption and military profiteering, not to mention the theft of ‘ghost soldier’ salaries.<sup>157</sup>

In this conflict-associated privatization, “economic predation, trafficking of all kinds, and looting both at the individual and at the collective level become essential features of the conflict because they are essential means of financing it.”<sup>158</sup> Massive wealth alienation, for example, is not only an end in itself, but also essential to the continuation of conflict because the militias involved cannot rely on traditional forms of funding if they hope to continue their fight. Wartime plunder is therefore an instrument for responding to economic inequity and economic deprivation, and in turn is often vital to sustaining conflict. As Stewart notes, plunder “has substituted for superpower sponsorship as a predominant means of conflict financing since the end of the Cold War.”<sup>159</sup>

Conflict and commerce have intertwined in this fashion at least since the Second World War. In explaining the wholesale integration of wealth acquisition, resource

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<sup>155</sup> *UN Panel Report 2001*, *supra* note 137 at 6–19.

<sup>156</sup> *Ibid* at 8. Turner notes that the pillage by Ugandan forces “seems to have benefited high-ranking officers, such as Generals Salim (brother of Museveni) and Kazini.” Turner, *supra* note 136 at 41.

<sup>157</sup> Mwenda, *supra* note 144, at 47–48 (describing military collaboration in price inflation, the expropriation of local businesses, and the failure to report dead or missing soldiers, whose salaries were then collected by superior officers).

<sup>158</sup> Prunier, *supra* note 143 at 337.

<sup>159</sup> Stewart, *supra* note 102 at 5–6.

development, and military organization, one commentator recharacterized the Nazi “total war” as “the total war economy”.<sup>160</sup> This war-making welfare state enriched the German military effort, and also “stabilized the economies and calmed the political atmosphere in the occupied countries”.<sup>161</sup> Similarly, “[t]he Holocaust will never be properly understood until it is seen as the most single-mindedly pursued campaign of murderous larceny in modern history.”<sup>162</sup> This Nazi war conglomerate actualized H.G. Wells’ predicted total military state, which eliminates the private-public distinction and reorganizes the entire economy in pursuit of war-making efficiency.<sup>163</sup> Nazi enrichment was such that, when the war ended, surprise was expressed at the widespread health and wealth of ordinary Germans in a time of great sacrifice and suffering throughout Europe.<sup>164</sup> War became the ultimate profit-sharing enterprise.

At times, peace negotiations are affected by the prospect of economic access and control. In Sudan, the Juba Peace accords between the SPLA and government were predicated on the recognition that the two could cooperate in order to divide oil wealth between them. On the other hand, conflicts might needlessly continue in what Le Billon describes as an “aggressive-symbiotic” relationship, where opposing parties have a shared

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<sup>160</sup> Berenice A Carrol, *Design for Total War: Arms and Economics in the Third Reich* (Paris: Mouton, 1968).

<sup>161</sup> Götz Aly, *Hitler’s Beneficiaries: Plunder, Racial War, and the Nazi Welfare State* (translated by Jefferson Chase (New York: Metropolitan Books, 2007) (2005) at 284.

<sup>162</sup> *Ibid* at 285.

<sup>163</sup> HG Wells, *Anticipations of the Reaction of Mechanical and Scientific Progress upon Human Life and Thought* (London: Chapman & Hall, 1902) at 185 (describing the state that has “incorporated with its fighting organization all its material substance, its roads, vehicles, engines, foundries, and all its resources of food and clothing”).

<sup>164</sup> “The people did not fit the destruction. They looked good. They were rosy cheeked, happy, well-groomed, and very well dressed. An economic system that had been propped up by millions of foreign hands and the total plunder of an entire part of the world was here displaying what it had achieved.” Aly, *supra* note 161 at 325, quoting Julius Posener, a German architect who returned to Berlin in 1945 to aid in reconstruction.

interest in “prolonging a profitable military stalemate.”<sup>165</sup> Here, peace is an obstacle to be overcome, rather than a goal to be achieved.

It might be possible to push this focus on the economic context of international crimes can to reconsider the boundaries of criminalization, posing questions about 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. However, the point here is a more modest one: even if ICL is *only* concerned with violent, ‘atrocities crimes’, it cannot ignore the economic contexts of those crimes. In particular, it cannot hope to seriously prevent future crimes, including within the same countries and indeed the same conflicts that it is already involved in, if it does not take some steps towards assigning responsibility to actors who enable conflict by participating in the economies of war. This includes the private and transnational companies that engage in the extraction of wealth and natural resources from conflict zones; the foreign lending institutions that receive laundered money or transfer payments for arms; and the foreign governments that enable these actions. The contemporary emphasis on human rights *atrocities* is indifferent to how and why international crimes occur, their long-term prevention, and the dual challenges of material inequity and moral responsibility offered by a critical Third World perspective.<sup>166</sup>

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<sup>165</sup> Phillipe Le Billon, “The political ecology of war: natural resources and armed conflicts” (2001) 20 *Political Geo* 561, 572.

<sup>166</sup> See Anghie & Chimni, *supra* note 22 at 96 (“[C]ontemporary ethnic conflict is not simply the latest expression of primordial forces. Its nature, its conduct, its shape are all inextricably linked both with colonialism and with the very modern forces of globalization that inevitably involve North-South economic relations.”).

## V. TOWARDS A CRITICAL CRIMINAL NORMATIVITY

This chapter has used postcolonial theory and TWAIL to challenge traditional understandings of international crime, as well as the terms in which the discourse is conducted. It has first responded to the idea that accounting for the concerns of the Third World somehow diminishes a pure process of normative reasoning, by demonstrating that to the extent that the ‘legal engineering’ of ICL is disrupted by political concerns, those concerns often emanate from Western states. It then demonstrated that the current engineering of international crimes is lacking in important ways, and that its inability to give expression to the priorities of TWAIL analyses will almost by necessity undercut the effectiveness of judicial responses to international crimes and atrocities. Thus TWAIL’s relevance is far broader than the special interests of the Third World. I have also argued that TWAIL scholars need to engage further with criminal law theory – in particular to think about why certain conduct ought to be seen as a crime, how defining particular crimes may lead to separate questions about remoteness, causation, and liability – if they wish to successfully build on the growth of ICL.

The benefits of this synergy extend beyond simply the decoding of international crimes. For one, the failure to address the causes of international crime, arrest a broader array of international criminals, or think critically about the sort of conduct that is criminalized by legislators and scholars, and prioritized by courts and prosecutors, continues international law’s lack of wide-ranging consideration for the interests of poor and conflict-afflicted populations. Expanding the terrain of the debate to include normative conceptions of crime makes it possible to more systematically analyze the structures, practices *and* theory of ICL.

This contemplation of criminal law philosophy gives additional moral and persuasive authority to traditional critiques of international law.

The internal critical perspective of this theoretical orientation helps draw out ICL's patterns of inadequacy, internal inconsistencies, and moral deficiencies in new ways. In addition, criminal law norms offer powerful rebuttals to the supposed amoralism of critical approaches such as TWAIL.<sup>167</sup> Focusing on the theoretical foundations of international criminal punishment confronts those sophisticated objections head on, arguing that the moral goods of punishing a limited set of international criminals for a limited set of international crimes do not resolve the moral incoherence in other aspects of ICL. It acknowledges the importance of such endeavours, while focusing on the vital interests that would be protected by a more normatively coherent discipline that was also applied with greater consistency. It accepts in part the "partial justice is better than no justice" argument, but also shows that in ICL, justice is *almost always* partial in both its theoretical and practical dimensions, and in ways that contradict the normative principles that ostensibly justify international criminal justice.

Occupying the language of criminal law theory also helps expose the limits of reliance on criminal mechanisms. There is no necessary agreement on the suitability of ICL, reformed or otherwise, for responding to international crimes. Non-criminal tools may be better suited to the multiple goals proffered by ICL's advocates: reconciliation, history writing, societal transition, retribution, rehabilitation, and deterrence among them. This long list suggests that there is no agreement on what ICL is supposed to accomplish — and

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<sup>167</sup> José Alvarez, "My Summer Vacation (Part III): Revisiting TWAIL in Paris" (28 Sept. 2010), online: *Opinio Juris*, <<http://www.opiniojuris.org>>(suggesting that though certain instances of international criminal justice may be problematic, advising against international criminal intervention may well be "immoral" in certain cases).

agreeing that it should do everything is as much evidence of a lack of consensus as it is a lack of careful consideration of the problem. Moreover, it obscures the reality that all these goals and others can be served by non-criminal mechanisms.<sup>168</sup> Instead of justifying ICL by pointing to the numerous theoretical justifications offered *in abstractio*, a TWAIL-aware analysis reverses the presumption, asking which of these objectives is the most important in a particular context, and what mechanisms can give them effect. To the extent ICL begins to take seriously different types of crimes and perpetrators, critical interrogations of these foundational justifications help identify what criminal and non-criminal processes can offer.

Finally, the lack of attention paid to the theory of criminal law as yet allows great scope for reform of the law. Many of ICL's ills have been blamed on its under-theorization: hence Robinson's warning that human rights law threatens to colonize the discipline;<sup>169</sup> Damaška's concern that ICL has a confused and contradictory set of goals;<sup>170</sup> and Tallgren's observation that there is no well-thought out justification for international criminal punishment.<sup>171</sup> To this we can add that a lack of attention to normative foundations gives space for all sorts of intuitive, ostensibly neutral and universal law-making that is actually deeply politicized, such as the decision to remove all but the so-called 'core crimes' from the Draft Code. That exercise in 'legal archaeology'<sup>172</sup> left the Draft Code both normatively

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<sup>168</sup> Mirjan Damaška, "What is the Point of International Criminal Justice?" (2008) 83 Chi.-Kent L Rev 329.

<sup>169</sup> See Darryl Robinson, "The Identity Crisis of International Criminal Law" (2008) 21 Leiden J Int'l L 925.

<sup>170</sup> Damaška, *supra* note 168 at 331 ("An additional problem is that the professed goals do not constitute a harmonious whole; rather, they pull in different directions, diminishing each other's power and creating tensions.").

<sup>171</sup> Immi Tallgren, "The Sensibility and Sense of ICL" (2002) 13 EJIL 561 at 567 ("The 'international criminal justice system' is assumed to function following the mechanisms of an idealized national system that cannot be localized anywhere.").

<sup>172</sup> Martin Ortega, "The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind" (1997) 1 Max Planck YB UN L 283 at 301.

discordant and pragmatically archaic. Theorizing criminal law anew is therefore a form of resistance to the deference to tradition in international law, which is often simply acquiescence to law made by powerful states, benefiting them and a set of Third World élites, indifferent to the interests of ordinary persons, and drawn from a primarily Western and non-plural history.<sup>173</sup> As Fletcher suggests, there is a “subversive potential” in legal study that is overridden by the tendency to reproduce “establishment tendencies”.<sup>174</sup>

How then are such interrogations to be managed? How are they to be realized without becoming captured by the same methodological problems that currently afflict orthodox approaches to the theory of ICL? I offer a set of principles — what I term a critical criminal normativity — to guide future TWAIL/criminal law theory explorations. These principles adopt postcolonial theory and TWAIL’s emphases on history, interdisciplinarity, and reform, and connect them to the study of ICL and its instantiation as a set of theoretically defensible criminal law norms. They form the outline of a TWAIL method for studying international criminal law.

Aside from its central interest in criminal law, this critical criminal normativity is marked by five characteristics. It is first deeply concerned with the history of the criminal law, and the sources and processes of its development. This includes attention to specific fields of law, such as public international law and doctrines of customary international law, as well as which systems and actors are privileged in the production of legal norms and legal knowledge. Historic analyses of the prohibition of apartheid, the ILC process, and the

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<sup>173</sup> See Drumbl, *supra* note 18 at 123–28 (on the cultural specificity and Western sources of much of ICL); Roger Phillips, “Kevin Jon Heller: The Nuremberg Military Tribunals and the Origins of ICL” (2012) 10 JICJ 492 at 494–95 (on the centrality to ICL of Western-derived law from the post-Second World War military tribunals); and, Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002) 47.

<sup>174</sup> George Fletcher, “Comparative Law as a Subversive Discipline” (1998) 46 Am J Comp L 683, 694.

prosecution of industrialists after World War Two shine a new light on contemporary ICL practices and the arguments of this dissertation as well as. TWAIL scholars have devoted great effort to uncovering biases within international law, and this approach adopts a similar attitude of disquiet with the presumed objectivity of international law, and its suspicion of the ‘others’ of international law.

Just as early TWAIL scholars recognized the interconnection between legal, political and economic reform, a critical criminal normativity also takes an expansive approach to the study of criminal law. The content and utility of different sub-fields of international law are dependent upon one another, and ICL is no different, connected as it is to international human rights law, international humanitarian law, public international law and domestic criminal law. This approach also argues that law and the problems it seeks to regulate must also be seen as integrated with non-law disciplines and approaches, including economics, political science, international relations, critical race theory, development studies and critical geography. Law is a multi-faceted approach to equally multi-faceted problems, and therefore cannot claim any ontological or methodological priority as a mode of response. To speak of international atrocity is, as argued in this chapter, to speak of the economic actors that help generate the conflict; the political maneuvers around what is treated as a crime; and, what it means to speak of certain views as political or scientific. The approach in this dissertation, including the preceding chapter, seeks to connect critical evaluations of international law with the development of criminal law norms.

By extension, this approach is attentive to both the express and implied normative commitments embedded within the related legal norms and systems of ICL, human rights, armed conflict law, and domestic criminal law. In adopting a critical perspective, critical

criminal normativity – as with TWAIL – is clear about its purposive approach to law, but also seeks to expose the deep politicization of these existing laws, legal systems, and theories of law. It challenges the idea that these exist apart from the particular actors, systems and beliefs that produced, conditioned and applied them. Hence the emphasis in these first two chapters on the relevance of postcolonial theory and the way in which particular states resisted the criminalization of apartheid. As a consequence, this method also recentres the epistemologies and lived experiences of those individuals and peoples who do not directly shape the law, but nonetheless remain its subjects.

In the same way that TWAIL is both a theory and a methodology,<sup>175</sup> critical criminal normativity is also evaluative and productive. It uses internal and external standards to assess the content of ICL and its processes of development. One of its primary concerns is whether these normative schemes abide by their own claims of universality: that they are intrinsically neutral, rational, or objective. At the same time, its explicit critical approach, grounded in a particular understanding of the historical context of international law, provides its own set of evaluative standards. By way of example, it not only critiques the content of the *ratione materiae* of ICL, it grounds that analysis in a normative justification for the changes it would prefer. It explains, for example, not only what *should* be part of ICL, but also *why* it should, and how such changes fit with or revise other aspects of the law. Thus insisting on the recognition of crimes committed by corporations also demands addressing how such corporations are to be held criminally liable, or how causation is to be determined. This approach provides the basis for reforms of ICL in ways that are both internally and externally coherent.

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<sup>175</sup> Obiora Chinedu Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2008) 10 Int’l Community LR 371.

Finally, critical criminal normativity adopts TWAIL's skepticism towards its own universalizing pretensions, and remains openly pluralist in its understanding of itself and its place in critical and mainstream scholarship. While offering a preferred theory and methodology, it understands that in order to be consistent with its own philosophical approach, its own analyses, conclusions and recommendations must be seen as contingent - upon historical understanding, evolving societal norms, and changes in application or interpretation of the law, to name a few. Other critical scholars may take less accommodating approaches to the perceived flaws of ICL; others may well prefer an imperfect system to an unattainable one. In recognition of this diversity, critical criminal normativity does not claim universality, nor does it demand eternal conformity with its conclusions. It remains open to alternative understandings, and sees its own revisability as essential to its validity and utility.

## VI. CONCLUSION: FROM EXCLUSION TO INCLUSION

The value of the methodological approach developed here is its connection of the insights of postcolonial theory and TWAIL to the *normative* structures of ICL. It is too easy to assign responsibility for gaps in the international criminal justice system to the stubbornness of self-interested states, and overlook the role of lawmakers, legal scholarship, and intellectual traditions in legitimating and enabling those gaps.

Critical criminal normativity recognizes these deficiencies as the outcomes of specific theoretical and normative arrangements that have historical and intellectual roots that predate the post-Nuremberg birth of modern international criminal justice. In developing this approach, this chapter has reassessed the normative foundations of current conceptions of international crime, and pointed to the utility of alternative normative foundations, such as

those initially proposed by the ILC. Relying on an understanding of international crime, even atrocities, as intimately connected to broader structural problems, it has proposed different understandings of ICL and new priorities for ICL mechanisms that are based on the important interests attacked by international crime.

As a methodological approach, critical criminal normativity connects disparate analytic schemes to expose both the unwelcome outcomes of international criminal justice, and the theoretical frameworks (and often theoretical disarray) that enable those same outcomes. As to the question of whether the reforms implied herein are feasible, that demands a separate and more sustained response than space can permit. Briefly though, it can fairly be said that imperfect though the *Rome Statute* may be, it was almost unthinkable — after decades of postponements dating back to the 1950s, then a push for a drug trafficking tribunal, then disputes over the definitions of crimes — that there might be eventually be a permanent court with jurisdiction over any such serious crimes. What was once pragmatically impossible is now a reality.

In this vein, there are one or two hints that the present argument for a greater consideration of the economic context of international crime is at least not completely out of line with ideas at the ICC. First, there is the recuperation of the industrialist trials in Germany. Those trials offer both a symbol of what is attainable in ICL as well as a legal prototype for reinvigorating contemporary international criminal prosecutions. Second, in a surprising footnote to a draft policy statement, the ICC's Office of the Prosecutor defended its decision to investigate post-election violence in Kenya by reference to the subsequent impact on Kenya's Gross Domestic Product (GDP) growth rate. That rate fell by 75%, reflecting the crimes' "impact on local communities in terms of security, social structure,

economy and persistence of impunity.”<sup>176</sup> In other words, the economic context surrounding the criminal behaviour was a key factor in determining the gravity of the Kenyan situation, and demonstrated the need to initiate criminal proceedings. This tantalizing hint has yet to be followed up on in a substantive sense, but is a grain of possibility around which practical and normative reform may well coalesce.

The development of a better international criminal system will, in the short- and medium-term, require some degree of compromise. Yet these accommodations ought not forestall the possibility of change, but be part of the strategies for enabling it. Adopting this mindset, and the methodological approach outlined above, are thus important steps towards developing a coherent ICL, and realizing a meaningful, counter-colonial international criminal justice that takes account of a broader range of interests and the many modes through which serious violence is perpetrated around the world.

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<sup>176</sup> The Office of the Prosecutor (International Criminal Court), “Draft Policy Paper on Preliminary Examinations” (4 October 2010) 14, para 71, online: <[ICCforum.com](http://www.iccforum.com)>.

## Chapter 3: The Interests and Limits of Extraterritorial Punishment

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Any government which could only reach its enemies on the battlefield would soon be destroyed. Therefore the true sanction for political laws lies in the penal ones, and where that sanction is lacking, the law sooner or later loses its power. For that reason the man who is judge in *criminal* trials is the real master of society.

Alexis de Tocqueville<sup>1</sup>

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<sup>1</sup> Alexis de Tocqueville, *Democracy in America*, by JP Mayer, ed, translated by George Lawrence (New York: Harper & Row, 1969) vol 1, ch 8.

## I. INTRODUCTION

A central difficulty in international criminal law has been explaining the justification for punishment of individuals – a problem that exists in the domestic context as well. The need for justification arises from the harms inflicted by punishment on the guilty, harms that would ordinarily be prohibited. In this sense, punishment itself is an evil, inflicted intentionally on an offender, by persons other than offender, for that person’s offence, by a legally recognized authority. It is also a kind of language that seeks to communicate to the offender and society at large why she is being punished. It thus has two mutually reinforcing components - hard treatment, and communication. Criminal theorists and moral philosophers have struggled to explain the authority of the state to inflict this harm. The problem is one of both norms and institutional practices.<sup>2</sup> Justifying punishment by relying on the arguments used in domestic law proves challenging in part because domestic criminal systems are themselves highly controversial. Finding the justification for international punishment in municipal law depends upon creating a fictional domestic regime that does not exist: “The ‘international criminal justice system’ is assumed to function following the mechanisms of an idealized national system that cannot be localized anywhere.”<sup>3</sup>

The previous chapter discussed in part the importance of international criminal law – both in its definition of international crimes, and in its application to actors – recognizing a broader set of interests that ought to be protected. This chapter, coupled with the next, applies critical criminal normativity to the task of justifying international criminal punishment. It uses the idea of interests to address the justification of punishment in international criminal

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<sup>2</sup> Antony Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) at 179-188.

<sup>3</sup> Immi Tallgren, “The Sense and Sensibility of International Criminal Law” (2002) 13 EJIL 561 at 566-567.

law. In addition, recognizing that international crimes can occur domestically and abroad, and that they may be prosecuted by either territorial or international courts, it also develops an interest-based account of extraterritorial jurisdiction.

In the first part, it builds on and adapts Chehtman's defense of such a regime in international law.<sup>4</sup> It develops this account through reference to German criminal law theory and the idea of criminal law as public law. As part of this explanation, it describes the alignment between TWAIL and three central interests that ground this particular theory of punishment. It explains the key interests that are to be protected by punishment in the context of ICL. Punishment seeks to affirm the dignity and security of individuals and peoples, and – in the international context – their interest in having some degree of state sovereignty and independence. In other words, not every crime necessarily demands or justifies international intervention. The second part focuses on this affirmation of sovereignty, which is important from a TWAIL perspective, given its long-standing concern with international law's instrumentalization in favour of reducing some state's sovereignty. Crucially, no other theory of punishment explains this interest. Importantly, while this chapter explains in part how extraterritorial punishment may be justified, it also spends a great deal of time on a more general justification for domestic punishment. This does not necessarily mean it is remote from ICL, as international crimes can frequently occur in civil or internal armed conflicts. The exposition of domestic punishment is necessary to ground the more controversial exercise of jurisdiction across state boundaries or by international criminal tribunals.

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<sup>4</sup> Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford: Oxford University Press, 2011).

## II. AN INTEREST-BASED ACCOUNT OF PUNISHMENT

### A. Rights and Interests, Dignity and Security

Chehtman argues that the power to punish is grounded in the collective interest of individuals in that state having its criminal laws in force.<sup>5</sup> This system of rules gives effect to a public good that contributes to the well-being of individuals who live under it in a certain way, and is important enough to warrant granting some authority the power to punish those who violate the norms of criminal law. The criminal law system in particular offers individuals a sense of dignity and security.<sup>6</sup> Others have described these concepts as those “whose actualization or aspiration [are] so pivotal...that at the level of self-identification it helps to construct and sustain our “we-feeling” – our very sense of “common publicness.””<sup>7</sup> As Hart explains, in assigning responsibility, criminal law regulates social relations by examining not only the harm caused, but also the emotional and social effects.<sup>8</sup> Antony Duff

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<sup>5</sup> *Ibid* at 32.

<sup>6</sup> *Ibid* at 37.

<sup>7</sup> Ian Loader and Neil Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007) at 164. Although Loader and Walker specifically reference ‘security’, their concern with the position of the individual in a community and her self-identification arguably also represents a connection of security to dignity in terms that fit with the following analysis.

<sup>8</sup> HLA Hart, “Punishment and the Elimination of Responsibility” in *Punishment and Responsibility: Essays in the Philosophy of Law*, (Oxford: Clarendon Press, 1968) at 182-83 (“Human society is a society of persons; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other’s movements as manifestations of intentions and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects. If one person hits another, the person struck does not think of the other as just a cause of pain to him; for it is of crucial importance to him whether the blow was deliberate or involuntary....If you strike me, the judgement that the blow was deliberate will elicit fear, indignation, anger, resentment: these are not voluntary responses; but the same judgement will enter into deliberations about my future voluntary conduct towards you and will colour all my social relations with you. Shall I be your friend or enemy? Offer soothing words? Or return the blow? All this will be different if the blow is not voluntary. This is how human nature in human society actually is and as yet we have no power to alter it. The bearing of this fundamental fact on the law is this. If as our legal moralists maintain it is important for the law to reflect common judgement of morality, it is surely even more important that it should in general reflect in its judgements on human conduct distinctions which not only underlie morality, but pervade the whole of our social life. This it would fail to do if it treated men merely as alterable, predictable, curable, or manipulable things.”).

also identifies the centrality of dignity, noting that it is the moral recognition of a shared humanity that grounds international criminal punishment.<sup>9</sup>

The twin goods of ‘security’ and ‘dignity’ deserve further elucidation beyond these oblique conceptualizations. One danger with not specifying these concepts, as noted in the subsequent discussion of *Rechtsgut* in Germany,<sup>10</sup> is that terminology acts as empty placeholders, capable of being filled with multiple meanings and justifying a variety of conduct. Security, so integral to Chehtman’s account, is rather undefined, leaving it vulnerable to corruption.<sup>11</sup> For example, legal sociologists such as Albrecht worry that, in a context of trends toward securitization, “[p]enal law and criminal policies are unfortunately the predestined domain for an erosion of law”<sup>12</sup>, and Bigio warns that the conflation of security with justice implies a “redefinition of freedom as a form of surveillance and control”.<sup>13</sup> The need to redefine security in broader terms<sup>14</sup> in order to develop useful public

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<sup>9</sup> RA Duff, “Authority and Responsibility in International Criminal Law”, in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 589 at 601.

<sup>10</sup> See notes 32 – 42, *infra*, and accompanying text.

<sup>11</sup> While Chehtman is more explicit in declaring the centrality of dignity and security to his account of punishment than some authors, his definition of the two values is quite sparse, saying that dignity and security only imply that criminal law “contributes to our sense of being rights-bearers, and that the legal system takes the protection of our rights seriously.” Chehtman, *supra* note 4 at 40.

<sup>12</sup> Peter-Alexis Albrecht, *Securitized Societies, The Rule of Law: History of a Free Fall* (BMW Verlag, 2011) at 1.

<sup>13</sup> Didier Bigio, “Liberty, whose Liberty? The Hague Programme and the Conception of Freedom”, in Thierry Balzacq & Sergio Carrera, eds., *Security versus Freedom: A Challenge for Europe’s Future* (London: Ashgate Publishing, 2011) at 35. Bigio further notes that the terminological slippage between freedom and security has led to “a concept of freedom that has become more dangerous for fundamental rights of individuals than even traditional security measures”. *Ibid* at 38.

<sup>14</sup> Jessica Tuchman Mathews, “Redefining Security” (1989) 68(2) *Foreign Affairs* 162 (“Global developments now suggest the need for another analogous, broadening definition of national security to include resource, environmental and demographic issues.”).

policy presents its Janus-face when criminal law is marshalled as an over-response to multiplying security threats.<sup>15</sup>

Offering further clarity as to the content of dignity and security not only distinguishes them from their use (or instrumentalization) in deterrence-based arguments, but also creates clear bridges to TWAIL from the outset. The identification of these interests reflects sociological accounts of punishment that identify similar goods. Safferling, for example, identifies similar goods in the context of ICL: belief in the reliability of the legal system, and the strengthening of the legal system through its self-exercise; promotion of sense of justice and catharsis; and satisfaction of normal human needs to assign responsibility.<sup>16</sup>

The goods of dignity and security are somewhat less concerned than Safferling with the specific position of victims. Instead, they focus on the idea of criminal law as public law, and particularly the notion that state enforcement of criminal law affirms the moral equality of individuals.<sup>17</sup> The good of dignity, for example, can be said to involve a number of inter-related incidents of *recognition*, including: that a wrong has been done; that an individual has a moral significance; that the rights that have been offended are real, not illusory or existing only on paper; and, that individuals are the moral equals of the other members of the collective whose rights are protected by the law. Crucially, these incidents of recognition can be extended to observers, victims, defendants, and convicted offenders alike through the

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<sup>15</sup> Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012) at 185 (“[t]he right to security has been institutionalized in the UK through a massive expansion of the scope of the criminal law”).

<sup>16</sup> Christoph JM Safferling, “Can Prosecution be the Answer to Human Rights Violations?” (2004) 5 German LJ 1469 at 1479.

<sup>17</sup> Malcolm Thorburn, “Criminal Law as Public Law” in RA Duff & Stuart Green, eds, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) 21 at 42 – 43.

process by which the criminal law treats offences and offenders, and the messages that process communicates to participants and the public at large.

The goods of security can be understood as confirmation of each observer, community member, and participant's *status*. In particular, the criminal law system offers status confirmation and thereby security through affirmation: that an individual's status as a rights holder has meaning, including through its general imposition of duties and its grant of liberties; that one's status as a rights-holder is subject to stable and predictable regulation; that this status shall not be altered arbitrarily, by either the state or other actors, including offenders; and that any infringements will be redressed to the extent possible. In this way, the state functions "to protect the personhood of its constituents."<sup>18</sup> Crucially, it is legal punishment, not some other response that affirms this status by linking the punishment to the victim of the specific offense. Prioritizing security as a key interest to be protected through criminal punishment does not demand the reprioritization of security as the state's "only task and source of legitimacy."<sup>19</sup> As shall be argued, excesses in pursuit of security will likely violate the interest-balancing that such an account of punishment entails.

Notably, while this is a consequentialist account of punishment, crime prevention - the traditional deterrent justification - is only seen as an ancillary benefit. It is something that is likely to happen as a result of a criminal law system being in place, but the extent to which it occurs is not central to the justification of punishment. The criminal law system and its practices of punishment are justified not because they maximize security, but because they

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<sup>18</sup> Markus D Dubber, "Criminal Law Between Public and Private Law" in Duff et al, eds, *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010) 191 at 211.

<sup>19</sup> Giorgio Agamben, "Security and Terror" (2001) 5:4 *Theory and Event* ("A state which has security as its only task and source of legitimacy is a fragile organism; it can always be provoked by terrorism to turn itself terroristic.").

are integral to the sense of dignity and security that are partial but essential elements of what TWAIL scholars and other liberal theorists consider as vital.<sup>20</sup> The central organizing principles of TWAIL are deeply infused with questions of recognition and status, evidencing a concern for the dignity of Third World states and peoples, as well as their physical, psychological, and economic security. Hence Mutua's denial of "othering" and insistence on "the moral equivalency of cultures and peoples."<sup>21</sup> As Fidler writes, "international law becomes a lens through which to examine intolerance in global politics and the search for a more tolerant global order that provides the Third World with not only space for self-determination but also bonds with the rest of humanity."<sup>22</sup> The Third World, notes Chimni, is defined for the purposes of TWAIL through the violence of the colonial encounter, and the subsequent persistent continuing marginalization and deprivation of certain states.<sup>23</sup>

The insistence on a more inclusive international legal order and set of international relations, along with a greater respect for state sovereignty and non-intervention,<sup>24</sup> can all be seen as invoking the equality and agency of Third World peoples and the associated need for stability in the political and economic structures that govern their lives. The Non-Aligned

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<sup>20</sup> See, e.g., Nicola Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988) 185-86 (emphasizing "the *significance* which punishment has for the citizens of a community, the place which it occupies in the development and cohesion of the community...").

<sup>21</sup> Makau Mutua, "What is Twail?" (2000) 94 ASIL Proc. 31.

<sup>22</sup> David P Fidler, "Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law" (2003) 2 Chinese JIL 29 at 32.

<sup>23</sup> B.S. Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 Int'l Community LR 3 at 5.

<sup>24</sup> Antony Anghie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflict" (2003) 2 Chinese J Int'l L 77 at 80-82.

Movement and the push for a greater equality in international economic arrangements<sup>25</sup> can be seen in the same light, as can the identification of Eurocentric biases throughout international law.<sup>26</sup> The pre-eminence of dignity and security are further found first in the understanding of the Third World as a conceptual frame based on the repetition of similar intersecting conflicts that cut across range of social divides<sup>27</sup> – including class, race, gender – and second in TWAIL’s focus (at least in part) on the amelioration of such “transnational linkages among the oppressed.”<sup>28</sup> In this way, dignity and security are integral to TWAIL imaginings of what Honderich suggests “a good life” might look like:<sup>29</sup> they are essential to the identification of all peoples as rights-bearing, moral peers, and to the actualization of such equality.

The affirmation of these goods help – and may be necessary – to generate a particularly useful public order that recognizes the moral worth and rights-bearing status of individuals.<sup>30</sup> Just as compliance with law can be maintained through tyranny, so can

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<sup>25</sup> See, e.g., Mohamed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979).

<sup>26</sup> Karin Mickelson, “Rhetoric and rage: Third world voices in international legal discourse” (1998) 16 *Wis Int’l LJ* 353 at 397, 414-415.

<sup>27</sup> Aijaz Ahmad, “Jameson’s Rhetoric of Otherness and the ‘National Allegory’” (1987) 17 *Social Text* 3, 8–9.

<sup>28</sup> Balakrishnan Rajagopal, “Locating the Third World in Cultural Geography” (1999) 15 *Third World Leg Stud* 1 at 20.

<sup>29</sup> Honderich identifies six elements of a ‘good life’: “A decent length of life, say 75 years rather than 35, the existence that is the lasting of a personal world for that time. Secondly, bodily well-being, including not being in pain and having more to eat than what merely sustains life. Freedom and power, in a living place and maybe in a family, and in the larger setting of a society and a homeland. Respect and self-respect, as against denigration and inferiority. The goods of relationship with others, narrower and wider. Finally, the goods of culture, just one of them being knowledge rather than ignorance.”). Ted Honderich, *Punishment: The Supposed Justifications Revisited* (London: Pluto Press, 2006) at 217.

<sup>30</sup> Ramsay, *supra* note 48 at 1 (“The communication of the law’s norms in the form of the state’s penal threats serves as a general reassurance function in so far as subjects know that violations of their protected interests will be taken seriously by the state. And this background reassurance is part of what makes the normal life of society possible.”).

dictatorship generate a useful public order. But while such rule might provide the more tangible goods alluded to earlier - public health care, or sanitation, or even universities and museums - it will not necessarily provide the equally vital goods of dignity and security offered by the interest-based account of criminal law. In particular, there is concern that undemocratic governments will tend to produce criminal law systems that fail to offer foreseeable and stable senses of dignity and security. At the same time, and as will be argued below, the fact that a state is a democracy does not guarantee that its criminal law regime always affirms the dignity and security of individuals.<sup>31</sup>

Relatedly, this justification of punishment is detached from a comprehensive delineation of the sentencing scheme or types of punishments that a criminal law system should adopt. If it can describe a punishment scheme in any detail, it is on the basis that more serious crimes should receive more serious condemnation, although without necessarily offering a breakdown of the types of punishment that are appropriate forms of condemnation.<sup>32</sup> The most it can offer is an upper limit to punishment. In doing so, it offers a rebuke to maximalist deterrence, which claims that greater security is derived from less crime, which is itself derived from stricter punishment. The interest-based analysis put forth here would not reject that claim on empirical grounds, but on the basis that an individual's interest to be free from severe or cruel punishment outweighs the collective interest in criminal law maximizing security. Thus while it is beyond the scope of this analysis to

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<sup>31</sup> See Bernd Schünemann, "Principles of Criminal Legislation in Postmodern Society: The Case of Environmental Law" (1998) 1 Buff Crim LR 175 at 177-180 (noting that notwithstanding the idea of the *Rechtsgut*, German courts have become more liberal with respect to interpretation of the constitutionality of legislation, moving from the prohibition to the acceptance of abortion. This is contrasted to American courts, which have moved from acceptance toward restriction.)

<sup>32</sup> In this regard, it parallels Joel Feinberg, "The Expressive Function of Punishment" (1965) 49 Monist 397 at 423 ("What justice requires is that the *condemnatory aspect* of the punishment suit the crime...[and] the more serious crimes should receive stronger disapproval than the less serious ones.").

provide a precise delineation of the cardinal and ordinal points of punishment, it can confidently point to a general upper limit on punishment.

A further prudential reason for such an upper limit on punishment is that it minimizes the harm done to the wrongfully convicted. ‘Wrongfully convicted’ in this sense does not mean those who are factually responsible but are convicted for the ‘wrong reasons’ - e.g., their ethnicity, personal animus on behalf of the judge - but those innocent persons whose convictions reflect a reasonable and honest mistake. Such decisions happen, and they should be rectified and their victims compensated as soon as possible.<sup>33</sup> Yet to convict an innocent person wrongly is different than to convict an innocent person intentionally - for example, because convicting innocent persons would have a serious deterrent effect. There is no collective interest in a criminal system that *intentionally* convicts innocents; such a scheme would undermine many of the dignity and security goods outlined above. A court may have the power to punish the innocent – as it is an organ invested with that ability – but it has a legal duty to not do so intentionally. In this way, the interest-based justification adopts the essential retributivist tenet of punishing only those who have actually offended, even as it allows for reasonable mistakes. Importantly, instead of imposing this requirement as a side constraint in otherwise deterrent schemes,<sup>34</sup> it requires it through reference to the same scheme of rights and interests that act as the normative justification for punishment in general.

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<sup>33</sup> Chehtman, *supra* note 4 at 48-49.

<sup>34</sup> See HLA Hart, “Prolegomenon to Punishment”, *supra* note 8, 1 at 3 (“What is needed is the realization that different principles (each of which may in a sense be called a ‘justification’) are relevant at different points in any morally acceptable account of punishment.”); and John Rawls, “Two Concepts of Rules” (1955) 64 *The Philosophical Review* 3 at 5. The problem with mixed theories is often that their combination of justifications does not blend the justifications, so that – as in Hart’s case – deterrence ultimately operates independently of the retributive arguments with which it is ‘mixed’. These ‘combined’ theories can thus be defeated by attacking the constituent elements, which operate independently of one another. Honderich, *supra* note 29 at 165 – 170.

This general justification bears some comparison to German criminal theory. The idea of criminal law protecting certain interests sounds similar to the German *Rechtsgut*-concept. The *Rechtsgüter* are the “protected legal interests”<sup>35</sup> held by individuals or society, but the doctrine (*Rechtsgüterlehre*) acts primarily as a theory of criminalization. It is a conception of what interests are to be protected by defining certain conduct as crimes.<sup>36</sup> While the interest-based account here does envision each crime as protecting a particular interest, the overall justification of punishment rests on the protection and assertion of the specific legal goods of dignity and security. In German criminal law, however, the justification for punishment is ‘Positive General Prevention’ – the idea that punishing induces a disposition to avoid wrongdoing.<sup>37</sup> That is, punishment gives effect to an interest in avoiding certain conduct but not necessarily to the specific interests of dignity and security identified here. In this way, the interest-based account links the specific interests protected by criminalization to the more abstract conceptions of dignity and security.

Relying on interests as sources of justification – whether for criminalization or punishment – does entail a certain degree of risk in that it presumes a particular set of social and political values that are in need of protection, and these values are liable to

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<sup>35</sup> Although there is some uncertainty about the precise meaning of the term, which has “so many possible meanings that it is simply impossible to translate it into English.” Otto Lagodny, “Basic rights and substantive criminal law: The Incest Case” (2011) 61 U Tor LJ 761 at 770.

<sup>36</sup> Howard D Fisher, *The German Legal System and Legal Language*, 4th ed (London: Routledge, 2009) at 244 (“It is a central principle that the function of criminal law is to protect *Rechtsgüter* against injury (*Verletzung*) or threat (*Gefährdung*).”).

<sup>37</sup> John Gardner, “The Functions and Justification of Criminal Law and Punishment” in John Gardner, ed, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007), 201.

reinterpretation depending on the *zeitgeist* of the times.<sup>38</sup> The decision to criminalize is based on prior value judgments about the interests to be protected or affirmed, value judgments for which the *rechtsgut* can offer no substantive normative criteria.<sup>39</sup> As Gardner says, those values must be defended (or assumed) as proper.<sup>40</sup> As noted in Chapters One and Two, the project of defining interests to be protected – whether by the criminal or the civil law – is intensely political, and inherent to the practice of state-building.<sup>41</sup> The justification of punishment depends then upon the context within which it is enacted, and in particular the political context and its associated social and economic effects. This is a problem common to all theories of punishment.<sup>42</sup>

Adopting an interest-based account does not necessarily lead to a liberal criminal law, as suggested by the modern trend toward illiberal outcomes even in Western democratic states.<sup>43</sup> As Dubber notes, the very idea of protecting the legal *interest* – as opposed to an individual *right* – was a means of expanding the criminal law’s reach; the Nazis took such expansion to an extreme with their desire to protect the interests of “Germanness” and the

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<sup>38</sup> Schünemann, *supra* note 31. See also Kai Ambos, “The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles - A Second Contribution Towards a Consistent Theory of ICL” (2013) *Crim L & Phil* 1-2 (“What is punishable today may be socially acceptable (and hence decriminalized) because of a change in the social attitudes of a population.”).

<sup>39</sup> *Ibid* at 6.

<sup>40</sup> Gardner, *supra* note 37 at 205 (“[I]t is true of all arguments for punishment, criminal or otherwise, that punishment is warranted under those arguments only on condition that the norm violated is, on other grounds, a sound one.”).

<sup>41</sup> Markus D Dubber, “Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law” in Duff & Green, *supra* note 17, 83 at 90-91.

<sup>42</sup> Gardner, *supra* note 37 at 205.

<sup>43</sup> Ambos, *supra* note 38 at 17.

“race and substance of the people”.<sup>44</sup> Punishment only makes sense in its broader social context.<sup>45</sup> And indeed, there is a risk of pursuing certain interests – particularly the interest in *security* – to an uber-Hobbesian extent that transforms the criminal law into an illiberal repressive tool.<sup>46</sup>

In Hobbesian terms, criminal law makes the rest of us feel more secure. Criminal law ordinarily protects security indirectly, through its response to attacks on other interests. In criminal law, these are paradigmatically interests in being free from bodily harm; murder is not an attack on one’s *sense* of security, but on one’s *actual* security. Insecurity is generated indirectly, for others who are not the immediate victims of the crime, and this sense of insecurity is compounded or assuaged by the societal response to the killing. Without it, says Hobbes, our sense of vulnerability would lead us to take pre-emptive action against anticipated coercion by others.<sup>47</sup> In general terms then, criminal punishment is an affirmation of political community and social arrangements. The danger is when security is over-emphasized, not only as a right to be protected by criminal law, but it in many ways as the pre-eminent right to be protected. As Ramsay warns, “[t]he institutionalization of the right to

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<sup>44</sup> Markus D Dubber, “Theories of Crime and Punishment in German Criminal Law” (2005) Am J Comp L 679, at 688.

<sup>45</sup> Lacey, *supra* note 20 at xii (that ordinary justifications of punishment fail because they are “set within a particular type of liberal framework”).

<sup>46</sup> Alice Ristroph, “Sovereignty and Subversion” (2015) 101 Va LR (forthcoming), online: SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2559246](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559246)> (Hobbes’ account of criminal law was seen as subversive in that it challenged contemporary power structures at the time it was written, but has come to signify illiberal repression).

<sup>47</sup> Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1996) XXVII (“[W]hen the sovereign power ceaseth, crime also ceaseth: for where there is no such power, there is no protection to be had from the law; and therefore every one may protect himself by his own power: for no man in the institution of sovereign power can be supposed to give away the right of preserving his own body, for the safety whereof all sovereignty was ordained.”).

security extends the liberal commitment to protect vulnerable individuals from harm to a point where it comes into contradiction with the underlying preconditions of liberal order.”<sup>48</sup>

In keeping with the tradition of modern Western criminal law and TWAIL, the interest-based justification and the key interests of ‘dignity’ and ‘security’ are conceptualized within and as advancing a specifically liberal framework, but the acceptability of these arguments largely rests on the defensibility of the subjective beliefs about the core values of dignity and security advanced herein. The preceding paragraphs have attempted to explain and defend the specific values at the core of the interest-based account; the subsequent sections attempt to use those values as the basis for explaining the jurisdictional reach of the criminal law. In doing so, they defend those values and the associated scheme of punishment on the basis of both the accordance of those values with liberal principles and their ability to offer a defensible system of extraterritorial criminal jurisdiction.

## **B. The State as Punishing Authority**

Paying attention to interests helps reconcile TWAIL’s recognition of the importance of state power with its simultaneous reluctance to entrench the same.<sup>49</sup> The authority of courts is justified on the basis that these centralized authorities, usually manifested under the auspices of the state,<sup>50</sup> are the best way to serve the important interests protected through

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<sup>48</sup> Ramsay, *supra* note 15 at 5.

<sup>49</sup> Anghie & Chimni, *supra* note 24 at 79.

<sup>50</sup> Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) at 1-3; Michael J Zimmerman, *The Immorality of Punishment* (Buffalo, NY: Broadview Press, 2011) at 19-21.

rights. The authority must have some de facto authority,<sup>51</sup> which is most likely to be an incident of state-involvement.

Affirming the centrality of the state in legal punishment is necessary for the popular support of the criminal law system.<sup>52</sup> As Easton notes, an institution will never be legitimate in the absence of some degree of public recognition.<sup>53</sup> Moreover, state courts remove the threat of victim's or vigilante justice,<sup>54</sup> and allow for both cost-reduction (with respect to the expenses of investigating, prosecuting, sentencing, housing offenders) and coordination.<sup>55</sup> Cost-reduction and coordination are not merely prudential reasons for centralized courts. It would be difficult to imagine a situation in which the central goods of dignity and security could be offered when every crime required building legal infrastructure anew, thereby extending the length of the process and multiplying inconsistency – and thus undermining the stability and predictability that are so central to one's dignity and security – across individual cases. The pragmatic reasons for preferring a centralized system are thus important in themselves, but also because they give great effect to the normative scheme outlined already.

The difficulty with saying criminal law is a public good is that the evidence for law's existence and its benefit is often obscured by its remoteness from day to day life for many people. Nonetheless, as Honderich says, the criminal law is as much an articulation of public

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<sup>51</sup> Chehtman, *supra* note 4 at 145 (“it must be recognized and obeyed to some significant degree.”).

<sup>52</sup> Duff, *supra* note 2 at xi (asking what justifies punishment is a central concern “for anyone who cares how states treat their citizens”).

<sup>53</sup> An authority is seen as having the moral right to rule, based in part on its psychological appeal and ability to “capture the imagination” of its audience. David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965) at 292-297.

<sup>54</sup> Hart, *supra* note 34 at 5.

<sup>55</sup> Chehtman, *supra* note 4 at 141-142.

policy as taxation, education, and health care — “[t]he question of the justification of punishment, then, has no existence independently of the question of the decent society.”<sup>56</sup> Indeed, this problem of remoteness seems to depend on the political structure and stability of a society, and the position of certain communities within that society. Criminal law remains a persistent specter, for example, in totalitarian states, where criminal law is often a tool of repression; or in states that have comparatively more political freedom, but a criminal law that prescribes corporal and capital punishment; or in impoverished and racialized communities that are subject to disproportionate policing within secular, liberal democracies. Criminal law is ephemeral and intangible, but also ever-present.

The law is made concrete then through its adjudication: the legal system and courts make decisions and issue authoritative judgments on the basis of clear pre-existing norms, and through the application of legal rules they do not act the basis of other, legally irrelevant considerations. What is ‘legally irrelevant’ will of course depend on the particular society and specific content of the laws in place, and is often captured in language of impartiality and independence. Standard examples from secular liberal democracies might includes preferences for defendants or victims of certain ethnic backgrounds, participants’ personal relationships with court or political personnel, the organizational affiliations of one of the parties, the defendant’s wealth, or the judge’s beliefs about an individual’s gender. While law-breaking does not itself negate the existence of law, it might be said that the *response* to the law-breaking might be an act of negation, if, for example, the legal system acts on the basis of such inappropriate considerations. The more a criminal regime depended on such spurious decision-making, the less reason there would be for either offenders or observers to

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<sup>56</sup> Honderich, *supra* note 29 at 206.

believe that punishment was related to criminal prohibitions, and thus that criminal law gave meaningful effect to individual and collective interests in dignity and security.

Evidence that criminal laws are in force is found in the practice of punishment. Note that it is the process of punishment, not merely evidence of its effect (e.g. low crime rates or the fact of punishment itself) that is necessary to give effect to the public good of law. To have hard treatment without censure is to lack the communicative process that validates the reason for punishment - violation of the particular legal rule. To have censure without hard treatment is to lack the concreteness demanded by the law. Similarly, compliance with legal prohibitions often proves too little in terms of normative agreement on reasons for action.<sup>57</sup> While compliance with legal prohibitions can be achieved without courts, for example, the fact of obedience does not necessarily demonstrate the concreteness of the law *qua* law. Summary justice and martial rule may be even more effective way of achieving compliance with certain laws, although these would not be seen as giving effect to the system of law, or the collective interests that justify the system, precisely because they would bypass that system and its adjudicative elements. Individuals might live up to their duties to obey the law, but the law would not be living up to its commitment to provide a sense of dignity and security. Even if one were to define these concepts in alternate terms, it would be safe to say that the collective interest in having this criminal law in force is outweighed by the widespread harms it perpetrates.<sup>58</sup>

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<sup>57</sup> See, e.g., Thomas Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) at 43; Easton, *supra* note 53 at 289; and Richard Price, "Emerging Customary Norms and Anti-Personnel Landmines" in Christian Reus-Smit, ed, *The Politics of International Law*, (Cambridge: Cambridge University Press, 2004) 106 at 113 (noting the disjunct between rhetoric and practice, such that a breach of a norm does not invalidate or delegitimize it, because "states often agree to a regulative norm more fully in rhetoric than in practice").

<sup>58</sup> Only a maximalist deterrence account, whereby the reduction of crime as much as possible is seen as the appropriate good to be delivered, and the only interest to be considered, would explain such a harsh system.

### C. Forfeiture, Dissent & Civil Disobedience

Considering the question of innocent offenders has returned us to the distinction between different types of rights. While we can justify a body holding a general power to punish, we must also explain how an individual suspect loses his claim-right to be free from the coercive reach of the criminal trial and sentencing. This claim-right against punishment is forfeited by the criminal offence itself. If punishment is, in part, a communicative gesture, and it seeks to convey to offenders and individuals the reasons for punishment, and affirm the legal norms of the society, then the commission of a wrong is a serious enough transgression that the offender has forfeited her claim-right against punishment: “[S]he cannot legitimately complain if she is strongly censured for her conduct, and reminded that this prohibition is also binding upon her.”<sup>59</sup> The nature of the rights that are forfeited are circumscribed by the upper limit of punishment referred to above, as well as the underlying rationale behind the upper limit: that whatever collective interest there may be in punishment, it will be overridden by the fundamental individual interest in being free from certain types of punishment, including punishment that is disproportionate to the crime committed. This may, in fact, lead to condemnation of many systems of punishment. Certainly the death penalty and corporal punishment are implicated by this argument, but other aspects of sentencing — including the conditions of imprisonment — will demand further scrutiny as well. Yet the concern here is with the general justification for punishment, and it is beyond the scope of the inquiry to go much deeper into the question of appropriate sentencing policy.

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<sup>59</sup> Chehtman, *supra* note 4 at 52.

If we are concerned with the question of rights, and which ones are to be validated and given legal recognition – as we were in Chapter 2 – then this specific formulation of the forfeiture argument as tied to communicative punishment presents a civil rights problem. Namely, what becomes of those who protest laws, and thus insist directly through their statements (as opposed to obliquely through the commission of criminal acts) that certain norms should not be binding? If punishment censures and communicates to the offender that a particular prohibition remains binding, then courts would seem to have a presumptive right to punish such civil disobedience. Instead of affirming the popular interest in criminal law as an ameliorative tool, have we not just legitimated the authoritarianism of states, especially those restrictive regimes that seem so pervasive in the Global South?<sup>60</sup>

This raises first an issue of criminalization, and whether there is a societal interest in having a particular criminal prohibition in the first place. Unjust laws ought to be null, because of the lack of societal interest either in the prohibition itself, or because the suffering imposed by the norm outweighs the collective interest in its enforcement. A different problem arises if the law protested is not patently unjust. Protests that oppose a law that mandates separate water fountains based on ethnicity seem qualitatively different from protests that oppose the prohibition against robbery or murder or kidnapping. The forfeiture argument would purportedly solve this issue by reminding the protesters that such norms remain binding upon them in spite of their explicit statements to the contrary. Yet while these statements of protest are communications that certain legal prohibitions ought not to be

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<sup>60</sup> Although it should be emphasized this is not solely a problem for the Third World. There is growing concern about the utilization of criminal law to stifle dissent in Western democracies as well. One contemporary example is Canada's proposed Bill C-51 (Anti-Terrorism Act, 2015), which national security experts warn may criminalize democratic protest movements as 'security threats'. See Craig Forcece, "Bill C-51: Does It Reach Protest and Civil Disobedience?" online: <[craigforcece.squarespace.com/national-security-law-blog](http://craigforcece.squarespace.com/national-security-law-blog)> (19 February 2015).

binding, they do not constitute grounds for punishment on their own. Punishment should not follow when the declaration - clear as it may be - is not accompanied by an attendant violation of the prevailing rights structure. Challenges to legal prohibitions ought to only trigger criminal sanctions when the declaration of non-application is accompanied by or embedded in an act (or omission) that challenges the rights structure that grounds collective interests in criminal law in the first place. Contesting a generally accepted criminal prohibition – on say murder – through direct critical speech (e.g. newspaper editorials or law journal articles) is qualitatively different than contesting that prohibition through the *act* of murdering someone. A collective interest arises in prohibiting murder, but there is ordinarily no collective interest that otherwise overrides the protestor’s right to free speech.

This is not to say that all speech is permissible. Even in liberal democracies, free speech is a misnomer, given the degrees to which speech is regulated. Someone who protests murder is different from someone who threatens murder. Court-ordered publication bans, defamation and libel laws, hate speech provisions, prohibitions against treason, are examples of such restrictions on speech. In keeping with the position advocated here, those restrictions may be justified on an interest-balancing approach applied to situations of conflicting rights. As in German criminal law, conflicting interests can be balanced on the basis of the “relative significance of the legal good, and the degree of interference” demanded by the conflict.<sup>61</sup> The proper balancing is thus achieved not by a simple hierarchical delineation of legal goods

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<sup>61</sup> Dubber, *supra* note 44 at 692 – 693.

or interests, but the specific contexts in which they are manifested – the concerns and preferences of their holders, of society, and the field of interests that surround them.<sup>62</sup>

Finally, the implication of this interest-balancing approach is that punishment is only permissible under the correct societal conditions. There is something insidious and disingenuous about a society that claims to offer dignity and security to its members by punishment, and claims that offenders are solely responsible for forfeiting their right to be free from punishment, while simultaneously creating the conditions (and sometimes even incentives) for criminal behaviour by failing to affirm other basic interests, particularly socio-economic ones.<sup>63</sup> This is an important challenge to all punishment theories to note,<sup>64</sup> but a more thorough exploration of it is beyond the scope of this particular argument.

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<sup>62</sup> Theodor Lenckner, “The Principle of Interest Balancing as a General Basis of Justification” [1986] *BYU LR* 645, 651 (Interests matter based on the idea that “when interests are weighed, it is not their abstract value which is the ultimate issue, but rather the extent to which they merit protection in a particular case.”).

<sup>63</sup> A challenge that might be raised in respect of international crimes and international relations as well. See Ted Honderich, *After the Terror* (Edinburgh: Edinburgh University Press, 2002) at 85-86 (“What this comes to is a proposition to the effect that there is a *responsibility* for the bad lives. It is not just that our actions are wrong, but that there is a responsibility on our part for them....We pass by, too, the whole complicated story of the extent to which the bad lives are owed to our very positive actions rather than our omissions, owed to our sins of commission rather than omission....I mean, mainly, economic actions that are clear-eyed, that are something or other like fully intentional with respect to causing bad lives.”).

<sup>64</sup> One acutely observed by criminal theorists who criticize or argue for the abolition of punishment in its present form because it is embedded in structural inequities. See, e.g., Deirdre Golash, *The Case Against Punishment: Retribution, Crime Prevention, and the Law* (New York: New York University Press, 2005) at 77-93, 155-159 (arguing that social inequality undermines retributive justifications of punishment, and demand alternative responses to crime prevention); and, Honderich, *supra* note 29 at 205 (“There is no more possibility of justifying punishment than of justifying any other large institution or practice of a society, say its distribution of income, or its system of education, without justifying the society to which that distribution contributes so greatly.”). Antony Duff explains this as the moral problem arising from a court that punishes on behalf of a society that has inflicted upon the accused “serious, persisting, and systematic injustice”: these individuals have been excluded from political participation or decision-making; they have been denied a fair opportunity to access the economic and material benefits of their society; the society they participate in has not treated them with the respect and concern they deserve. Their crimes are not necessarily justified or excused, but their conduct cannot be judged by some authority claiming to enforce the criminal law. Duff, *supra* note 1 at 184. A similar argument has also been made in the context of Islamic criminal law, where Tariq Ramadan has argued that corporal and capital punishment cannot be levied in societies that are riven with social injustice, including poverty and illiteracy. Tariq Ramadan, “An International call for Moratorium on corporal punishment, stoning and the death penalty in the Islamic World”, online: <[tariqramadan.com](http://tariqramadan.com)> (5 April 2005).

#### **D. Jurisdictional Claims & Extra-Territorial Punishment**

The description of punishment has so far offered a general explanation of how punishment may be justified, explaining the elements of an interest-based approach, which incorporates certain elements of traditional justifications for punishment even as it resiles from certain other components. The attention to interests and the legal goods of dignity and security provides a strong foundation for legal punishment. This explanation fits with ordinary liberal understandings of who should be punished and how such a process should occur, as well as TWAIL's emphasis on the well-being of individuals. However, it remains to be seen when and where a specific criminal law system or legal organ may exercise its jurisdiction, and how "domestic" jurisdiction differs from international or extraterritorial jurisdiction. This section deals with this issue, using the preceding analysis as a basis for explaining extraterritorial jurisdiction and the ability of states (and international courts) to exercise jurisdiction over conduct that takes place outside of territory under their control.

Jurisdictional issues pose fundamental questions for both domestic<sup>65</sup> and international criminal law,<sup>66</sup> and assertions of extraterritorial jurisdiction are often the source of intense conflicts. These conflicts frequently result from competing interests: one state claims that its interest in self-government and autonomy prevents some other state (or international body) from exercising criminal jurisdiction over acts committed in the territory of the first state.

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<sup>65</sup> Thorburn, *supra* note 17 at 32 ("...the settled doctrine of justification defences in the common law, just like the structure of criminal wrongdoing, is concerned with the protection of jurisdiction, both public and private, rather than with the identification of moral wrongs.").

<sup>66</sup> Louise Arbour, "Progress and Challenges in International Criminal Justice" (1998) 21 Fordham Int'l LJ 531, 531 (describing "the extraordinary difficulty of trying to marry together principles of international law (a profoundly consensual body of law that is essentially concerned with regulating conflict between *States*) with the criminal law, which is primarily concerned with *personal* liability.").

This rationale has been used to rebuff attempts by the International Criminal Court to assert jurisdiction in non-States Parties such as Sudan,<sup>67</sup> over American soldiers,<sup>68</sup> and even to delay cases or transfer them to domestic authorities (as in Kenya).<sup>69</sup> The challenge here is to reconcile these competing interests, and a first step is to reconsider the possible bases of criminal jurisdiction.

### 1. Territorial Jurisdiction

Territorial jurisdiction is generally uncontroversial: states will have a *prima facie* exclusive right to prosecute crimes that occur on its own territory. Offences committed within a state — whether by a citizen, resident or visitor, and whether against a citizen, resident, or visitor — undermine that society's interest in the criminal law being in force, and thus the public good(s) provided by criminal law. All persons in the territory of a state share the collective interest in enforcing that state's laws.<sup>70</sup> Here, one finds some curious debate in ICL about the propriety of the application of international criminal law not by territorial states, but by extraterritorial authorities to whom the territorial state has ceded some jurisdiction. According to this position, when states have not consented to these institutions that exercise extraterritorial jurisdiction, then the citizens of these non-consenting states who

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<sup>67</sup> Comments of Mr. Elfatih Erwa, Sudanese Ambassador to the UN, made to the Security Council immediately after the passage of Resolution 1593, referring Darfur to the ICC. UNSC Meeting Record, UN Doc S/PV.5158 (31 May 2005) at 12-13.

<sup>68</sup> Bartram S. Brown, "US Objections to the Statute of the International Criminal Court: A Brief Response" (1999) 31 NYU J Int'l L. & Pol. 855, 868-878.

<sup>69</sup> The Kenyan government challenged the admissibility of cases concerning post-election violence to the ICC on the basis that it was initiating complementary domestic proceedings. See Situation in the Republic of Kenya, Case No. ICC-01/09-02/11-274, *Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"* (Aug. 30, 2011).

<sup>70</sup> Chehtman, *supra* note 4 at 57-58.

have committed crimes while on the territory of consenting states, ought to be exempt from the application of ICL *by international institutions*. In short, Americans who commit war crimes in Afghanistan (a state party to the ICC), should only be tried by Afghani courts, not the ICC. Sending the accused to the ICC would represent the ‘democracy defect’ of international law, whereby individuals are subject to laws to which the state of nationality has not consented.<sup>71</sup>

Yet as long as territorial jurisdiction is exercised, it is difficult to see where the defect lies. Territorial jurisdiction is the basis for the prosecution of any foreigners who commit crimes in foreign countries, but the validity of those foreign laws does not depend on their ratification by the governments (or people) of some other states. State A’s disagreement with State B’s particular criminal prohibition (against say alcohol consumption) or its delegation of some part of its jurisdiction to an international entity makes no difference.<sup>72</sup> The concept remains analogous to the exercise of domestic criminal authority over a foreign national; it just so happens that another entity *also* has jurisdiction over that same conduct in that state.

## 2. Nationality-Based Jurisdiction

Nationality-based jurisdiction can be claimed on one of two grounds: that the offender, or more controversially, the victim is a national of an extraterritorial state.

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<sup>71</sup> Madeline Morris, “The Disturbing Democratic Defect of the International Criminal Court” (2001) 12 *Finnish YB Int’l L* 109 at 113 (“What is the democratic basis for the ICC’s power as applied to populations whose states have *not* consented on their behalf? Here, the ICC’s claim to democratic legitimacy breaks down. There is no democratic linkage between the ICC and those non-party nationals over whom it would exercise authority.”)

<sup>72</sup> Morris argues that such assignments of authority to the ICC exceed ordinary jurisdictional delegations by granting it a significant degree of control independent of the delegating state. She further argues that non-party states have not consented to the authoritative position of the ICC as a supranational law-making institution, but her complaint is the less convincing one that the problem is states do not control the outcomes of judicial processes. It is more an attack on the nature of international law itself. *Ibid* at 111-112, 115-116.

Nationality-based jurisdiction arose in the context of cultural differentiation. In the Middle Ages and prior to the formation of the nation-state, criminal jurisdiction was associated with tribal identity, not territorial control.<sup>73</sup> Individuals would ‘carry’ their home law with them as they traveled, often leading to great complexity.<sup>74</sup> In contemporary times, nationality-jurisdiction is justified on the basis that it accounts for gaps in prosecution that arise when the territorial state is unable or unwilling to prosecute crimes.<sup>75</sup> At the same time, these gaps are often connected to sense of national identity. As Rafuse notes, having been supplanted by territorial jurisdiction in the age of the nation-state, nationality-based jurisdiction was revived when states refused to extradite their own nationals accused of crimes. At the same time, those states did not want to encourage impunity, and sought to have their nationals “tried by their natural judges” – their national court system.<sup>76</sup>

As for whether international jurisdiction can be asserted on the basis of passive personality, this too will be the subject of negotiation between the custodial state<sup>77</sup> and the state of nationality of the victims. In situations where neither the territorial state nor the state of nationality of the perpetrator pursue international jurisdiction, relying on passive personality raises at least four important issues. First, most international crimes involve numerous victims, and there is the potential for conflict between the states of which these

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<sup>73</sup> Shalom Kassan, “Extraterritorial Jurisdiction in the Ancient World” (1935) 29 AJIL 237, 240; Cedric Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008) 49 (discussing Germany); and, Geoffrey Watson, “Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction” (1992) 17 Yale LJ 41, 46 – 47.

<sup>74</sup> Robert W Rafuse, *The Extradition of Nationals* (Urbana: University of Illinois Press, 1939), 134 – 135.

<sup>75</sup> Paul Arnell, “The Case for Nationality Based Jurisdiction” (2001) 50 ICLQ 955; Watson, *supra* note 73, at 42; and, Ryngaert, *supra* note 73, at 186.

<sup>76</sup> Rafuse, *supra* note 74, at 134 – 136.

<sup>77</sup> That which is either hosting or has custody over the alleged suspects.

multiple victims are nationals as to how to respond to the crime. Second, the passive personality claim would seem to be subsidiary in priority to those of the territorial and active personality states in so far as those states may wish to invoke national proceedings (or some other alternate mechanism) with respect to offenders. Third, there is no principled reason to restrict the protection of overseas victims to those victims of a particular nationality,<sup>78</sup> as opposed to all the victims of a massive crime, or to all local victims of common crime. Indeed, as argued in the next chapter, this sort of differentiation between victims of the same or similar crime may be a profound normative problem for criminal law regimes. Finally, there remains concern that this tenuous link can be exploited to the advantage of more powerful states as they seek to assert their own domestic, as opposed to international, jurisdiction. For these reasons, passive personality remains a dubious and controversial basis of jurisdiction even in international criminal law.<sup>79</sup>

Jurisdiction claimed on the basis of the offender's nationality (or more precisely, citizenship) is also problematic. When a Bolivian commits a crime in Japan, that does not undermine the criminal law of Bolivia, or the belief held by individuals in Bolivia that the criminal law remains in force in La Paz. The collective interest that explains the criminal law and legal punishment in Bolivia is unaffected. If Japan either will not or should not punish the offender,<sup>80</sup> Bolivia does not now hold that power. The interest in upholding Bolivian law

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<sup>78</sup> Chehtman, *supra* note 4 at 61.

<sup>79</sup> Regula Echle, "The Passive Personality Principle and the General Principle of *Ne Bis In Idem*" (2013) 9 Utrecht LR 56 at 60.

<sup>80</sup> Should not punish because it cannot offer a fair trial, or because it imposes cruel punishments, such as the death penalty or corporal punishment.

is similarly untouched if a Bolivian in Japan is the victim of a crime.<sup>81</sup> Subject to certain exceptions that arise in respect of serious crimes, the public goods of criminal law are generally only beneficial in the territorial state; in this limited respect Bolivians remain unaffected by what happens in Japan even if the offender or victim (or both) are Bolivian.<sup>82</sup>

Though nationality-based jurisdiction aims to fill a gap, in truth it cannot explain all exercises of criminal jurisdiction. Under a strictly nationality-based regime, tourists and visitors would be *de facto* diplomats, immune from prosecution. These individuals would all have to be arrested and extradited, with the trials happening in foreign courts far removed from the scene and effects of the crime, as well as evidence and witnesses. In a globalized world, with tourists, migrant workers, temporary non-citizen residents, permanent non-citizen residents, occupied territories, indigenous populations, dual citizens and so on, strictly nationality-based jurisdiction would introduce tremendous complexity<sup>83</sup> to processing criminal cases. As an example, recent Dutch legislation to expand the scope of its extraterritorial jurisdiction on a nationality basis treated Dutch citizens and permanent residents (of at least five years) as equals for the purposes of criminal law. On the other hand, permanent residents of less than five years were not caught by the legislation because they are not otherwise seen as nationals; the government had to create a separate obligation to

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<sup>81</sup> Chehtman, *supra* note 4 at 67-68 (“While an individual is abroad, the only system of criminal law that can meaningfully contribute to her (relative) sense of dignity and security is the criminal law of the territorial state.”).

<sup>82</sup> It may be, however, that nationality offers a convenient basis for assigning jurisdiction in situations where no territorial authority exists.

<sup>83</sup> Danielle Ireland-Piper, “Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine” (2013) 9 Utrecht LR 68, 74.

extradite or prosecute in respect of their foreign crimes.<sup>84</sup> Unless it is to create gaps of its own, or thoroughly mire criminal law in bureaucratic processes, nationality-based jurisdiction only makes sense as a supplement to exclusively territorial jurisdiction. Nationality is thus not a sufficient basis for extraterritorial jurisdiction.

### 3. Reconsidering Nationality-Based Jurisdiction

#### *(a) Nationality & TWAIL*

Does a TWAIL view on extraterritorial jurisdiction necessarily reject nationality-based jurisdiction? After all, had colonial powers asserted nationality-based criminal jurisdiction, exercising some degree of control over their overseas nationals, colonial practices arguably would not have been nearly as brutal as they were. In this view, nationality-based jurisdiction could have been an instrument for restraining colonial excess, and a demonstration of colonial powers' sense of responsibility for their nationals whilst overseas. The appealing insight here is that moving away from nationality-based jurisdiction risks retroactively ratifying colonial-era failures to prosecute and control colonizers.

This is a powerful argument, and one to be mindful of particularly as it highlights the deficiencies of relying solely on territorial jurisdiction. What criminal law recourse could colonized peoples have when alien domination denied them even the most basic aspect of territorial control? Nonetheless, this pro-nationality position can be nuanced in ways that suggest it is not a repudiation of the interest-based account. For one, this view risks conflating the colonial-era *failure* to prosecute with the jurisdiction to do so. Colonial powers

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<sup>84</sup> Cedric Ryngaert, "Amendment of the Provisions of the Dutch Penal Code Pertaining to the Exercise of Extraterritorial Jurisdiction" (2014) 61 Neth Int'l LR 243, 245 – 246 (discussing 2014 amendments).

could well have prosecuted individual colonizers under the relatively uncontroversial doctrine of territorial jurisdiction. To the extent colonial powers were de facto or de jure in control of colonized spaces, then territorial jurisdiction sufficed to explain the operation of criminal law. That the colonial powers failed to act – on territorial or nationality-based grounds – says less about the relative merits of those bases for jurisdiction than it does about how colonizers saw the colonized: as not worthy of the concern to be expressed through criminal law.

In this light, the crux of the problem is not that the colonial powers could not conceive of a way to control their nationals, but that they did not see colonized peoples as equals: either as nationals, as citizens or indeed as full human beings. That is, arguably the reason that colonial powers did not prosecute colonial crimes is not that they felt constrained by a lack of nationality-based jurisdiction, but that they did not see the victims of colonial crimes as rights-bearing individuals deserving of the protection of the criminal law.<sup>85</sup> Artefacts of this mindset were highlighted in Chapter 1 – on the contestation at the International Law Commission over recognizing colonialism and apartheid as crimes in the Draft Code of Crimes.

It is worth recalling here that much of the crime and brutality of colonialism was not that of individual colonizers (which is not to minimize their conduct), but of the structural enforcers of colonial domination. Colonialism was not private crime – it was state-sanctioned, supported, and overseen. As long as the state ratified the brutalities of colonialism as state policy, it mattered little whether nationality-jurisdiction was enforced

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<sup>85</sup> Barry Wright, “Self-Governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples” (2007) 26 U Queensland LJ 39, 46 – 47 (that implementation of the Indian Penal Code was delayed by a generation due to “European settler resistance to the idea of having the same statue as Indian subjects”).

because colonial practices simply were not seen as criminal. How one explains criminal jurisdiction is a moot point when the authorities do not recognize the commission of crime or the existence of victims. Here again we can remind ourselves of the history of international human rights detailed in Chapter 2: how domestic minorities were exempted from the protection of international human rights law; how the Allies who developed the Nuremberg Statute were wary of allowing criminal liability to accrue for their own treatment of minorities; and how even civil liberties groups conceived of colonial subjects as in need of civilizing.<sup>86</sup>

(b) *Nationality as a Fail-Safe for Territorial Jurisdiction?*

The colonialism example does raise an important point: what is to be done when the colonial power fails to exercise jurisdiction? An interest-based account explains how, depending on the seriousness of the conduct, criminal jurisdiction can arise even where neither territorial nor national jurisdiction has been exercised. It can offer the fail-safe absent from the colonial encounter. Moreover, it may even offer further contemporary benefits in the post-decolonization era, explaining why third states can exercise jurisdiction over crimes that the state of nationality will not prosecute, and where the territorial state cannot gain custody.<sup>87</sup> This is the whole point of extraterritorial jurisdiction – to normatively explain a residual jurisdiction where traditional heads of jurisdiction are not applied. Nationality-based jurisdiction does not do enough to close this gap.

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<sup>86</sup> See Chapter 2, Part II.

<sup>87</sup> The United States has steadfastly refused to extradite corporate executives implicated in the Bhopal chemical disaster to India. Territorial jurisdiction is thus obstructed, whereas nationality-jurisdiction is unenforced. An interest-based account would explain why third states – say, Canada – might prosecute those individuals where they to travel outside of the United States.

In this light, the key point is whether or not colonialism's practices are seen as crimes. In spite of the outcome of the International Law Commission's process on the *Draft Code of Crimes* described in Chapter 1, colonialism arguably rises to the level of a serious crime. Indeed, the profound, systemic brutality of colonialism would arguably meet Chehtman's own description of criminality that carves out an exception and triggers extraterritorial jurisdiction. Heeding the warnings of Césaire, unchecked colonialism - unlike the commission of ordinary crime overseas - would have reverberations for the home state: the 'boomerang effect' of colonialism where the colonizer's contempt for the native transforms the colonizer himself into the very subject he detests.<sup>88</sup> Perhaps more prosaically – but in keeping with the analysis so far – the non-prosecution of colonialism, partly because of its brutality, partly because of state connivance in that violence, would certainly give pause to domestic populations. They would have to reconsider their own sense of dignity and security in light of the impunity their judicial system afforded to horrific acts overseas.

Even then, the colonialism example remains relevant, for gaps in prosecution may well arise independent of the problem of identifying an individual's nationality. As the whole point of finding bases for extraterritorial jurisdiction is to fill in these gaps, particularly with respect to international crimes nationality is only a partial solution. Here, it is perhaps worth recalling that universal jurisdiction over piracy was originally premised on the idea that pirates had no nationality.<sup>89</sup> Even if we accept that the piracy point is a legal fiction or impossibility, how to deal with that other great legal fiction of contemporary legal systems – the corporation? As argued in Chapters 1 and 2, the role of corporate actors in international

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<sup>88</sup> Aimé Césaire, *Discourse on Colonialism*, translated by Joan Pinkham (New York: Monthly Review Press, 2000) (1955) at 41.

<sup>89</sup> Albert Levitt, "Jurisdiction over Crimes" (1925) 16 J Am Inst Crim L & Criminology 316, 323 – 324.

crime is significantly underappreciated. Identifying the nationality of transnational corporations adds a further obstacle to their prosecution.<sup>90</sup>

(c) *Nationality Jurisdiction as Overreach*

Though nationality-jurisdiction does not close all the gaps (and may create some of its own) in criminal jurisdiction, it also threatens the opposite problem: overreach. Without further restrictions, it permits extraterritorial jurisdiction over *any* crime committed overseas, no matter how minor. In practice, dual criminality requirements (that the conduct be a crime in both the territorial and national states) as well as severity criterion (that the crime warrant a particular length of sentence) seem necessary as well.<sup>91</sup> A further requirement is usually warranted. Nationality-based jurisdiction once was justified on the basis that it allowed peoples of different cultures to mix without fear of legal oppression. It encouraged Europeans to go the Third World without concern for the “primitive animosity” offered by alien legal systems;<sup>92</sup> it allowed individuals to be judged by their peers;<sup>93</sup> and it provided constitutional guarantees that might be lacking in some parts of the world. Yet it provides no such guarantees to the Third World visitor to Europe whose minor offence – in the eyes of her hosts – is subject to harsh penalties at home, or unfair procedures.<sup>94</sup> Thus concerns about

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<sup>90</sup> Ryngaert, *supra* note 73, at 91.

<sup>91</sup> See, e.g. Ryngaert *supra* note 84 (that the new legislation only operated for crimes that were liable to 8 years in prison under Dutch law); Watson, *supra* note 73, at 59 – 60 (on a seriousness requirement), and Eric Cafritz and Omer Tene, “Article 113-7 of the French Penal Code: The Passive Personality Principle” (2003) 41 Col J Transnat’l L 585, 597 (on need for a dual criminality requirement).

<sup>92</sup> Kassan, *supra* note 73, at 239.

<sup>93</sup> Rafuse, *supra* note 74, at 134-136.

<sup>94</sup> Ireland-Piper, *supra* note 83, at 76 (on nationality jurisdiction and totalitarian regimes).

civil rights must come into play, lest nationality jurisdiction, once intended to protect civilized Europeans from the vagaries of foreign justice (including, in contemporary times, the American death penalty), enables degradation and denial of civil rights.<sup>95</sup>

(d) *Nationality Jurisdiction and Legal Imperialism*

Finally, there is the concern that this overbreadth can be a vehicle for legal imperialism. Watson notes the important parallels between nationality jurisdiction and the use of consular jurisdiction by the United States in overseas territories, which prescribed separate punitive regimes for foreign nationals in “barbarous lands” without offering reciprocity to those foreign states.<sup>96</sup> It was also frequently used not to protect individuals from cruel treatment, but US commercial interests: overriding conflicting civil laws, and shielding foreign subsidiaries of US corporations.<sup>97</sup> The French legislature arguably went one step further. It voted to expand France’s nationality jurisdiction (which arises on the basis of either the victim or perpetrator’s nationality) notwithstanding that the Justice Minister and legislative commission both noted that it was a form of legal imperialism.<sup>98</sup> That legislation further granted nationality-based extraterritorial criminal jurisdiction for anything that is a crime under French law, including defamation, trademark violation, usury; or the victimization of a French corporation; applying it diligently would “lead to a wholesale

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<sup>95</sup> Arnell, *supra* note 75, at 959 (that a rationale for nationality jurisdiction is affirming human rights protections); Watson 81 (that international human rights law must be a constraint); Rafuse (using the example of returning a Jewish person to Nazi Germany)

<sup>96</sup> Watson, *supra* note 73, at 49 – 50.

<sup>97</sup> *Ibid* at 67.

<sup>98</sup> Cafritz and Tene, *supra* note 91, at 587, n14.

export of French economic regulations.”<sup>99</sup> Finally, in a cogent reminder of Third World concerns about foreign interference in domestic affairs, Australia attempted to prosecute a dual national solely in order to prevent the named individual from taking up a position in the government of the Solomon Islands.<sup>100</sup>

These concerns are not necessarily unique to nationality-based jurisdiction – they may well manifest in any system of unconstrained extraterritorial jurisdiction – but they do demand some extra elements that nationality alone cannot explain, and which the interest-based account must. Two chief complaints arise with respect to nationality as a basis for extraterritorial jurisdiction. First, nationality cannot explain why all extraterritorial crimes committed by (or, in a passive personality scheme, against) nationals of State X should not be prosecuted by State X. Second, it cannot explain why some third-state – not the territorial state, or the state of nationality – should be able to exercise a fail-safe jurisdiction over serious crimes that would otherwise go unpunished.

#### 4. Extraterritoriality and Domestic Interests

Earlier it was noted that extraterritorial crime generally has no effect on the state of nationality, or the sense of dignity and security that individuals feel. Yet this is not an absolute position. The exception to this rule, Chehtman argues, is crime that affects certain societal interests. Punishing extraterritorial acts that genuinely affect Bolivia’s “sovereignty,

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<sup>99</sup> *Ibid* at 588 – 590.

<sup>100</sup> Commonwealth Director of Public Prosecutions, ‘Respondent’s Summary of Argument’, Julian Ronald Moti v R (No. 47 of 2010) 3 (“[T]he Australian High Commissioner to the Solomon Islands, Mr Cole, on a number of occasions requested the AFP to investigate the applicant, and that the motivation was largely to prevent the applicant from becoming the Attorney-General in the Solomon Islands.”).

security, or important governmental functions”<sup>101</sup> can provide Bolivians with the appropriate sense of dignity and security in the same ways outlined above. While extraterritorial crimes do not ordinarily affect the domestic enjoyment of these goods, crimes that seek to attack that domestic state or its citizens may well affect such goods. Such crimes might include nationality-targeted terrorism, attacks against political officials abroad, coup-plotting, or currency or passport counterfeiting.

As with our earlier discussion of *rechtsgut* norms and the abuse of nationality-based jurisdiction, determining what constitutes an appropriate interest is often open to debate because of concerns about the malleability of ‘interests’. Building on the analysis of Chapters 1 and 2, a more limited understanding of crime ought to define the conduct that is properly the subject of extraterritorial jurisdiction. Whereas some states’ provisions on extraterritorial jurisdiction can be instrumentalized to assert civil interests, shield corporations from prosecution, or compel foreign states to mirror or acquiesce to their economic laws, extraterritorial criminal jurisdiction ought to be limited to those crimes whose seriousness is widely recognized and agreed upon. Ideally, this would include the expanded sense of international criminal law advocated for in the previous chapters; crimes recognized under customary international law;<sup>102</sup> and, crimes covered by widely adopted treaties.<sup>103</sup> The multilateral recognition of these crimes will go a long way toward reducing the potential abuse of extraterritorial criminal jurisdiction (as a means of interfering with foreign states). It will also protect against the criminalization creep that is becoming common in many

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<sup>101</sup> Chehtman, *supra* note 4 at 74.

<sup>102</sup> Including genocide and torture.

<sup>103</sup> This includes familiar international crimes such as genocide, torture, and apartheid, as well as crimes such as money-laundering, terrorism, public official corruption, hijacking.

domestic jurisdictions through the paradigm of securitization. Focusing on these crimes will help ensure that the most serious crimes that pose great threats to the interests of dignity and security are at least capable of being addressed through the criminal law, and that the failures of one state to prosecute are not the last word.

These crimes of course trigger territorial jurisdiction, but that jurisdiction will no longer be exclusive. The interest of Japanese citizens in self-government and autonomy that leads to a *prima facie* immunity from extraterritorial jurisdiction would be overcome when it shielded offenders who committed crimes against the vital interests of foreign states.<sup>104</sup> Thus, if Japan failed to prosecute crimes committed on its territory against Bolivia's "vital interests", Bolivia – but not Iran or Belgium or Namibia – could justifiably exercise extra-territorial jurisdiction.

When the types of interests attacked by the unprosecuted crimes are fundamental (as they are with international crimes), this trumps the ordinary immunity<sup>105</sup> of self-government, and helps explain when an authority may intervene in order to exercise another's jurisdiction.<sup>106</sup> When considering 'international crimes', this concurrent power to punish is rooted in state involvement in the perpetration, instigation, or tolerance of certain crimes. State connivance in or toleration of criminality renders criminal rules ineffectual and negates the public goods such laws ordinarily provide. As long as criminal jurisdiction remains exclusive to the state, the perpetrators of international crime cannot be understood as bound

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<sup>104</sup> Similarly, territorial states may have an interest in delegating their territorial jurisdiction, particularly when responding to transnational crime as part of a cooperative, international effort.

<sup>105</sup> Chehtman, *supra* note 4 at 101-102.

<sup>106</sup> Thorburn, *supra* note 17 at 39.

by the law. The failure to enforce the criminal law directly implicates the problem of moral equality that lie at the core of the goods of dignity and security.

This holds true even when the state or its agents only target certain ethnic groups, or even just a minority of the population. The interest against victimization held by members of the persecuted minorities may override the interest in self-government held by the majority of the population. A similar argument can be made in respect of inter-state international crimes. Individuals in *any* territory have a common interest in the criminal prohibitions against international crimes being in force.<sup>107</sup> In addition to the goods of dignity and security noted above, this helps prevent other forms of security threats such as reprisals, and imposes similar norms of conduct on the troops of all parties. Civilians who may be subject to violence as a result of conflict obviously have an interest in the validation of these rules, but even in cases where civilians are removed from conflict, the members of the military forces involved have that interest.<sup>108</sup> Even if only a subset of the population will benefit from this protection, the importance of these interests means that they defeat the ordinary territorial immunity of sovereignty.

#### **E. A Presumption of International Jurisdiction?**

The concurrent extraterritorial authority to punish also arises because giving one state or belligerent party the exclusive jurisdiction over its own citizens or military personnel will not necessarily give effect to the prohibition against the same international crime in the

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<sup>107</sup> Gerhard Werle, *Principles of International Criminal Law*, 2d ed, (The Hague: TMC Asser Press, 2009) at 43, paras 116-118.

<sup>108</sup> Military manuals make the point that observance of the laws of war encourages one's enemies to respect those same rules. See, e.g., *Law of War Deskbook*, Major Gregory S Musselman, ed, (Charlottesville, VA: United States Army Judge Advocate General's Legal Center & School, 2011) at 9.

territory of another party. During the Vietnam War, both North and South Vietnam were simply incapable of applying criminal prohibitions to American soldiers, and thus unable to provide its population with the public goods of dignity and security offered by the criminal law.<sup>109</sup> In part this is because Vietnamese civilians could not really believe that American soldiers or senior officials were bound by criminal prohibitions. The My Lai massacre, in which hundreds of civilians were killed and raped by American troops, took place seven months after a Department of Defense report on American atrocities in Vietnam,<sup>110</sup> and led to a single conviction. This was no anomaly: there was “a My Lay each month for over a year”,<sup>111</sup> and about 50,000 civilian casualties per year,<sup>112</sup> but only twenty-four convictions.<sup>113</sup> In such a conflict between state-like entities, international criminal punishment may be necessary because neither side will be able to trust in the other’s prosecutions, thereby failing to give effect to the goods of dignity and security.

Territorial punishment may not even give effect to those prohibitions in the territory of the party that is doing the punishing. In numerous cases, international (or hybrid) tribunals have been developed in response to concerns about impartiality and bias in national courts: in Rwanda;<sup>114</sup> the former Yugoslavia;<sup>115</sup> Kosovo;<sup>116</sup> Cambodia;<sup>117</sup> Sudan;<sup>118</sup> and the Democratic

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<sup>109</sup> Chehtman, *supra* note 4 at 105-106.

<sup>110</sup> Seymour Hersh, “My Lai, And its Omens” *New York Times* (16 Mar. 1998).

<sup>111</sup> Nick Turse & Deborah Nelson, “Civilian Killings Went Unpunished” *Los Angeles Times* (6 Aug. 2006), noting that the US Army’s own Vietnam War Crimes Working Group substantiated over three hundred separate incidents, and indicated at least five hundred more occurred.

<sup>112</sup> Jonathan Schell, *The Military Half: An Account of Destruction in Quang Ngai and Quang Tin* (New York: Knopf, 1968).

<sup>113</sup> Including Lieutenant William Calley’s conviction for My Lai. Turse & Nelson, *supra* note 111.

<sup>114</sup> Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935, UNSC Report, UN Doc S/1194/1125 (4 Oct. 1994), para 137 (that an international tribunal should be established “for the purposes of independence, objectivity and impartiality”).

Republic of Congo.<sup>119</sup> Thus these prohibitions must not only be rules that *can* be applied internationally, but - because of the intrinsic circumstances of and suspicion generated by armed conflicts - will often *have* to be adjudicated internationally as well. The mere fact that the territorial state criminalizes certain conduct “cannot really contribute to the sense of dignity and security of individuals in that state”,<sup>120</sup> because (a) the state has either perpetrated, instigated, or tolerated the crime, or (b) the state is not capable of punishing the actual perpetrators. Thus the context within which the criminality took place may well favour extraterritorial jurisdiction.

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<sup>115</sup> In order to ensure the national trials were impartial and not “political retaliation”, it was agreed that the Office of the Prosecutor of the ICTY would review case files before local authorities could arrest suspects for trial in domestic courts. See Mark S Ellis, “Bringing Justice to an Embattled Region – Creating and Implementing the “Rules of the Road” for Bosnia-Herzegovina” (1999) 17 Berkeley J Int’l L 1, 7. The internationalized (i.e. not purely domestic) War Crimes Chamber in Bosnia was similarly established out of concern, in part, about impartiality. See “Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts”, UNSC Report, UN Doc S/2002/678 (19 June 2002).

<sup>116</sup> The UN Mission in Kosovo (UNMIK) established an International Judges and Prosecutors Programme (IJPP) that allowed for the allocation of an international judge or prosecutor to sit in on domestic courts conducting trials stemming from the Kosovo armed conflict. The only requirement was that an international judge or prosecutor was necessary to ensure the independence or impartiality of the trial. Section 1, UNMIK/Reg/2000/64, (15 Dec. 2000).

<sup>117</sup> The Group of Experts recommended an ad hoc tribunal instead of trials under Cambodian law in part on the basis of concern about impartiality and political interference. “Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135” UNGA Report, UN Doc A/53/850 (15 Mar. 1999), para 179 (“only a United Nations tribunal can be effectively insulated from the stresses of Cambodian politics”).

<sup>118</sup> African Union High-Level Panel on Darfur, *The Quest for Peace, Justice and Reconciliation* (Oct. 2009), para 248.

<sup>119</sup> Office of the High Commissioner for Human Rights, “Democratic Republic of the Congo – 1993-2003”, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003 (Aug. 2010), paras 1043-46.

<sup>120</sup> Chehtman, *supra* note 4 at 119.

## F. Distinguishing International From Domestic Municipal Crimes

The danger is this may collapse the distinction between international and municipal crimes, and with it an important aspect of state sovereignty. To this point, the explanation of extraterritorial authority has largely rested on the notion that certain crimes affect certain fundamental interests. This is in keeping with the previous chapter's insistence that the list-based approach to international crimes is inadequate precisely because it fails to consider non-international crimes that implicate serious interests, including by contributing to or enabling the atrocities ordinarily seen as international crimes. Yet individual murders or rapes surely trigger fundamental interests as well, and at that point, the traditional distinction between international and domestic crimes disappears.

In order to trigger extraterritorial authority under this interest-based analysis, the crime must implicate a fundamental interest, and the failure to prosecute that crime must be widespread.<sup>121</sup> It must be more than just a failure to prosecute a specific incident of serious crime, which might result from any number of justifiable reasons, or the failure to prosecute numerous incidents of less severe crimes. A *widespread* failure to prosecute *serious* crimes, however, ought to be understood differently.

Whereas others define international crimes on the basis of their severity and widespread character, this approach also examines the response to such crime. It remains largely true that international jurisdiction is triggered "when political organization, rather than operating as a safeguard...becomes a threat."<sup>122</sup> International crimes are characterized

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<sup>121</sup> Werle, *supra* note 107 at 43 ("[c]onsiderations of expediency may call for an internationalization of criminal law enforcement when isolated prosecution of certain crimes by an individual state has no prospect of success") and 45 ("International criminal law provides an answer to the failure of traditional mechanisms for protecting human rights").

<sup>122</sup> Kirsten J Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (Oxford: Routledge, 2012) at 24.

by this inability to rely on the state: “[t]here are certain criminal rules that cannot be in force in a given state unless at least some extraterritorial authority holds a concurrent power to punish those who violate them.”<sup>123</sup>

It is worth recalling here that the ‘widespread’ requirement is also tied to the identification of those who hold an interest in the punishment of crime. It cannot be an individually-held interest, for this would lend itself to absurdities in the ordinary prosecution of crimes. If it were the interest of victims alone that justified punishment, it would be hard to explain how a murderer could be punished, as his victim would not seem to have any interests left to be affirmed.<sup>124</sup> Perhaps we might say that the interest of the victim’s family also mattered, but this does little to help the cause. We would be left in the position of suggesting that if you killed one member of a family - say a business partner with whom you had a falling out - you would be better off killing her husband, parents, sister and three children as well so as to eliminate anyone whose interests could justify punishment. In truth, once we start saying that it is the interest of people other than the victim - even if just the family - what we are really starting to say is that there is a societal interest in punishment. The reality, however unfortunate it may be, is that this societal interest is not always triggered with respect to individual or sporadic failures to prosecute. This presents a trade-off of interests, or perhaps a choice between impunity gaps, one that puts its faith in the efficiency of a societal-interest system, instead of the upside-down logic of a victim-based system.

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<sup>123</sup> Chehtman, *supra* note 4 at 100. He also notes that for certain crimes, “a criminal rule cannot really be in force on the territory of a given state if it has to rely exclusively on being enforced by that state.” *Ibid* at 90.

<sup>124</sup> *Ibid* at 34. Also, the victim’s interest presumably would only extend as far as stopping or preventing the crime; not punishing it.

Note here the distinction between the failure to *prevent* and the failure to *prosecute*. The two may well often accompany one another, particularly in cases of international crimes where the state is complicit to some degree in the perpetration, instigation or tolerance of the crime. Yet they are not co-extensive; a state's *response* to criminality is what determines belief in the validity of the criminal prohibition. Perhaps there is a case to be made for extraterritorially-sourced 'humanitarian' intervention in order to help prevent the crimes,<sup>125</sup> but offenders should still be prosecuted by local authorities. By extension, widespread and serious crimes that are not punished may well trigger extraterritorial jurisdiction.

The latter two categories of crime point at a way of theorizing international crime: those crimes which are (1) widespread; (2) are serious crimes in that they implicate fundamental interests of individuals; and, (3) will not be prosecuted by the territorial state because of its complicity (either through perpetration, instigation, or acceptance) in the conduct, or its inability to punish the perpetrators.<sup>126</sup> The first two requirements of scope and moral egregiousness dovetail quite nicely with the work of the International Law Commission described in Chapter 2, and thus help explain why certain of the additional crimes referred to in that chapter ought to be considered candidates to become international crimes. The third explains when the complementary exercise of extraterritorial jurisdiction may be warranted.

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<sup>125</sup> Bearing in mind, of course, Roth's caveat: "Even if too little intervention is now objectively a greater overall problem than too much intervention, it does not follow that a broader licensing of intervention would occasion more of the right measures in the right places." Brad Roth, "The Enduring Significance of State Sovereignty" (2004) 56 Fla LR 1017 1044-45.

<sup>126</sup> This includes the inability of a state to secure custody of key foreign suspects, which can contribute to a lack of confidence in criminal rules being in force even when other foreign suspects are tried.

## **G. Alternative Theories & the Interest in Non-Intervention**

A final concern is how the interest-based account compares to alternate justifications of punishment. While the interest-based account is not perfect, it remains preferable to standard accounts largely because of its ability to recognize the interest in self-determination, autonomy, and sovereignty. It thus charts the third way recognized by Delbrueck many years ago, which negotiates between the two radical options for understanding human rights protection. Instead of either demanding the eradication of state sovereignty as a necessary condition for human rights protection, or conceiving of human rights protection as a matter exclusively *internal* to a state, it proposes a flexible approach that does not place excessive demands either on international institutions to intervene, on states to zealously and uncompromisingly prosecute, or on ordinary people to bear an unbearable burden of suffering.<sup>127</sup> By contrast, retributive punishment, that which describes punishment as justified because it is deserved, places no limit on what crimes may be punished extraterritorially. If what matters is that deserving offenders are punished, then it matters little who is doing the punishing. Similarly, if offenders are to be punished, then it matters little whether the offence was a serious incident of a particular widespread species of crime, or an isolated minor transgression.

Deterrence-based justifications similarly commit every state to punish any particular offender. This is true even of utilitarian-deterrent accounts that are concerned with achieving optimal outcomes by assessing a broader range of factors beyond the pure deterrent effect of

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<sup>127</sup> Jost Delbrueck, "International Protection of Human Rights and State Sovereignty" (1982) 57 *Indiana LJ* 567, 569-70.

punishment.<sup>128</sup> After all, the interest-based account is from the family of consequentialist theories, and if it can rely on competing interests, deterrence proponents can similarly argue that there are multiple factors that go into deciding what will maximize utility. Given, for example, American threats to invade the Hague to rescue its soldiers who might be prosecuted by the ICC, or to cut off military aid to states that either exercise or enable the exercise of non-American criminal jurisdiction over US troops, the refusal to prosecute Americans might give effect to other goods that must be balanced against deterrence.

Smaller states' refusals to prosecute American soldiers might not maximize the deterrent effect of criminal prohibitions, yet might well give effect to sufficient other goods, such as the continuation of American military aid. This, however, tends toward reinforcing hierarchical relationships between states, an arrangement that exists in tension with the TWAIL project and common understandings of fairness in international law. A territorial state that sought to prosecute nationals of another, powerful state might be precluded from ever prosecuting such nationals if it caused sufficient inter-state friction.<sup>129</sup> But if the broader utilitarian analysis favoured *not* prosecuting, then states could not choose to take the moral stand to prosecute American soldiers who transported detainees for torture in black sites. The option of sub-optimal prosecution would be removed from this normative structure, severely

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<sup>128</sup> It is worth considering why legal punishment and deterrence are so closely related. A committed deterrence theory would not only permit punishment of the innocent, but would dispense with trials altogether and enact summary justice. An example might be the *favela* death squads in Brazil. See Nancy Scheper-Hughes, "Death Squads and Democracy in Northern Brazil", in Jean Comaroff & John L Comaroff, eds, *Law and Disorder in the Postcolony* (Chicago: University of Chicago Press, 2006) 150 at 158-159 (arguing that democratization, which exposed the horrendous state of Brazil's poor, also constructed their presence "as a direct assault on the social order" and thus in need of control; many who had yet to commit a crime were knowingly jailed or even "marked for extermination" in order to prevent them committing crime in the future). Hence individuals' interest in deterring offenders does not, on its own, act as a justification for *legal* punishment. Moreover, to the extent it justifies anything, it permits the levying of harsh suffering on possibly innocent individuals in order to satisfy the interest in deterrence. In doing so, however, it abuses the fundamental and overriding interests against such cruel treatment held by those who are forced to suffer the violence.

<sup>129</sup> Chehtman, *supra* note 4 at 79.

curtailing the agency of states when confronted with crimes committed by nationals of more powerful countries. Again, this directly contradicts an essential premise of TWAIL and our broader understandings of fairness and sovereignty in international law. An interest-based logic might thus be preferable to deterrence theorists, on the basis that the interest-based account grants a power to punish, which includes the discretion to use that power.

Of course, there are few purely retributive or deterrent theories of punishment, and quite a few mixed theories instead. Retributive and deterrent justification are often mixed with expressionist rationales. Yet this mixing again offers no limit on the types of crimes that may be punished territorially. If the goal is to convey to the perpetrator the message that he has committed a serious wrong, there is no intrinsic limitation to expressivism. It may be that some bodies are better situated to convey the message - for reasons of language or culture, perhaps - but rather than precluding extraterritorial jurisdiction, it will only limit the range of extraterritorial bodies that can exercise jurisdiction. A true commitment to expressivism in ICL would place certain conditions on these extraterritorial organs in order to enhance their communicative capacities. Consider in this regard the concern that international criminal tribunals are often unable to reach reliable verdicts because the evidence they depend upon often does not support the eventual judicial conclusions.<sup>130</sup> This dulls the expressivist capacity of both the trial and the verdict itself, which cannot be treated with a great degree of certainty given the difficulties associated with evidence communication and interpretation. Similarly, international criminal trials often rely on sources of law that are alien to the local

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<sup>130</sup> In her exhaustive survey of fact-finding in the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Special Chambers for East Timor, Nancy Combs argues that one of the major reasons evidence is so unreliable is that courts and their officials are unable to communicate with and understand the communications of witnesses. Nancy Amoury Combs, *Fact-finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

cultures and contexts within which they operate.<sup>131</sup> Yet these failings do not offer a limit on the types of crimes that may be extraterritorially punished; they simply demand that courts meet certain requirements before doing so.

In this way, the expressivist position is actually quite compatible with TWAIL concerns – particularly around the cultural competence of institutions. However, it fails to offer the requisite concern for state sovereignty, requiring no distinction between ‘ordinary’ and ‘international’ crimes. Otherwise, expressivism in ICL offers little that the interest-based theory does not (with its emphasis on censure as a necessary element of punishment).<sup>132</sup> Where the two differ, again, is that only the interest-based account offers a plausible reason to generally respect the distinction between municipal and international crimes, and a state’s sovereign authority over the administration and exercise of its criminal justice mechanisms. Primarily because the interest-based account is the only one that consistently preserves this differentiation, it is to be preferred as a rationale for extraterritorial jurisdiction.

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<sup>131</sup> See, e.g, Roger Phillips, “Kevin Jon Heller: The Nuremberg Military Tribunals and the Origins of International Criminal Law” (2012) 10 JICJ 492 at 494-495 (arguing that many bedrock principles of ICL are taken from the practice of five Western states at the military tribunals for Tokyo and Nuremberg), and Diane Marie Amann, “Harmonic Convergence? Constitutional Criminal Procedure in an International Context” (2000) 75 Indiana LJ 809, 851-862 (on the near-total exclusion of non-Western criminal law systems from ICL).

<sup>132</sup> See Robert D Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, (2007) 43 Stan J Int’l L 39 at 44 (“The principal value of ICL punishment lies in its expressive dimensions, which more accurately capture the nature of international sentencing and ICL’s realistic institutional capacity to contribute to the ambitions objectives ascribed to it. International criminal tribunals can contribute most effectively to world public order as self-consciously expressive penal institutions: publicly condemning acts deplored by international law, acting as an engine of jurisprudential development at the local level, and encouraging the legal and normative internalization of international human rights and humanitarian law.”)

### III. SOVEREIGNTY & TERRITORIAL IMMUNITY

#### A. Sovereignty: a Third Essential Interest

Implied throughout the preceding discussion has been a third interest, one specifically relevant to the exercise of extraterritorial jurisdiction. Whereas the earlier described interests of dignity and security were conceived of as largely complementary to one another in their role as primary justificatory factors for punishment, this third interest performs a gatekeeper function that has no obvious alliance to dignity and security. That interest – variously described as self-government, autonomy, or indeed sovereignty – is a primary normative hurdle for all international and extraterritorial courts to overcome.

In considering the balancing of interests, Chehtman weighs dignity and security against what he terms autonomy and self-determination. He offers little explanation of those terms; they are, as with dignity and security, taken as self-evident. While this acknowledges the danger of impunity, it gives too little credit to sovereignty's historical role in protecting against intervention, especially to the extent it implies that international courts are presumptively to be preferred to national courts because international courts do not suffer from the same deficits of apparent bias, instrumentalization, or politicization as national courts. This section describes how the annals of sovereignty write a broader history, one that sees the various features of state sovereignty as a set of complex interactions that serve an important purpose of shielding domestic authority from external interference.

Adopting Raz,<sup>133</sup> Chehtman argues that sovereignty and autonomy are linked to ideas of prosperity and self-respect that inhere in the group membership of individuals in a nation-

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<sup>133</sup> Joseph Raz, "National Self-Determination" in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995) at 126ff.

state.<sup>134</sup> This highlights important incidents of sovereignty, but is incomplete from a TWAIL perspective. First, it fails to problematize the continuities between inter-state colonialism and international law's postcolonial order.<sup>135</sup> Ideas of statehood in the UN Charter entrenched colonial concepts of the state, along with the actual territorial boundaries and demographics of the nation-states imposed by colonial rule.<sup>136</sup> If a decolonizing territory would not satisfy the criteria of statehood, it essentially forfeited the right to self-determination, because lack of statehood corresponded to a lack of 'civilization' – which justified intervention and direct domination in the first place.<sup>137</sup> Decolonizing states were compelled to take on the attributes and legal forms of their colonial masters, for “in international legal terms, the only way to decolonize was through self-determination as a nation-state.”<sup>138</sup> Moreover, the form of the state also carried with it a corpus of pre-existing international law that was often ill-suited to the needs of newly decolonized states.<sup>139</sup> Thus the very idea of the nation-state is itself deeply contested in TWAIL; it contains within it a paradox, whereby the form of the state acts as a shield against particular forms of intervention, even as it represents a profound

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<sup>134</sup> Chehtman, *supra* note 4 at 25-28.

<sup>135</sup> See Antony Anghie, “The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case” (1993) 34 Harv Int'l LJ 445 at 447 (arguing that European jurists had to craft international law to explain the “dispossession of the non-European world”), and, Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5 Soc & Leg Stud 321 at 332 (“In particular, we see in Vitoria's work the enactment of a formidable series of maneuvers by which European practices are posited as universally applicable norms with which the colonial peoples must conform if they are to avoid sanctions and achieve full membership.”).

<sup>136</sup> Diane Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” (1996) 5 Soc & Leg Stud 337 at 339 – 340.

<sup>137</sup> Anghie, “Colonial Origins”, *supra* note 135.

<sup>138</sup> Sundhya Pahuja, “The Postcoloniality of International Law” (2005) 46 Harv Int'l LJ 459 at 463.

<sup>139</sup> Georges Abi-Saab describes the dissatisfaction that these states had with, *inter alia*, the sources of international law and aspects of the law on state responsibility. “The Newly Independent States and the Rules of International Law: An Outline” (1962) 8 Howard LJ 95, 106 – 110, 113 – 116.

intervention of its own. To speak of the nation-state as a vehicle for prosperity and autonomy is to omit the internal fractures of the postcolonial state.<sup>140</sup>

Second, and by extension, the assumption of group-membership in the nation-state is a difficult one to verify in many postcolonial states (and Western settler-colonial states),<sup>141</sup> whose borders were drawn in colonial times and were largely unaffected by decolonization. As a result, many states are highly multicultural in demographic terms, but also internally dissonant. It seems counter-intuitive to point to the self-respect stemming from membership in the group that makes up a state, when at the same time those states are frequently fractured along the lines of sub-state group membership – including ethnic, religious and tribal identity. As discussed in the next chapter, identifying intra-state group identities is an important element in determining the propriety of international criminal punishment. And while the condition of statehood may be instrumental in developing national identities, it is premature to presuppose that such self-conceptions have already coalesced.

Third, the instrumental effects and benefits of sovereignty, especially its (potential) role in staving off external interference, are not fully recognized in this explanation. It is somewhat surprising that Chehtman's description, focused as it is on punishment across borders, does not truly broach the subject. The idea of interference, and indeed of criminal institutions as potentially being used to alter either the modes or agents of domestic governance, is an important site of conflict in ICL and international law more generally. Wariness of foreign and international interference with formal sovereignty is almost embedded in postcolonial theory, TWAIL, and other critical scholarship from the global

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<sup>140</sup> Interestingly, Chehtman refers to Turkey and South Africa – home to racial and ethnic fissures between Turks and Kurds, and Afrikaners and black South Africans – as examples. Chehtman, *supra* note 4 at 27.

<sup>141</sup> Including, *inter alia*, Australia, Canada, and the United States.

South and elsewhere. It is the *bête noire* of virtually every aspect of international law, public and private.

The presumed inadequacy of extraterritorial domestic courts as purveyors of justice lies in their real or apparent commingling with the self-interest and suspicions of inter-state politics, again raising questions of impartiality or independence. Independent or not, those courts will be *seen* as politicized and not impartial or neutral, and possibly even as adjudicating on the basis of factors unrelated to the specific trial or situation. This problem of real or perceived bias thus often pre-empts territorial exercises of jurisdiction by national courts, and has generated a need for “more neutral, independent, international mechanisms of accountability.”<sup>142</sup> This concern animated the proliferation of international and hybrid criminal tribunals around the world,<sup>143</sup> and even operates at the ICC.<sup>144</sup> In each of those situations, there was a cognizable concern that the courts in question might be captured by political or personal interests, or reflect real or perceived bias. Certain extraterritorial criminal law regimes or courts might be presumptively disqualified from exercising extraterritorial jurisdiction; perhaps because they are from neighbouring states with interests in what occurs; former colonial powers; or states with other significant and specific political or economic interests in the conditions of territorial state. National courts of the territorial state will often be disqualified from conducting these trials for the same reasons.

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<sup>142</sup> Sarah Williams, *Hybrid and Internationalised Criminal Tribunals* (Oxford: Hart Publishing, 2012) at 28.

<sup>143</sup> See notes 114-119, and accompanying text, *infra*.

<sup>144</sup> Art. 17(2) of the Rome Statute specifies that the ICC may obtain jurisdiction when local proceedings are not impartial or independent; Art. 20(3)(b) permits double jeopardy when the other proceedings “were not conducted independently or impartially”. *Statute of the International Criminal Court* (17 July 1998) 2187 UNTS 90, 37 ILM 1002.

Ultimately, this suggests that international courts are generally safer options in that they are not beholden to the interests of particular states, or of particular authorities within a state. In the words of one distinguished commentator, international courts are “totally independent of states and subject to strict rules of impartiality”, whereas domestic courts, including those acting extraterritorially, are prone to abuse and instrumentalization.<sup>145</sup> The impartiality problems of domestic courts can thus be seen as encompassing unwarranted or instrumental interference in the affairs of territorial states, and generating a preference for international (or hybrid national-international) courts, which are generally seen as insulated from such concerns. Yet Chehtman’s account does not take up this issue with respect to international courts.

The fact that national courts exercising extraterritorial jurisdiction are predisposed to mistrust or interference does not preclude the existence of similar problems with international courts. Many states and commentators remain suspicious of international tribunals. International courts remain influential domestic political actors,<sup>146</sup> and can become instrumentalized or politicized in the same way as domestic courts, even unintentionally.<sup>147</sup> Bassiouni warns that states can manipulate international criminal institutions through a variety of subtle methods, including “by bureaucratic and financial means, which involve the control of the structures, their operations, personnel, and more importantly, their

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<sup>145</sup> Antonio Cassese et al, *Cassese’s International Criminal Law*, 3d ed, Paola Gaeta, ed, (Oxford: Oxford University Press, 2013) at 321.

<sup>146</sup> Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014) at 4-5.

<sup>147</sup> William Burke-White, “Complementarity in Practice” (2005) 18 *Leiden J Int’l L* 557 at 568 (warning of the danger “that the prosecutor will unwittingly or unintentionally play into the hands of the national government, and later the political dynamics within the target state in favour of one side.”).

resources.”<sup>148</sup> To this one can add that much of the enforcement of international criminal law, even when international courts are prosecuting it, depends on legal and police systems that are outside the control of the international institution. NATO obstructed the work of the ICTY by refusing to arrest any suspects for years.<sup>149</sup> Similarly, the ultimate transfer of Milošević to the Hague was the product of domestic political considerations: it almost certainly violated national Yugoslav law (and broke the terms of the Dayton Accords), but led immediately to the granting of \$1 billion in aid to the FRY.<sup>150</sup> Thus concerns about politicization – and therefore the subversion of sovereign protection – affect international institutions as well as their foreign domestic counterparts.

This relates to a fourth concern, where an international court or tribunal may begin to be *seen* as untrustworthy in the same way as a particular foreign court. One can imagine that if the ICC were only to investigate cases in poor or African countries, people in those territories and indeed around the world might begin to wonder whether the criminal prohibitions against international crime are really in force, and whether a geographically selective court can really give effect to the goods of dignity and security. Some certainly

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<sup>148</sup> M Cherif Bassiouni, “International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice” in *The Oxford Companion to International Criminal Justice* Antonio Cassese, ed, (Oxford: Oxford University Press, 2009) 131 at 141.

<sup>149</sup> The ICTY was established in May 1993. By 1996, 74 indictments had been issued, but only seven suspects had been arrested. Journalists would often take photos of the at-large suspects passing unimpeded through NATO checkpoints. On occasions when some gestures towards accountability were made, foreign troops even warned Radovan Karadžić (wanted for his alleged role in directing the Srebrenica genocide) that he should temporarily adopt a lower profile. It was not until the summer of 1997 that NATO troops began actively pursuing suspects. Carol Off, *The Lion, the Fox and the Eagle* (Toronto: Vintage, 2001) at 292 – 304.

<sup>150</sup> Konstantinos D Magliveras, “The Interplay Between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law” (2002) 13 EJIL 661 at 662, 676 (noting that the Serbian government at the time (1) acknowledged that the transfer of Milosevic would help secure large sums of international aid at a donor’s conference, and (2) referred to Milosevic as its ‘most valuable export commodity’). The day after Milosevic’s transfer to The Hague, over \$1bn in aid was pledged to the Republic of Serbia. “Milosevic Extradition Unlocks Aid Coffers” BBC News (29 June 2001), online: BBC News <<http://news.bbc.co.uk>>.

believe so. One scholar argues that case selection problems seriously undermine the legitimacy of the ICC;<sup>151</sup> others point to its effect on state support for the ICC;<sup>152</sup> and another notes that while the Court is certainly distinct from its predecessors, these patterns contribute to a sense of the ongoing, long-term partiality of virtually all international criminal courts and tribunals.<sup>153</sup>

Note that this is a separate question from the capacity of the extraterritorial court to engage in judicial or fact-finding activities. Courts must be seen as convicting and punishing accused persons for the right reasons, and the perception of bias irredeemably taints the criminal process, even when the convictions themselves are accurate under the substantive law.<sup>154</sup> An individual may be guilty, but may not be capable of being called to account by a particular institution.<sup>155</sup> This sovereignty-based concern is not about technical qualifications as much as it is about the extraterritorial authority playing an untoward role in international relations, and failing to give effect to goods of dignity and security in the same way that problematic foreign domestic courts might fail. Just because a court is an international one does not mean it is free from the concerns that say Vietnamese soldiers might have had about

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<sup>151</sup> Margaret De Guzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court” (2012) 33 *Mich J Int’l L* 265 at 271ff.

<sup>152</sup> See Julie Flint & Alex de Waal, “Case Closed: A Prosecutor Without Borders” *World Affairs* (Spring 2009) at 36 (noting African views of ICC prosecution as a “selective political instrument”), and, Charles Jalloh, “Regionalizing International Criminal law” (2009) 9 *Int’l Crim LR* 445 at 462-65.

<sup>153</sup> Michael Struett, “The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the ICC” in Steven Roach, ed, *Governance, Order, and the International Criminal Court*, (Oxford: Oxford University Press, 2009) 107 at 108.

<sup>154</sup> Antony Duff, *The Trial on Trial*, vol 3 (Oxford: Hart Publishing, 2004) at 88 (accurate in the sense of being a ‘fortuitously true belief’ in the defendant’s guilt, albeit one brought about by incorrect procedure or inadequate evidence).

<sup>155</sup> RA Duff, “‘I Might Be Guilty, But You Can’t Try Me’: Estoppel and Other Bars to Trial” (2003) 1 *Ohio St J Crim L* 245 at 254.

the American prosecution of those implicated in the My Lai massacre, or that Americans might have had about Vietnamese prosecutions of captured American military officers. The same concerns and constraints ought to apply.<sup>156</sup>

While the strength of Chehtman's account is that it allows for sovereignty as not just a political but a criminal law interest, his account of sovereignty does not quite do justice to the parallel ways in which international courts might be disqualified from exercising extraterritorial jurisdiction in the same way as foreign domestic courts. As such, any delineation of the interest in sovereignty must be more robust than one that gestures to autonomy and group membership. It must be alive to the realities of postcolonial international relations, where it has both aspirational, identity-based aspects, as well as more formal instrumental effects: the ability to prevent external interference – including from international agents – is an important value of sovereignty in itself.

## **B. Sovereignty & International Criminal Jurisdiction**

An account of sovereignty and its defeasibility in ICL must therefore be contextualized in the historical construction and usurpation of sovereignty, a history that has important implications for conceptualizing the interest-based account. In the preceding section, one important aspect of this disparate history was identified in the internal plurality of identities and group membership that characterize the postcolonial state. By questioning the completeness of territorial boundaries as proxies for identifying the interest in a particular state's sovereignty, a further, broader deficiency is identified. Chehtman's account of

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<sup>156</sup> Submissions of the Amicus Curiae on Head of State Immunity, *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 38–42 (May 31, 2004) (warning that two States may not be [*sic*] establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts).

sovereignty curiously locates the interest in sovereignty as *exclusively* within territorial (and thus national boundaries). Yet surely the interest in sovereignty – just as the interests in dignity and security – can transcend territorial borders. In other words, just as Canadians living in Toronto may have dignity and security interests affected by the extraterritorial prosecution of crimes in Rwanda, they may also have an interest in affirming Rwandese or Indian sovereignty. As Gathii suggests, this is particularly true when the formal dimensions of sovereign equality are recognized as instruments for posing “a challenge to the undemocratic and hierarchical nature of the present international order.”<sup>157</sup> To the extent that there is a global interest in reforming this system – and arguably the concepts of dignity and security at least make this implicit suggestion – then there is a transnational interest in preserving the sovereignty of distant states.

Exploring these formal aspects of sovereignty helps illustrate the complexities of sovereignty breaches that are perhaps obscured in the interest-based account as it stands. In international law, sovereignty is entangled with statehood, and entails four criteria as defined in the *Montevideo Convention*: a permanent population; a defined territory; government; and the capacity to enter into relations with other states.<sup>158</sup> The state exists as a political fact even prior to recognition by other states, and thus has the right to, *inter alia*, “legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.”<sup>159</sup> The *Montevideo Convention* further confirms that states have no right to intervene in the affairs of another state, and that national law of the territorial state applies to nationals

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<sup>157</sup> James Thuo Gathii, “The Limits of the *New International Rule of Law on Good Governance*” in Edward Kofi Quashigah & Obiora Chinedu Okafor, eds, *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer, 2009) 207 at 223-224.

<sup>158</sup> *Montevideo Convention on the Rights and Duties of States*, (26 Dec. 1933), 165 LNTS 19, art. 1.

<sup>159</sup> *Ibid* at art 3.

and foreigners equally.<sup>160</sup> Thus the basic parameters of sovereignty seem to make clear that – absent the consent of the territorial state – extraterritorial jurisdiction is *prima facie* impermissible.

At the same time, there is growing recognition that the sovereignty is not absolute, and can be pierced when the state fails to live up to certain of its responsibilities. The ‘failed’ state cannot (or will not) meet its governance responsibilities, and thus some extraterritorial entity must intervene to remedy the situation. According to Giorgetti, modern international relations places an array of burdens on the state: to provide “protection, a functioning legal system, a working judiciary, an effective education system, healthcare, an efficient administration able to deliver goods and services, infrastructures, and the possibility to participate in the global economy.”<sup>161</sup> Indeed, it is the modern economic system that demands states also deliver “trade facilities, a financial market, communication systems, a road network, air-connections, port-access and security...[and] be able to support complicated financial and banking transactions.”<sup>162</sup> The scope of obligations that states must live up to in order to retain their autonomy rights is simply tremendous. While there can be disagreement about a number of these goods, particularly the economic ones, as a justification for intervention, our interest centres only on the legal and judicial system. The concern here is only to attempt to map out the relationship between sovereignty as responsibility, and extraterritorial interest-based punishment.

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<sup>160</sup> *Ibid* at arts 8 and 9.

<sup>161</sup> Chiara Giorgetti, *A Principled Approach to State Failure: International Community Action in Emergency Situations* (Leiden: Martinus Nijhoff, 2010) 3.

<sup>162</sup> *Ibid* at 4.

There is nothing novel about this notion of sovereignty as responsibility. At least as far back as the sixteenth century, Jean Bodin conceived of the sovereign as bound by natural or divine law.<sup>163</sup> In so far as Bodin described the ‘absolute’ sovereign, it was in the context of centralizing public authority so as to limit competing authorities, such as the church or nobility.<sup>164</sup> Hobbes,<sup>165</sup> de Vattel,<sup>166</sup> and Grotius<sup>167</sup> also offered the idea of limits on sovereignty. Thus – even without delving into justifications for modern armed action such as humanitarian intervention – it can be safely said that sovereignty as responsibility to one’s subjects, and further as a basis for some degree of intervention, is not a new conceptual approach.<sup>168</sup>

The list of requirements for sovereignty, combined with the notion of centralized public authority, points to interaction between various aspects of sovereignty. Krasner has identified four such aspects: *domestic* sovereignty, the organization of public authority within the state; *interdependence* sovereignty, the ability to control the flow of goods, information and people across one’s borders; *Westphalian* sovereignty, the exclusion of external actors from unilaterally exercising internal authority; and *international legal* sovereignty, the

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<sup>163</sup> “The absolute power of princes and sovereign lords does not extend to the laws of God and nature”. Jean Bodin, *Six Books of the Commonwealth*, translated by MJ Tooley (Oxford: Alden Press, 1995) at 29 (Book I, Ch. VIII).

<sup>164</sup> Delbrueck, *supra* note 127.

<sup>165</sup> Hobbes, *supra* note 47 at XXI:21 (“the obligation of subjects to the sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them.”).

<sup>166</sup> Emer de Vattel, *The Law of Nations; or Principles of The Law of Nature, Applied to The Conduct And Affairs of Nations And Sovereigns*, Béla Kapossy and Richard Whatmore, eds, (Indianapolis: Liberty Fund, 2008) at 290 (Book II: §56) (that the principle of non-intervention did not protect oppressive states).

<sup>167</sup> Grotius noted that that extraterritorial states could offer to foreign peoples “assistance when laboring under grievous oppressions”. Hugo Grotius, *De Jure Belli Ac Pacis*, AC Campbell, trans., (London: MW Dunne, 1814), Book 2, Ch. 25, §VIII.

<sup>168</sup> Luke Glanville, “The antecedents of ‘sovereignty as responsibility’” (2011) 17 Eur. J Int’l Rel. 233.

mutual recognition of states, and the confirmation of their status in the international system.<sup>169</sup> In the interest-balancing approach to punishment here, whereby a failure to prosecute is an essential element to triggering extraterritorial jurisdiction, that failure to prosecute can be understood as a failure of *domestic* sovereignty, which affects the territorial state's status as an inviolable *international legal* entity, and explains the usurpation of one aspect of its Westphalian sovereignty. This is the normative track on which runs the interest-based account of extraterritorial punishment.

The lurking issue, however, is how this relatively neutral description of a sovereignty breach is conceptualized in a post-colonial world, where all manner of interventions have been justified on the basis of a lack or failure of sovereignty. The notion of state failure echoes the concerns about the identification and use of difference as a pretext for intervention, the imposition of hierarchies within an international order, and the establishment of 'civilization'.<sup>170</sup> Glanville notes that sovereignty as responsibility helped justify a range of practices from colonialism to 'humanitarian intervention': "It does not require much imagination to understand ideas of trusteeship and the so-called 'standard of "civilization"' as germs of contemporary notions of the 'responsibility to protect' and 'sovereignty as responsibility'."<sup>171</sup> In the postcolonial era, what has changed is the form, not

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<sup>169</sup> Stephen D Krasner, "Sovereignty and its Discontents" in *Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 3. This paper does not, however, adopt his thesis that sovereignty is not an embedded principle in international law or a constraint upon international action.

<sup>170</sup> See, e.g., Antony Anghie, "The Evolution of International Law – Colonial and Postcolonial Realities" (2006) 27 *Third World Q* 739 at 742 ("[I]nternational law posits a gap, a difference between European and non-European cultures and peoples, the former being characterized, broadly, as civilized and the latter as uncivilized (and all this implies in terms of the related qualities of each of these labels."); Walter D Mignolo, "The Geopolitics of Knowledge" in Mabel Moraña, Enrique Dussel & Carlos A. Jáuregui, eds, *Coloniality At Large: Latin America and the Postcolonial Debate* (Durham: Duke University Press, 2008) 225 at 239; and, Homi K Bhabha, *The Location of Culture* (New York: Routledge, 1994) at 68 ("What does need to be questioned, however, is the mode of representation of otherness.").

<sup>171</sup> Glanville, *supra* note 168 at 244.

the substance of this civilizing relationship,<sup>172</sup> which replicates itself through terminological substitutes for the civilizing mission;<sup>173</sup> human rights,<sup>174</sup> ‘modernization’ and ‘development’.<sup>175</sup> Each of these concepts offer ameliorative potential, but are also instrumentalized as doctrines of sovereignty-reduction.<sup>176</sup> Their emphasis on *intra*-state governance ignores concerns about *inter*-state governance, dodging questions of representation, participation and legitimacy at the global level by focusing on local deficiencies.<sup>177</sup> Here, the insistent elimination of difference implies its own form of violence.

In Anghie’s history of international law, sovereignty (and its abuse) plays a fundamental role: colonialism proceeded not by querying whether non-European people’s

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<sup>172</sup> Mohamed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979) at 59; Peter Fitzpatrick & Eve Darian-Smith, “Introduction” in Peter Fitzpatrick & Eve Darian-Smith, eds, *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999) 1 at 4; and, Gayatri Chakravorty Spivak, “Neocolonialism and the Secret Agent of Knowledge” (1991) 13 *Oxford Lit Rev* 220 at 224–25 (arguing that neocolonialism produces “identity models that will seem like they are coming from other cultural spaces” but which actually mimic Western models.).

<sup>173</sup> Brett Bowden, “The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization” (2005) 7 *J Hist Int’l L* 1.

<sup>174</sup> Fitzpatrick & Darian-Smith, *supra* note 172 at 5 ([h]uman rights, “is the ‘new’ standard replacing civilization as the criterion for dividing and judging the world.”) See also Bowden, *supra* note 173; and, Ram Prakash Anand, “Family of ‘Civilized’ States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation” (2003) 5 *J Hist Int’l L* 1; Onuf argues that the civilized/uncivilized binary embodied Eurocentric superiority in at least two ways: either the materially poor non-European other (such as African slaves) were too savage to be civilized, or the prosperous non-European other (such as the Chinese) were despots and therefore the political inferiors of Europe. In this way, Europeans could answer the challenge of Asian prosperity and “explain Chinese wealth while at the same time devaluing Chinese civilization.” Nicholas Onuf, “Eurocentrism and Civilization” (2004) 1 *J Hist Int’l L* 37 at 38.

<sup>175</sup> Fitzpatrick & Smith, *supra* note 172 at 5.

<sup>176</sup> Escobar notes that even the acceptance of the decolonized states as sovereign equals was simultaneously accompanied by the redifferentiation implied by “developed” and “underdeveloped”, unilateral delineation of socio-economic status that almost reflexively prescribed a further interventionist programme. The two emerged concomitantly with the decolonization movement as imperial powers sought to recraft relationships with the colonies that were less obvious but no less intrusive, even though development economists were initially anti-imperial. See Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 1995) at 23-27, 72ff.

<sup>177</sup> Such avoidance is enabled by and in large part depends upon the continued acceptance of the United Nations as the proxy for democratic inter-state relations, even though the “democratic pretensions” of the UN continually “capitulate to the global balance of power”. See Otto, *supra* note 136 at 337.

sovereignty could be breached, but whether non-Europeans were even capable of possessing sovereignty. It was not a pre-existing doctrine *applied* to relations between European and non-European states, but developed in *response* to the encounter between Europeans and non-Europeans, and served to create a system where sovereignty and its protections were consistently denied to non-Europeans.<sup>178</sup> Thus even if we resile from the excessive criteria of Giorgetti and the flagrant wrongs of colonial interventionism, and restrict ourselves to the question of atrocity and international crime, there is widespread reluctance to permit breaches of sovereignty because of the worry of abuse.<sup>179</sup> Sovereignty as responsibility is as easily understood as a vehicle for ulterior interference as it is for altruistic intervention.

In this light, the dilemma of statehood and sovereignty identified earlier becomes readily apparent.<sup>180</sup> The problem with regulating sovereignty in the postcolonial world is managing these inherent contradictions. Sovereignty is “both the central problem...to be

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<sup>178</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 16ff.

<sup>179</sup> A phenomenon seen vividly in the discussions about the responsibility to protect and unilateral humanitarian interventions. See, e.g. Ian Brownlie, “Thoughts on Kind-Hearted Gunmen”, in *Humanitarian Intervention and the United Nations*, Richard B Lillich, ed., (Charlottesville, Va: University Press of Virginia, 1973) 139 at 147-48. (“Whatever special cases one can point to, a rule allowing humanitarian intervention, as opposed to a discretion in the United Nations to act through the appropriate organs, is a general license to vigilantes and opportunists to resort to hegemonial intervention.”); Oscar Schachter, *International Law in Theory and Practice* (London: Martinus Nijhoff, 1991) 1 at 26 (“[I]t is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention.”); Richard B Bilder, “Kosovo and the ‘New Interventionism’: Promise or Peril?” (1999) 9 *J Transnat’l L & Pol’y* 53 at 161 (“most scholars have rejected the claim that humanitarian intervention is a legitimate exception of the prohibition of the use of force in the UN Charter”); Jules Lobel & Michael Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime” (1999) 93 *AJIL* 124 at 153 (arguing that “great powers can use humanitarian concerns to mask geopolitical interest”); and, Hans Köchler, *Global Justice or Global Revenge?: International Criminal Justice at the Crossroads* (New York: Springer, 2003) at 13 (“[I]n an environment in which no checks and balances exist to restrain the arbitrary use of power[,] [h]umanitarian intervention’ has become one of the key terms to legitimize what otherwise would have to be called ‘act of aggression’ or ‘interference in internal affairs’”).

<sup>180</sup> Anghie & Chimni, *supra* note 24 at 79; David M Kennedy, “Some Reflections on the ‘Role of Sovereignty in the New International Order’” in *State Sovereignty: The Challenge of a Changing World: Proceedings of the 1992 Conference of the Canadian Council on International Law* (1992) at 237.

overcome by international law, and...the central aspirational project to be completed, affirmed, achieved.”<sup>181</sup> The classical dilemma of international law – how to create order among sovereign states – takes on a new twist in relation to the Third World and dissolves into itself: How does an international law rooted in colonialism and empire, regulate the replication of those practices of colonialism and empire within the sovereign territory of postcolonial states, without legitimating the reinstatement of colonialism and empire?

The domestic centralization of authority in the territorial state, combined with the Westphalian exclusion of extraterritorial authorities from usurping that centralized authority, serves to insulate criminal regimes, or even regimes that fail to respond to crime, from any form of external supervision. This is the precise problem discussed in Chapter Five, which analyzes the Security Council referrals of Libya and Sudan to the ICC. On the one hand, international crimes have clearly been committed in those states, and evidence suggests that responsibility lies in part with the leadership of both states. Nonetheless, there are serious questions about the legality of those referrals and the indictments of the respective Libyan and Sudanese heads of state. On the one hand, the referrals offer a possible means of restraint on the crimes committed by those states; on the other hand, the legal arguments used to justify the referrals seem to problematically rewrite important elements of international law and sovereign equality.

Here, the understanding of sovereignty as a shield from external interference has been conditioned by historical and present-day interventions that institute or perpetrate the domination and control of less powerful states and their peoples. It is this second understanding of sovereignty as a shield that goes a long way to explaining the interest that

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<sup>181</sup> *Ibid* at 238.

peoples have in not allowing territorial authority to be usurped by extraterritorial agents. For all its demonization as a barrier to the restraint of domestic tyranny – in Syria, in Darfur, in Libya – it has to be recalled that the valorization of sovereignty has been habituated by sovereignty’s role as an impediment to *international* tyranny.

From a postcolonial perspective, the benefits of sovereignty have been seen in even more expansive terms. The principle of non-intervention prohibits all manner of foreign involvement in the domestic affairs of states, including the use of force but also the imposition of governance models, economic policy, and direction of foreign affairs. Domestic sovereignty means that “[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State”, whether accompanied by the use of armed force or not.<sup>182</sup> Though state sovereignty is an inefficient guarantor of internal goods and services, and may even be an active denier of the same, these imperfections do not negate the fact that it also remains the alternative best equipped to manage the problems of intra- and inter-state inequalities.<sup>183</sup> Unidimensional analyses of sovereignty thus do not do justice to the multifarious aspects of territorial governance and international insulation that animate a broad interest in its preservation, and which generally flow across territorial boundaries.

This gives rise to four points about the sovereignty and the interest-based account of punishment. First, to the extent that this explanation requires some balancing of interests, that must be taken on a case-by-case basis and not an automatic defeat of sovereignty by virtue of

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<sup>182</sup> UNGA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (24 Oct. 1970).

<sup>183</sup> Benedict Kingsbury, “Sovereignty and Inequality” (1998) 9 EJIL 599 (arguing that while sovereignty can enable international law’s reluctance to address inequality, the imagined alternatives will prove no better and may even be worse in other respects).

the fact of international crime, it acknowledges and accords with the TWAIL unease about blanket assertions of, or unregulated denudations of, sovereignty. The postcolonial relationship with sovereignty is a tenuous one, even more tenuous than that advanced by those with a serious commitment to extraterritorial interventions. In part, this is because – as described in Chapter One – decolonizing territories had little choice but to accept the formal indicia of statehood and state-based sovereignty if decolonization was to be a reality. This uncertainty can also take a different form, one deeply suspicious not just of the actualization of sovereignty, and the sincerity of its recognition, but the limits of the concept itself. As noted in Chapter Two, formal decolonization has not been accompanied by substantive alteration of colonial relationships. The form of the nation-state has been seen as integral to the continuation of these relationships, and to the regularization of the state of crisis within the postcolonial state<sup>184</sup> – a state of crisis that gives rise to complaints of the failure to live up to an ever-expanding list of sovereign responsibilities.<sup>185</sup> There is thus a serious consideration of rewriting the terms of sovereignty, through the dissolution of states and their structures, and the return of sovereignty to pre-colonial entities.<sup>186</sup> In this light, a balancing

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<sup>184</sup> See, e.g., Obiora Chinedu Okafor, *Redefining Legitimate Statehood: International Law and State Fragmentation in Africa* (The Hague: Kluwer Law, 2000) at 99 – 100 (“In Africa, the new states were imposed long before the search for nationhood even began. This is a factor that has made historical cleavages salient, and ensured the fragility and fragmentation of the post-colonial African state.”); Barry Schutz, “The Heritage of Revolution and the Struggle for Governmental Legitimacy in Mozambique” in I. William Zartman, *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (London: Lynne Rienner Publishers, 1995) 109 at 112 (“All states are creations of conflict, consensus, and contrivance, but perhaps the states of Africa are the most contrived of all...As a result, African states are especially subject to fragmentation and reconfiguration based on the claims and consequences of internal dispute and conflict and external ambitions and operations.”).

<sup>185</sup> Siba N’Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans* (Minneapolis: University of Minnesota Press, 1996) at 195-202.

<sup>186</sup> Of which Makau Mutua is the most well-known, but not only, exponent. See Makau Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry” (1995) 16 *Mich JIL* L 111 at, 1150; Mutua, “Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State” (1995) 21 *Brooklyn JIL* 505 at 535 (“the unnatural entity [of the post-colonial state]...must be unscrambled peacefully”). Mutua’s analysis, however, is not unique in decrying the nation-state. Hannah Arendt argued against the dominant sense of state

mechanism is needed that embraces the inherent tensions of sovereignty, acknowledges the constraints posed by the present normative order of international relations, and the possibility of an alternative understanding – of statehood, of sovereignty, of global governance – implied by the problematization of the state.

Second, if it is to give serious effect to the interest in sovereignty and the territorial state's ability to exclude external actors from acting as domestic authorities, then this balancing exercise must be pluralist in its conception of state response to crime. In one sense, this requires a mediation of the fissure between international courts reliance on international law concepts in the prosecution of international crime, and domestic courts use of local, culturally determined standards.<sup>187</sup> The analysis must further recognize the possibility of alternate responses to international crime beyond criminal prosecution. Amnesties, truth commissions, reparations, lustration, disarmament and demobilization programmes, trade reforms, anti-corruption initiatives, indigenous or tribal justice practices – these are some of the plausible non-judicial responses that ought to be seen as relevant to the determination of whether there has been a failure to respond. The credibility given to these initiatives cannot be trivial; they cannot be dismissed out of hand simply because they are not formal trials, particularly when they are part of complex transitions away from regularized atrocity.<sup>188</sup>

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sovereignty. See, e.g., Douglas Klusmeyer, "Hannah Arendt's Case for Federalism" (2010) 40 *Publius* 31 (synthesizing Arendt's critique of sovereignty); Frederick Cooper, *Citizenship between Empire and Nation: Remaking France and French Africa, 1945 – 1960* (Princeton: Princeton University Press, 2014) (describing the collapse of efforts to decolonize French-colonized Africa into a French federalist Union, instead of separate states); and, Gary Wilder, *Freedom Time: Negritude, Decolonization, and the Future of the World* (Durham: Duke University Press, 2015) (that federalism would have offered better redistributive benefits than statehood after decolonization).

<sup>187</sup> Frédéric Mégret, "The International Criminal Court and State Sovereignty: the 'Problem of an International Criminal Law' Re-examined", in John Carey, John Pritchard & Bill Dunlap, eds, *International Humanitarian Law: Prospects* (New York, Transnational Publishers, 2006) 47 at 115.

<sup>188</sup> As they were in South Africa and Argentina, for example.

Third, this approach must also look beyond decision-making to consider the actors ultimately involved in the assertion of jurisdiction. Those engaged in assessing the seriousness of the crimes, and the quality of the state response to them will not necessarily be the same entities actually intervening to exercise extraterritorial jurisdiction. Thus the position of that state in the international community, its relations with other states, its history of domination or being dominated, its capacities and policies, are all relevant to the determination of the interest in sovereignty. Specifically, the interest in sovereignty may change in relation to certain entities, because of past or present interactions with between them and the territorial state. As argued in Chapters 4 and 5, this can be seen in connections between territorial states and extraterritorial (neo)colonial powers, but also manifests itself in the interaction between postcolonial states and international institutions. Those particular relationships and histories may in fact disqualify some domestic courts or some international courts and tribunals from certain exercises of the normatively justifiable practice of extraterritorial punishment.

Finally, the balancing exercise must be contextualized to consider more than just normative conceptions or immediate qualitative evaluations of particular crimes and judicial, prosecutorial or other accountability efforts. The interest-balancing risks being reduced to a quasi-objective analysis, the application of a relatively neutral formula. Yet a historical understanding of sovereignty as a mode of imperial control – first through its development in the colonial encounter, and then through the actual practices of piercing sovereignty that arose after decolonization – means that the identity of the extraterritorial state or organization engaging in those balancing exercises is as important as the outcomes themselves. It also matters what role is left for the territorial state in these evaluations. Again, this is in part a

question of past linkages, where prior associations and interactions will have some bearing on the plausibility of contemporary reframings of sovereignty to permit extraterritorial involvement. It must be asked what role is left for state consent in jurisdictional decision-making, and how the involvement of particular institutions in the decision-making process affects both the effectiveness of international criminal justice and its normative structures.

Four questions need to be addressed through a multilateral forum for determining what authority or entity ought to be responding to the conduct in question. First, is it a crime over which extraterritorial jurisdiction arises, either because it is recognized under customary international law, international criminal law, or widely adopted treaties? Second, what states or entities have jurisdictional priority, and which are making an active claim to exercise that jurisdiction? That is, which state is the objective territorial state; which is the subjective territorial state; which has active (i.e. perpetrator) nationality; which has passive (i.e. victim) nationality?

Third, is the territorial state unable or unwilling to prosecute? The concept of unwilling or unable itself demands greater clarification than can be offered in this space beyond two brief comments. First, inability can have a number of meanings. Amongst other things, it might refer to lack of technical capacity, such as judges and lawyers with experience in ICL, logistical and infrastructure deficiencies, or the absence of fair trial guarantees. That being said, the ICC has confirmed that Libya may try a senior Gaddafi official notwithstanding concerns about the possibility of his receiving a fair trial,<sup>189</sup> in part

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<sup>189</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 6, *Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi"* (24 July 2014).

because the accused was unable to meet with his lawyer for nearly 18 months.<sup>190</sup> As for unwilling, there are further concerns about how this clause can affect the autonomy of judicial systems and state responses to criminality. South Africa was certainly unwilling, for a variety of reasons, to prosecute many apartheid perpetrators. As noted in Chapter One, South Africa did not ratify the *Apartheid Convention* in part to guarantee it had the option to not prosecute offenders. It is therefore an open question whether an ICT might have claimed jurisdiction over such crimes because South Africa generally preferred to use a truth and reconciliation process instead of the criminal law. The use of a non-criminal mechanism, such as amnesties or truth and reconciliation commissions or any of the other non-prosecutorial methods referred may well run afoul of the complementarity analysis, even though a state and its people might prefer to avoid the criminal law. In Côte d'Ivoire, the ICC has insisted that the Court has jurisdiction to try an accused even though she has already been convicted of international crimes by a domestic court, because that domestic conviction is based on different conduct.<sup>191</sup> A highly formalist approach would therefore require domestic courts to put accused persons on trial for any and all conduct that might constitute an international crime, in order to foreclose the exercise of extraterritorial jurisdiction. The

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<sup>190</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 6, *Response on behalf of Abdullah Al-Senussi to the "Application for Leave to Reply & Consolidated Reply on Behalf of the Libyan Government to Responses to the 'Libyan Application for Extension of Time Related to Pre-Trial Chamber I's 'Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court'"* (7 July 2014), para. 9.

<sup>191</sup> *Prosecutor v Simone Gbagbo*, ICC-02/11-01/12 OA, *Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"* (27 May 2015). Part of the ICC's insistence may arise from concern that Gbagbo is in line to receive a Presidential pardon, even though she received a 20-year sentence. Agence France-Presse, "Pardon possible for I. Coast's 'Iron Lady' Simone Gbagbo" (10 March 2015), Yahoo News online: <[news.yahoo.com](http://news.yahoo.com)>. A pardon, however, would not necessarily make the admissibility determination any more or less defensible.

breadth of unwilling and unable will go a long way toward determining whether and how a state's sovereignty may be breached.

Fourth, should any of the other authorities be disqualified on the basis of their connection to the conduct in question? For example, is it a former colonial or colonized state? Is the third-party state linked to the conflict in any way, either through political support of the parties, advocating for it on the international stage, or the unilateral provision of supplies and arms? Does the claiming state have any important business or commercial interests that are at stake or affected by the conduct or its adjudication? Have its courts or chambers demonstrated a fidelity to international law, and do they satisfy internationally ratified fair trial requirements, such as those contained within the ICCPR? Are these assessments of their capacity supported by independent review, such as by the UN Human Rights Council or local NGOs?

If the balancing of interests is to be a meaningful explanation of extraterritorial jurisdiction, it cannot act mechanically, claiming the outcomes of a formulaic decision-making process as producing an objective neutrality. It must take the ambiguities and contradictions of sovereignty seriously in theory and in practice. Otherwise, it only replaces the positivist conceptualization of absolute sovereignty with a rigid formalism of its own.

#### IV. CONCLUSION: A DEMAND FOR DEMOCRACY?

This chapter has attempted to build upon the interest-based justification for punishment, in order to show its affinity to TWAIL priorities through an interest-balancing approach. As this chapter has shown, interest-based justifications are not unique in criminal law theory, but the account advanced by Alejandro Chehtman and developed further here is

particularly well-suited to explaining why state sovereignty ought to be respected. The principles at the heart of this scheme are aligned with core TWAIL precepts outlined in the preceding chapters. Nonetheless, as suggested by German criminal theorists, and as arguably realized with the rise of security-based criminalization in a range of states, the flexibility of interest-based approaches to criminalization and punishment risks illiberal impositions of criminal law in the name of vaguely defined or overzealously protected interests. Chehtman's explanation therefore demands a greater specificity as to the interests to be balanced against one another and protected, and so this chapter has also given further clarity and shape to those core interests, problematizing and refining the interest-based account – and particularly its understanding of sovereignty – in ways that consider the realities of contemporary international and domestic criminal practices.

The interest-based account of international criminal punishment can be summed up in five steps. First, the interest in punishing perpetrators of international crimes is initially shared by individuals in the territorial state. Second, individuals in other states also have an interest in these international prohibitions being in force as it gives them a sense of dignity and security with respect to the territorial state and other entities that cannot or will not enforce at least some important criminal prohibitions, including non-territorial states and state-like groups (such as rebel or secessionist groups). When the state is not only delinquent in its enforcement of criminal prohibitions, but often an active participant in the crime, dignity and security may well be affirmed through an alternate, extraterritorial source.

Third, this extraterritorial jurisdiction is rooted in the nature of the crimes and the rights attacked by them. Violations of the right to be free from torture, or ethnic cleansing, or apartheid, are serious enough to overcome the ordinary immunity that would result from the

interest in self-government. In essence, this is an argument that favours universal jurisdiction for international crimes – subject to the caveats outlined above. Fourth, the interests of individuals in the prosecuting state are not central to the claim of extraterritorial jurisdiction. What is central is that the prosecution, wherever it may take place, affirms to all individuals that this prohibition is in force and applies to all territories where such crimes are taking place.

Finally, extraterritorial authority should be considered a concurrent, not a pre-eminent, authority to punish. States are not *always* complicit in international crimes, and can punish certain crimes that might be committed or attempted by smaller entities or agents.<sup>192</sup> Similarly, it would make sense for states to be able to prosecute their own nationals when those individuals are accused of crimes in which the state of nationality is not otherwise involved. An example would be the Netherlands' prosecution of Dutch national Frans van Anraat, who was found to be complicit in war crimes. Van Anraat had supplied the Saddam Hussein regime in Iraq with chemical precursors, in the knowledge they would be used as weapons; he was tried and convicted after those precursors were weaponized into mustard gas and used against Iraqi Kurds.<sup>193</sup> However, when crimes pit governing entities (i.e. states,

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<sup>192</sup> An individual, or small group, in control of very powerful weapons might have the intent and capacity to commit serious international crimes. At the same time, given the size and nature of the group, domestic trials might not trigger the claim of unfairness or bias that would otherwise arise in interstate or a more conventional intra-state armed conflict. Chehtman refers to the example of the famous Jewish poet Abba Kovner. Kovner led a small group that attempted to exact revenge for the Holocaust by poisoning (and killing) a large number of civilians in major German cities, as well as members of the SS that were held as prisoners of war. The civilian plot was never put into action; the POW plan was only partially implemented, but resulted in no deaths. See Jonathan Freedland, "Revenge" *The Guardian* (26 June 2008) online: <[www.guardian.co.uk](http://www.guardian.co.uk)>; and, Rich Cohen, *The Avengers: A Jewish War Story* (New York: Knopf Publishing, 2001) at 157-218. Germany arguably could have put Kovner on trial without triggering claims of unfairness or bias, as the context of the crime – despite its planned scale – mirrored that of small organized crime, and a not a state-to-state conflict.

<sup>193</sup> See *Prosecutor v. Van Anraat*, December 23, 2005, LJN: BA6734, District Court of The Hague, 09/751003-04, § 6.5.1 – 6.6 (Neth.); and, *Appeal Judgment in the case of Frans van Anraat*, Netherlands, May 9, 2007, LJN: BA6734, Court of Appeal in The Hague, No. 22-000509-06.

or state-like groups, that would ordinarily administer criminal punishment) against one another, individuals in one territory cannot trust in the prosecution of offences by the other, and as such, prosecutions cannot provide the necessary sense of dignity and security to individuals in either territory.

This understanding of the interest-based justification of punishment is intrinsically democratic because it relies on collective interests. Yet is not pure majoritarianism either, because it acknowledges that the violation of certain fundamental interests can operate to remove the immunity from extraterritorial jurisdiction, even though it is only a subset of the population that possesses this particular interest. This is the case, for instance, with military troops (who have an interest in international law being in force even when civilians may not, because of their proximity to conflict zones), religious minorities (who have interests in prohibitions against persecution being in force), and ethnic groups disproportionately affected by failures to prosecute.

From a TWAIL perspective, an important concern is whether this democratic predisposition is in fact a veiled democratic requirement. Yet while the interest-based account embodies certain democratic values, it does not lead necessarily to the position that a government must be a vibrant liberal democracy in order to preserve its interest against extraterritorial authority. Indeed, many vibrant liberal democracies have failed to prosecute international crimes,<sup>194</sup> and democratic processes can be used to enable such failures. For example, the war crimes acts of Australia and the United Kingdom prevented prosecution of

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<sup>194</sup> Timothy LH McCormack, “Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their “Own Nationals” for International Crimes” in Philippe Sands & Mark Lattimer, eds, *Justice for Crimes Against Humanity* (Oxford: Hart, 2003) at 107.

Allied forces for offences.<sup>195</sup> The Canadian *Crimes Against Humanity and War Crimes Act* differs in that it states that crimes can be prosecuted even if they were committed before the Act as long as they were customary at the time of occurrence. Yet none of the various types of suffering imposed by governmental practices – including the ethnic cleansing and persecution of Indian Residential Schools<sup>196</sup> (which have also been described as ‘cultural genocide’);<sup>197</sup> the forced adoptions of First Nations children;<sup>198</sup> and, nutrition-deprivation

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<sup>195</sup> Gillian Triggs, “National Prosecutions of International Crimes and the Rule of Law” in Helen Durham & Timothy LH McCormack, eds, *The Changing Nature of Conflict and the Efficacy of International Humanitarian Law* (The Hague: Kluwer, 2000) 175 at 178-83.

<sup>196</sup> The Indian Residential Schools program placed over 150,000 First Nations, Inuit, and Métis children were forcibly placed in boarding schools designed to assimilate Canadian Aboriginal peoples by “eliminating parental and community involvement in the intellectual, cultural, and spiritual development of Aboriginal children.” The program started in the late nineteenth century, and the final school closed in 1996. See *Interim Report* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012). The residential school system sometimes led to forced sterilization, physical and sexual abuse of the students, and forcible ‘enfranchisement’. Enfranchisement was an associated process of assimilation that removed the legal rights that accrued to individual Aboriginal persons, and allowed them to gain fuller rights through their ‘gradual civilization’ as British subjects; the inferiority of Aboriginal rights (i.e. disenfranchisement) was enshrined by the same act that then encouraged Aboriginal persons to assimilate through enfranchisement. See: *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, SM 1857 (20 Vict), Cap XXVI at 84; *Sexual Sterilization Act*, SA 1928, c 37 at. 117; and, *An Act Respecting Sexual Sterilization*, SBC 1933, c 258 at 3821.

<sup>197</sup> Truth & Reconciliation Commission of Canada, “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth & Reconciliation Commission of Canada” (2015), 1 (“For over a century, the central goals of Canada’s Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as “cultural genocide.”) See also statements by former Canadian Prime Minister Paul Martin; Justice Murray Sinclair, Chairman of the Truth & Reconciliation Commission established to review the residential school program and its effects; and Phil Fontaine and Bernie Farber, respectively the former chief of the Assembly of First Nations and head of the Canadian Jewish Congress. See: “Paul Martin accuses residential schools of ‘cultural genocide’” (26 Apr. 2013), online: CBC News <[www.cbc.ca](http://www.cbc.ca)>; Chinta Puxley, “Residential schools called a form of genocide” (17 Feb. 2012), online: Globe & Mail <[www.globeandmail.com](http://www.globeandmail.com)>; and, Phil Fontaine & Bernie Farber, “What Canada committed against First Nations was genocide. The UN should recognize it” (14 Oct. 2013), online: Globe & Mail <[www.globeandmail.com](http://www.globeandmail.com)>.

<sup>198</sup> The forced adoption program was a modification of the declining residential school system that continued to emphasize the importance of assimilation through mainstream Canadian schools. Instead of placing Aboriginal children in boarding schools, while ostensibly still in the care of their biological families, it saw thousands of Aboriginal children taken away from their Aboriginal families and placed – through adoption – with non-Aboriginal families, so that they could attend mainstream schools with non-Aboriginal Canadians. See Patrick Johnston, *Aboriginal children and the child welfare system* (Toronto: Canadian Council on Social Development, 1983) (Johnston describes the period of forced adoptions that began in the 1960s but continued

experiments<sup>199</sup> – have been prosecuted under that Act. While some of these various pieces of legislation conceivably permit the prosecution of Axis offenders, usually elderly Nazis who emigrated after the war, there is no evidence of them being used to prosecute Allied crimes during the Second World War. Yet the democratic identities of the Allied states seem relatively unimpeachable.<sup>200</sup>

Thus it is more appropriate to conceive of the interests in being protected from crime, in having criminal prohibitions enforced through legal punishment, and in a state possessing the autonomy of self-governance, as all distinct from one another. The right to self-government provides a *prima facie* immunity against extraterritorial authority. The absence of democratic self-government does not, however, *automatically* grant any extraterritorial body the power to punish; that must be determined separately. This is because the aspect of national autonomy implicated by the criminal law is only one piece of self-government, focused on the application of criminal law prohibitions. While democracies may well tend to

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for at least two decades as the ‘Sixties Scoop’; the scoop refers to the practice of taking almost all newly-born children on reserves from their mother’s arms); Justice Edwin C Kimmelman, *No Quiet Place: Review Committee on Indian and Metis Adoption and Placements* (Manitoba: Review Committee on Indian and Métis Adoptions and Placements, 1985) (noting that children were routinely shipped away from Aboriginal households to adoption homes); and Raven Sinclair, “Identity lost and found: Lessons from the sixties scoop” (2007) 3:1 *First Peoples Child & Family Review* 65 (noting that 70% of Aboriginal children were placed with non-Aboriginal families). On the intersections between forced adoption, residential schools, and the child welfare system, see Suzanne Fournier & Ernie Crey, *Stolen from Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver: Douglas & McIntyre Ltd, 1997) (*inter alia*, connecting child welfare policies to negative health outcomes for Aboriginal peoples). Two lawsuits have been filed over the policy, in British Columbia and Ontario.

<sup>199</sup> Ian Mosby, “Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942 – 1952” (2013) 46 *Social History* 145. Mosby describes long-term studies that maintained and enforced malnutrition, deprived Aboriginal peoples of nutritional supplements in order to better study malnutrition, and even withdrew dental services in case dental treatment affected the results of the study. He notes that these experiments were conducted even as Nazi human experimentation was exposed, and the Nuremberg Code of ethics on human experimentation was being developed.

<sup>200</sup> To the extent they are still considered democracies, a challenge that in contemporary times is most frequently levied against Russia.

produce such systems, there is no necessary relationship, and putting too much faith in democracies risks obscuring the failings of the criminal law that centre on the differential treatment of minorities, certain types of victims, and certain types of offenders. Indeed, paradigmatic liberal democracies have consistently refrained from investigating or prosecuting international criminals within their territory. Even if the criminal law system is weak and flawed – such that it does not respect individual rights, treat like cases alike, and that it regularly metes out extremely harsh punishment – this only weakens the immunity against extraterritorial jurisdiction; it does not by itself grant jurisdiction to any external authority. In part, this is because – as described above – the interest in sovereignty is a broad concept, and perhaps better identified as an interest in non-intervention. Thus the interest-based approach only explains how extraterritorial punishment may be justified in a world where sovereignty remains an important value; to demand particular forms, structures or institutions of governance as a pre-condition to the assertion of territorial criminal punishment would be to undermine the foundation of the interest-based account.

## Chapter 4: Group-Based Selectivity and Postcolonial Repression

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The fact that some ‘weaker’ states have invited the ICC to intervene shows that governments of such states do not necessarily consider ICC intervention as against their interests. (Indeed, they consider it in their interests, as long as the ICC strengthens the *government’s* position vis-à-vis its internal enemies).

Sarah Nouwen<sup>1</sup>

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<sup>1</sup> Sarah Nouwen, “Legal Equality on Trial” (2012) 7 Neth YB Int’l L 151, 167.

## I. INTRODUCTION

The underlying caveat that ought to accompany interest-based accounts of crime and punishment is that their inherent flexibility is no guarantee of critical reflection or refinement of the tools of criminal justice. Writing on the position of the *Rechtsgut* in German criminal and constitutional theory, Dubber argues that it has been somewhat undermined because its flexibility – or lack of determinative normative content – does not inexorably lead to a sustained critical challenge on the status quo.<sup>2</sup> As noted in the previous chapter, an interest-based account of criminal law allows for expansion of the criminal law’s ambit,<sup>3</sup> an expansion that may simply sustain the status quo or even permit illiberal excess.

This chapter argues that the interest-based justification for punishment is capable of sustaining a critical analysis of the practices of international criminal justice. By focusing on the issue of selectivity, it argues that decoding the justifications for punishment allows for reconsideration of the situations in which punishment is permissible. One such situation is the differential treatment of similarly-situated victims and offenders on the basis of their group identity or affiliation.

Perhaps the most quintessential TWAIL perspective on international criminal law (ICL) is its concern about selection problems. The selective application of ICL to weaker, less powerful states would seem to be clear evidence that ICL is Eurocentric, that it marginalizes the Third World, and that it is an instrument of Western power. Such an analysis is perfectly in keeping with TWAIL critiques of international law, and connects the

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<sup>2</sup> Markus D Dubber, “Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law” in RA Duff & Stuart Green, eds, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) 83 at 89.

<sup>3</sup> David Luban, “Beyond Moral Minimalism” (2006) 20 *Ethics & Int’l Aff* 353 at 355-56 (“There is no contradiction in combining skepticism about whether ICL can work with the view that, if it works, it might as well grow.”).

contemporary development of ICL to the positions of the Non-Aligned Movement and pre-TWAIL scholars that problematized the position of decolonized states in the international community.

This position nonetheless seems an incomplete summation of selectivity largely because it grounds selectivity in public international law's traditional failings to deal with all states on an equitable basis. These connections are certainly relevant, but they do not confront the significance of selectivity as a problem of *criminal* law. Refocusing on selectivity in this light transcends the traditional foci of ICL critique – on either inter-state politics, or the particularities of trial mechanics – and creates space for critical reflections on ICL's effects *within* states. It also grapples with TWAIL's own internal dilemmas about statehood that problematize the state and its use of law as a site of oppression as much as international law and institutions are seen to do.

By demonstrating how certain instantiations of selectivity undermine the interest-based justification of punishment, it reinvigorates the selectivity argument. In particular, it argues that not all selectivity is equally problematic,<sup>4</sup> but that what will be defined as *group-based selectivity* attacks the goals, justifications and effectiveness of ICL in ways that other types of selectivity do not. This is because the risk of prosecution starts to turn more on the group membership – and less the conduct – of the perpetrator. To be clear this is not to say that ICTs prosecute individuals who have committed no crimes, but that in group-based selectivity, the likelihood of a perpetrator's prosecution – relative to other similarly-situated offenders – starts to depend on the group identity of the offender. Defining group-based

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<sup>4</sup> Kenneth Culp Davis, *Discretionary Justice: A Preliminary Enquiry* (Baton Rouge: Louisiana State University Press, 1969), 167-168 (the important question is not whether selective prosecution occurs, but when is it impermissible).

selectivity, and demonstrating its effect on the normative basis of criminal punishment, rescues it from the common defence that selectivity is a natural and unobjectionable feature of all domestic and international criminal regimes.

In this way, instead of addressing the problem of inter-state selectivity in order to prove the continuation of inter-state hierarchies within ICL, this chapter examines selectivity at the intra-situational level. It argues that TWAIL should be as concerned, if not more so, about the differential treatment of similarly situated victims and offenders on the basis of their group identity or affiliations *within* particular situations. This group-based selectivity may well undermine the justifiability of ICL or a particular ICT.

This chapter builds on the previous one by exploring the relationship between punishment theory and the frequent charges of selectivity that are levied against international criminal institutions. This chapter argues that in ICL, group-based selectivity gravely undermines the interests in dignity and security in specific countries and situations where it is practiced. Moreover, its repetition in a variety of contexts may seriously undermine the institution as a whole. Systems of international criminal justice must therefore be wary of the pitfalls of group-based selectivity because it has both important practical effects (on the continuation of conflict, societal reconciliation, and the elimination of intra-state power imbalances) as well as profound normative consequences. The more a criminal law system depends on spurious decision-making that leads to clear differential treatment between parties to a conflict, the less reason there exists for either offenders or observers to believe that punishment was related to criminal prohibitions, and thus that criminal law gives meaningful effect to individual and collective interests in dignity and security.

The first part of the chapter briefly lays out the traditional defence of selectivity: that it is a common practice in all criminal law systems. From this perspective, the selectivity of international tribunals is unsurprising, and may even be an indicator of the health and vitality of the international criminal system. This part sets the stage for the second section, which outlines the various ways in which selectivity manifests itself in ICL. This new typology of selectivity illustrates how many of the practices and concerns about selectivity in ICL are often the same as in domestic criminal law, thus giving credence to the notion that at least some forms of selectivity are perhaps less problematic than they are made out to be. However, this part also emphasizes the importance of one variety of selectivity: group-based selectivity. Whereas others have approached selectivity<sup>5</sup> in international criminal law previously, they have neither offered as detailed a categorization as that developed here, nor have they drawn connections to punishment theory, preferring instead to map out trends in selectivity over time.

The third part argues that the lack of clarity about different types of selectivity in ICL obscures the fact that group-based selectivity is not an ordinary feature of liberal criminal systems. It also obscures the serious normative and pragmatic repercussions for *all* criminal law – international or domestic – that flow from group-based selectivity. Using examples from ICC prosecutions, this part explains how group-based selectivity in international law undermines the normative justifications of punishment. Importantly, it argues that group-based selectivity is not a variation on the theme of “international law is colonialism”, but a more nuanced claim that disaggregates the Third World state and identifies how ICL affects

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<sup>5</sup> See, e.g., Timothy LH McCormack, ‘Selective Reaction to Atrocity’ (1996-1997) 60 *Albany Law Review* 681; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005).

the position of Third World peoples through interactions with local political and legal structures that undermine the sense of dignity and security in important ways. It is not only international institutions that are criticized by this TWAIL view on punishment and selectivity, but also many Third World states and elites. Considering selectivity from a TWAIL perspective warrants examination not only of the institution, but the Janus-face of sovereignty and statehood in the Third World. As Anghie and Chimni note, “it is sometimes through supporting the Third World state and sometimes by critiquing it that the interests of the Third World people may be advanced.”<sup>6</sup>

In the fourth section, I respond to one objection to this analysis. That argument suggests that when the gravity of certain offenders’ crimes is low enough, then non-prosecution – even if leads to group-based differentiation – is defensible. I offer one normative and one pragmatic reply. The normative reply is that the analysis in Part III suggests that group-based selectivity tends to favour the politically and economically powerful. Those crimes should be seen as inherently more grave simply because the likelihood of impunity increases with politically and economically more powerful entities (and indeed in many cases it is the state itself that is implicated). The pragmatic reply is that one way to combat the allegations and force of selectivity is to issue general prospective guidelines for case selection and the exercise of prosecutorial discretion, as well as specific explanations of why certain cases are not investigated or prosecuted.

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<sup>6</sup> Antony Anghie and Bhupinder S Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflict’ (2003) 2 *Chinese Journal of International Law* 77 at 83.

## II. THE DEFENCE OF SELECTIVITY PRACTICE

Many of the arguments that explain selectivity practices in ICL bear important parallels with domestic criminal law. Perhaps most obviously, domestic criminal courts do not prosecute every single offender, or seek justice for every single crime. Even German criminal law, which, in an attempt to avoid arbitrary exercises of prosecutorial discretion and thus the charge of selectivity bias otherwise places an obligation to prosecute all offences, permits the authorities some leeway.<sup>7</sup>

While these practices might be fairly characterized as selective, they would not necessarily draw ire. Sometimes this selectivity results because a strict policy of prosecuting every bicycle thief or drug user would overwhelm law enforcement and judicial resources. Alternatively, formal criminal justice might itself result in some degree of injustice to the perpetrator, given the severity of the crime (or lack thereof). Thus, while the ‘peace versus justice’ debate is perhaps unique to ICL, it is true that in domestic law many crimes are not prosecuted because they are not seen as serious enough, or are diverted to alternate mechanisms – such as special programs for drug users and youth offenders – instead of the stigma and punitive outcomes of formal trials. Also, there may be disagreement as to what conduct ought to be legislated as criminal – the debate between under- and over-criminalization is seemingly constant, as lawmakers criminalize anti-social behaviour and posit ‘security’ as the basis for ever-greater criminalization.<sup>8</sup> Selectivity – in the laws to be

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<sup>7</sup> See Kai Ambos, “Comparative Summary of the National Reports” in Louise Arbour et al (eds), *The Prosecutor of a Permanent International Criminal Court* (Freiburg: Edn iuscrim, 2000) 495, at 505-509; Hans-Heinrich Jescheck, “The Discretionary Powers of the Prosecuting Attorney in West Germany” (1970) 18 Am J Comp L 508; and, Michael Bohlander, *Principles of German Criminal Procedure* (Oxford: Hart Publishing, 2012) 25-26.

<sup>8</sup> See Chapter 3.

applied, in the crimes to be addressed, in the offenders to be punished – actually occurs rather frequently in domestic law.

This defence of concordance explains away selectivity at international tribunals on the basis that selectivity is in fact quite common in, if not intrinsic to, most domestic criminal systems.<sup>9</sup> If this selectivity is an ordinary feature of liberal democratic states, where the criminal law system is generally understood to be independent, fair and unbiased, then - so the argument goes - the selectivity complaint cannot have much purchase in the international arena.<sup>10</sup> In this understanding, selectivity does not offer evidence of the frailty of a legal system; if anything, it demonstrates concordance between ICL and domestic regimes that offer robust protections of fair trial rights, and a strong sense of impartiality and independence.<sup>11</sup> Selectivity is thus evidence that, far from being exceptional, ICL actually parallels defensible and everyday domestic criminal law.

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<sup>9</sup> See Mirjan Damaška, ‘What is the Point of International Criminal Justice?’ (2008) 83 Chicago-Kent LR 329, at 360-361 (“All terrestrial justice is in this sense selective, and only divine justice on Judgment Day will be all-encompassing.”), and Cryer, *supra* note 5 at 192 (“it is essentially impossible” that selectivity does not occur).

<sup>10</sup> Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009) at 91 (analogizing selective prosecution of international crimes to selective prosecution of speeding drivers).

<sup>11</sup> Cryer, *supra* note 5 at 291 (“It is practically impossible for the international criminal law regime to achieve perfect compliance with rule of law standards and be perfectly consistent. National criminal law systems do not achieve full compliance with such standards, and they operate in an environment that is far more conducive to fulfilling such criteria.”).

### III. A TYPOLOGY OF SELECTIVITY

Having outlined the defence of selectivity – that selectivity in ICL parallels domestic practices – this section delves into a more detailed analysis of selectivity practices. It outlines a number of inter-related selectivity practices, and explains how they have manifested themselves in ICL over time.

McCormack identifies a ‘dual selectivity’ in ICL. The first selectivity is the choice of what crimes are to be prosecuted; the second is the choice of which actors to be prosecuted.<sup>12</sup> While these are certainly important examples of selectivity, they are neither exhaustive, nor are they fine-grained enough. Selectivity about actors can result from several different sources, meaning responsibility for those choices rests with different actors and leading to differing normative consequences. As Cryer suggests, the choice of which principles of liability and defence are used by an ICT is another example of selectivity.<sup>13</sup> At the same time, Cryer’s description is susceptible to similar criticism as McCormack’s account – it maps out trends over time without noting the different sources of selectivity, or the full variety of selectivity practices. It matters, for example, whether an ICT fails to investigate a particular conflict or actor because it is statutorily precluded from doing so, or because its prosecutors exercise their discretion to not investigate. When thinking about selectivity, its normative consequences, and whether and how it can be remedied, one must be conscious of where that selectivity originates.

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<sup>12</sup> McCormack, *supra* note 5 at 683.

<sup>13</sup> Cryer, *supra* note 5 at 191.

## A. Design Selectivity

While the paradigmatic example of selectivity is the targeted enforcement of the law against only certain states, selectivity can pre-date any question of enforcement. What is termed here as ‘design selectivity’ is grounded in choices that are made by international organizations and states as they establish various ICTs, or even independent of any particular court or tribunal. From a TWAIL perspective, not enough has been said about design selectivity. It could be argued that international criminal tribunals all represent a Western liberal democratic model; that debates about ‘international’ procedure are really just debates about choosing between elements of Anglo-European common-law or continental-European civil law; or that the definitions of international crime and restricting the material jurisdiction of tribunals to the ‘core crimes’ (as opposed to the expansive approach offered by the International Law Commission) privileges Western priorities. Thus while great energy has been devoted to problematizing how tribunals exercise their discretion, TWAIL scholars would be well served to consider how the structures and normative foundations of international criminal tribunals are often equally questionable.

### 1. Material Selectivity

There would arguably be fundamental gaps in ICL even if it was enforced equally against all culpable actors across the world, because – as argued in Chapters 1 and 2 – the conduct that is criminalized represents specific understandings of violence and of human rights violations. This can be described as *material selectivity*, the question of what crimes fall under the material jurisdiction of the relevant tribunals, or indeed even of international

criminal law generally. At the IMTs, no charges were laid against either Allied or Axis powers for the crimes that are now seen as particularly emblematic of Allied criminality – the mass bombing of civilians in major cities and population centres. In contemporary times, this challenge can be seen in the failures to prosecute crimes that are not atrocities, but represent “slow violence”.<sup>14</sup> It is related to other decisions that are made in the development of international criminal institutions about the choice of substantive law to be applied. Material selectivity is thus a highly important example of design selectivity – choices about defining the general and special parts of criminal law that constitute ICL, and that are to be applied by particular tribunals.

## 2. Procedural Selectivity

The natural correlative to material selectivity is *procedural selectivity*. Here, one can think of the debates about merging common-law and civil law rules of procedure that have been a part of ICL debates since the Second World War. A more complete but non-exhaustive list of selectivity in the law would include choices about the categories of crimes; their definitions; the rules of procedure and evidence to be used; the principles of liability applied, including whether corporations can be held responsible; and, the defences available to accused. Each of these choices are about the institutional design of a particular court or tribunal, that ostensibly apply to all cases or investigations (however they may be chosen), and which pre-date the opening and operation of that court.

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<sup>14</sup> See, e.g., Rob Nixon, *Slow Violence* (Cambridge: Harvard University Press, 2011) at 211, referring, *inter alia*, to the “delayed action casualties” of Gulf War Syndrome, and civilians suffering from depleted-uranium fallout.

### 3. Geographic Selectivity

Tribunals that are established to respond to the criminality in specific conflicts or states, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), or Special Court of Sierra Leone (SCSL), will by definition embody a non-discretionary selectivity. Their jurisdiction is statutorily circumscribed such that officials have no discretion to investigate conduct occurring outside certain temporal or geographic restrictions. In those cases, selectivity is not a product of discretionary exercise of authority *after* the establishment of a tribunal, but a statutorily imposed limit that allows for no discretion on the part of judicial authorities.

An essential part of an ICT's design is determining the territory over which it may exercise jurisdiction. While tribunals may be established in response to a particular conflict, they will not necessarily have jurisdiction over all the crimes that occurred in that conflict. One of way limiting this jurisdiction is through statutory *geographic selectivity*. This becomes particularly relevant when the criminal conduct in question crosses borders, as with the SCSL. While the SCSL acts as an international tribunal for crimes committed in Sierra Leone, it lacks jurisdiction over those crimes committed in Liberia, which was part of the same conflict and where Charles Taylor ruled. Taylor has been indicted for his role in the Sierra Leone war, but only for crimes committed in Sierra Leone.<sup>15</sup> As Liberia has not itself initiated any trials in relation to the civil war, there has been no formal accountability for crimes that occurred in Liberia.

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<sup>15</sup> *Prosecutor v Charles Ghankay TAYLOR*, SCSL-03-01-T, Judgement, (18 May 2012).

#### 4. Temporal Selectivity

Related to this geographic limit is statutory *temporal selectivity*. The ICC can only investigate conduct that occurred after the *Rome Statute* came into effect on July 1<sup>st</sup>, 2002. As a result, while the ICC has opened investigations into the DRC, the criminal conduct that predates 2002 is outside of its jurisdiction. This lacuna is explained on the principle of prohibiting *ex post facto* law – it would be wrong to hold actors responsible for conduct they could not have known was a crime prior to July 1, 2002.

Another example of such selectivity is the restriction of the ICTR’s investigation to the events of the 1994 calendar year,<sup>16</sup> which raises two concerns. First, there is the claim that confining the ICTR’s jurisdiction to 1994 precluded consideration of pre-genocide acts by Hutus or the culpability of any foreign agents for assisting them.<sup>17</sup> The second and perhaps under-acknowledged worry is that the 1994 focus also prevents accountability for post-genocide acts by Tutsis, which investigators suggest were at least crimes against humanity and possibly genocide<sup>18</sup> with untold victims.<sup>19</sup>

Given that the ‘counter-genocide’ was a key spark in the DRC conflict, it becomes clear that not only does this statutorily-mandated selectivity create inconsistencies in the treatment of similar conduct arising within arguably the same conflict, but that different

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<sup>16</sup> *Statute of the International Criminal Tribunal for Rwanda* (8 Nov. 1994), Art. 1.

<sup>17</sup> A report commissioned by the government of Paul Kagame accused France of helping train Hutu militias, planning the genocide, and carrying out a small number of killings. “France Accused in Rwanda Genocide”, (5 Aug. 2008) online: BBC News, <<http://news.bbc.co.uk/2/hi/africa/7542418.stm>>.

<sup>18</sup> *Report of the Secretary-General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of Congo*, UN Doc. S/1998/581 (29 June 1998).

<sup>19</sup> Gerard Prunier has suggested hundreds of thousands have been killed or disappeared by Rwanda and Rwandan-supported agents since 1994. See Helena Cobban, “The Legacies of Collective Violence” *Boston Review* (1 Apr. 2002).

statutes can interact to create serious lacunae in international law. Here, one can see where it would be unfair to solely blame the ICC prosecutors for not investigating the tremendous Rwandan atrocities in the DRC or colossal Ugandan plunder of the same region, when many of those acts are outside ICC jurisdiction because they predate 2002. At least some responsibility for this gap lies with the UN Security Council for not expanding the ICTR's mandate to include pre- or post- 1994 conduct.

## **B. Operational Selectivity**

Design selectivity can be contrasted against what is generally termed here as *operational selectivity*. Operational selectivity is defined as exercises of discretion that occur *after* a court is already running, when the law – whatever it may be – is to be enforced by a tribunal and its agents. At the same time, the distinction between design and operational selectivity is more complex and cross-cutting than the neat divides presupposed by this binary.

### 1. Capacity Selectivity

An inherent problem in the prosecution of crime is the sheer number of potential offenders that could be prosecuted. In domestic contexts, there is a tremendous (and, as described at the outset of Chapter 3, growing) range of criminalised conduct. Investigating and prosecuting every possible offense – of bike theft, of personal drug use, or even of serious crimes such as assault – would threaten to overwhelm law enforcement and courts. Prosecutors and law enforcement officers make decisions which crimes to prioritize, and which cases to prosecute. These are discretionary responses to problems of design that are

often generated by prior questions of the breadth of criminal law and the resources made available. With international crimes, the related problem is the capacity of tribunals to deal with the tremendous number of offenders that are often implicated in international crimes, while operating on limited budgets.<sup>20</sup> International crimes usually arise in connection with large-scale conflicts that involve complex, decentralized networks of command, operating across large geographic areas, and substantial numbers of victims. Each individual trial becomes fairly complex and time-consuming, and prosecuting all perpetrators becomes a logistical impossibility.

For example, the ICTY has completed 147 trials, with 14 more ongoing, since its creation in 1993,<sup>21</sup> while the ICTR has completed 64 trials, with 11 pending appeals, since its 1995 establishment.<sup>22</sup> By contrast, local Rwandan courts dealt with 120,000 accused, and a further two million cases were processed in the *gacaca* system.<sup>23</sup> To give some sense of the scale of the prosecutorial efforts, 10,000 prisoners are said to have died while *awaiting trial* in *gacaca* courts.<sup>24</sup> For the ICTY and ICTR, another capacity-related issue was the Completion Strategy, which pushed each tribunal to finish trials and then all other work by specific dates.<sup>25</sup> As for the ICC, confronted with a near-universal jurisdiction over which

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<sup>20</sup> Hitomi Takemura, “Big Fish and Small Fish Debate—An Examination of the Prosecutorial Discretion” (2007) 7 Int’l Crim LR 677, 679.

<sup>21</sup> As of 16 April 2015. Figures available online at <<http://www.icty.org/sid/24>>.

<sup>22</sup> While the ICTY has no accused at large, nine individuals have been indicted but not tried by the ICTR. See *Status of Cases*, available online at <<http://41.220.139.198/Cases/StatusofCases/tabid/204/Default.aspx>>.

<sup>23</sup> Hollie Nyseth Brehm, Christopher Uggen, and Jean-Damascène Gasanabo “Genocide, Justice, and Rwanda’s Gacaca Courts” (2014) 20 J Contemporary Crim Just 333, 346.

<sup>24</sup> BBC News, ‘Rwanda gacaca genocide courts finish work’ (18 June 2012), available online at <<http://www.bbc.com/news/world-africa-18490348>>.

<sup>25</sup> Takemura, *supra* note 20, at 680 – 681.

conflicts to investigate, is continually faced with capacity problems. It is already investigating cases in eight different situations, and considering more in at least a dozen others. With a limited budget, number of investigators and prosecutors, but a broad mandate, the Office of the Prosecutor (OTP) is always balancing competing demands on its resources both inside particular situations, and across situations.

In determining which cases and actors to prosecute, tribunals and their officers must exercise some discretion. To insist that all perpetrators be put on trial is to insist on futility; even if the prosecutor desires to do so, tribunals often lack the capacity. This we can describe as *capacity selectivity*, which restricts the ability of tribunals to investigate all perpetrators *within* a situation, and – in the case of the ICC – also limits the number of situations it can reasonably investigate at any given moment. Of course, there must be an exercise of discretion at some point – choices must be made about which perpetrators are to be prosecuted, and by which level of court, and those that are not to be prosecuted at all – but capacity selectivity helps explain why some of those choices must be made at all. It also helps rebuff the strong-retributivist insistence that all perpetrators of serious crimes must be prosecuted – the demand is simply unattainable.

## 2. Justice-Based Selectivity

Discretionary selectivity may arise even in the absence of capacity problems. Prosecutors may be concerned that the trial of certain individuals or actors will cause more problems than they will solve, usually by prolonging conflict, exacerbating dire humanitarian conditions, or injuring attempts at national reconciliation. This position is perhaps more colloquially known as the ‘peace versus justice’ problem.

In the 1980s, the government of Argentina initiated trials against nine senior members of military juntas that had overseen the ‘Dirty Wars’ of 1976 to 1983. The post-junta civilian government was concerned that widespread prosecutions of the military would prompt a coup and return to army rule. Thus, even though a self-amnesty imposed by the last junta was overturned, the civilian government passed legislation to limit the number of offenders that could be prosecuted, in particular by preventing prosecutions of those who had been in the lower ranks of the military at the time of their offenses.<sup>26</sup> South Africa’s transition from apartheid rule began when the ruling Afrikaner government agreed to relinquish power – and thus end the crimes and horrors of the apartheid regime – if an amnesty were agreed.<sup>27</sup> A truth and reconciliation commission was established as a vehicle for granting amnesty from criminal prosecutions for those offenders who fully confessed their political crimes, and which enabled “a reasonably peaceful transition from repression to democracy.”<sup>28</sup>

A more contemporary example of this debate is found in Sudan. In the wake of the ICC’s decision to indict Sudan’s President Omar al-Bashir, observers warned that the indictment would lead to predictable reprisals against NGOs and others offering assistance to the very victims the ICC sought to protect through its prosecution, and might prolong conflict by giving al-Bashir less incentive to engage in peace talks with rebels in southern Darfur.<sup>29</sup>

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<sup>26</sup> These amnesties and legal restrictions were resisted by human rights organizations and, some twenty years later, repealed by another civilian government. See Par Engstrom and Gabriel Pereira, “From Amnesty to Accountability: The Ebbs and Flows in the Search for Justice in Argentina” in Leigh A Payne and Francesca Lessa, eds, *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2012) 97 – 122.

<sup>27</sup> Jay A Vora & Erika Vora, ‘The Effectiveness of South Africa’s Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans’, (2004) 34 *Journal of Black Studies* 301, 302.

<sup>28</sup> Desmond Tutu, “Chairperson’s Foreword” in *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, (29 Oct. 1998), 1-24, at 5.

<sup>29</sup> See, e.g., Julie Flint and Alex de Waal, ‘Case closed: a prosecutor without borders’ 171:4 *World Affairs* (2009) 23-38, at 34-36.

Nonetheless, the ICC proceeded with the indictment, only to suspend its efforts after the Security Council failed to support the Court.<sup>30</sup> Selectivity can thus depend on strategic considerations about the political and humanitarian ramifications of prosecuting every possible perpetrator, instead of just some of them.

### 3. Inter-situational Selectivity & Tribunal Discretion

As noted above, one of the most familiar claims of enforcement selectivity concerns the choice of which conflicts or, in ICC parlance, which ‘situations’ to investigate. In Part II.A, it was pointed out that these types of choices can be taken by the international community when it chooses to establish ICTs for certain conflicts and not others. For example, while there is a Special Tribunal for Lebanon, there is none for Israel, Palestine, or Iraq. While the ICTY exists, there are no courts for Abkhazia, Ossetia or Chechnya. Though East Timor and Cambodia have international tribunals, Sri Lanka does not.

Notably, the ICC has been similarly criticized for its preoccupation with Africa, and its non-investigation of other situations over which it might otherwise have jurisdiction.<sup>31</sup> Yet these choices seem qualitatively different from some other selectivity practices because they are made by different decision-makers. When tribunals are not created for certain conflicts, it is difficult to identify which parties – states, international organizations, regional groups and other actors – are responsible for failing to establish an international tribunal. On the other hand, when the ICC chooses to investigate a situation, the site of responsibility seems much clearer. It may be that the Office of the Prosecutor declined to bring forward an investigation

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<sup>30</sup> *Reports of the Secretary-General on the Sudan and South Sudan, Comments of Ms Fatou Bensouda, Chief Prosecutor of the ICC*, UN Doc. S/PV.7337 (12 December 2014).

<sup>31</sup> Charles Jalloh, “Regionalizing International Criminal law” (2009) 9 Int’l Crim LR 445.

in a particular situation, or that the Pre-Trial Chamber declined to confirm certain indictments. The picture may become murkier when the Security Council (and thus a group of states both inside and outside the ICC's Assembly of States Parties) fails to refer a situation to the Court. For example, one might identify the Russian veto of the attempt to refer the Syrian situation the key obstruction, but it is worth noting that other states – including a Canadian government often opposed to Russia because of its involvement in Ukraine – lobbied against the same referral behind the scenes.<sup>32</sup>

As a result, whereas inter-situational selectivity can be the product of tribunal design (to prosecute one situation and not others), and may also reflect discretionary choices made by the international community or – within a tribunal – by pre-trial chambers, prosecutors, and investigators, it can also result from a mix of actors. Thus, while the ICC has relatively broad jurisdiction there is a risk of assigning an unfair amount of blame to the Court for not filling in all the jurisdictional gaps that states and other international organizations otherwise tolerate. While the ICC's choice of which situations to investigate is often an exercise of discretion internal to the institution,<sup>33</sup> this institutional decision-making must also be considered in relation to that of other international organizations and states – including ICC states parties.

### **C. Group-Based Selectivity**

Not all selectivity will have unexceptional analogues in domestic practice. Inter-situational selectivity, for example, is a practice unique to ICL. While there may be some

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<sup>32</sup> David Petrasek, "Why has Canada given up on justice in Syria?" *The Globe and Mail* (Can.) (23 Jan 2013), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>33</sup> Even when there is a referral from the Security Council, the ICC has the discretion not to pursue the case.

basis to complain about the international community's apparent inconsistency in establishing ad hoc tribunals for one country or conflict and not another, it would be peculiar to complain of domestic courts only enforcing their laws domestically. Choices of which situations to investigate have frequently been criticised for being inherently politicized or exhibiting political bias, especially when made by the ICC.<sup>34</sup> This trend of cartographic discernment is usually seen as problematic because it seems to replicate interstate power imbalances through the lack of attention paid to Western states as compared to the Third World. For those who see neo-colonialism in ICL, they see it first here.

This concern may be stronger with respect to the geographic selectivity identified in Part II.A. That tribunals exist for Rwanda and Lebanon but not Sri Lanka, for example, does not reflect well on the priorities and capabilities of the international community. Yet it seems a bit unfair to charge the ICC with wholesale geographic selectivity, or at least to declare that the attention paid to African states is somehow untoward. After all, each situation in Africa save those of Libya and Darfur was a self-referral. Those referrals may embody other problems with the notion of the state, or improper attempts on the part of the referring authorities to limit or direct the work of the ICC in particular ways, but it cannot be said that the Court's *acceptance* of those self-referrals is in itself a normative problem.

At the same time, not all self-referrals are created equally. As Stigen notes, the first two referrals to the ICC came from Uganda and DRC after the possibility of *proprio motu* investigations were raised by the Prosecutor, putting some pressure on those states to self-

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<sup>34</sup> See, e.g., Jalloh, *supra* note 31 at 462–65, and William A Schabas, “Victor’s Justice: Selecting “Situations” at the International Criminal Court” (2010) 43 John Marshall LR 535 at 549.

refer.<sup>35</sup> The OTP ‘invited’ referrals from Central African Republic, Kenya, and Côte d’Ivoire as well; when Kenya declined to self-refer, the OTP instead initiated its own investigation of the situation. This seems to fit with Gallavin’s analysis of the Prosecutor’s *proprio motu* power as leverage to secure a broader investigative mandate from states.<sup>36</sup>

Nonetheless, it is difficult to identify the sort of blatant territorial discrimination in the enforcement of ICL that would be suggested by geographic selectivity. In part, this is because, for a variety of complex and historical factors, many examples of international crime seem to be clearly taking place in the territories of Third World states. Choosing between a Special Tribunal for Lebanon and a Special Tribunal for Sri Lanka is not choosing between the First and Third World. A caveat to this point would be that, as noted earlier in this chapter and in Chapters 1 and 2, the prior question of what constitutes an international crime may reflect its own form of selectivity by removing some conduct from the realm of international criminal jurisdiction.

If selectivity means anything as a serious charge against international criminal institutions and the discipline of ICL, it is that the accumulated practice of ICL institutions betrays a trend of differential treatment that lacks a persuasive or sustainable normative justification. At a certain point, this accumulation coalesces into a sense that at a general level, well-intentioned, anti-impunity, human rights-conscious international criminal institutions are not treating all international crime equally.

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<sup>35</sup> Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions* (Leiden: Martinus Nijhoff Publishers, 2008) 246.

<sup>36</sup> Chris Gallavin, “Prosecutorial Discretion Within the ICC: Under the Pressure of Justice” (2006) 17 *Crim LF* 43, 43 – 44.

This trend is related to but distinct from historical patterns in ICL. It is true that the courts at Nuremberg and Tokyo did not prosecute the Allies for even the most blatant of crimes - the fire-bombings of entire German towns, the atomic levelling of Hiroshima and Nagasaki, and the destruction of dozens of other Japanese cities. But those failures were failures of a court with jurisdiction over *one* conflict to prosecute equally *within* that same conflict. Similar problems can be seen at the ICTY and ICTR, although perhaps the examples are not so stark as those of the military tribunals. Yet their problems are also different to the extent that the jurisdiction of those tribunals was constrained to certain territories and time periods.

These failures to investigate are important not because they prove a persistent tension between the West and the Global South, but because they point to a problematic relationship between ICL and international and domestic arrangements of power. The concern then, is not with material selectivity or other aspects of what has been described as *design* selectivity, or the other practices captured under operational selectivity. Rather, it is with a specific subset of selectivity that may result from either the design of the tribunal, or the exercise of discretion within the tribunal – what is described here as *group-based selectivity*.

Group-based selectivity is selectivity that turns not on the nature of the conduct of the individual, or the strength of evidence against them, but on the group identity of that person. This group identity can take any number of forms, but frequently parallels differentiation between parties to the conflict. At the IMTs, group membership in the Allied forces seemed to ensure a lack of prosecution. At the ICTY, NATO troops were similarly de facto exempt,<sup>37</sup>

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<sup>37</sup> See Michael Mandel, “America Gets Away With Murder” in *How America Gets Away With Murder* (London: Pluto Press, 2004) at 176 – 206.

just as with the RPF at the ICTR,<sup>38</sup> and international peacekeepers before the SCSL.<sup>39</sup> Finally, the ICC is currently practicing group-based selectivity in a number of different situations. Returning to the idea of self-referrals, “prosecutions of only one side in the conflict seem to be the price of the self-referral strategy”.<sup>40</sup> As argued in the subsequent sections, group-based selectivity has profound implications for the justification of international criminal punishment. These concerns do not necessarily arise with other forms of selectivity, and present independent normative problems that cannot be reconciled by reference to domestic practice.

#### **D. Group-Based Differentiation: A Poor Domestic Analogue**

While some selectivity is inevitable and perhaps even welcome, not all selectivity is defensible. Group-based selectivity, for example, cannot be defended, for example, in the same way that other selectivity practices were through comparison to domestic criminal law regimes. If prosecutors in the United States pursued drug offences *only* when committed by African-Americans, or if Canadian police and prosecutors failed to investigate the disappearance or murder of *only* aboriginal and indigenous women, that would be evidence not of selectivity but of a selectivity *bias*. It would demonstrate what is described here as

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<sup>38</sup> On alleged RPF crimes, see the Organization of African Unity, “The RPF and Human Rights” in *Rwanda: The Preventable Genocide*, Report of the Panel of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events (July 2000).

<sup>39</sup> On alleged crimes by the Economic Community of West African States Monitoring Group (ECOMOG) peacekeepers, see, e.g., Human Rights Watch, “Shocking War Crimes in Sierra Leone” (24 June 1999) (referring to the summary execution of 180 rebels), online: <[www.hrw.org](http://www.hrw.org)>.

<sup>40</sup> William Schabas, “Prosecutorial Discretion v Judicial Activism at the International Criminal Court” (2008) 6 JICJ 731, 753.

“group-based selectivity”, the systematic unequal treatment of certain perpetrators and victims on the basis of their group identity, real or perceived.

This selectivity bias attacks the central values of dignity and security that justify punishment. A sincere moral regard, one in which our “fellow human beings...have a claim on our respect and concern simply by virtue of our shared humanity”,<sup>41</sup> is premised upon the idea of equality. One need not advocate for maximalist equality that demands nothing less than global distributive equity, but the floor for a minimalist approach surely must be equal treatment before the law.

Wellman is correct that international criminal justice must start somewhere, and that starting point will always appear partial to some.<sup>42</sup> The point though is not that justice must start somewhere but that if it is to give effect to these interests, then wherever it starts, it must start with all those who are responsible for international crimes in that particular crisis. That is, even if the ICC only wants to investigate *this* regional war in Africa and not *that* Western-led war in the Middle East or South Asia, it must at least investigate *all* perpetrators in that regional war and not just select parties. Otherwise, as argued in the next section, whether that process *aspires* to be more comprehensive or not, it calls into question the rationales that justify punishment in the first place. It directly undermines dignity interests by implying inequalities between victims and offenders in the same conflict, and security interests by allowing serious crimes to go unpunished. It also diminishes these interests indirectly, by possibly emboldening some perpetrators who recognize they are on the ‘right’ side of the

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<sup>41</sup> RA Duff, “Authority and Responsibility in International Criminal Law”, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 589, at 601.

<sup>42</sup> Christopher Heath Wellman, “Piercing Sovereignty: A Rationale for International Jurisdiction Over Crimes that do not Cross International Borders” in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) at 478–79.

law, by potentially worsening inequitable power relations within states, and by undermining the credibility of the institution in question and thus its future viability.<sup>43</sup>

#### IV. GROUP-BASED SELECTIVITY AND INTERNATIONAL CRIMES

Unfortunately, this group-based selectivity is quite common in ICL, challenging the basic requirement that ICTs “punish the guilty on a non-discriminatory basis”.<sup>44</sup> One of the problems is that group-based selectivity can easily be the product of the other types of selectivity listed above, even though those practices might not be (as) questionable on their own. For example, depending on how the temporal jurisdiction of a tribunal is defined, it may privilege and protect certain groups over others, as was the case with the Rwandan conflict. Defining certain conduct as a crime and not other conduct may mean that certain methods of warfare employed by one party to a conflict are prosecuted, whereas the practices of its opponents are not. Thus a state might wage an aggressive war while otherwise largely complying with the relevant law of war, whereas its opponents might resort to war crimes in the course of defending themselves. As the ICC’s prohibition of aggression has not yet come into effect, individuals from the aggressor state may well be de facto immune from criminal trial. Geographic selectivity may mean that certain crimes are not recognized as such even though they are part of a conflict that is otherwise investigated for international crimes, as was the case with the conflict in Liberia and Sierra Leone.

Historically, group-based selectivity is found in the post-war military tribunals that turned away from Allied crimes while prosecuting Axis forces for many comparable crimes;

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<sup>43</sup> William Schabas, “International Justice for International Crimes” (2006) 14 Eur Rev 421 at 422.

<sup>44</sup> Lyal S Sunga, *The Emerging System of International Criminal Law* (The Hague: Kluwer Law International, 1997) at 330.

to a lesser extent at the ICTY, where NATO forces were never prosecuted; at the ICTR, where neither the victorious forces of the Tutsi Rwandan Patriotic Front (RPF) nor the French military trainers of Hutu *genocidaires* were prosecuted; and in a number of ICC situations – including the very first situation investigated in Uganda, where government forces have not been prosecuted for crimes committed in northern Uganda. Since then, the problem has presented itself in other cases, notably the Côte d’Ivoire (CIV), Libya, and Central African Republic (CAR). Relying on self-referrals almost invites such group-based selectivity.<sup>45</sup>

The situation in northern Uganda was first referred to the ICC by the government of Uganda in 2003. At the time, President Yoweri Museveni claimed that the only way to bring the Lord’s Resistance Army (LRA) to justice was to request international assistance, specifically to help capture LRA leaders who were accused of brutal crimes: the recruitment of child soldiers, attacks on vulnerable civilians, and massive rape. The terms of the initial referral were narrowly constructed, so that the ICC would only have jurisdiction over crimes committed by the LRA. Luis Moreno Ocampo, then-Chief Prosecutor of the ICC, made it clear that these one-sided directions would be disregarded; the court would interpret the referral to encompass the entire situation, and consider allegations of crimes by all actors in the conflict, not just the LRA. Yet this acknowledgement was only made six months after the initial press release, which refers exclusively to the criminality of the LRA, with no mention

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<sup>45</sup> See, e.g., Schabas, *supra* note 40 at 753 (describing self-referrals as a ‘trap’); Paola Gaeta, “Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?” (2004) 2 JICJ 949, 952 (that states will use self-referrals to target their political opponents, and will not cooperate when investigations turn to crimes of the state or its allies). Heikilina Verrijn Stuart, “International Criminal Justice under Pressure” 105 International Justice Tribune (May 5, 2010), 2 (that self-referrals potentially instrumentalize the court as tools of domestic politics); and, Luc Côté, “Independence and Impartiality” in Luc Reydam, Jan Wouters, and Cedric Ryngaert, eds, *International Prosecutors* (Oxford: Oxford University Press, 2012) 319, at 409 (that self-referrals are instruments for states “to marginalize and pressure their political enemies”).

of the UPDF or its Local Defence Units (LDUs),<sup>46</sup> and Ocampo's appearance with Museveni at a press conference held that same night - which ruined the idea of impartiality of the ICC from the start.<sup>47</sup> Crucially, despite the rhetoric of the Office of the Prosecutor, and requests from Acholi leadership,<sup>48</sup> the impression lingers as no action has been taken against government troops.

Similar patterns can be identified in other situations investigated by the ICC, whether they are self-referrals, ad-hoc declarations, or cases referred by the Security Council. In Libya, the ICC indicted Muammar Gaddafi, his son (and *de facto* Prime Minister) Saif al-Islam Gaddafi, and his head of Military Intelligence, Abdullah al-Senussi, for ordering and directing the murder and persecution of hundreds of regime opponents.<sup>49</sup> No rebels have been prosecuted for crimes committed as part of the resistance to and transition from Gaddafi's rule. According to the International Commission of Inquiry appointed by the UN Human Rights Council, anti-government forces committed both war crimes and crimes against humanity in the war against the Gaddafi regime. This included murder, torture, cruel treatment, and pillage in order to render the town of Tawergha uninhabitable to its 30,000 (former) residents who had fled the area.<sup>50</sup> The rebels also often killed and tortured

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<sup>46</sup> ICC Press Release, "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC", ICC-20040129-44 (29 January 2004).

<sup>47</sup> See the comments of Ugandan international law scholar Dr Philip Kasaija in E. Mutaizibwa, "Museveni turns from ICC admirer to critic" *The Observer (Uganda)* (9 June 2013), online: <[www.observer.ug](http://www.observer.ug)> See also Amy Ross, "Transnational Geographies and Human Rights" in Vincent J Del Casino Jr, et al (eds.), *A Companion to Social Geography* (Oxford: Wiley-Blackwell, 2011) 490, at 500.

<sup>48</sup> Suggestions by the Acholi Religious and Cultural Leaders in Response to the Request by the International Criminal Court' (Statement, Gulu, 12 November 2004), reprinted in Tim Allen, *Trial Justice: The International Criminal Court and Lord's Resistance Army* (New York: Zed Books, 2006) at 86–7.

<sup>49</sup> See ICC-01/11-12, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI" (27 June 2011).

<sup>50</sup> See "Report of the International Commission of Inquiry into Libya" (8 March 2012), paras. 56 – 63.

government troops and security officers after capturing them. This included capturing, beating, and then executing at least 66 members of Gaddafi's convoy.<sup>51</sup> These killings, at first seemingly random, became more systematic.<sup>52</sup> The rebels especially targeted dark-skinned men assumed to be African mercenaries hired by Gaddafi, even though that rumour was false.<sup>53</sup> Instead, black Libyans and migrant workers were attacked or killed in large numbers without proof of military involvement.<sup>54</sup> Rebels also engaged in the widespread illegal detention of thousands of suspected pro-Gaddafi loyalists.<sup>55</sup> The ICC cannot even plausibly claim that the new government is exercising complementarity in respect of these crimes, as the post-Gaddafi government passed an amnesty law for rebels, even for international crimes such as murder, torture, and forced displacement.<sup>56</sup>

The ICC's investigation into the Côte d'Ivoire's declaration of ad-hoc jurisdiction has been similarly one-sided. Only Laurent Gbagbo and his supporters have been indicted by the ICC for crimes committed during the civil war in CIV, even though the armies and

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<sup>51</sup> Human Rights Watch, "Death of a Dictator" (17 Oct. 2012) <[www.hrw.org](http://www.hrw.org)>.

<sup>52</sup> Amnesty International, "The Battle for Libya: Killings, Disappearances and Torture" (13 Sept. 2011), at 57 – 69.

<sup>53</sup> *Ibid* at 79 – 90. These rumours were at first promoted and then denied by Amnesty International. See Maximilian C Forte, *Slouching Towards Sirte: NATO's War on Libya and Africa* (Montreal: Baraka Books, 2012) 249 – 250.

<sup>54</sup> Human Rights Watch, "A New Libya Must Honor Human Rights" (23 Aug. 2011), online: <[www.hrw.org](http://www.hrw.org)> ("Dark-skinned Libyans and sub-Saharan Africans face particular risks because rebel forces and other armed groups have often considered them pro-Gadhafi mercenaries from other African countries. We've seen violent attacks and killings of these people in areas where the National Transitional Council took control"); David Zucchino, "Libyan rebels appear to take leaf from Kadafi's playbook", *Los Angeles Times* (24 Mar. 2011), online: <[articles.latimes.com](http://articles.latimes.com)>; Kim Sengupta, "Rebels settle scores in Libyan capital", *The Independent* (UK) (27 Aug. 2011), online: <[www.independent.co.uk](http://www.independent.co.uk)>; "AU: Libya rebels killing black workers", *CBS News* (US) (29 Aug. 2011), online: <[www.cbsnews.com](http://www.cbsnews.com)> (warning rebels were "indiscriminately killing black people").

<sup>55</sup> Human Rights Watch, "Libya: New Government Should End Illegal Detention" (16 Nov. 2012) <[www.hrw.org](http://www.hrw.org)>.

<sup>56</sup> See International Crisis Group, "Trial and Error: Justice in Post-Qadhafi Libya" Crisis Group Middle East/North Africa Report N°140, (17 Apr. 2013) at 28 – 31.

supporters of his opponent Alassane Ouattara have been accused of comparable crimes by a national commission appointed by Ouattara himself.<sup>57</sup> Credible accusations include rape, pillage, and widespread killings, including massacres of civilians and summary executions.<sup>58</sup> The International Committee for the Red Cross claims that up to 800 civilians were massacred by Ouattara forces at Duékoué in March 2011.<sup>59</sup> One of the commanders responsible for the massacre was arrested in May 2013, but there have otherwise been no accountability efforts aimed at Ouattara troops, despite widespread acknowledgement of the need to boost such justice initiatives.<sup>60</sup> The country's truth and reconciliation committee, as well as other accountability efforts, have been either inactive or ineffective.<sup>61</sup>

The self-referrals of the Central African Republic (CAR) and Democratic Republic of Congo are similarly problematic. In the Central African Republic (CAR), the ICC has indicted Jean-Pierre Bemba, a Congolese national accused of murder, rape, and pillaging while participating in the civil war in support of Alain Patassé's rule.<sup>62</sup> Bemba and Patassé were defeated by Francois Bozizé. Yet neither Bozizé - who started the civil war that led to

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<sup>57</sup> Commission Nationale d'Enquête [Republique de Côte d'Ivoire], "Rapport d'enquête sur les violations des droits de l'homme et du droit international humanitaire survenues dans la période du 31 octobre 2010 au 15 mai 2011" (July 2012) at 30, <[www.fidh.org/IMG/pdf/cne\\_resume\\_rapport\\_d\\_enquete.pdf](http://www.fidh.org/IMG/pdf/cne_resume_rapport_d_enquete.pdf)>.

<sup>58</sup> See, e.g., Human Rights Watch, "Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive" (9 April 2011) and Human Rights Watch, "'They Killed Them Like It Was Nothing': The Need for Justice for Côte d'Ivoire's Post-Election Crimes" (April 2011), 74 – 90.

<sup>59</sup> International Committee for the Red Cross, "Côte d'Ivoire: hundreds of civilians killed in Duékoué" News Release 11/82 (2 April 2011) <[www.icrc.org](http://www.icrc.org)>.

<sup>60</sup> See, UNHCR, "Rapport de l'expert indépendant sur la situation des droits de l'homme en Côte d'Ivoire, Doudou Diène (Special Rapporteur), A/HRC/23/38 (3 June 2013), 18 – 21; and, Human Rights Watch, *Turning Rhetoric Into Reality: Accountability for Serious International Crimes in Côte d'Ivoire* (April 2013).

<sup>61</sup> See Amnesty International, *Côte d'Ivoire: The Victor's Law* (2013), 65 – 69 <[www.amnesty.org](http://www.amnesty.org)>.

<sup>62</sup> These crimes were charged as two counts of crimes against humanity and three counts of war crimes. *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* (15 June 2009).

his installation - nor anyone under his command has been indicted for the massive crimes that began during the war and continued under his rule. These include enforced disappearances, the summary execution of hundreds of civilians, and other unlawful reprisals against civilians for rebel attacks, including the burning of thousands of homes and the persecution of ethnic minorities.<sup>63</sup> Little was done to investigate abuse directed or approved by the Bozizé government, which eventually passed an amnesty law for crimes committed between March 2003 and 2008.<sup>64</sup> It was not until May of this year that the new CAR government - whose troops and partners have themselves been accused of horrific crimes - issued an international arrest warrant to put Bozizé on trial for crimes against humanity.<sup>65</sup> Notably, the indictment for Bemba was only issued once he had lost a presidential election in the DRC to Laurent Kabila. Furthermore, while a number of parties to the conflict in eastern Congo have been investigated, those allied to Kabila have not in spite of evidence of their crimes. Government-allied troops are “generally incapable of carrying out military operations in accordance with the law” and “systematically result in human rights violations”;<sup>66</sup> engage in mass rape;<sup>67</sup> and are allegedly responsible for half of documented sexual violence cases.<sup>68</sup>

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<sup>63</sup> See, Human Rights Watch, *State of Anarchy: Rebellion and Abuses Against Civilians* (September 2007), 45 – 69, and 84 – 90; and, Human Rights Watch, *‘I Can Still Smell the Dead’ - The Forgotten Human Rights Crisis in the Central African Republic* (September 2013), 64 – 66.

<sup>64</sup> See Amnesty International, *Central African Republic - Action Needed to End Decades of Abuse* (2011), 17 – 19.

<sup>65</sup> See Al-Jazeera, “CAR issues arrest warrant for ex-president” (1 June 2013) <[www.aljazeera.com](http://www.aljazeera.com)>.

<sup>66</sup> See UN Organization Mission in the Democratic Republic of the Congo (MONUC) and Office of the UN High Commissioners for Human Rights, *The Human Rights Situation in the Democratic Republic of Congo (DRC) during the Period January to June 2007* (27 Sept. 2007) at para 60.

<sup>67</sup> Amnesty International, *Democratic Republic of Congo: Torture and Killings by State Security Agents Still Endemic* (Oct. 2007); *Report of the Secretary-General on conflict-related sexual violence, A/66/657\*-S/2012/33\** (13 Jan. 2012) at para 27 (“In several incidents, mass rapes appear to have been perpetrated as a form of retaliation by armed groups or by elements of the [FARDC]”);

As noted above, neither have any Ugandans or Rwandans been indicted for their involvement in either the massive plunder of or the counter-genocide in the DRC.<sup>69</sup>

#### A. Victim and Offender Status

This group-based selectivity produces several ill-effects that extend beyond the traditional focus on what selectivity means for the tribunal itself and manifest as important intra-state consequences of group-based selectivity. First, in the face of voluminous evidence of state-sponsored crimes – including torture,<sup>70</sup> sexual violence,<sup>71</sup> and the use of child-soldiers<sup>72</sup> – the Court’s unwillingness to investigate the UPDF has undermined the security

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<sup>68</sup> *Report of the Secretary-General on sexual violence in conflict*, UN Doc. A/67/792-S/2013/149 (14 Mar. 2013) at para 40 (half of documented sexual violence cases were attributable to government troops) and, *Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Soldiers of the Congolese Armed Forces and Combatants of the M23 in Goma and Sake, North Kivu Province, and in and around Minova, South Kivu Province, From 15 November to 2 December 2012* (May 2013).

<sup>69</sup> *Report of the Secretary-General’s Investigative Team charged with investigating serious violations of human rights and international humanitarian law in the Democratic Republic of Congo*, UN Doc. S/1998/581 (29 June 1998).

<sup>70</sup> Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda* (Sept. 2005) at 35–37; Human Rights Watch, *State of Pain: Torture in Uganda* (29 Mar. 2004) at 16; “The Current Investigation by the ICC of the Situation in Northern Uganda”, The American Non-Governmental Organizations Coalition for the International Criminal Court; a Program of the United Nations Association of the United States of America (16 February 2006); UN Committee Against Torture, *Concluding Observations: Uganda*, CAT/C/CR/34/UGA (21 June 2005), at para 10(n).

<sup>71</sup> *Uprooted and Forgotten*, *supra* note 70 at 46; Allison Anderson Pillsbury & Jane Lowicki, “Against all odds: surviving the war on adolescents - Promoting the Protection and Capacity of Ugandan and Sudanese Adolescents in Northern Uganda” (New York: Women’s Commission for Refugee Women and Children, 2001) at 42; *Report of the Secretary-General on children and armed conflict in Uganda*, UN Doc S/2007/260 (7 May 2007) [‘2007 Report of SG’], para. 36; and Human Rights Watch, *Abducted and Abused* (14 July 2003) at 70–71.

<sup>72</sup> See R. Kasasira and Y. Mugeru, “UPDF has 5,000 Child Soldiers” Daily Monitor, 20 April 2007 (quoting the Uganda Parliamentary Forum for Children); Department of State, *Country Reports for Human Rights Practices for 2007* (2008), available at <[www.state.gov](http://www.state.gov)>; Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda* (March 2003) at 19 – 20; 2007 Report of SG, *supra* note 71, at para. 8; Sverker Finnström, *Living with Bad Surroundings: War, History, and Everyday Moments in Northern Uganda* (Durham: Duke University Press, 2008), at 90 – 91; Jeannie Annan, Christopher Blattman, and Roger Horton, *The State of Youth and Youth Protection in Northern Uganda: Findings from the Survey of War Affected Youth* (September 2006); and Coalition to Stop the Use of Child Soldiers, “Child Soldiers 1379 Report” (November 2002) at 96–97.

and dignity interests of large numbers of victims of UPDF crimes, as well as those of other political opponents of the Museveni dictatorship. Blithe declarations that the LRA commits more serious crimes fly in the face of the evidence outlined above, important understandings of gravity,<sup>73</sup> and local demands that the UPDF be held accountable.<sup>74</sup> While victims should not control criminal law, courts cannot simply ignore victims, particularly given the scale and duration of the impugned government conduct. Yet neither the Ugandan government nor the international community has shown any interest in arresting or punishing those responsible. As noted previously, the same can be said of other situations of group-based selectivity.<sup>75</sup> All of these impunity gaps attack dignity and security interests by promoting the idea that the status of victim turns on the identity – not the conduct – of the perpetrators.

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<sup>73</sup> Primarily the idea that, *ceteris paribus*, state criminality – and its associated prospect of impunity – is inherently more grave than non-state criminality. See Part V below.

<sup>74</sup> Surveys of local populations in northern Uganda have consistently identified a strong preference for trying/punishing UPDF soldiers and/or Ugandan government officials. See: Phuong Pham and Patrick Vinck, *Transitioning to Peace: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (2010), Human Rights Center, University of California, Berkeley; Phuong Pham et al, *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (2007), Human Rights Center, University of California, Berkeley; Phuong Pham et al, *Research Note on Attitudes About Peace and Justice in Northern Uganda* (2007), Human Rights Center, University of California, Berkeley; and, Phuong Pham et al, *Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda* (2005), International Center for Transitional Justice and the Human Rights Center, University of California, Berkeley. In 2010, the survey’s authors noted that “[t]he proportion of respondents implicating the government has increased significantly.” See Pham and Vinck, *Transitioning to Peace*, *ibid* at 39.

<sup>75</sup> The one exception being the Democratic Republic of Congo. A small number of domestic trials have been initiated, although “prevailing sentiment” is that perpetrators “have almost categorically enjoyed impunity.” Antonietta Trapani, *Complementarity in the Congo: The Direct Application of the Rome Statute in the Military Courts of the DRC*, Report of the DOMAC Project (Reykjavik, November 2011), 35. With specific reference to government-affiliated troops, there is a “pervasive prejudice in favour of impunity for government forces” and related corporate actors (such as Anvil Mining, a company reference in Chapter 2). *Ibid* at 36, 47-48, and 62. There exists a “lack of political will” behind the trials, which are subject to the “influence of politics” and “executive interference with judicial independence.” Avocats Sans Frontiers, *The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo*, (Brussels, 2009), 94. At the same time, positive developments have been noted in the trials of government and non-government troops alike for sexual offences. See Trapani, *infra* at 41 – 46; and, Open Society Foundation, *Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo* (Jan. 2013) (noting nearly three hundred convictions for sexual violence offenses from October 2009 to October 2012 using mobile gender courts).

## **B. Intra-State Marginalization**

More importantly, thinking about group-based selectivity demands attention to the specificities of political and social effects *within* states. A TWAIL understanding of ICL is incomplete if it only analyzes the discipline's inter-state aspects, or – as with the African Union's objections to the ICC – emphasizes the victimization of Third World states at the hand of international courts.<sup>76</sup> The dynamics of the interaction between group-based selectivity and the particular local context malign the security interests of ordinary individuals in important ways. Crucially, studying these dynamics also explains why the concern about group-based selectivity is not simply a desire for a legalist utopia that flattens out the political context of international crime. Rather, it is in part *because* of the political context of international crime that group-based selectivity takes on added concern, as group-based selectivity so often poses no challenge to the status quo of power relations in the international and domestic spheres.<sup>77</sup>

In Uganda, for example, the victims of the UPDF are often victims three times over: of the UPDF; of the LRA; and, of the post-colonial Ugandan state. These crimes have been committed almost exclusively against the same Acholi civilian population that is terrorized by the LRA. The LRA has been enabled by the state forcing hundreds of thousands of Acholi

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<sup>76</sup> See Chapter 5.

<sup>77</sup> Nouwen, *supra* note 1, at 168: “[T]he OTP has generally not reversed inequality before the law at the domestic level... governments tend to shield from justice those who are loyal to them, while prosecuting their political opponents when possible. Rather than focusing on those who control the legal machinery at the domestic level, however, the ICC has also focused on the enemies of those in power (or, in the case of Libya, of those who were likely to be in power soon). Only in Sudan and Kenya has it opened cases against officials of the ruling (and not crumbling) regime. In most situations, the Court has thus not reversed possibly existing inequalities in the application of domestic law.”

civilians into internally displaced persons (IDP) camps.<sup>78</sup> The sidelining of UPDF victims bears troublesome parallels to the historical marginalization of the Acholi (and other northern peoples) within Uganda, a practice that traces back to colonialism but which has become more apparent and virulent since Ugandan independence. Ethnic alliances have riven domestic politics for decades, and the country's military has also often been ethnically divided.<sup>79</sup> The civil war that installed Museveni in 1986 was marked by massive ethnic-based conflict and ethnically-targeted atrocity, which transformed into the present-day conflict with the LRA.<sup>80</sup>

The ICC's unwillingness to cross this ethno-political divide reifies it. In part this is by passively legitimating UPDF practices<sup>81</sup> through non-prosecution, but also by representing itself as politically aligned with at least one party to the conflict. In Uganda, the Court is no

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<sup>78</sup> Of the 33 charges against Joseph Kony, 28 concern crimes committed in or against IDP camps in northern Uganda. See *Warrant for Arrest of Joseph Kony*, ICC-02/04-01/05, Pre-Trial Chamber II (27 Sept. 2005). The UN, human rights groups, anthropologists and others have noted that the UPDF and LDUs have committed crimes against these same IDPs with impunity. See *Uprooted and Forgotten*, *supra* note 70, at 42-47; 2007 Report of SG, *supra* note 71, at paras 33 – 37; Internal Displacement Monitoring Centre, *Uganda: Need to focus on returnees and remaining IDPs in transition to development* (24 May 2012) at 3; UNHCR, *A Time Between: Moving on from internal displacement in northern Uganda* (1 Jan. 2010); Nidal Nabil Jurdi, "Complementarity and State-Referral: The North Uganda Situation" in *The International Criminal Court and National Courts: A Contentious Relationship* (London: Ashgate Publishing, 2011) at 146-147; "Forced Displacement in Northern Uganda" (July-August 2001), Submission of International Educational Development to the UN Sub-Commission on the Promotion and Protection of Human Rights (53rd sess, Agenda item 2); Allen, *supra* note 48 at 60; Finnström, *supra* note 72 at 84, 90; and, Heike Behrend, "War in Northern Uganda: The Holy Spirit Movements of Alice Lakwena, Severino Lukoya and Joseph Kony (1986-97)" in C. Clapham (ed), *African Guerrillas* (Oxford: James Currey Ltd, 1998) 108 at 117.

<sup>79</sup> See generally, Samuel Decalo, "Uganda: The Postliberation Vacuum" in *Coups & Army Rule in Africa* (New Haven: Yale University Press, 1990) 139; Ali Al'amin Mazrui, *Soldiers and Kinsmen in Uganda: The Making of a Military Ethnocracy* (London: Sage Publications, 1975); Adam Branch, "Exploring the Roots of LRA violence: Political crisis and ethnic politics in Acholiland" in Tim Allen and Koen Vlassenroot, eds., *The Lord's Resistance Army: Myth and Reality* (London: Zed Books, 2010) 25, at 30 – 31; and Pascal Ngoga, "Uganda: The National Resistance Army" in Clapham, *supra* note 78, 91 at 103 – 104.

<sup>80</sup> Susan Dicklitch, "Uganda: A Microcosm of Crisis and Hope in Sub-Saharan Africa" (1996) 51 Int'l J 103, at 105; Edwin A Brett, "Neutralizing the Use of Force in Uganda: The Role of the Military in Politics" (1995) 33 J Mod Afr Stud 129, 145.

<sup>81</sup> Sarah Nouwen & Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2011) 21 EJIL 941, 952.

longer perceived as neutral and impartial, but as ‘an ally of one of the parties to a conflict, the incumbent government.’<sup>82</sup> The “friendship”<sup>83</sup> between the state and the ICC, including the unwillingness to investigate the UPDF, intensely politicizes the intervention of the Court in northern Uganda<sup>84</sup> by putting the impartial and neutral mechanisms of the Court in the service of an oppressive regime.

Again, Uganda is not an outlier. This pattern repeats itself in other states, where group-based selectivity often favours a repressive regime in the context of ethno-political conflict. In the DRC, President Joseph Kabila has been accused of serious crimes in the suppression of political dissent;<sup>85</sup> the country “teeters on the brink of dictatorship”<sup>86</sup> in the face of “increasing authoritarianism”.<sup>87</sup> The conflict that helped bring Kabila to power and which the ICC is concerned with is – as with Uganda – rooted in colonial rule. Belgian colonizers sent Congolese, Rwandans, and Burundians across the Belgian Congo, and thus the future borders of three independent states. After decolonization, many Rwandans remained on the Congolese side of the border, where they were able to vote, hold political office, and eventually obtain land rights in resource-rich eastern DRC. At the same time, the

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<sup>82</sup> Sarah Nouwen & Wouter Werner, “The Law and Politics of Self-Referrals” in Alette Smeulers (ed), *Collective Violence and International Criminal Justice* (Oxford: Intersentia, 2010) 255 at 270; Ross, *supra* note 47, at 500 – 501.

<sup>83</sup> See the curious set of particularities catalogued by Nouwen and Werner, *supra* note 81, at 951 – 953.

<sup>84</sup> Contradicting assurances that self-referrals leading to international jurisdiction would prevent such politicization. Payam Akhavan, “The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court” (2005) 99 AJIL 403 at 404.

<sup>85</sup> See, e.g. Human Rights Watch, *DR Congo: Deadly Crackdown on Protests* (24 Jan 2015), and *DR Congo: Mass Arrests of Activists* (18 Mar 2015) online: Human Rights Watch, <[www.hrw.org](http://www.hrw.org)>.

<sup>86</sup> Mvemba Phezo Dizolele, “The Mirage of Democracy in the DRC” (2010) 21:3 J Democracy 143.

<sup>87</sup> International Crisis Group, *Congo: Is Democratic Change Possible?*, Africa Report No. 225 (5 May 2015), 7 – 8.

ethnic difference between Hutus, Tutsis, and indigenous inhabitants of eastern DRC were manipulated by Mobutu Sese Seko (in much the same way as the Belgians had) in order to shore up political support.<sup>88</sup> One important step was depriving Congolese-Rwandans (the Banyamulenge) of their land rights on the basis of questionable citizenship; as aliens, the Banyamulenge were now “left exposed to the whims of those with access to power.”<sup>89</sup> As it turned out, this “divide and rule” strategy prompted ethnic cleansing and sustained ethnic conflict,<sup>90</sup> which in turn gave the post-genocide government in Rwanda (and its Ugandan allies) a pretext for sending troops across the DRC border.

This analysis resonates with the description of Côte d’Ivoire in Chapter Two. In that conflict, contemporary contests of ethnic identity, politics, and citizenship bear continuities with colonial regulation of the state and its cocoa industry. Just as questions of citizenship were central to excluding some groups from resource control in DRC, so were they in Côte d’Ivoire.<sup>91</sup> In Central African Republic, the newly-independent state was ruled by a series of kleptocratic regimes that enriched their families and ethnic groups – their political base –

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<sup>88</sup> Georges Nzongola-Ntalaja, “Politics of Citizenship in the Democratic Republic of Congo” in Sara Dorman, Daniel Hammett, Paul Nugent, eds, *Making Nations, Creating Strangers: States and Citizenships in Africa* (Leiden: Brill, 2007) 69, 72 – 76.

<sup>89</sup> Robert H Bates, *When Things Fall Apart: State Failure in Late-Century Africa* (Cambridge: Cambridge University Press, 2008), 127.

<sup>90</sup> René Lemarchand, “The Democratic Republic of the Congo: From Failure to Potential Reconstruction” in Robert Rotberg, ed, *State Failure and State Weakness in a Time of Terror* (Washington, DC: Brookings Institution Press, 2003), 29, 38 – 40.

<sup>91</sup> See, e.g., *Hot Chocolate: How Cocoa Fuelled the Conflict in Côte d’Ivoire*, Global Witness (June 2007), 24 – 40; Carol Off, *Bitter Chocolate: Investigating the Dark Side of the World’s Most Seductive Sweet* (Toronto: Vintage, 2007), 95 – 157; and, Dwayne Woods, “The Tragedy of the Cocoa Pod: Rent-Seeking, Land and Ethnic Conflict in Ivory Coast” (2003) 41 *J Mod Afr Stud* 641.

through resource exploitation<sup>92</sup> and the privatization of the state.<sup>93</sup> Francois Bozize, who deposed Ange Felix Patasse in a coup, similarly treats resources “as a source of quasi-personal enrichment” necessary to securing the political patronage he needs to remain in power.<sup>94</sup> That this patronage stems both from local ethnic groups as well as the former colonial power of France (which still has major business interests in the CAR), again parallels the other states mentioned above.<sup>95</sup> It also reminds that the emphasis on resource extraction returns us to the question of the role of private actors – corporations, traders, and financiers – in these situations, and how group-based selectivity shields them along with their political and military allies.

In each of these situations, group-based selectivity suggests that the ICC represents an extension of the domestic criminal law system that can be subordinated in service of partisan political agendas.<sup>96</sup> Whereas so much Third World suspicion is aimed at the ICC’s inter-state activities (such as its Africa-myopia), the real concern is of ICL’s intra-state instrumentalization. Worryingly, as in Uganda and the other states mentioned, these political actors not only commit core international crimes, but are also highly repressive and illiberal in other ways. The Museveni dictatorship has held power for thirty years, through an ‘elite

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<sup>92</sup> Patrick Berg, “A Crisis-Complex, not Complex Crises: Conflict Dynamics in the Sudan, Chad, and Central African Republic Tri-Border Area” (2008) 4 *International Politike und Gesellschaft* 72, 74 online: <[http://library.fes.de/pdf-files/ipg/ipg-2008-4/08\\_a\\_berg\\_gb.pdf](http://library.fes.de/pdf-files/ipg/ipg-2008-4/08_a_berg_gb.pdf)>.

<sup>93</sup> International Crisis Group, *Central African Republic: Anatomy of a Phantom State*, Africa Report No. 136 (13 Dec. 2007) (quoting the report’s executive summary).

<sup>94</sup> International Crisis Group, *Central African Republic: Untangling the Political Dialogue*, Africa Briefing No. 55 (9 Dec. 2008), 3 -4.

<sup>95</sup> *Ibid*; Patrick Berg, *The Dynamics of Conflict in the Tri-Border Region of the Sudan, Chad and the Central African Republic*, Report commissioned by Friedrich Ebert Foundation (Berlin: Mar. 2008), 19–20; and, Jasper Bauters, *A Taxonomy of Non-State Armed Actors in the Central African Republic* (IPIS: Antwerp, 2012), 11–12.

<sup>96</sup> Nouwen and Werner, *supra* note 82 at 262–263.

bargain...that is only partially inclusive’,<sup>97</sup> a post-1986 political transition that was ‘autocratic’<sup>98</sup> and ‘an assault on parliamentary independence’,<sup>99</sup> and which uses the LRA conflict to enable internal corruption<sup>100</sup> and the elimination of broader political opposition.<sup>101</sup> As described above, other states also frequently see international criminal accompanied by or committed in the context of political suppression and ethnic divide and rule strategies. From a TWAIL perspective, a central problem with group-based selectivity is not that ICL enables Western domination of the South, but that it often supports autocratic, oppressive governments *within* the Third World that have committed core international crimes as part of a wider strategy for obtaining or retaining political power.

### C. Goals and Justifications of Punishment

None of this is to say that the individuals who are being prosecuted should not be held accountable,<sup>102</sup> only that group-based selectivity produces an independent normative problem

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<sup>97</sup> Stefan Lindemann, “Just Another Change of Guard? Broad-Based Politics and Civil War in Museveni’s Uganda” (2011) 110 *African Affairs* 387, at 388.

<sup>98</sup> J. Olaka-Onyango, “Constitutional Transition in Museveni’s Uganda” *New Horizons or Another False Start?* (1995) 39 *J Afr L* 156, 171-172.

<sup>99</sup> Joshua B Rubongoya, *Regime Hegemony in Museveni’s Uganda: Pax Musevenica* (New York: Palgrave Macmillan, 2007) 189.

<sup>100</sup> Andrew Mwenda, “Uganda’s Politics of foreign aid and violent conflict: the political uses of the LRA rebellion” in Allen and Vlassenroot, *supra* note 79, 45 at 47–53.

<sup>101</sup> See, e.g., Anne Mugisha, “Museveni’s Machinations” (2004) 15 *J Democracy* 140; Bernard Tabaire, “The Press and Political Repression in Uganda: Back to the Future?” (2007) 1 *J E Afr Stud* 193; and, Human Rights Watch, *World Report 2014: Uganda*, available online: <[www.hrw.org](http://www.hrw.org)>.

<sup>102</sup> Although the propriety of the ICC doing so is a contested subject. See *supra* note 48 (on the prosecution of the LRA).

for ICL. It both weakens the Court's claims to legitimacy<sup>103</sup> and undercuts claims that it is giving effect to interests in dignity and security.

Group-based selectivity undermines the dignity and security interests of individuals through its communications to the general populations. Victims receive confused messages about their own moral worth, while the larger community receives contradictory information about what norms are in force in the community. Meanwhile, if only *some* offenders will be punished (or at least prosecuted), and if the distinction will be related to their group identity and relative political power, then future potential offenders may receive the message that their conduct is not criminal. Rather, these individuals may believe that the consolidation of power (or alliance with political power) is a viable means of protecting oneself from the reaches of international criminal justice.<sup>104</sup> If anything, selectivity could intensify conflict, and thus insecurity, by providing the additional prize of judicial immunity for the victor who then seizes political power.<sup>105</sup>

Finally, group-based selectivity concerns not just our understanding of victims and perpetrators but of the conflict itself. International criminal trials relate both individual and collective action within those conflicts. Even if trials are ill-suited to the task of creating historical records,<sup>106</sup> the fact remains that the documents, evidence and arguments laid down over the course of multiple trials become a (imperfect) record of the conflict itself.

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<sup>103</sup> Ross, *supra* note 47 at 500 – 501.

<sup>104</sup> Larissa J van den Henrik, *The Contributions of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff, 2005), 264 (saying that the ICTR's failure to prosecute RPF members "will send out the message that anyone who is in power, need not fear prosecution").

<sup>105</sup> Ross, *supra* note 47, at 500.

<sup>106</sup> Mirjan Damaška, "What is the Point of International Criminal Justice?" (2008) 83 Chicago-Kent LR 329 at 331–340.

Individually and collectively, trials convey crude understandings of right and wrong that privilege particular narratives over others. The reluctance to prosecute local and transnational actors for their plunder during conflict suggests that such conduct and the insecurity it generates is perhaps acceptable. When the ICC indicts only LRA leaders and declines to investigate the UPDF, it not only aligns itself with the government's explanation of the conflict, it *legitimizes* that narrative: the LRA (and indeed the Acholi generally) are primitive, violent and backwards, and the response of the government is justified because it seeks to protect individuals and prevent further violence. If this were not the case, the ICC would also investigate the UPDF, or the anti-Gaddafi rebels in Libya, or the Ouattara loyalists in CIV, and so on. Just as Western interventions in the Third World are excused from consideration by international criminal institutions because of both their good intentions and the alleged goods they deliver - secularism, democracy, post-ethnic unity - so too are the interventions of certain Third World actors against their own marginalized populations excused because of their projections of modernity.

#### V. GRAVITY AS A JUSTIFICATION OF SELECTIVITY

One rebuttal to the preceding analysis is that this differential treatment is in fact normatively justified on the basis that the crimes investigated in those states are, in keeping with our concern about types of violence and its impact, the most grave. For example, while the ICC is only investigating Jean-Pierre Bemba in relation to the CAR situation, the International Crisis Group notes that while all sides committed crimes during the civil war, Bemba's were "particularly brutal".<sup>107</sup> The general argument is that the crimes that are

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<sup>107</sup> See International Crisis Group, "Central African Republic: Keeping the Dialogue Alive," Africa Briefing No. 69, (12 January 2010), 4.

selected for investigation and prosecution are the most serious crimes of all that are taking place in the world. If the institution in question had the capacity to do so, it would surely pursue other crimes in other parts of the world, or other criminal actors because all international crimes – by definition – are grave. This reflects the ideas of *capacity* selectivity – that some conduct, even though criminal, cannot be addressed through criminal courts because those institutions must make difficult choices.

#### **A. The Indeterminacy of Gravity**

In elucidating the contours of gravity, the ICC has defined it in broad, holistic terms. In 2010, the OTP stated in a draft policy that the gravity assessments include “both quantitative and qualitative considerations based on prevailing facts and circumstances...[including] the scale, nature, manner of commission of the crimes, and their impact.”<sup>108</sup> This description was fairly similar to that of the 2006 draft policy, which noted that “these factors should be considered jointly: no fixed weight should be assigned to the criteria, but rather a judgment will have to be reached on the facts and circumstances of each situation.”<sup>109</sup> As argued below, this flexibility lends itself to indeterminacy, making it difficult to rely on gravity as a rationale for explaining what seem to be discrepancies in either selecting situations to investigate, or cases within those situations.

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<sup>108</sup> The Office of the Prosecutor (International Criminal Court), “Draft Policy Paper on Preliminary Examinations” (4 October 2010), 13, para 70, online: <[ICCforum.com](http://www.iccforum.com)>.

<sup>109</sup> Quoted by Schabas, *supra* note 40 at n43 (citing “Criteria for Selection of Situations and Cases, unpublished draft document of the Office of the Prosecutor”, June 2006, at 5). See also Paul Seils, “The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court” in Morten Bergsmo, ed, *Criteria for Prioritizing and Selecting Core International Crimes Cases*, 2d ed (Oslo: Torken Opsahl, 2010) 69 at 72–73.

The conceptual problem with gravity-based arguments is that they require understanding the numerous crimes that take place around the world (or within the territorial jurisdiction of the court or tribunal in question) as being part of a hierarchical structure where some crimes are objectively worse than others. The possibility of making fine moral distinctions between various international crimes seems remote, whether across situations or within situations. Attempts to do so have only pointed further at the inconsistencies inherent in gravity assessments in ICL.

At the ICC (as partial explanation of the decision not to investigate the alleged crimes of Coalition forces in Iraq),<sup>110</sup> the “key consideration”<sup>111</sup> has been the number of victims. Yet one might also point to apparent inconsistencies here, based on the decision of the ICC Chief Prosecutor to investigate North Korea’s attack on two warships, which led to less than fifty casualties, despite previously declining to investigate Great Britain because that case only involved a dozen or so victims.<sup>112</sup>

The same problem presents itself outside of the ICC. For example, an entire tribunal was established in order to assign accountability for the death of one man in Lebanon,<sup>113</sup> whereas at the ICTY (as partial explanation of the decision not to prosecute alleged NATO

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<sup>110</sup> After finding evidence of wilful killing and inhuman treatment of civilians, the Prosecutor determined the cases were inadmissible almost exclusively on the basis of gravity. Luis Moreno-Ocampo, Office of the Prosecutor – International Criminal Court, “Letter Concerning the Situation in Iraq” (Feb. 9, 2006), at 8–9. Online: <[http://www.iccnw.org/documents/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf)>.

<sup>111</sup> *Ibid.*

<sup>112</sup> As noted by Margaret De Guzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court” (2012) 33 *Mich J Int’l L* 265 at 285.

<sup>113</sup> The Special Tribunal for Lebanon was established to investigate the 2005 bombing that killed then Prime Minister Rafik Hariri, although 22 others also died in the same attack.

crimes in Kosovo<sup>114</sup> and in order to determine which cases to refer from the ICTY to national courts<sup>115</sup>), the rationales for not investigating related to the number of victims. Whether one looks between or across situations, there is serious inconsistency in the idea of gravity. This inconsistency is enabled because while a numbers-based sense of gravity implies a largely formalist criterion, it fails to specify in advance how wide or narrowly one ought to focus the highly contextual lens of gravity.

The apparent numbers-based inconsistency that arises in choosing cases within and between situations might be explained by reference to the effects or centrality of certain international crimes to other harms. In this way, gravity distinctions turn on the contested underlying notions of violence and broad or narrow sense of harm<sup>116</sup> that connect to definitions of the material jurisdiction of international courts. Thus the harm with which the Special Tribunal for Lebanon is concerned is the particular impact of the killing of the Lebanese Prime Minister. This fits well with a TWAIL sense of gravity, especially as Chapters 1 and 2 advocated for a more expansive approach to understanding violence and international crime. Yet international prosecutors have largely not embraced this holistic understanding of gravity. When it comes to atrocity crimes, then the decision to not

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<sup>114</sup> See “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia” (13 June 2000), at Para. 92: “If one accepts the figures in this compilation of approximately 495 civilians killed and 820 civilians wounded in documented instances, there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity.” Online: <<http://www.icty.org/sid/10052>>.

<sup>115</sup> Claudia Angermaier, “Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia”, in Bergsmo, *supra* note 109 at 27, 41.

<sup>116</sup> De Guzman, *supra* note 112 at 288 (“[H]arm can be measured along various dimensions: extent of harm to individual victims, number of victims affected, broader impact on the community, and so forth. One person may feel that it is “worse” to inflict great suffering on a single victim, while another is more outraged by a crime that harms many people to a lesser extent. Similarly, some may view an attempted crime that harms no one but threatened substantial harm as more grave than a completed crime that harms a great number but only slightly. Seriousness of harm, in other words, is incommensurable and therefore provides an inadequate justification for selection decisions.”).

investigate British troops for their wilful killings in Iraq stands out as peculiar given that those killings were the result of an aggressive war, of which the United Kingdom was a major political proponent and military contributor (second on both counts only to the United States), and that the war itself led to hundreds of thousands of Iraqi casualties.

At the same time, as noted in Chapter 2, there has been a dearth of attention paid to non-traditional international crime, including conduct that has long been criminalized in international law such as pillage. Earlier it was noted that Rwandans were not being prosecuted for the ‘counter-genocide’ in the eastern DRC; neither have any Ugandans been prosecuted for the occupation and plunder of the natural resources of that region during that same period. Given that the International Court of Justice has found Uganda responsible for billions of dollars worth of plunder during that period,<sup>117</sup> and is now moving forward with proceedings on reparations,<sup>118</sup> the lack of criminal charges for individuals is anomalous. It suggests that gravity is perhaps not as holistic a concept as it might be, and that selectivity can often shield not only military and political actors and activities, but economic ones as well.

## **B. Gravity & Group-Based Selectivity**

These understandings of gravity are arguably missing a key element of particular interest to the discussion of group-based selectivity. In each of those cases, the entity that is not being prosecuted is integrated with or attached to the dominant political force in the

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<sup>117</sup> Judgement, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Rep. 2005, 168, 257 (Having found Uganda responsible for the plunder, the Court then said that it “considers appropriate the request of the DRC for the nature, form and amount of the reparation due it”).

<sup>118</sup> ICJ Press Release, *Democratic Republic of the Congo v Uganda*, Press Release No. 2015/18 (9 July 2015).

territory. In Uganda, gravity was the chief factor advanced by the ICC in explaining its decision to only prosecute the LRA.<sup>119</sup> Yet this explanation does not account for the fact that the ICC is largely functionally redundant in Uganda.

In Uganda, as with several other states where group-based selectivity can be identified – including Côte d’Ivoire,<sup>120</sup> Libya,<sup>121</sup> and the DRC<sup>122</sup> the state has attempted to engage in local trials for international crimes. Though Uganda has been unable to arrest LRA leadership, this is one area where the Court is unable to give help. It cannot enforce an arrest warrant, and it is even questionable whether the ICC has added any weight to this effort, given pre-existing widespread international condemnation of the LRA, foreign-supported military efforts against the group, and the large amounts of military and general aid directed to the Ugandan government. None of this is to say that the crimes of the LRA are *not* grave, only that gravity cannot explain why the Court’s attentions are turned *only* to the LRA. An interest-based account, on the other hand, can explain why the Court might assume jurisdiction over LRA crimes even though the Ugandan state possesses the technical capacity to prosecute those crimes by pointing to the potential mistrust that might result if the state

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<sup>119</sup> Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, New York (24 Oct. 2005), 6 (“In Uganda, the criterion for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by all groups – the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity.”).

<sup>120</sup> Former first lady Simone Gbagbo was sentenced to 20 years in prison in connection with international crimes. “Ivory Coast’s former first lady Simone Gbagbo jailed” *BBC News* (10 March 2015), online: <[bbc.com](http://bbc.com)>.

<sup>121</sup> The ICC has said that, in spite of concerns about the fairness of the proceedings, the trial of Abdullah al-Senussi is inadmissible before it due to Libya’s own prosecution of the case. The claimed deficiencies with the trial did not rise to a level that would have precluded Libyan jurisdiction. *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 6, *Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”* (24 July 2014).

<sup>122</sup> See *supra* note 75, describing that local trials – when dealing with government troops – have exhibited a pro-government bias, although there have been some successes in the prosecution of sexual violence cases.

government – which has been embroiled in a military confrontation of varying intensity with the peoples of Northern Uganda for 30 years – were to conduct the trials. Even then, however, this justification would explain why the ICC might have jurisdiction over both the UPDF *and* the LRA at the same time.

If, as the OTP has argued, all international crimes are sufficiently grave but the Court is forced to exercise some triage in choosing its cases on account of its limited resources, then a further criterion ought to be added to gravity: the likelihood of impunity. The odds of the LRA leadership going on trial in Uganda, or the Gbagbo regime in Côte d’Ivoire, or the Gaddafi regime in Libya would not seem to shift much with ICC involvement. In the latter two examples, the states have already started domestic trials. On the other hand, none of the states referred to above have demonstrated a serious interest in prosecuting individuals connected to the state. This suggests that while there may well be concern as to what is politically possible for ICTs to achieve, it is also the case that in many situations an international tribunal is not expanding the realm of what is possible. Simpson describes this as the paradox of cosmopolitanism, “an attempt to transcend sovereignty while remaining largely reliant on particular instantiations of it.”<sup>123</sup> In this light, ICTs that engage in group-based selectivity are not transcending sovereignty – they are simply sharing the burden of labour in prosecuting what local or international political authorities have delineated as politically possible. Since the agents defining this scope of possibility are also engaged in trials themselves, a central effect of the international trial is to legitimate the position of the domestic political authority.

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<sup>123</sup> Gerry Simpson, *Law, War & Crime: War Crimes Trials and the Re-invention of International Law* (Cambridge: Polity Press, 2007), 46.

In this light, the state's unwillingness to try its own officials for their crimes suggests that the ICC should prioritise the investigation of the state. At least in that scenario, the ICC will have some value to add to the criminal justice process<sup>124</sup> by combatting what Schabas describes as a "classic impunity paradigm" – the state sheltering its own agents from judicial reckoning.<sup>125</sup>

Current understandings of gravity give insufficient due to the idea that there is something profoundly grave about state complicity in international crimes. As John Gardner writes, at least some public officials "are in a special moral position because they are officials."<sup>126</sup> The further concern is that Schabas' paradigm of impunity is not an afterthought, but a central problem of international criminal justice, and state involvement in such crimes only compounds the risk of impunity. If anything, from the perspective of an international court, it should not matter if a state is responsible for far fewer deaths than its opponents, because the international court is often the only hope for calling the state to account. That is, the gravity requirement should be seen as satisfied as soon as a state's involvement is made out, because state involvement represents both the archetype of international crime and the paradigm of impunity.<sup>127</sup> In fact, the odds of serious crimes going

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<sup>124</sup> Although again, the interest-based justification would suggest that the ICC should investigate all sides to the conflict, not just one.

<sup>125</sup> Schabas, *supra* note 40, at 747–48.

<sup>126</sup> John Gardner, "Criminals in Uniform" in Antony Duff, Lindsay Farmer, Sandra Marshall, Massimo Renzo & Victor Tadros, eds, *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013), 97.

<sup>127</sup> See Schabas, *supra* note 40; Nouwen & Werner, *supra* note 81 at 951, n 52; David Luban, "A Theory of Crimes Against Humanity" (2004) 29 Yale HIL 85, 107 (arguing that the rationale for outlawing crimes against humanity is "the interest of humankind in preventing and penalizing the horrors that governments inflict on their own people."); and, Richard Vernon, "What is Crime Against Humanity?" (2002) 10 J Pol Phil 231 at 248. Satisfying gravity requirements, of course, does not remove the obligation to make other assessments of admissibility at the ICC, such as complementarity.

unpunished may well be an additional factor in to be considered in holistic assessments of gravity.

As such, if gravity is to be the distinguishing factor in deciding whom to prosecute, then it suggests something rather the opposite of the current use of gravity: it would point towards political power instead of away from it. As for the objection that this would simply reverse the poles of group-based selectivity, and thus present the same normative problems as before, the answer lies in the rationale for adopting this modified sense of gravity. As noted above, governments are already prosecuting their opponents, and therefore giving effect to the dignity and security interests threatened by the crimes of the opponents; international prosecutions would give effect to those interests when threatened by the government itself.

### **C. Remediating Group-Based Selectivity**

As for whether such prosecutions are possible, or whether the insistence on remediating group-based selectivity will simply render ICL useless, there is reason for optimism. While not perfect, two tribunals have demonstrated the possibility of all-party prosecutions. At the ICTY, Croatian, Bosnian-Muslim, Bosnian-Serb, and Serbian perpetrators were all prosecuted. Meanwhile, the SCSL engaged in prosecutions of the three main military forces in the conflict.<sup>128</sup> In both cases, international forces (NATO in Yugoslavia, and ECOMOG in Sierra Leone) were not prosecuted. And, in an important distinction from the ICC, these prosecutions took place after the conflicts had largely ended. Nonetheless, their examples points to the possibility of remediating group-based selectivity at

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<sup>128</sup> The Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF).

the ICC and in other ICTs, instead of accepting it as an inherent feature of international criminal justice mechanisms.

In addition, greater transparency with respect to its decision-making processes would help minimize the perceptions of selectivity and bias that arise with group-based selectivity. In particular, there is a need for the ICC to begin to formally regulate selectivity, instead of simply recognizing it as commonplace and inherent to criminal law. As Danner notes, prosecutorial discretion needs to be supplemented by guidelines on how that discretion is exercised.<sup>129</sup> As the above analysis has indicated, a more complete and consistent definition of gravity, how it is assessed, and its role in prosecutorial decision-making will be important. Explaining how situations and cases within situations are chosen “would enhance perceptions of legitimacy by bringing to light the factors that influence selection decisions rather than leaving them clouded in secrecy”.<sup>130</sup> Explanations of why certain cases are taken on and others are not would help mitigate concerns about group-based selectivity.<sup>131</sup>

The tribunal should be prepared to offer detailed explanations of which specific incidents have been investigated, what particular evidence was relied upon in reaching the decision not to prosecute, and what the criteria were for evaluating that evidence and making

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<sup>129</sup> Alison Marston Danner, “Legitimacy and Accountability of Prosecutorial Discretion at the ICC” (2003) 97 AJIL 510 at 541 (arguing that the ICC Prosecutor should follow the ICTY model and “draft a set of prosecutorial guidelines to govern his discretionary decision making...[which] will materially assist the Prosecutor in accomplishing both the achievement of legitimacy and the perception of legitimacy”).

<sup>130</sup> International Criminal Procedure Expert Framework, *Towards a Codification of General Rules and Principles of International Criminal Procedure* (Amsterdam/The Hague, October 2011) at 10, online: <<http://www.legal-tools.org/en/doc/245a90/>>. See also Alexander KA Greenawalt, “Justice Without Politics? Prosecutorial Discretion and the International Criminal Court” (2007) 39 NYU J Int’l L & Politics 583, 588 (“internal prosecutorial policy can—and most likely will—moderate the problem”).

<sup>131</sup> Stigen *supra* note 35, at 413 (“Charges that decisions are politically driven are easy to make but hard to rebut. One way to address this problem is to issue prosecutorial guidelines beforehand.”).

the ultimate decision.<sup>132</sup> These explanations are relevant in ICL in a way that they are not in domestic criminal law, because the scale of international crimes are frequently so large as to draw attention and threaten public interests in a way that ‘ordinary’ domestic crimes do not. Public dissemination will help assuage concerns about the decision-making process of the tribunal, even if they will not fully alleviate concerns about group-based selectivity.

## VI. CONCLUSION

The first part of this chapter developed a typology of different selectivity practices under two main categories. Choices that are made before a tribunal starts operating are generally known as design selectivity and include choices made about the law to be applied by the tribunal – substantive selectivity – and choices made about how investigations, trials and appeals will operate – procedural selectivity. Operational selectivity largely concerns the exercise of discretion *after* a tribunal comes into existence. It can include capacity selectivity, that is choices not to prosecute based on the limited resources available to a tribunal; choices not to establish tribunals for certain conflicts; and choices not to investigate certain situations where jurisdiction otherwise exists. It also included statutory constraints on the temporal and geographic reach of ICTs.

The divisions between types of selectivity are not perfect. For example, it can be difficult to draw bright lines between situations. The counter-genocide in DRC might be seen as either an extension of the Hutu-on-Tutsi genocide, or a separate situation entirely. A

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<sup>132</sup> *Ibid*, at 412 – 413 (“The perception of the ICC as legitimate and credible depends not only on the Court’s exercise of jurisdiction but also on its non-exercise. Therefore, there might be a need to explain why a given situation or case was not proceeded with. The necessity of offering some explanation in politically charged situations was illustrated in the ICTY Prosecutor’s Kosovo Report....Due to the intimate relationship between the ICTY Prosecutor and NATO, which *inter alia* had assisted the Tribunal by collecting evidence and making arrests, the Prosecutor realised that criticism would be raised if she decided not to deal with the matter.”

distinction between the 1994 genocide and the DRC crimes might arise on the basis of the altered power dynamic within Rwanda, or because the conflict shifted to a different geographic zone, or some combination thereof. One insight of the preceding analysis is that different types of selectivity will emanate from distinct sources and thus reform efforts should be pointed to different sites of the ICL system or ICT. For example, if the concern is that a certain tribunal has been improperly restricted, as with the ICTR, efforts might best be targeted at the Security Council. If the worry is that the definition of aggression or its related opt-out clauses unduly favour certain states, then perhaps the appropriate forum is the ICC Assembly of States Parties. If there is concern that certain crimes are not prosecuted, then efforts might best be focused on training national or international prosecutors in how to prosecute them.

The second insight is that while most selectivity arguments can be rationalized as defensible – partly through reference to domestic practice – group-based selectivity is extremely difficult to defend. Group-based selectivity is inherently partisan. It implies political allegiance to particular parties in a conflict that takes root in both popular imagination and actual practice. Thus the narratives generated by the tribunal are skewed; the prospects for deterrence and reconciliation are dimmed; and the normative justifications for piercing sovereignty and punishing are similarly undermined. A third remark is that group-based discrimination has these repercussions whether or not it is generated by a less controversial selectivity (such as that based on capacity, or geographic restrictions). In addition, it can be seen that TWAIL, far from being exclusively concerned with political questions, has something meaningful to say about criminal law practice and theory as well.

Third, while this chapter has focused for the most part on political contests, often between governments and rebels, group-based selectivity should not be seen as restricted to these binaries. As noted in Chapter 2 and in the descriptions of group-based selectivity in this chapter, the political contestation and ethnic competition that often characterizes international crime is frequently connected to control over the public purse and natural resources. As a result, foreign states and private economic actors – engaged in resource extraction, arms trading, or other business relationships with the state – are also shielded by practices of group-based selectivity. For example, the fact that the Western and African businesses very visibly engaged in mining ventures or trade in natural resources in eastern DRC or in Sierra Leone are not prosecuted for their complicity in or commission of international crimes is also likely to affect the dignity and security interests of local populations. In this way, an ICT that prosecutes all political and military actors in a given situation still has not gone as far as it should in remedying group-based selectivity.

The final observation is that the concern with group-based selectivity is not that it represents a conflict between groups of states – First and Third World, say – but *within* states. In Uganda, Côte d’Ivoire, CAR, DRC and Libya, prosecutions have largely shielded government entities and their military and private allies. Sometimes, as in American and British pressure not to prosecute Tutsis for their post-genocide crimes,<sup>133</sup> international connections will be relevant to explaining why this selectivity happens, but often it is focusing on intra-state conditions that will explain why this selectivity *matters*. In many of these situations, overlooking the repression of state agents while prosecuting their opponents further concretizes internal cleavages between political, tribal, ethnic and religious groups

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<sup>133</sup> David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014) 75-76.

that lie at the heart of the precipitating conflict, particularly in postcolonial Africa.<sup>134</sup> Moreover, it imbricates ICL in pre- and post-conflict patterns of widespread, state-sponsored criminal repression of those same groups. While the phenomenon of inter-situational selectivity is significant, a thorough and meaningful analysis of selectivity must take stock of ICL's entanglement with domestic power structures – including economic relationships – and its consequences for the local marginalized populations.

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<sup>134</sup> Christopher W Mullin and Dawn L Rothe, *Blood, Power and Bedlam: Violations of ICL in Postcolonial Africa* (New York: Peter Lang, 2008) 77.

## Chapter 5: Legal Standing and the Administration of the Global Legal Order

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[I]t is sometimes through supporting the Third World state and at others, by critiquing it, that the interests of Third World peoples may be advanced.

Antony Anghie & Bhupinder Chimni<sup>1</sup>

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<sup>1</sup> Antony Anghie & Bhupinder S Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 Chinese J Int'l L 77 at 83.

## I. INTRODUCTION

The preceding chapters have established several key elements of the argument. A consistent theme has been to rethink contemporary understandings and practices of international crime with a view to broadening the application of international criminal law. Chapter One addressed the underlying biases that resist expanding the definition of international crime to include crimes such as apartheid. Chapter Two then offered a normative justification for turning the discipline's attention to broader understandings of violence, and in particular to the economic context of international crime. The third chapter offered a normative justification for extraterritorial punishment, one that explained how national and international courts could justifiably punish international crimes that happen in foreign states. In rehabilitating the complaint of 'selectivity', Chapter Four argued that international criminal law needed to be applied more broadly, against not just certain parties to a conflict, but *all* parties to a conflict. There should, on this account, be much *more* international criminal law (ICL) than is currently practiced.

Yet, as Chapter 4 shows, this has not been the case: selectivity of various types is practiced or enabled in virtually every court that engages with ICL. And, as argued in Chapter 3, some restrictions are perhaps welcomed by states wary of ICL's effects on their sovereignty. Lurking throughout the preceding chapters has been the question of international law's checkered history. For all its salutary benefits and its noble aspirations, international law has also been marred by histories of exceptionalism, of marginalizing the poorer and less powerful states of the world, and of enabling instead of restraining horrific long-term abuses of colonialism and apartheid. At times it has been an emancipatory project, but as Louise

Arbour, former Chief Prosecutor of the ICTY and ICTR has warned, often even its best intentions are overwhelmed by complexity and contradiction.<sup>2</sup>

This dissertation has been concerned with the criminal law nature of international criminal law (ICL). Each preceding chapter has adopted the ethos of a critical criminal normativity, seeking to reconceptualize Third World Approaches to International Law (TWAIL) in terms of criminal law theory. Running through these chapters has been the shared concern that to date TWAIL has paid too much attention to ICL as embedded in the problematic histories of international law generally, and not enough attention to ICL as part of the field of criminal law. The dissertation so far has analyzed the normative foundations of the law, reconsidering the idea of ‘legal engineering’, the definitions of international crime, the basis for extraterritorial punishment, and the normative coherence of specific practices and enforcement.

This chapter, however, more directly considers ICL’s oscillation between international and criminal law, specifically taking up the modes by which international criminal tribunals establish or assert their jurisdiction in relation to domestic states. Chapter 3 noted that the interest-based justification of punishment was in essence an argument for a form of universal jurisdiction, one that was balanced against an interest in sovereignty. The question in this chapter concerns the assertion of jurisdiction by international courts (as opposed to extraterritorial *national* institutions). This chapter thus takes a step back from the expansionist theme. Having established a *prima facie* justification for the general power of

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<sup>2</sup> “Having worked in the human-rights field internationally, I now find it incredible how the West seems to be absolutely incapable of hearing what it sounds like to the rest of the world – a total disconnect, in the promotion of what it rightly believes are universal values, while being completely oblivious to the fact that others don’t take this at face value as being a good-faith pursuit of universal goods. It just doesn’t work.” Quoted in Douglas Saunders, “Why Louise Arbour is Thinking Twice” *The Globe and Mail* (CAN) online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)> (28 March 2015).

extraterritorial jurisdiction, this chapter turns to the authority of specific institutions to exercise that power. The existence of a general justification only says that *some* entity may be able to exercise the power. Why, for example, is the ICTY justified in adjudicating international crimes arising from the breakup of the former Yugoslavia, and the Control, Ethics and Disciplinary Body of the Union of European Football Associations (UEFA) not? The general power is an abstract concept but, as Duff notes, any body claiming the right to exercise that power must satisfy some additional *preconditions* as an entity.<sup>3</sup>

This idea of preconditions acts as a limiting concept, occupying an intermediate position in the sets of requirements that must be satisfied before punishment is levied. The most abstract stipulations concern the general justification for punishment, which exists independent of any institution; the most concrete address the trial itself, and the particular facts, rules and people involved in the adjudication of distinct cases with their specific complainants and defendants. Somewhere in between lies the question of whether a specific body is generally permitted to adjudicate a certain set of cases.

This chapter takes at its starting point Duff's conception of preconditions for punishment. The first part outlines the main preconditions of capacity, intelligibility, and standing. It explains the significance of these concepts and the challenges they may pose in relation to the exercise of extraterritorial jurisdiction over international crimes. The question of standing – that of an international court's relationship to a particular situation, and its right to exercise jurisdiction over it – is highly contested in ICL.

In this vein, the second part of the chapter pushes the analysis of preconditions further. It examines the question of standing in greater detail by considering the ICC's

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<sup>3</sup> Antony Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001) 179ff.

attempts to secure jurisdiction over Omar al-Bashir, President of Sudan. I argue that the ICC lacks jurisdiction because al-Bashir has immunity under international law, and the ICC's legal position is incorrect. Though this analysis is a fairly doctrinal analysis of the law, this chapter is not simply about whether one court in one case has acted correctly; rather it is a reflection on how the court's decision-making has been defended and contested. While the al-Bashir case points at ways in which an extraterritorial court might fail to meet the preconditions of punishment, the real importance of the case is how it ties together various threads articulated in the preceding chapters. It considers, for example, how Third World knowledge is conceptualized or recognized in legal scholarship and broader debates about ICL. It also involves examination of the uneasy co-existence of the emancipatory potential of ICL alongside the politicization and sometimes the instrumentalization of ICL. It refocuses on the centrality of sovereignty as an interest to be considered in punishment, as well as the last chapter's attention to the role of ICL in both amending and enforcing international and domestic inequalities and insecurity.

In this way, the al-Bashir case is a site for legal contestation, but also for reflection on what it means to adopt a TWAIL perspective on ICL, and especially the utility of formalism as legal critique and its compatibility with TWAIL. In arguing against the ICC's claim over al-Bashir, this chapter adopts a relatively doctrinal analysis to the law. Putting the legal correctness of the argument aside, the question that lies beneath this analysis is how such a formalist approach fits with the critical methodology claimed in Chapters One and Two. Parts II and III of this chapter offer a doctrinal analysis of the legal issues at stake, and point at the possible violation of the precondition of standing by the ICC. Part IV revisits this formalist approach as the basis for exploring the double standards and inequities that arise in

the enforcement of the law, and to express specific TWAIL anxieties about the practice and development of ICL. Many of these issues have been brought to light in previous chapters.

First, there are concerns about the role of the Security Council in the assignment and enforcement of international criminal jurisdiction. More generally, this amounts to an apprehension about the formalization inside ICL of the hierarchical relationships between states that exist outside of ICL. Second and relatedly, there is a concern that the application of ‘international’ law obscures the internal biases and false neutrality of both the law itself, and the mechanisms that adjudicate and enforce it. As argued in relation to the definitions of crime, this is also reflected in the treatment of sub-altern perspectives on the law: that they are tainted, political, or purely self-interested. In the al-Bashir case, less powerful states (and their peoples) are excluded from the development of international law, and arguably even said to lack the capacity to shape the law.

Third, it expresses unease about the reshaping of law that is implied by the ICC’s arguments. In keeping with this dissertation’s dual focus on international and criminal law, this unease arises in respect of both public international law norms, as well as concepts of criminal law. Fourth, there is the disquiet initially expressed in Chapter Two that ICL is tasked with doing too much, and that its ineffectiveness becomes an excuse for inaction on behalf of the international community to work towards alternate responses to international crime.

Finally, there is the worry that the legally problematic pursuit of al-Bashir not only upends international law with little benefit – because of the difficulty in arresting al-Bashir – but that it gives states pause – or a legal excuse – to reconsider their commitment to ICL. Returning to the points made in Chapter 4 about intra-state effects, there is concern that the

ICC position becomes an excuse for states to not cooperate with or otherwise obstruct the Court. This, of course, risks reducing the protections offered by the Court to the ordinary people that bear the brunt of international crime's abuses.

Thus as much as this chapter is about correcting legal mistakes, it is also a reflection on what it means to engage in critical legal scholarship. Whereas doctrinal approaches to international law may concretize a problematic substantive law, they also serve to expose the faux rationality of particular norms as well as the double standards of that law's enforcement. As much as TWAIL may seek to reform international law, it is wary of the creation of the international legal exception that under the guise of 'reform' is merely the introduction of double standards in the application of the law that often diminishes the interests of Third World states and peoples. The law is neither fully reformed, nor is the novel exception routinized to apply to all states. In this vein, this chapter shows how a formalist approach may, in certain circumstances, constitute a 'critical' criminal normativity.

## II. PRECONDITIONS OF PUNISHMENT

Before a court may exercise its power to punish, certain preconditions must be satisfied. Intuition suggests that there is something amiss with allowing a UEFA tribunal that ordinarily adjudicates the conduct of players on a soccer pitch to also determine whether a political leader in Belgrade bears any responsibility for the deaths of thousands of unidentified people in north-western Bosnia. Questions of skills, training, expertise and standing all come into play, and it is worth briefly exploring these questions in order to better understand the way in which international criminal law is and ought to be practiced.

## A. Capacity

Duff identifies three initial preconditions. Addressing the most obvious problem with UEFA's purported jurisdiction over international crimes, the first preconditions concern whether the judicial authority in question has the *capacity* to try accused persons. For example, the court must have the logistical capacity to engage in an international criminal trial. This includes the ability to properly investigate, secure evidence, and house witnesses, accused persons, and where appropriate victims. In many cases this will require a working relationship with the territorial state or authority, which can raise its own set of cooperation problems. Even in situations where there is a cooperative relationship, however, the other issues of logistical capacity remain. In a way, the logistical burden is tremendous, given the complexity of evidence-gathering in war-torn regions, the lengths of trials, and often sensitive if not volatile political context within which these activities take place.

Relatedly, the extraterritorial court must have sufficient familiarity with and expertise in the substantive law being applied. International criminal trials are relatively unique in domestic and international criminal law, and require the understanding and application of complex and often contradictory laws. This means not only that there must be judges who are capable of managing extremely lengthy and complex trials, but that there be comparably skilled prosecutors and investigators, as well as defence counsel and amici curiae. The complexity of trials and the scale of the allegations often levied against the accused imply the importance of adequate funding for the tribunals, their staff, and prosecuting and defence counsel. The officers of the court must, of course, also have fidelity to this law, adhering to its prescriptions and fundamental requirements.

## B. Intelligibility

Of course, a court must be able to recognize, affirm and ensure the fair trial rights of the accused. Each legal system will have its own particular version, but at a minimum the court should be able to give effect to the principles of Article 14 of the ICCPR.<sup>4</sup> Part of the fair trial aspect can be observed in Duff's admonition that the criminal law must be *intelligible* to the accused. The accused must be able to understand the rules, procedures and crucially the values behind the process of punishment. Moreover, this must be more than just recognition of the fact that these rules, procedures and values exist, and are being used to judge that individual; it must be an *understanding*, not merely recognition of coercion.<sup>5</sup> This is an important burden for courts. While the defendant will likely have good familiarity with the facts that are contested in international criminal trials, she is unlikely to have as good a grasp of the applicable law. Indeed, many experts often cannot agree on the law within a tribunal, and even different institutions will disagree with one another on the provenance or pedigree of foundational concepts.<sup>6</sup>

Putting confusion about the appropriate law and interpretation aside, there is a further danger that courts must be especially aware of in extraterritorial situations: the language of

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<sup>4</sup> Which deals with fair trial standards.

<sup>5</sup> Duff, *supra* note 3 at 189 – 190.

<sup>6</sup> As with the doctrine of joint criminal enterprise (JCE). The ICTY defined JCE as requiring in part a common plan to commit a crime; all variants of JCE were said to be part of customary international law. *Prosecutor v Duško Tadić*, IT-94-1-A, *Appeal Judgement* (15 July 1999) paras 227, 220. The Special Court for Sierra Leone, however, declared that the common plan did not have to include the commission of a crime as the common purpose. *Prosecutor v Brima, Kamara and Kanu*, SCSL-04-16-A, *Judgment* (22 Feb. 2008) para 80. See also Wayne Jordash & Penelope Van Tuyl, "Failure to Carry the Burden of Proof" (2010) 8 JICJ 591. The Extraordinary Chambers in the Courts of Cambodia stated that the most expansive definition of JCE was not a part of customary international law at the time the ICTY declared it to be. *Prosecutor v NUON et al*, Case No. 002/19-09-2007/ECCC/TC, *Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)* (20 May 2010) paras 77 – 83, and *Decision on the Applicability of Joint Criminal Enterprise* (12 Sept. 2011) para 38.

the law has often been a source of problems.<sup>7</sup> Different cultural understandings of apparently self-evidence concepts such as time and geography have presented great difficulty with affirming the reliability of witness testimony at ICTs. This leads, for example, to concerns about the quality of evidence received by ICTs, and the reasoning underlying many convictions. The problem is severe enough to lead one commentator to suggest reconceptualizing the ‘reasonable doubt’ standard of proof in more permissive terms.<sup>8</sup>

Finally, in addition to issues about communication, understanding, and evidentiary burdens, there is the concern that much of the substantive law of ICL is based on narrow ranges of Western practice. In other words, so much of the *law* of ICL is not truly international at all, but almost completely Western (and in fact largely American) in its source.<sup>9</sup> Thus not only is there disagreement about what substantive law is to be applied, there is concern that the law that is applied is parochially reliant on European traditions that may not have the same cultural relevance when applied in non-Western crimes. This dulls both the effectiveness of the proceedings within the courtroom as well as their expressive value outside the trial setting. Clearly then, a court that lacks the capacity to administer an international criminal trial will not satisfy the preconditions of punishment.

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<sup>7</sup> Diane Marie Aman, “A Janus Look at International Criminal Justice” (2013) 11 *Northwestern J Int’l Hum Rts* 5, 12–13; Nancy Amoury Combs, *Fact-finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

<sup>8</sup> Combs, *ibid.*

<sup>9</sup> Roger Phillips, “Kevin Jon Heller: The Nuremberg Military Tribunals and the Origins of International Criminal Law” (2012) 10 *JICJ* 492 at 494 – 495.

### C. Standing

Another precondition states that the punishing authority must have the standing to judge the alleged criminal. Criminal courts claim a universality (at least within a defined political community) that UEFA's disciplinary body cannot. An interest-based explanation of punishment identifies how this standing is derived – through its affirmation and balancing of important interests and associated values. Yet in a way, this question of standing is not precondition so much as it is a *post*-condition. That is, it is the practice of punishment in the past that affirms the ability of the court to give effect to these values, and thus the suitability of the court to continue to punish in the future. In other words, at some point there must be a first mover, a leap of faith that is to be later confirmed; what is assumed for a nascent international criminal tribunal subsequently becomes a precondition of punishment.

The ad hoc tribunals for Rwanda and the former Yugoslavia are examples of this process. At the time, international criminal law had largely been in abeyance since the post-war military tribunals. There was a great deal of jurisprudence to be applied, but not much in the way of institutional structures or political faith in the need or viability of future international criminal tribunals. And while it can perhaps fairly be suggested that the establishment of the ad hoc tribunals functioned as *mea culpas* for the international community's failure to exercise more robust, preventive measures in the conflicts themselves, those tribunals did offer notable successes. It has famously been said that the ICTY needed built up its credibility over time, through careful, step-by-step maneuvers.<sup>10</sup> This included gaining diplomatic trust, but also (and importantly for this particular analysis) focusing on so-called 'low-level' offenders – those individuals who directly committed

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<sup>10</sup> Louise Arbour, "Progress and Challenges in International Criminal Justice" (1997) 21 Fordham Int'l LJ 531, at 537.

crimes of murder, torture, sexual assault and so on but were low-ranking members of the official hierarchy – in order to demonstrate its relevance, viability and indeed propriety.

The ICTY was followed by a tribunal for Rwanda,<sup>11</sup> and those tribunals helped lay the groundwork for the ICC. As a permanent tribunal with broad jurisdictional remits, this precondition is quite relevant to assessments of the ICC's ongoing work, and the Court is thus more vulnerable to critiques in relation to the question of standing. Whereas the ICTY and ICTR explained their jurisdiction through the Chapter VII powers of the Security Council, the ICC is a treaty-based court that – like the so-called hybrid or mixed tribunals<sup>12</sup> – depends on state consent<sup>13</sup> for its jurisdiction. The centrality of standing has long been recognized by the OTP. When challenged as to why the ICC was pursuing al-Bashir and investigating Sudan, but neglecting to prosecute former US President George W Bush for alleged crimes in Iraq or Israel for its alleged crimes in the occupied Palestinian territories, then-Chief Prosecutor Ocampo explained that the Court lacked jurisdiction over these states.<sup>14</sup> In Ocampo's explanation, while the court had the power to adjudicate crimes, it did not have the authority to investigate all situations or crimes because it lacked jurisdiction.<sup>15</sup>

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<sup>11</sup> Although the ICTR was vulnerable again to the criticism that it was a low-risk intervention that sought to deflect attention from preceding international inaction that might have prevented the genocide in the first place.

<sup>12</sup> These tribunals include the Special Court of Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), and the Special Panels of the Dili District Court (East Timor Tribunal).

<sup>13</sup> One exception being the STL, which operates with the similar obligations to cooperate as the SCSL and ECCC. However, unlike other mixed tribunals, the STL was created under Chapter VII authority because Lebanon itself would not ratify the arrangement of the tribunal. Göran Sluiter, "Responding to Cooperation Problems at the STL" in Amal Alamuddin, Nidal Nabil Jurdi, and David Tolbert, eds, *The Special Tribunal for Lebanon: Law and Practice* (Oxford: Oxford University Press, 2014), 134, 138 – 140.

<sup>14</sup> See Interview of Luis Moreno-Ocampo by David Frost (20 June 2008) on *Frost Over the World*, Al-Jazeera English, and Interview of Luis Moreno-Ocampo (19 March 2009) on *Riz Khan*, Al-Jazeera English (both available online at <[www.youtube.com/user/AlJazeeraEnglish](http://www.youtube.com/user/AlJazeeraEnglish)>).

<sup>15</sup> *Ibid.*

In the ICC regime, states declare their consent to the terms of the *Rome Statute* either by ratifying the treaty, or on an ad-hoc basis.<sup>16</sup> Subject to admissibility challenges (usually on the basis that the state has started complementary proceedings) ratification in theory is consent to the Court's exercise of jurisdiction, whether it is initiated by the state itself or another state party referring a case,<sup>17</sup> or the Office of the Prosecutor.<sup>18</sup> There also exists a Security Council referral power,<sup>19</sup> which to date has been used to grant the ICC jurisdiction over the objections of the territorial state. The scope of that referral power is deeply contested, and forms the basis for the following analysis, and the broader reflections described at the outset of this chapter.

### III. THE REFERRAL OF AL-BASHIR

The debate surrounding the referrals of Sudan<sup>20</sup> and Libya<sup>21</sup> to the ICC is a profound demonstration of the uncertainties and contradictions of ICL. Through its referral powers, the Security Council empowered the Office of the Prosecutor (OTP) to investigate the domestic conflicts in those states, even though neither had ratified the *Rome Statute*; the OTP responded with indictments against, *inter alia*, Omar al-Bashir and Muammar Gaddafi – the leaders of both countries. Controversy has ensued because these referrals involve the application of jurisdiction to non-consenting states, attack the special, all-encompassing

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<sup>16</sup> Art. 12(3), *Statute of the International Criminal Court*, 2187 UNTS 90 (1998) [*Rome Statute*].

<sup>17</sup> Art. 14, *ibid.*

<sup>18</sup> Art. 15, *ibid.*

<sup>19</sup> Art. 13(b), *ibid.*

<sup>20</sup> UNSC Res 1593 at UN Doc. S/RES/1593 (31 Mar. 2005).

<sup>21</sup> UNSC Res 1970 at UN Doc. S/RES/1970 (26 Feb. 2011).

immunities of heads of State under international law, and the lack of agreement as to the legal basis for these extraordinary maneuvers.

With Gaddafi's death during the Libyan civil war of 2011, focus has shifted to al-Bashir who, despite being indicted in 2009, remains free.<sup>22</sup> While many feel al-Bashir *should* be prosecuted for his alleged role in the crimes committed against Darfuris,<sup>23</sup> there is no agreement on why the ICC is competent to do so. One commentator says the authority stems from the Security Council's Chapter VII referral, not customary international law (CIL),<sup>24</sup> another that the authority is found in CIL, not Chapter VII,<sup>25</sup> and, the Pre-Trial Chamber (PTC) argues that both rationales apply.<sup>26</sup> This confusion has bred indeterminacy and debate, and highlighted the concerns noted in the introduction to this chapter: that the hierarchies of international law are imported into ICL; that international law is neutral, and Third World opposition to the PTC is a political, not legal position; that basic principles of international and criminal law are being upended; and that the ICC position reduces the protection offered by ICL by giving states legally defensible excuses to not cooperate with the Court.

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<sup>22</sup> In July 2015, South Africa's failure to arrest al-Bashir became the subject of renewed debate.

<sup>23</sup> Including the suggestion that the Government of Sudan sought legal advice on how to carefully calibrate its military activities in Darfur in order to fall just shy of satisfying the *dolus specialis* of genocide. Mark Osiel, *Making Sense of Mass Atrocity* (Cambridge: Cambridge University Press, 2009) at 137 (citing confidential interviews conducted by the author).

<sup>24</sup> Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" (2009) 7 JICJ 333.

<sup>25</sup> Paola Gaeta, "Does President Al Bashir Enjoy Immunity From Arrest?" (2009) 7 JICJ 315.

<sup>26</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 at Pre-Trial Chamber I, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (4 March 2009) [*First Bashir Warrant*], and *Second Decision on the Prosecutor's Application for a Warrant of Arrest* (12 July 2010) [*Second Bashir Warrant*].

## A. Immunities, Treaties, and Customary International Law

The controversy and indeterminacy around Sudan and Libya is the product of two separate aspects of the referrals – the referrals themselves, and the subsequent indictments of al-Bashir and Gaddafi. These two facets independently affect distinct rules of customary international law. The first and familiar rule protects states from being bound by agreements they did not consent to. The foundational principle with respect to the law of treaties is that of *pacta tertiis nec nocent nec prosunt*—treaties neither create obligations upon nor grant rights to third parties.<sup>27</sup> This customary international law rule is codified in Article 34 of the Vienna Convention of the Law of Treaties,<sup>28</sup> which is considered to be a restatement of customary international law.<sup>29</sup> Article 35 of that convention adds that obligations only arise for third party States if those States expressly accept the obligation.<sup>30</sup> Articles 39 and 40 specify that only parties to a treaty may amend it, and only after consultation with other parties. Neither Sudan nor Libya (at the time of the referrals) had ratified or otherwise consented to the *Rome Statute*'s terms. As well, the Security Council is not a party to the

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<sup>27</sup> See *Certain German Interests in Polish Upper Silesia*, Merits, (1926) PCIJ (Ser A) No 7 at 29 (“A treaty only creates law as between the States which are parties to it”).

<sup>28</sup> *Vienna Convention on the Law of Treaties*, 29 May 1969, 1155 UNTS 331 at 333, 8 ILM 679 [VCLT].

<sup>29</sup> Alexander Orakhelashvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions” (2005) 16 EJIL 59 at 67 (“The law of treaties codified in VLCT 1969 at also embodying customary law, applies to the constituent instruments of international organizations, such as the UN Charter); Evan Criddle, “The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation” (2004) 44 Va J Int'l L 431 at 433 (that the Vienna Convention on the Law of Treaties states customary international law and is internationally authoritative). See also Mark E Villiger, *Customary International Law and Treaties*, 2d ed (Leiden: Martinus Nijhoff, 1997) at 75 – 76 (that the International Law Commission was set the task of “recasting of existing customary law into the written form”) and Malgosia Fitzmaurice, “Third Parties and the Law of Treaties” (2002) 6 Max Planck YBUNL 37 at 105.

<sup>30</sup> While insisting that Sudan should cooperate with the ICC, the Security Council referral notes “that States not party to the *Rome Statute* have no obligation under the Statute”. See SC Res 1593 at *supra* note 20.

*Rome Statute*, nor has it consulted with the Assembly of State Parties on this issue.<sup>31</sup> Nor do the provisions of the *Rome Statute* even permit the alteration of its terms by the Security Council, let alone in a way that would somehow make Article 27(2) applicable to non-States Parties.<sup>32</sup> Sudan would therefore seem to have no obligations—to arrest al-Bashir or do anything else—under the *Rome Statute*.

The second customary law rule protects heads of States in particular. The indictment of al-Bashir (and of Gadhafi, until his death) is controversial both because Sudan is not a party to the *Rome Statute*, and because al-Bashir – as Sudan’s sitting head of State – has both functional and personal immunities. While the Sudanese constitution allows for his local prosecution under certain conditions,<sup>33</sup> he remains presumptively protected from all foreign criminal jurisdiction.<sup>34</sup> This immunity applies whether the head of state is traveling or not, and whether abroad for government business or private purposes.<sup>35</sup> For this reason, head of state immunity is more comprehensive than diplomatic immunity or ordinary functional

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<sup>31</sup> To the extent it might be argued that it fits with the principles and purposes of the UN to bind Sudan to the terms of the *Rome Statute* in violation of customary and treaty law, it should be noted that the drafters of the VCLT agreed that “the present Convention will promote the purposes of the United Nations set forth in the Charter”. See the 6<sup>th</sup> and 7<sup>th</sup> recitals in the Preamble to the VCLT, *supra note*28.

<sup>32</sup> See Héctor Olásolo, *The Triggering Procedure of the International Criminal Court* (Leiden: Martinus Nijhoff, 2005) at 97 (“[N]o de jure power to alter the jurisdictional scheme of the [*Rome Statute*] has been granted to the Security Council by the [*Rome Statute*] or [UN Charter]”).

<sup>33</sup> Al-Bashir can lose his immunity if three-quarters of the National Legislature of Sudan votes to charge al-Bashir before the Sudanese Constitutional Court. If convicted by that court, he would be declared to have forfeited his office, thereby losing his international immunities as well. See 2005 *Interim Constitution* (Sudan), art 60.

<sup>34</sup> Roseanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008) 169; and Dapo Akande, “International Law Immunities and the International Criminal Court” (2004) 98 AJIL 407 at 410.

<sup>35</sup> The ICJ described the scope of the immunity as follows: “A head of state enjoys in particular ‘full immunity from criminal jurisdiction and inviolability’ which protects him or her ‘against any act of authority of another State which would hinder him or her in the performance of his or her duties.’” See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* Judgment, (2008) ICJ Rep 177 at 236-237 at para 170.

immunities. This expansive immunity recognizes the functions of heads of state, which include high-level diplomacy, negotiations, and the pacific settlement of disputes. These are more extensive and all-encompassing functions than those held by ordinary diplomats,<sup>36</sup> who often perform much narrower diplomatic tasks, let alone former heads of states who have no official role at all. In this light, part of the rationale for observing head of state immunity is that prosecution of such high-ranking officials may well jeopardize the structure and functioning of the state.<sup>37</sup> This is not to say that there is *no* rationale for potentially abrogating the immunities of sitting heads of states, only that—as recognized by the Institut de droit international<sup>38</sup>—there are important countervailing reasons for both preserving them and distinguishing incumbents from *former* heads of states, even when the persons involved are accused of serious international crimes.

Combining these two rules – on treaties and immunities – the immunities of non-States Parties are arguably unaffected by the *Rome Statute* rules on immunities.<sup>39</sup> These rules are not merely the product of treaties or even international comity. According to the

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<sup>36</sup> Heads of states can have multiple constitutional and political functions beyond the symbolic embodiment of sovereignty. See Hazel Fox, *The Law of State Immunity*, 3d ed (Oxford: Oxford University Press, 2013) at 542 (noting that heads of states have “full powers” of the State, including “the capacity to represent and act for the State”). heads of states have been described as having an “exceptional position” amongst those who may claim some sort of immunity. See Lassa Oppenheim & Herscht Lauterpacht, eds, *International Law: a Treatise*, 8th ed (London: Longmans, Green, 1955) at 358. Under the terms of the Interim National Constitution, *supra* note 33, Bashir is both the head of state and the Government of Sudan, and has important constitutional and political roles to play (as does arguably his First Vice-President).

<sup>37</sup> Paola Gaeta, “Official Capacity and Immunities”, in Antonio Cassese, Paola Gaeta & John RWD Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford: Oxford University Press, 2002) 975 at 988.

<sup>38</sup> The Institut’s 2009 resolution on immunity affirmed the protection of personal immunities in the face of alleged international crimes, even as it encouraged States to consider waiving those same protections. See Third Committee, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Institut de droit international, Napoli Session (2009) <[www.idi-iiil.org](http://www.idi-iiil.org)>.

<sup>39</sup> Gennady M Danilenko, “ICC Statute and Third States” in Cassese, Gaeta & Jones, *supra* note 37, vol 2 at 1871 at 1885.

International Court of Justice (ICJ),<sup>40</sup> the International Law Commission,<sup>41</sup> national authorities,<sup>42</sup> and leading scholars,<sup>43</sup> the special protections of head of state immunity arise under customary international law. Even commentators who insist that the ICC *can* exercise jurisdiction over al-Bashir recognize that his immunity is a feature of customary international law.<sup>44</sup> It is therefore no ordinary rule of international law, but an important and widely recognized one.

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<sup>40</sup> *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), Judgment, 2002 ICJ Reports 3 at 21–22 (paras 53–55) (that the functions of Ministers for Foreign Affairs grants them the same immunities as heads of state under customary international law, and they thus enjoy “full immunity from criminal jurisdiction and inviolability”) and 24 (para 58).

<sup>41</sup> International Law Commission, Preliminary report on immunity of State officials from foreign criminal jurisdiction, Special Rapporteur Roman Anatolevich Kolodkin, UNGAOR, 60th Sess, UN Doc A/CN.4/601 (29 May 2008) paras 30–34 (that the scope of immunities are determined almost exclusively by reference to customary international law).

<sup>42</sup> John R Crook, “Contemporary practice of the United States relating to international law: State jurisdiction and immunities: US Brief suggests Pope’s immunity as a head of state” (2006) 100 AJIL 219 at 220 (quoting the US State Department: “The doctrine of head of state immunity is applied in the United States as a matter of customary international law”); and Gaddafi (Court of Cassation, France) (2001) 125 ILR 490 at 509 (“In the absence of contrary international provisions binding on the parties concerned, international custom precludes the institution of proceedings against incumbent heads of State before the criminal jurisdictions of a foreign State.”).

<sup>43</sup> Antonio Cassese, “When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case” (2002) 13 EJIL 853 at 864–866 (explaining that the “customary rules on personal immunities” preclude asserting criminal jurisdiction over incumbent heads of states); Akande, *supra* note 34 at 409 (“These immunities are derived, firstly, from the customary international law of state immunity... Secondly, under customary international law and applicable treaties, diplomatic agents of states are entitled to immunity from the criminal and civil jurisdiction of the foreign state to which they are accredited.”); Phillip Wardle, “The Survival of head of state Immunity at the International Criminal Court” (2011) 18 Aust Int’l LJ 181 at 185 (describing “the immunity enjoyed by incumbent heads of state under customary international law”); Steffan Wirth, “Immunities, Related Problems, and Article 98 of the *Rome Statute*” (2001) 12 Crim LF 429 at 429 – 430 and 443 (that personal immunities are derived from the customary law of state immunity, and that “traditional customary international law doctrine” recognizes immunity even in the face of core crimes); Yasmin Q Naqvi, *Impediments to Exercising Jurisdiction Over International Crimes* (Leiden: TMC Asser Press, 2009) at 230; and, Fox, *supra* note 36, at 539.

<sup>44</sup> Including both Gaeta and Akande. See Gaeta, *supra* note 25 at 317 (“The proposition according to which, under customary international law, incumbent heads of state, when facing domestic charges of international crimes are entitled to immunity from arrest and from criminal prosecution in the territory of foreign states appears undisputed.”); and, Akande, *supra* note 24 (that while head of state immunity is a rule of customary international law, it may be overcome by the Security Council binding a state to the *Rome Statute*’s treaty waiver of immunity).

Yet despite its extensive nature, head of state immunity is neither absolute nor permanent. The immunity is non-existent for *former* heads of state: once an individual leaves office, she can be prosecuted for international crimes (but not official acts) committed whilst in office.<sup>45</sup> More importantly, the immunities of a sitting head of State can be waived by the state concerned. In other words, the immunities belong to the office and not the individual.<sup>46</sup> These waivers can be ad hoc, or – as in the case of Article 27(2) of the *Rome Statute* – ongoing.<sup>47</sup> Recognizing the competing rationales for preserving immunity and preventing impunity, the Institut de droit International first affirmed the importance of immunities, but then recommended that states consider waiving those immunities as appropriate.<sup>48</sup>

## **B. The Legal Nature of Security Council Referrals**

Having established these basic principles, we must then consider how they intersect with the modes by which the ICC has claimed jurisdiction. Al-Bashir is being investigated in relation to crimes allegedly committed in Darfur, which were referred to the ICC through Article 13(b) of the *Rome Statute*. The PTC did not specify exactly how Resolution 1593 might bind Sudan to the *Rome Statute* and remove al-Bashir’s immunity, but there are three possibilities. One is through the delegation of the Security Council’s Chapter VII powers to

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<sup>45</sup> The immunity becomes the same as the limited functional immunity that protects most officials with immunity. See Van Alebeek, *supra* note 34 at 183; and Cassese, *supra* note 43.

<sup>46</sup> The *Vienna Convention on Diplomatic Relations*, 500 UNTS 95 at art 32 provides for the right of a State to waive the immunities of its own official(s).

<sup>47</sup> Article 27(2): “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” *Rome Statute*, *supra* note 16.

<sup>48</sup> *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, *supra* note 38.

the ICC, which then exercises that authority to compel cooperation from Sudan. Another position is that the Security Council can bind Sudan to the *Rome Statute* and Article 27(2) through a Chapter VII resolution.<sup>49</sup> The third is deleting the immunity through direct action by the Council itself. The last two arguments both depend on Article 103 of the UN Charter, and so are considered together. The common problem with all three of these arguments is that the Charter does not allow the Security Council to extend the jurisdiction of the Court.<sup>50</sup> The ICC is not able to exercise any Chapter VII powers because it is not part of the UN, and the Security Council itself does not have the authority to revise customary international law in order to negate al-Bashir's immunity. Those rules—which include the UN Charter itself,<sup>51</sup> the customary law rules of immunities outlined above, and the law of treaties—severely restrict the Security Council's powers in this case and prevent the ICC from exercising jurisdiction over al-Bashir.

### 1. Delegation of Chapter VII Powers

First, even if it is assumed that the Security Council has the power to remove immunities, this does not necessarily mean that power may be delegated to the ICC. Assigning a discretionary decision-making power requires that the recipient is actually competent to receive the Chapter VII power in the first place.<sup>52</sup> According to the UN Charter,

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<sup>49</sup> Akande, *supra* note 24.

<sup>50</sup> Luigi Condorelli & Santiago Villalpando, "Can the Security Council Extend the ICC's Jurisdiction?" in Antonio Cassese et al, eds, Cassese, Gaeta & Jones, *supra* note 37 at 572.

<sup>51</sup> *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

<sup>52</sup> See Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Clarendon Press, 2000) at 247 ("[T]he competence of the Council to delegate Chapter VII powers to an entity does not in itself mean that the entity has the institutional competence to be able to exercise those powers") and 252–53 ("The delegation of Chapter VII

competent entities are: UN member states;<sup>53</sup> “regional arrangements” as contemplated by Article 51 of the Charter;<sup>54</sup> and, organs of the UN itself. The ICC does not fall into any of these categories: it is obviously not a UN member state, nor is it a regional arrangement under Article 51 of the Charter.<sup>55</sup> Yet even if the ICC were classified as a regional arrangement, the only Chapter VII powers that can be delegated to regional arrangements are military enforcement powers.<sup>56</sup>

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powers to a regional arrangement gives the arrangement—and thus its organs—the right to exercise those powers but not in disregard of its constituent treaty”).

<sup>53</sup> An example of such a delegation occurred in Operation Artemis, the French-led Interim Multinational Emergency Force to assist troops in the UN Mission in the Democratic Republic of Congo (MONUC) authorized by SC Res 1484 (30 May 2003).

<sup>54</sup> Such as NATO, whose operations in Kosovo were authorized by SC Res 1244 (10 June 1999).

<sup>55</sup> While there is no definition of “regional” in the Charter, the types of organizations considered to be regional agencies include the Organization of American States (OAS), the Arab League, and the African Union (AU). Along with the AU, OAS, and Arab League, Conforti includes the Commonwealth of Independent States (CIS) the Organization for Security and Cooperation in Europe (OSCE) the Western European Union (WEU) the Arab League, the Economic Community of West African States (ECOWAS) and the Organization of Eastern Caribbean States (OECS). Benedetto Conforti, *The Law and Practice of the United Nations*, 3d ed (Leiden: Martinus Nijhoff Publishers, 2005) 235–238. Only the AU, OAS and Arab League are unambiguously considered regional agencies. See Waldemar Hummer & Michael Schewitzer, “Article 52” in Bruno Simma, et al, *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002) 807 at 828. NATO may arguably be a Chapter VIII regional agency as well, notwithstanding its establishment as a collective security group. See Sarooshi, *supra* note 52 at 251. The ICC’s global reach may actually prevent it from recognition as a regional entity. See Hummer & Schweitzer, *ibid* at 822 (“Short of requiring ‘regions’ in the geographic sense, the requirement of some degree of spatial proximity among members of ‘regional arrangements’ cannot be dropped, since this would cause the decentralized system of the UN for securing the peace, which is embodied in these regional arrangements, largely to lose its effectiveness”). Parties to the Rome Statute are as diverse and geographically scattered as the UN membership. At the time of writing, 121 States Parties had ratified the ICC Statute. There were 33 States Parties from Africa, 25 from Western Europe (including Canada, New Zealand and Australia) 18 from the Asia-Pacific Region, and 27 from the Caribbean/Latin America. A complete and current list of States Parties is online <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>56</sup> As per Article 53(1) of the Charter. Sarooshi, *supra* note 52 at 247- 253. See also, Jurgen Bröhmer & George Ress, “Article 53” in: Simma et al, *supra* note 55 at 859–866, esp 860 (“[T]he majority of the member States assumed that the non-military sanctions were not enforcement actions which, from a systematic perspective (relation between Art. 53 and Art. 2(4)) is a conclusive interpretation”); Conforti, *supra* note 55 at 231-238; *Report of the Secretary-General, An Agenda For Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, UN Doc A/47/277 – S/24111 (17 June 1992) (regional organizations should be used for preventive diplomacy and peacekeeping); and, Christine Gray, *International Law and the Use of Force*, 2d ed (Oxford: Oxford University Press, 2004) at 282-294.

The only remaining way in which the ICC might receive Chapter VII powers is through recognition as part of the UN system. Yet there is no basis for the position that the ICC is either a principal or subsidiary organ of the UN. The *Rome Statute* was negotiated outside the auspices of the UN, and Articles 1 and 4(1) of that treaty state that the Court is permanent (i.e. it does not exist at the pleasure of the UN) and that it has “international legal personality”. The Preamble and Article 2 of the UN-ICC Agreement similarly recognize the independence of the Court from the UN system.<sup>57</sup> Unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL), the ICC is governed entirely by its Assembly of States Parties. While judicially independent, the ICTY and ICTR are able to exercise Chapter VII authority because they are organs of the UN that have been established by the Security Council and delegated such authority.<sup>58</sup> The authority of the ICC, on the other hand, is based on the consent of States to the *Rome Statute*<sup>59</sup> and is wholly independent of the organizational structure of the UN. Aside from the ability to refer matters to the Court, the only substantive role that exists for the UN is in relation to Article 16 suspensions of the ICC’s jurisdiction over a particular situation by the Security Council. Neither of these roles are mentioned or elaborated upon in the UN-ICC agreement, and neither the *Rome Statute* nor its drafting history make any clear provision for accepting or exercising Chapter VII

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<sup>57</sup> *Negotiated Relationship Between the International Criminal Court and the United Nations*, ICC – UN, ICC-ASP/3/Res.1 (4 October 2004).

<sup>58</sup> Sarooshi, *supra* note 52 at 107. The scope of this Chapter VII authority is limited in two ways. First, by the restrictions on subject-matter, personal, temporal and territorial jurisdiction contained within the ICTY and ICTR statutes. Secondly, by the purpose of Chapter VII delegation, as established by the tribunal statutes and the Security Council resolutions establishing the tribunals. See para 4 of SC Res 827 (25 May 1993) and Article 29 of the ICTY Statute; and, para 2 of SC Res 955 (8 November 1994) and Article 28 of the ICTR Statute.

<sup>59</sup> Either through ratification or ad hoc acceptance of ICC jurisdiction under Article 12(3) of the Rome Statute.

powers.<sup>60</sup> Similarly, the Security Council cannot supervise any other aspect of the Court's work, including the appointment of its personnel. Contrast this with the SCSL, where the Secretary-General is responsible, either solely or jointly with other members of the SCSL, for the appointment of judges, prosecutors and the registrar of the court.<sup>61</sup> The far-reaching independence of the ICC suggests that there is no basis on which to suggest the ICC can receive Chapter VII powers, including the supposed power to bind non-parties to the *Rome Statute*.

## 2. Article 103 and the Supremacy of the Security Council

The second set of arguments states that Sudan must comply with the Security Council referral because of Sudan's membership in the UN and Article 103<sup>62</sup> of the UN Charter.<sup>63</sup> Instead of Chapter VII powers flowing through the ICC, the obligation to arrest al-Bashir is directly imposed upon Sudan by the Security Council itself. According to this position the Security Council has "an almost unlimited power to take any measure it considers necessary

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<sup>60</sup> There are only two references to Chapter VII in the Rome Statute, in Articles 13 and 16. Security Council resolutions taken pursuant to either provision must be Chapter VII resolutions. The Chapter VII requirement certainly places procedural obligations on the Security Council (in terms of voting requirements per Article 27 of the UN Charter) as well as some sorts of obligations upon the Court (to either initiate or suspend certain types of proceedings). However, there is no indication in Articles 13 and 16 of the Rome Statute – or any other documents – that in passing Chapter VII resolutions the Security Council also transfers additional powers to the Court in order to enable it to meet those obligations. This would seem unnecessary in the context of Article 16, as no additional powers would be required for the ICC to stop doing what it is doing. As for referrals under Article 13, the language of the provision is permissive (i.e. the Prosecutor decides whether to proceed) and contains no further reference to the modification of existing ICC powers or procedures.

<sup>61</sup> See Arts. 2- 4 at 6 at 7 and 10 of the *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court For Sierra Leone* (16 January 2002).

<sup>62</sup> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." UN Charter, *supra* note 33 at art 103.

<sup>63</sup> *Ibid.*

to protect international peace”.<sup>64</sup> A more modest claim made in reference to al-Bashir is that while immunities limit Council action because of their customary character, a Chapter VII referral actually transforms the *Rome Statute* into a Security Council resolution, thus binding Sudan to the treaty and giving effect to the *Rome Statute*’s treaty-based waiver of its customary international law rights.<sup>65</sup>

At the same time, these commentaries have been contradicted by the ICJ,<sup>66</sup> ICTY,<sup>67</sup> and many other observers. De Wet, for example, acknowledges that while customary law is generally not a constraint on the Security Council, certain principles are; as such, the Security Council must still “respect the core elements of state sovereignty”,<sup>68</sup> which includes the principle of diplomatic immunity.<sup>69</sup> The claim that there is no hierarchy between treaty and custom conflicts with the ICJ decision in *Nicaragua*, which notes that even though treaty and customary norms may overlap in content, they are of distinct character and exist separately from one another in international law.<sup>70</sup> Intuitively, we can see that customary law norms –

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<sup>64</sup> Wirth, *supra* note 43 at 442; Michael Reisman, “Peacemaking” (1993) 18 Yale LJ 415; José Alvarez, “The Security Council’s War on Terrorism: Problems and Policy Options” in Erika De Wet, André Nollkaemper & Petra Djikstra, eds, *Review of the Security Council by Member States* (New York: Interstentia, 2003) 119 at 132 – 133 (treaty and custom are entangled, and it is hard to tell where one starts and the other begins; thus, if Article 103 overrides treaty norms, then it must override their customary law analogues as well); and, Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004) 188 (there is no hierarchy between treaties and customary international law, and thus if Article 103 prevails over one, it must over the other as well).

<sup>65</sup> Akande, *supra* note 24.

<sup>66</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Reports 1971 at 16 et seq.

<sup>67</sup> *Prosecutor v Tadić*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, (Oct. 2, 1995). paras 28 – 29 (“In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).”).

<sup>68</sup> De Wet, *supra* note 64, at 193 – 195.

<sup>69</sup> *Ibid* at 96.

<sup>70</sup> *Military and Paramilitary Activities in and against Nicaragua (Nic. v USA)*, 1986 ICJ Reports at 94 – 95.

precisely because they are *not* fixed in the same way as treaty norms – can organically evolve in ways that convention-based rules cannot. Moreover, as Orakhelashvili notes, the classical reading of Article 103 is that “its relevance consists in excusing Member States for their non-compliance with trade and economic agreements with states which are subjected to the mandatory sanctions imposed by the Security Council”.<sup>71</sup>

While this pecuniary-focused explanation has been relaxed in practice,<sup>72</sup> it has not challenged the distinction between treaties and custom, and thus does not change the argument that the UN referral cannot negate al-Bashir’s immunity. For example, the drafting history of Article 103 shows that, after considerable debate about whether the Charter should be supreme over all international law, the drafters made a deliberate choice to specify “international agreements” instead of “all international obligations”, elevating the Charter only above treaties and other international agreements.<sup>73</sup> This was affirmed by the General Assembly in the Declaration on Friendly Relations,<sup>74</sup> which distinguished between “obligations under the generally recognized principles and rules of international law” and “obligations under international agreements valid under the generally recognized principles

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<sup>71</sup> Alexander Orakhelashvili, “The Acts of the Security Council: Meaning and Standards of Review” (2007) 11 Max Planck YBUNL 143 at 149.

<sup>72</sup> As evidenced by the *Lockerbie* decision of the ICJ, in which the conflicting treaty obligation overridden by the Security Council was not one concerning trade but Libya’s obligation to either prosecute or extradite the alleged bombers of Pan Am Flight 107.

<sup>73</sup> See *Report of the Rapporteur of Committee IV/2* at as approved by the Committee, “Privileges and Immunities” in: Documents of the United Nations Conference on International Organization (San Francisco 1945) Volume XIII at 707. See also Rob McLaughlin, “The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising ‘All Necessary Means’” (2008) 12 J Conflict & Security L 389 at 400- 401; and Rain Liivoja, “The Scope of the Supremacy Clause of the United Nations Charter” (2008) 57 ICLQ 583 at 602- 605.

<sup>74</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV) UN Doc. A/RES/25/2625 at 121 at 124 (24 October 1970).

and rules of international law”, and clearly stated only the latter were superseded by the Charter.<sup>75</sup> This understanding has appeared in numerous declarations by the General Assembly<sup>76</sup> without contradiction, and has also been confirmed by the International Court of Justice (ICJ),<sup>77</sup> and numerous scholars writing on the UN<sup>78</sup> and the *Lockerbie* decisions.<sup>79</sup>

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<sup>75</sup> *Ibid.*

<sup>76</sup> See para 3 of the *Declaration on the Strengthening of International Security*, GA Res 2734 (XXV) UN Doc A/RES/25/2734 (16 December 1970); para 4 of the *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, GA Res 42/22 at UN Doc A/RES/42/22 (18 November 1987); and the *Preamble of Respect for the Purposes and Principles Contained in the Charter of the United Nations to Achieve International Cooperation in Promoting and Encouraging Respect for Human Rights and for Fundamental Freedoms and in Solving International Problems of a Humanitarian Character*, GA Res 55/101 at UN Doc A/RES/55/101 (2 March 2001).

<sup>77</sup> *Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt*, Advisory Opinion, 1980 ICJ Reports 73 at 89-90 at para 37 (all international organizations are bound by the rules of general international law). See also *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK) Provisional Measures*, [1992] ICJ Reports 3 at 15, para 39 (“in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention”).

<sup>78</sup> Aleksander Orakhelasvili, “The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions” (2005) 16 EJIL 59 at 69 (“Article 103 makes the Charter prevail over international agreements ... but this is not the case for the general international law, of which jus cogens is a part. The clear text does not support the opposite view, and those who wish to see Article 103 as making the Charter prevail over general international law cannot rely on evidence, but only on wishful thinking”); Derek Bowett, “The Impact of Security Council Decisions on Dispute Settlement Procedures” (1994) 5 EJIL 89 at 92 (“It is true that this reasoning confined to the supremacy of a Council decision over inconsistent treaty rights or obligations, because Article 103 is concerned solely with compatibility between Charter obligations and obligations ‘under any other international agreement’. Accordingly the reasoning would not apply where a member relied on its rights under general international law”); Geoffrey R Watson, “Constitutionalism, Judicial Review, and the World Court” (1993) 34 Harvard ILJ 1 at 25 (“Article 103 at relied on so heavily by the majority, provides that Charter obligations prevail over ‘other international agreements’; it does not provide that Charter obligations prevail over jus cogens and other forms of customary international law”); and, Judith Gardam, “Legal Restraints on Security Council Military Enforcement Action” (1996) 17 Mich J Int’l L 285 at 304 (“[T]he presence of Article 103 in the Charter has no impact on the need for the Security Council to comply with general international law... It is not necessarily inconsistent for the Security Council to override other treaty obligations of States while remaining bound itself by customary rules. States have differing treaty obligations but customary obligations bind all States equally”). See also August Reinisch, “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions” (2001) 95 AJIL 851 at 858; Luis Miguel Hinojosa Martinez, “The Legislative Role of the Security Council in Its Fight against Terrorism: Legal, Political, and Practical Limits” (2008) 57 ICLQ 333 at 345–347, and Antonios Tzanakaopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford: Oxford University Press, 2011) at 72 – 73.

<sup>79</sup> See McLaughlin, *supra* note 73, 402 (the *Lockerbie* decisions “generally assert that the Article 103 trump is exercisable over treaty law”); Christian Tomuschat, “The *Lockerbie* Case Before the International Court of Justice” (1998) 48 Rev - Int’l Comm Jurists 38 at 43- 44; and, Bernhard Graefrath, “Leave to the Court What

If the Charter only has primacy over international *agreements* and not customary international law, then Member States are not obliged to comply with all directions that emanate from the UN. Any Security Council directive to violate a principle of customary international law is *ultra vires*, because any obligation to comply “is conditional upon the Council’s compliance with the Charter principles: Article 103 cannot make a resolution which is unlawful under the Charter prevail over other legal norms”.<sup>80</sup> First made by Kelsen in 1950,<sup>81</sup> this point was repeated by the ICJ in the *Lockerbie* case<sup>82</sup> and reinforced by other commentators.<sup>83</sup> In other words, UN Member States are bound to comply with Security Council resolutions under Chapter VII, but only when those decisions themselves do not breach the boundaries of UN competence—such as norms of customary international law. This is a crucial restriction on the scope of obligations that can be imposed by the Security Council in al-Bashir’s case.

Resolution 1593 can be seen as violating customary international law and therefore *ultra vires* through its effects on the customary international law of immunities and through its effects on the law of treaties. As a treaty-based organization, the UN is bound by the law of treaties: it is restricted by the terms of the UN Charter, as well as the codified and customary international law rules of treaties. Those basic rules prevent the Security Council,

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Belongs to the Court: The Libyan Case” (1993) 4 EJIL 184, 198-199 (criticizing the Court’s initial Lockerbie decisions for their inadequate analysis of Article 103 as it relates to non-treaty matters).

<sup>80</sup> Orakhelashvili, *supra* note 78 at 69.

<sup>81</sup> Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (New York: Praeger, 1950) at 95 (“The meaning of Article of 25 is that the Members are obliged to carry out these decisions which the Security Council has taken in accordance with the Charter”).

<sup>82</sup> Cited with approval in *Lockerbie (Libya v UK) Provisional Measures* [1992] ICJ Reports 3 at 101- 102 (diss. op. El-Koshi, para 23) (not dissenting on this point).

<sup>83</sup> See, e.g., Bowett, *supra* note 78 at 92- 93.

the ICC, and any other international organization or group of States, from extending the jurisdiction of the Court or binding a non-State Party to any treaty without that State's consent. Depending on one's reading of the *Rome Statute*, these rules either completely preclude Security Council referrals of any non-State Party, or limit the ICC's powers in such cases.

Some may disagree with the characterization of the Darfur referral as *ultra vires*. Wood argues that the referral has not bound Sudan to the *Rome Statute*, but only imposed the provisions of that treaty, and therefore is not *ultra vires*.<sup>84</sup> Of course, as he acknowledges, the referral imposed on Sudan "obligations to cooperate that were at least as comprehensive as those it would have been if it had been a party".<sup>85</sup> Since this imposition of obligations is unaccompanied by the benefits that accrue through ordinary ratification of the *Rome Statute*, such as voting rights in the Assembly of States Parties, the distinction Wood draws is more semantic than substantive. Problematic assertions such as these fail to fully address the *pacta tertiis* principle and the customary nature of immunities, and demand further analysis of the Security Council referral power, how such resolutions are to be interpreted, and their permissible effects in relation to Sudan and al-Bashir.

### 3. Re-interpreting the Security Council Referral Power

The simplest (and perhaps most controversial) interpretation of Resolution 1593 and its effects is to not recognize the validity of the referral at all, because the law of treaties prevents binding non-States Parties to treaties. This interpretation does nullify the Security

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<sup>84</sup> Michael Wood, "The Law of Treaties and the UN Security Council: Some Reflections," in Enzo Cannizzaro, ed, *The Law of Treaties Beyond the Vienna Convention* (New York: Oxford University Press, 2011) 244 at 251.

<sup>85</sup> *Ibid.*

Council referral power, which can still be meaningful even though it cannot extend the Court's jurisdiction.<sup>86</sup> For example, there may be states who will not self-refer to the ICC. At the same time, the OTP itself—burdened perhaps by the volume and difficulty of its existing work, or concerned with other crimes that appear more serious—may be unable to devote the resources to engage in a *proprio motu* investigation. If these uninvestigated situations were deemed a threat to international peace and security, the Security Council could refer the matter to the OTP and therefore signal the situation's importance (without obligating the Court to take any action). While the Court and Prosecutor would still have discretion over whether and how the case was pursued, this limited referral power could advance the anti-impunity and justice-seeking goals of both the ICC and the UN while affirming the decision to grant the UNSC referral power, without stretching basic principles of international law to the extreme.

Another way of interpreting the referral is to say that it has a limited effect because the *Rome Statute* must be read down when applied to non-States Parties. To the extent the referral does place obligations on Sudan, it can be said to have limited effect by precluding the application of certain provisions of the statute, including Article 27(2). As a result, Sudan would still have no obligation to cooperate with the ICC, but ICC members would be required to cooperate only so long as they did not violate rules of customary international law, including those concerning head of state immunity. This is not an ideal solution, for it does not remove the role of the Security Council from the referral process. However, it does restrict the scope of that authority and still allows room for the Prosecutor to independently choose not to investigate those cases referred by the Council.

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<sup>86</sup> See Condorelli & Villalpando, *supra* note 50.

When statutory powers appear to conflict with other powerful legal norms, those powers are regularly interpreted in a non-conflicting manner, i.e. “read down” when appropriate. This saves the trouble of redrafting the statute so that it is no longer in conflict by providing a common-law rule of limited application with the same effect.<sup>87</sup> In international law, reading down statutes gives effect to another common rule of law of treaties—that treaties should not conflict with customary international law.<sup>88</sup> Indeed, the ICJ has already gone down this path when discussing immunities in the *Arrest Warrant* case, stating that even where a domestic court might otherwise have jurisdiction over a foreign official, “such extensions of jurisdiction in no way affects immunities under customary international law.”<sup>89</sup> In cases of non-State Party referrals, the *Rome Statute*’s treaty-based

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<sup>87</sup> In Canada, where the practice of reading down is often used with respect to conflicts with constitutional norms and in non-constitutional questions of interpretation, reading down may be necessary to combat unintended over-inclusiveness: “[I]t is impossible for drafters to spell out every qualification or limitation that might appropriately apply in a given set of circumstances.” Reading down is further justified by the “strong and virtually impossible to rebut” presumption of coherence between conflicting laws. Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham, ON: LexisNexis, 2008) at 166-7 and 225. Peter Hogg describes the benefit of reading down as conciliatory: “[Reading down] achieves its remedial purpose without declaring the provision invalid. It allows the bulk of the legislative policy to be accomplished, while trimming off those applications that are constitutionally bad.” Peter Hogg, *Constitutional Law of Canada* (Scarborough: Thomson/Carswell, 1998) §15.7.

<sup>88</sup> Anthony Aust, *Modern Treaty Law and Practice*, 2d ed, (Cambridge: Cambridge University Press, 2007) 248 (it is “legitimate to assume parties did not intend a treaty to be incompatible with customary international law”) and 250 (“a treaty is to be interpreted in a way consistent with general principles and rules of international law”); Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press 2010) at 272 “Where a treaty rule is ambiguous and *could* be construed to require ‘violation’ of a customary norm, it seems appropriate to apply a principle that the treaty should be interpreted in so far as possible to be consistent with the customary norm.”); and, Sheila Weinberger, “The Wimbledon Paradox and the World Court: Confronting Inevitable Conflicts between Conventional and Customary International Law” (1996) 10 *Emory Int’l LR* 397 at 438 (“A treaty ought never to be construed to violate customary international law, if any other possible construction remains, and can never be construed to violate rights under customary law.”).

<sup>89</sup> “[T]he rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while the absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extensions of jurisdiction in no way affects immunities under customary international law.... These remain opposable before the courts of a foreign State, even where those courts exercise jurisdiction under those conventions.” *Arrest Warrant*, *supra* note 40 at para 59.

override of head of state immunity would conflict with the customary law rule that continues to apply to non-States Parties. In such a situation, Article 27(2) should be interpreted as simply not applying.<sup>90</sup>

Others have argued that reading down the *Rome Statute* violates principles of the law of treaties because it makes Article 27(2) redundant or inutile.<sup>91</sup> This interpretation is flawed in three respects. First, as mentioned earlier, this interpretation violates a separate principle of law of treaties, which is that treaties cannot bind third parties.<sup>92</sup> The second problem is that reading down Article 27(2) in the case of al-Bashir does not make it redundant. Rather, it recognizes the exceptional nature of the clause. Recall that Article 27(2) is an example of an ongoing waiver from the ordinary customary law rules of immunities; without it, even States Parties to the *Rome Statute* could claim the protection afforded by personal immunities. In almost every case before the ICC, Article 27(2) does exactly what it is meant to do—override the immunities of individuals in those states that have consented to ICC jurisdiction.

The vitality of Article 27(2) was demonstrated by the proceedings against Kenyan President Uhuru Kenyatta. Precluding the application of Article 27(2) to al-Bashir had no impact on its utility against Kenyatta and others; the Kenyatta prosecution failed because of the ICC's general problems of enforcement.<sup>93</sup> Article 27(2) is only inoperative in that

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<sup>90</sup> This argument can be extended. One possibility is that all provisions of the Statute that create an obligation on the non-consenting state are of no effect, and States Parties are only bound by those obligations that do not violate customary law. For example, Sudan would have no Article 86 obligation to cooperate with the Court, while a State Party to the Rome Statute would have the obligation to cooperate with the ICC but not to arrest al-Bashir.

<sup>91</sup> Akande, *supra* note 24 at 338.

<sup>92</sup> See art 35, *VCLT*, *supra* note 28, and accompanying text.

<sup>93</sup> Specifically the inability of the OTP to gather sufficient evidence, which it argues was a direct result of the Kenyan government's non-cooperation with the Court. See *Prosecutor v Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11 at *Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute* (3 December 2014); *Notice of withdrawal of the charges against Uhuru Muigai Kenyatta* (5

specific and narrow class of cases where two criteria are met: a non-party state has not voluntarily accepted the jurisdiction of the Court; and, persons clothed with personal immunity are indicted. As it stands, Darfur is the only current situation that meets these criteria, and only al-Bashir is in the class of persons that could be exempted from its application.<sup>94</sup> The fact that Article 27(2) has not been relied upon in the other cases does not mean that it is redundant, but that the Prosecutor has chosen not to utilize it by not pursuing anyone else protected by personal immunities. This exercise of prosecutorial discretion does not render a provision inutile, let alone justify the expansive interpretation of that clause.

The third flaw flows from this problem. Objecting to the “reading down” of the *Rome Statute* because it supposedly nullifies some provisions of the treaty is both incorrect and contradictory. Whereas negating the application of Article 27(2) in the al-Bashir case would not render it null for the vast majority of cases, applying it here would render Article 98(1) entirely ineffective and inutile. Article 98(1) precludes the Court from requesting states to arrest persons if that request would violate other international obligations owed by those states, such as obligations to respect immunities.<sup>95</sup> Even when “read down”, Article 27(2) can apply to individuals other than al-Bashir,<sup>96</sup> but if Article 98(1) cannot apply to individuals such as al-Bashir—a national of a non-state party who would otherwise seem to be protected by customary law immunities—then it cannot claim any effectiveness.

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December 2014); and, *Decision on the withdrawal of charges against Mr Kenyatta*, Trial Chamber (13 March 2015).

<sup>94</sup> Of the other active ICC investigations, the only other situation that met these criteria was in Libya.

<sup>95</sup> Article 98(1): “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.” *Rome Statute*, *supra* note 47.

<sup>96</sup> Such as Uhuru Kenyatta, *supra* note 93.

The only way to achieve a harmonious reading of Articles 27(2) and 98(1) that is both internally coherent as well as consistent with external rules of international law is to either disregard the referral entirely or to read down Article 27(2). The conflict between Article 27(2) and the rules of the law of treaties is otherwise unresolvable. The tension between them may be understood as a conflict between a *product* of the treaty system and the norms that are *fundamental to the existence of that system*, one that must be adverted to regardless of the object and purpose of the treaty in question.<sup>97</sup> If applied in the present case, this rule would not permit the arrest of al-Bashir so long as he remained President of Sudan, but would have other positive benefits. It would reinforce existing customary international law on both immunities and treaty interpretation, while still giving some effect to the important anti-impunity goals of the ICC by allowing the pursuit of those Sudanese suspects who are not covered by personal immunities.<sup>98</sup>

The Security Council does not have the authority to refer non-States Parties to the *Rome Statute*, nor does it have the authority to bind non-States Parties to the terms of the *Rome Statute*. Either of those acts would run contrary to customary international law, which is a fundamental limit on the powers of the Council. Even if the Security Council had the power to establish ad hoc international criminal tribunals with substantially the same powers as in the *Rome Statute*, whose trial procedures and ultimate trial outcomes will be substantially the same as those of the ICC, that does not mean the Council can simply utilize the *Rome Statute* and the Court as a temporary or substitute ad hoc tribunal. To be clear, the

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<sup>97</sup> Note as well that the inclusion of Articles 98(1) and 98(2) (precluding ICC jurisdiction on the basis of either international law immunities or bilateral agreements not to surrender certain nationals of states) make clear that the object and purpose of the treaty cannot be solely to end impunity or extend humanitarian protection.

<sup>98</sup> Another way in which reading down supports anti-impunity efforts is by preserving the Charter's priority over so-called Article 98(2) agreements. These agreements restrict the Court's ability to pursue suspects, are treaty- not CIL-based, and therefore clearly subordinate to Article 103 of the Charter.

Security Council could certainly use the facilities and personnel of the ICC (subject to its consent, of course) but it would, as it did with the ICTY and ICTR, have to pass a separate Chapter VII resolution with a separate statute, establishing - for all intents and purposes - an entirely separate tribunal. But this would not resolve either the specific problem with head of state immunities, nor would it address the broader implications of pursuing al-Bashir.

A Security Council referral of a non-State Party to the ICC is not just the imposition of a criminal accountability mechanism akin to the ICTY or ICTR. In terms of trial outcomes, the ICC and ad hoc tribunals might be indistinguishable, but the concern here transcends the relatively narrow question of trial justice. Whether the case is undertaken by the ICC or an ad-hoc tribunal, broader concerns remain: about the credibility of the institutional structures surrounding ICL, and the effect of Security Council referrals on the state and rules of international law, the normative coherence of ICL, and its ultimate viability as an effective regime. In other words, the worry is not the fate of an individual dictator but that delivering this justice requires upending important principles of international law and sovereign equality, legitimizing the exercise of extraordinary powers by the legitimacy-challenged Security Council, and importing the hierarchies of inter-state relations into ICL. There is something anti-septic about the idea that this is only a question of trials and individual criminal responsibility when the propriety of the trial is deeply contextualized by the international legal framework within which it takes place, and upon which it exerts reciprocal effects. Here, it is the impacts on international law that are of fundamental concern.

### C. No Customary Law Exception to Immunities

If the immunity of a head of state is part of customary international law, then any Security Council action that directly or indirectly removes this immunity is therefore *ultra vires* and not binding upon Member States.<sup>99</sup> The only alternative is to argue that another rule of customary law has created an exception to head of state immunity.<sup>100</sup> This alleged exception states that immunities do not protect individuals charged with international crimes by international criminal tribunals.<sup>101</sup> This eliminates the need to rely on the authority of the Security Council.<sup>102</sup>

This customary law argument follows several lines: that the 1919 *Report of the Commission on the Responsibility of the Authors of the War*<sup>103</sup> and the statutes of previous international criminal tribunals show historical belief in the exception; that the rationale for personal immunities does not hold up *vis-a-vis* international courts because they are free

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<sup>99</sup> The necessary implication is that the purported competence of the ad hoc tribunals to strip immunities was also *ultra vires*.

<sup>100</sup> To be clear, the ICC has not adopted the position that it is creating a new exception and therefore changing customary international law. Rather, the PTC has been unambiguous about its belief that customary international law has already changed and that the necessary precedents already exist. To adapt Wolfke's phrasing, the PTC is trying to "justify [its] conduct as allegedly permissible exceptions of a valid general customary rule." See Karol Wolfke, *Custom in Present International Law* (Boston: Martinus Nijhoff, 1993) at 65- 66.

<sup>101</sup> See Gaeta, *supra* note 25.

<sup>102</sup> After ignoring this argument in its confirmation of al-Bashir's indictment, the PTC relied almost exclusively on this alleged exception two years later. See *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber I, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* (12 December 2011) ["Malawi Decision"], paras 22 – 43 (Security Council reference para 36).

<sup>103</sup> *Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties—Report Presented to the Preliminary Peace Conference*, reprinted in (1920) 14 AJIL 95 at 116-117 ["1919 Commission Report"].

from the bias of domestic courts; relatedly, that these statutes and the *Arrest Warrant*<sup>104</sup> decision of the ICJ demonstrate that the ICC, as an international court, automatically has jurisdiction over al-Bashir; and, that there is a growing practice of international criminal tribunals removing the immunities of sitting heads of state. Yet the evidence the PTC relies upon often demonstrates something quite different from what is claimed. The *Arrest Warrant* decision, for example, actually affirmed the immunity of the individual concerned. It was only in obiter that the judges – without examining state practice or the statutes of any international tribunals, without distinguishing between incumbents and former immunity holders, and in the absence of the parties even raising the issues – suggested that immunities might not apply before international courts. The following analysis fills in the gaps of the ICJ reasoning, noting that the supposed precedents lack the historical pedigree or legal significance attributed to them for a variety of reasons. Statutes and prior cases that supposedly demonstrate the exception do not in fact deviate from the basic rules of immunity outlined above; previous prosecutions either concern former heads of state or incumbents whose immunity was waived; and, the statutes of previous tribunals actually provide evidence of a separate rule that affects substantive defences, not procedural immunities.

#### **D. The Cases of Former Heads of State**

A rule of customary international law can only be said to exist when there is evidence of state practice following the rule, and belief in the legal validity of that rule. There is little evidence of state practice or *opinio juris* that sitting heads of state can be arrested and tried for international crimes. The cases that purportedly establish this rule usually suffer from one

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<sup>104</sup> *Supra* note 40.

or both of the following flaws: the individuals concerned were no longer sitting heads of state at the relevant time, and therefore lacked the personal immunity that al-Bashir currently has; or, they had been transferred, with the consent or cooperation of the State, to the court in question, which amounts to a waiver of the immunity by the state concerned. These reasons fit perfectly with ordinary understandings of head of state immunity, and show no evidence of an exception to those rules.

The PTC claims four examples of heads of state who have lost their personal immunities before international criminal courts and tribunals: Laurent Gbagbo, Muammar Gaddafi, Charles Taylor, and Slobodan Milošević. The first two cases are dubious precedents for indicting al-Bashir. The arrest and transfer of Laurent Gbagbo, the former president of the Côte d'Ivoire, cannot be claimed as precedent given that he was a former head of state at the time of his arrest and transfer to the ICC,<sup>105</sup> and his immunities had been waived by *Gbagbo's own government*.<sup>106</sup> Gbagbo was President from 2000 until a disputed election in 2010. In April 2003, his government declared its *ad hoc* acceptance of ICC jurisdiction “*sans retard et sans exception*”,<sup>107</sup> thereby accepting the statutory waiver of immunity under Article 27(2). Nearly a year before Gbagbo's eventual arrest in 2011, his successor

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<sup>105</sup> Gbagbo surrendered his claim to winning the 2010 Ivory Coast presidential election on 11 April 2011. The ICC was not authorised to open its investigation into post-election violence until 3 October 2011. Situation in the Côte d'Ivoire, ICC-02/11-14, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire* (3 Oct. 2011). A warrant for Gbagbo's arrest was issued on 23 November 2011 at nearly 7 months after he had lost any claim to immunity: *Prosecutor v. Laurent Koudou Gbagbo*, ICC-02/11, Pre-Trial Chamber III, Warrant of Arrest for Laurent Koudou Gbagbo (23 November 2011); and, *Public redacted version of Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo* (30 November 2011).

<sup>106</sup> That self-referral was for any crimes that had been committed during an armed rebellion against Gbagbo's rule that started on 19 September 2002. “Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale,” Letter from Bamba Mamadou, Minister of State (CIV) to ICC (18 April 2003) <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>107</sup> *Ibid.*

confirmed the continuing unconditional acceptance of ICC jurisdiction.<sup>108</sup> Arresting individuals whose immunity has been waived and who are former heads of state is perfectly in accordance with the ordinary customary rules of immunities; they present and provide no support for any exception.

As for the deceased Muammar Gaddafi, his case<sup>109</sup> cannot count in any meaningful sense. Including Gaddafi as a “precedent” seems an inaccurate embellishment given that he was indicted *after* al-Bashir, and placed in precisely the same unsettled legal position. Even had Gaddafi lived, there is little doubt that the new Libyan government either would have waived his immunity and surrendered him to the Court, or initiated domestic proceedings against him.<sup>110</sup> Again, this is in line with the present law on immunities.

Charles Taylor, the former warlord leader of Liberia, was a sitting head of state at the time of his indictment,<sup>111</sup> but had been out of office for nearly three years at the time of his arrest and transfer to the SCSL. Again, the transfer of a former head of state is in line with ordinary rules of personal immunities.<sup>112</sup> The trial of Slobodan Milošević, who was indicted while still serving as President of the Federal Republic of Yugoslavia (FRY),<sup>113</sup> is a more

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<sup>108</sup> On 14 December 2010 at Alassane Ouattara—Gbagbo’s opponent in the 2010 election who was declared victorious by the Independent Election Commission and internationally recognized as President—issued a confirmation of the state’s continuing acceptance of ICC jurisdiction under Article 12(3) of the Rome Statute. “Confirmation de la Declaration de Reconnaissance,” Letter from Alassane Ouattara, President (CIV) to ICC (14 December 2010) <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>109</sup> A warrant for his arrest was issued in June 2011 but proceedings were terminated in November 2011 after his death. Situation in the Libyan Arab Jamahiriya, ICC-01/11, Pre-Trial Chamber I, *Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah al-Senussi”* (27 June 2011).

<sup>110</sup> The National Transitional Council of Libya stated Muammar Gaddafi’s son, Saif al-Islam Gaddafi, would have a domestic trial instead of being sent to the ICC. “Libya rules out ICC trial for Saif Al-Islam”, Al Jazeera English (9 April 2012) <[www.aljazeera.com](http://www.aljazeera.com)>.

<sup>111</sup> A sealed indictment was issued in March 2003. *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Indictment (7 March 2003) (on file with author). Taylor resigned as President of Liberia on 11 August 2003 at and was not arrested until 29 March 2006.

complex case, but still not nearly as straightforward as suggested by the Court. By the time Milošević was produced before the ICTY in 2001, he had lost his bid for re-election, resigned as President of the Federal Republic of Yugoslavia (FRY), and been arrested on domestic corruption and abuse of power charges.<sup>114</sup> He was therefore a former head of state, at which time the ICTY reissued a warrant for his arrest.<sup>115</sup> As with Gbagbo, Gaddafi and Taylor, Milošević lacked any personal immunities at the time of his arrest and trial.<sup>116</sup> Again, this creates no exception to the traditional customary law of head of state immunity.<sup>117</sup>

#### **E. Statutory Precedent, Substance, and Procedure**

In addition to these very recent international cases, the PTC also relies on statutory precedents. Yet there are equally compelling alternate explanations of this evidence that the PTC does not engage with. An example is the 1919 Commission Report presented at the

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<sup>112</sup> As noted by the court. See *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Appeals Chamber, *Decision on Immunity from Jurisdiction* (31 May 2004) para 59 (Taylor Immunity Decision).

<sup>113</sup> One of his contemporaries, Milan Milutinović, was also indicted while serving as President of Serbia. However, Milutinović surrendered himself to the ICTY after his term ended in 2002 and did not raise immunity as an issue during his trial. See *Prosecutor v. Šainović et al*, IT-05-87, Trial Chamber, “Decision on Milutinović Motion for Provisional Release—Public” (22 May 2007) at para 10.

<sup>114</sup> Milošević lost to Vojislav Koštunica. While his term was not set to end until June 2001 at he resigned on 7 October 2000 after public protests at alleged manipulation of electoral results by his allies.

<sup>115</sup> The warrants were re-issued on 22 January 2001. See ICTY, News Release, SJP/P.I.S./557-e, Milosevic and others case: warrants re-issued to the Federal Republic of Yugoslavia, (23 January 2001) <[www.icty.org/sid/8029](http://www.icty.org/sid/8029)>.

<sup>116</sup> See *Prosecutor v. Slobodan Milošević*, IT-02-54, Trial Chamber, “Decisions on Preliminary Motions” (8 November 2001). Both the Hague District Court and, on appeal, the European Court of Human Rights, held that they lacked jurisdiction to hear the matter. See *Slobodan Milošević v. The State of the Netherlands*, reprinted in (2002) 41 ILM 86; and, *Milošević v. the Netherlands*, App. No. 77631/01 at Eur Ct HR (19 March 2002).

<sup>117</sup> While Serbia transferred Milošević to the ICTY in violation of a domestic court order (see Konstantinos D. Magliveras, *The Interplay Between the Transfer of Slobodan Milošević to the ICTY and Yugoslav International Law*, 13 EJIL (2002) 661 at 663- 668) this should not be interpreted as a waiver of immunity. For one, Milošević had no immunity to waive at the time, since he had ceased to be President of Serbia in 1997 and President of the FRY in 2000. Second, Serbia, as a provincial entity within the federal state of Yugoslavia, was not competent to waive any immunity Milošević might have had as President of the FRY.

Preliminary Peace Conference after the First World War, which implied that immunities should not apply for international crimes.<sup>118</sup> While the Commission may itself have envisaged a change in the nature of immunities, States failed to implement the Commission's proposals.<sup>119</sup> The Commission Report led to Article 227 of the Treaty of Versailles, in which "[t]he Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties".<sup>120</sup> The obvious problem is that this again deals with the immunity of a *former* head of state. Additionally, Article 227 recognized that any jurisdiction the Allies enjoyed over the former Kaiser was not absolute. Instead of obliging the Netherlands to transfer the former Emperor, the Allies could only "request" his transfer,<sup>121</sup> an entreaty that was promptly rejected. None of this creates an exception to the standard understanding of personal immunities.<sup>122</sup>

The PTC also claims the statutes of previous international criminal tribunals provide further evidence of an established customary law exception. However, this position overlooks the important distinction in criminal law between substantive defences and procedural constraints such as immunities.<sup>123</sup> Article 27(1) of the *Rome Statute*<sup>124</sup> contains a

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<sup>118</sup> "1919 Commission Report", *supra* note 103 at 116- 117.

<sup>119</sup> Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005) at 33.

<sup>120</sup> *Treaty of Versailles*, 225 CTS 188, reprinted in 13 AJIL Supp. 151, 385 (1919).

<sup>121</sup> Contrast this "request" with the mandatory language of Articles 228 and 230 at *ibid*, requiring Germany to hand over all accused persons and all documentation necessary to the determination of responsibility.

<sup>122</sup> The failure to realize Article 227 has been labeled "the least satisfactory aspect" of the Treaty of Versailles. Cryer, *supra* note 119.

<sup>123</sup> Van Alebeek, *supra* note 34 at 265-266; Fox, *supra* note 36 at 555-556; and Akande, *supra* note 34 at 414-415, 419-420 and n 67 (although Akande argues that part of Article 27(1) of the Rome Statute also affects procedural immunities). See also "Taylor Immunity Decision", *supra* note 112 at para 32.

near identical statement to declarations contained in the Nuremberg<sup>125</sup> and Tokyo Charters,<sup>126</sup> as well as the ICTR and ICTY Statutes.<sup>127</sup> These provisions all remove the substantive defence of official capacity—the defence that an individual cannot be held responsible for acts of the State. Yet what makes the *Rome Statute* unique is Article 27(2), which removes personal immunities—the procedural barriers that prevent a court from exercising its authority over particular individuals. Article 27(2) has no statutory predecessor; none of the other statutes even mentions immunities.<sup>128</sup> In addition, the ICJ has twice stated that immunity from jurisdiction is not the same as absence of responsibility,<sup>129</sup> and this point is otherwise so commonly repeated that it is a “cliché”;<sup>130</sup> to conflate the two is to misstate basic principles of criminal law. The earlier introduction of immunity and waivers further illustrates the important difference between substantive defences and procedural bars: if the

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<sup>124</sup> “[O]fficial capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.” Article 27(1) Rome Statute, *supra* note 47.

<sup>125</sup> Article 7, *Charter of the International Military Tribunal* (Nuremberg Charter), reprinted in Michael R Marrus, *The Nuremberg War Crimes Trial, 1945-46: a documentary history* (Boston: Bedford Books, 1997).

<sup>126</sup> Art 6, *Charter of the International Military Tribunal for the Far East*, reprinted in Robert Cryer & Neil Boster, *Documents on the Tokyo International Military Tribunal* (New York: Oxford University Press, 2008).

<sup>127</sup> See Article 7(2) *Statute for the International Criminal Tribunal for the Former Yugoslavia* (1993) 32 ILM 1159 at and Article 6(2) *Statute for the International Criminal Tribunal for Rwanda* (1994) 33 ILM 1602. The Special Court for Sierra Leone has a similar provision in its statute. Art 6(2), *Statute of the Special Court for Sierra Leone*, (2002) 2178 UNTS 138 at 145.

<sup>128</sup> Fox, *supra* note 36 at 555 (“In fact, only the ICC expressly provides that immunity may be set aside”).

<sup>129</sup> Arrest Warrant, *supra* note 40 at para 60 (“Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility”). See also *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights (Singapore v UN)*, Advisory Opinion, (1999) ICJ Reports 62 at 88- 89, para 66. While that case concerned the immunity of a UN official and not a head of state, the ICJ noted that the immunity of that official did not negate UN responsibility for damages caused by the actions of that official.

<sup>130</sup> Cryer, *supra* note 119 at 292.

two were identical in meaning, then head of state immunity could *never* be waived by a state against the wishes of the accused.<sup>131</sup> This directly contradicts the nature of immunities, and strongly undermines the PTC's argument that statutory precedent is on its side.

#### IV. FORMALISM AS LEGAL CRITIQUE

The preceding analysis has adopted a largely doctrinal approach that ultimately validates conservative interpretations of immunities, the law of treaties, and the powers of the Security Council. Though I argue that this position is legally correct, it creates two forms of dissonance with the TWAIL analysis that has animated this dissertation. First, the immediate effect of this positivist approach is to validate the immunity of a military strongman implicated in notorious crimes. Second, this analysis raises a more general question about methods. Whereas this dissertation has claimed a critical approach from the outset, one advocating for particular reimaginations of ICL and often an expansion of its application, this chapter has taken the opposite tack: using a conservative approach that ultimately constrains the ambit of ICL. In this final part, I argue that formalism can be a valid method of legal critique that gives effect to a TWAIL view of ICL and the interests of ordinary citizens.

As much as TWAIL scholars, and indeed the earlier chapters of this dissertation, have argued that 'mainstream' international law is too parochial and predisposed to marginalize Third World interests, they have also argued that the exceptional enforcement of the present rules of international law unequally distribute the benefits and burdens of whatever law – parochial or otherwise – exists. It was earlier said in Chapter Three that sovereignty is a Janus-faced concept in TWAIL; in a way, the 'critical' methodology is similarly split.

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<sup>131</sup> *Ibid.*

Adherence to doctrinal approaches threatens to reify the substantive law that is being contested; the enactment of exceptions to the status quo, however, often target or operate to the detriment of Third World states and peoples. In a sense, to say – as Anghie and Chimni did – that “it is sometimes through supporting the Third World state and at others, by critiquing it, that the interests of Third World peoples may be advanced” is to say that it is sometimes by adopting international law’s traditional norms, and sometimes by upending them, that the interests of Third World peoples may be given effect.<sup>132</sup> The idea of the ‘critical’ is not just about critical reflections on the substance of the law itself or against whom it is enforced, but on the processes by which the law is made, and which actors are privileged in its making. It is here, in the recognition of the relationships between international institutions and the imbalance of the international order that the critical bite of the preceding argument lies.

The doctrinal analysis of Part III points at important questions that are effaced by the emphasis on the alleged criminality of al-Bashir, and the apparent self-interest that he and other African state leaders have in restricting the scope of ICL as much as possible. The first of these issues is that the ICC approach to al-Bashir, the anti-immunity position, wrongly presupposes the political neutrality of international law and international legal institutions. The second point is that the formalist analysis exposes the double standards inherent in the anti-immunity position, and the potential instantiation of the power imbalances and hierarchies of interstate relations in international criminal justice. Third, the formalist approach shows that the al-Bashir issue gives autocrats and dictators a strong legal foundation on which to pin their self-interested resistance to the application of ICL. This

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<sup>132</sup> *Supra* note 1.

legal platform lends greater credibility to the obstructionism of states, and indirectly reduces the protections afforded by ICL. Fourth, this analysis returns to the question of legal engineering raised in Chapter One by illustrating how descriptions of resistance to the ICC overlook the important legal arguments raised. Again, Third World states are said to lack the capacity to engage in legal (as opposed to political) analysis. Moreover, by concentrating the authority to resolve important international law questions in the Security Council and the ICC, the anti-immunity position further reduces the role of Third World states in the development of international law. Finally, by constraining the scope of international criminal jurisdiction, the doctrinal approach recognizes the interests that may arise in non-prosecution, and the questions the utility of a blanket insistence on prosecution.

#### **A. Exposing the Non-Neutrality of International Law**

The underlying position behind arguments that favour arresting al-Bashir is that the rationale for immunities is inapplicable to the ICC because it is an international and not a domestic court. In Cassese's words, international courts are "totally independent of states and subject to strict rules of impartiality", whereas domestic courts, including those acting extraterritorially, are prone to abuse and instrumentalization.<sup>133</sup> The impartiality problems of domestic courts can thus be seen as encompassing unwarranted or instrumental interference in the affairs of territorial states, and, as implied in Chapter 3, generate a preference for international (or hybrid national-international) courts, which are generally seen as insulated from such concerns.

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<sup>133</sup> Antonio Cassese et al, *Cassese's International Criminal Law*, 3d ed, Paola Gaeta, ed, (Oxford: Oxford University Press, 2013) at 321.

Yet this preference does not amount to an absolute rule, as the cleavage between the national and international is surely not as clean as imagined here. In Chapter Four, concern was expressed at the way in which the practice of ICTs can often give effect to or concretize power imbalances and inequalities within states. As the ICC in particular lacks an enforcement arm, enforcement of its decisions largely originate at the state level, making the actions of national legal and police systems integral to the Court's work. This opens the door to at least some degree of bias, and arguably contributes to the problem of group-based selectivity. International courts always remain influential domestic political actors,<sup>134</sup> and can become tools of external or ulterior influence in the same way as domestic courts, even unintentionally.<sup>135</sup> Bassiouni warns that states can manipulate international criminal institutions through a variety of subtle methods, including “by bureaucratic and financial means, which involve the control of the structures, their operations, personnel, and more importantly, their resources.”<sup>136</sup> While the attraction of multilateral international institutions is that they generally deflect these concerns by diffusing control or administration of the institution across a wide plurality of actors and interests, this does not mean those institutions are immune from being captured by or used in service of particular interests.<sup>137</sup> An international criminal tribunal that is, or is seen to be, a tool of politics — as opposed to an

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<sup>134</sup> Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014) at 4-5.

<sup>135</sup> William Burke-White, “Complementarity in Practice” (2005) 18 *Leiden J Int'l L* 557, 568 (warning of the danger “that the prosecutor will unwittingly or unintentionally play into the hands of the national government, and later the political dynamics within the target state in favour of one side.”).

<sup>136</sup> M Cherif Bassiouni, “International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice” in Antonio Cassese, ed, *The Oxford Companion to International Criminal Justice*, (Oxford: Oxford University Press, 2009) at 131, 141.

<sup>137</sup> The Special Court for Sierra Leone affirmed this position, adopting the position of the amici in the Charles Taylor case. See *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, “Submissions of the Amicus Curiae on Head of State Immunity”, Trial Chamber II (23 October 2003) para 78.

institution with political effects — is one that will first fail to give effect to the values of dignity and security, and secondly alienate those states either wary of the institution or looking for a ready-made excuse to withdraw from it. Moreover, this makes clear that the formalist analysis of the al-Bashir referral and head of state immunities is in many ways an analysis of the larger system of international criminal justice and its place in the international system.

## **B. The Place of Inter-state Hierarchies in ICL**

In this light, the idea that immunities are not relevant before international courts assumes that ICTs have transcended the interest of individual states. Yet the view from below is that only the interests and priorities of some states are relevant, particularly when the Security Council is involved.<sup>138</sup> The concern then is that reliance on the Security Council's Chapter VII authority will import hierarchies and inequities between states into the international criminal justice system. This problem has manifested itself since the initiation of the ICC regime in relation to the Article 16 deferral power, which allows the Security

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<sup>138</sup> The Security Council has been criticized from a range of perspectives. See *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc A/59/565 (2004) 64 (“The Security Council needs greater credibility, legitimacy, and representation to do all that we demand of it”); Mohamed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Dordrecht: Martinus Nijhoff, 1994) at 7 (that in the post-Cold War era it is “less acceptable than ever that sovereign States should have created an international organization equipped with broad powers of control and sanction vis-à-vis themselves but *itself* exempted from the duty to respect both the Charter which gave it birth and international law”); José Alvarez, “Hegemonic International Law Revisited” (2003) 97 AJIL 873 (with a single global superpower, the Security Council has become in part a vehicle for the exercise of hegemonic international law that favours the interests of the United States); David Bosco, “UN Security Council, Esq.” (2004) 143 Foreign Policy 89 (that the Security Council will use international criminal law as a substitute for enforcement action); Allen Buchanan & Robert Keohane, “Precommitment Regimes for Intervention: Supplementing the Security Council” (2011) 25 Ethics & Int'l Aff. 41 (that while a legitimate institution for the purposes of peacekeeping, the Security Council lacks transparency and accountability); Yehuda Z Blum, “Proposals for UN Security Council Reform” (2005) 99 AJIL 632 at 645 (“If ‘democracy’ and ‘equality’ are the watchwords of the General Assembly, they clearly do not apply—and were not intended to apply—to the Security Council.”); and, Nobumasa Akiyama, “‘Article 24 Crises’ and Security Council Reform: A Japanese Perspective” (2009) 11 J E Asian Int'l L 159 (that the Security Council's effectiveness is hampered by both its unrepresentativeness and its inability to respond to increasingly complex and novel security challenges).

Council to defer ICC prosecutions for one year.<sup>139</sup> The *Rome Statute* of the ICC came into force on July 1, 2002; at the same time, the post-Yugoslav civil war peacekeeping mission in Bosnia-Herzegovina was up for renewal at the Security Council and due to expire on July 15. The United States threatened to veto the renewal of the peacekeeping mission unless it could secure immunity from the ICC for its peacekeepers.<sup>140</sup> Resolution 1422, which renewed the Bosnia peacekeeping mission for one year but excluded ICC jurisdiction over non-States Parties to the ICC, was adopted on July 12;<sup>141</sup> eleven months later, Resolution 1487 extended the mission for a further year, and repeated this exemption.<sup>142</sup> While those two resolutions used the language of Article 16, Resolution 1497 (on a peacekeeping mission in Liberia) was broader in its phrasing and made no specific reference to Article 16.<sup>143</sup> Presumably the change in language was an attempt to offset the requirement in the *Rome Statute* to renew the exemption every year, but it also had the effect of precluding even territorial states from

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<sup>139</sup> Art 16, *Rome Statute*, *supra* note 16: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

<sup>140</sup> The mission was initially due to expire on July 1. While the United States had already vetoed one resolution that sought to extend the peacekeeping mission, it allowed another that extended the mission first until July 3 and then until July 15. See SC Res 1420, UN Doc S/Res/1420 (30 June 2002) and SC Res 1421, UN Doc S/Res/1421 (3 July 2002).

<sup>141</sup> SC Res 1422, UN Doc S/Res/1422 (12 July 2002). Operative paragraph 1 reads as follows: “Requests, consistent with the provisions of Article 16 of the *Rome Statute*, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the *Rome Statute* over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise”.

<sup>142</sup> SC Res 1487, UN Doc S/Res/1487 (12 June 2003) (repeating the language of Resolution 1422, *ibid*).

<sup>143</sup> SC Res 1497, UN Doc S/Res/1497 (1 Aug. 2003). Operative paragraph 7 reads: “Decides that current or former officials or personnel from a contributing State, which is not a party to the *Rome Statute* of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State”.

exercising territorial jurisdiction over the peacekeepers in what was described as “an abusive and arbitrary deprivation of some UN member states’ criminal jurisdiction.”<sup>144</sup>

States protested vociferously at these exemptions,<sup>145</sup> arguing that they subverted both the ICC and the larger international criminal justice project. Moreover, they objected to the blackmail of the Security Council and its peacekeeping missions in territories where the need for a neutral military presence was pressing. These states and the Secretary-General further insisted that the Council resolutions were potential violations of treaty law to the extent they amended the *Rome Statute* so as to prevent it from exercising its territorial-based jurisdiction,<sup>146</sup> and abused the Statute’s intent for Article 16 to be used on a case-by-case basis (as opposed to a blanket exclusion for an entire class of persons).<sup>147</sup>

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<sup>144</sup> Salvatore Zappala, “Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC” (2003) 1 JICJ 671 at 674.

<sup>145</sup> On objections to Resolution 1422, see statements of Argentina, Canada, Colombia, Cuba, Fiji, Germany, Malaysia, Samoa, Syria, and Ukraine. On Resolution 1487, see statements of Argentina, Brazil, France, Greece, Iran, Jordan, Lichtenstein, Malawi, Netherlands, Nigeria, South Africa, Switzerland, Syria, Trinidad and Tobago, and Uruguay.

<sup>146</sup> See, e.g., Statement of the Secretary General, UN SC Meeting Record, UN Doc S/PV.4772 (12 June 2003); Statement of New Zealand (noting “serious concern that the use of the specific procedure laid down in article 16 in a generic resolution, not in response to a particular fact situation and with the intention to renew it on an annual basis, was inconsistent with both the terms and the purpose of that provision”); Statement of Jordan (“The resolution does not relate to the Council’s being seized of any particular political situation, and the Council’s interpretation of article 16 does not accord with the drafting history of that article.”); Statement of Iran (“The resolution unduly interfered with the Statute of the ICC, which is concluded among States in accordance with the law of treaties – a law that recognizes only parties to a treaty competent to interpret or amend it.”); and Statement of Brazil (“Brazil is concerned about proposals and initiatives that seek to reinterpret or review the *Rome Statute*, in violation of the practice of international law and of the Vienna Convention on the Law of Treaties”). See also Carsten Stahn, “The Ambiguities of Security Council Resolution 1422 (2002)” (2003) 14 EJIL 85 at 91 (noting that the Permanent Representative of Germany was concerned about an attempt to amend a non-UN treaty through a Chapter VII resolution).

<sup>147</sup> Neha Jain, “A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court” (2005) 16 EJIL 239 at 247. See also statements of Switzerland, Lichtenstein, Uruguay and Trinidad and Tobago in UN SC Meeting Record, *supra* note 142.

After evidence emerged of American soldiers abusing detainees at the Abu Ghraib prison in Iraq,<sup>148</sup> the Security Council refused to support further renewals of the broad-based exemptions. A new approach was developed – the United States insisted that were the Security Council to refer a situation to the ICC, such referrals would include similar exemptions. This is the so-called ‘Paragraph Six problem’, found in the Security Council resolutions that referred Sudan and Libya to the ICC and which essentially repeat the language of Resolution 1497.<sup>149</sup> This again negates the territorial jurisdiction of the Court, contradicts the statutory authority of the Security Council to refer situations and not specific investigations or cases, and the requirement that exemptions be limited to one year.<sup>150</sup> As with the earlier exemptions, these provisions were also protested by states:

Operative paragraph 6 of the resolution is killing its credibility – softly, perhaps, but killing it nonetheless. We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the *Rome Statute* once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council.<sup>151</sup>

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<sup>148</sup> The abuse was quite widespread and systematic. See International Committee of the Red Cross, *Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* (14 February 2007) (outlining the severe abuse suffered by a range of detainees prior to their transfer to Guantanamo Bay.

<sup>149</sup> SC Res 1593, UN Doc S/Res/1593 (31 March 2005) and SC Res 1970, UN Doc S/Res/1970 (26 February 2011). Reading as follows: “6. Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the *Rome Statute* of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.”

<sup>150</sup> Nigel White & Robert Cryer, “The ICC and the Security Council: An Uncomfortable Relationship” in José Doria et al, eds, *The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko* (The Hague: Brill, 2009) 455 at 473–476. Jain argues, in the context of virtually identical language in Resolution 1497, that this also cannot constitute a valid bilateral immunity agreement under Article 98(2) of the *Rome Statute*. Jain, *supra* note 147, at 247 – 249.

<sup>151</sup> Statement of the Philippines, UNSC Meeting Record, UN Doc S/PV.5158 (31 May 2005). See also Statements of Argentina (“[W]e regret that we had to adopt a text that establishes an exception to the jurisdiction of the Court.”); Tanzania (“[W]e are concerned that the resolution also addresses other issues that are, in our view, extraneous....We are therefore unable to accept that the resolution should in any way be

Here, arguably one sees Alvarez's warning of hegemonic international law playing out.<sup>152</sup>

By way of contrast, the Court and Security Council have been willing to give effect to these exemptions when emanating from certain states but not others. After the Security Council referred the situation in Darfur (Sudan) to the ICC, the African Union (AU) expressed its concern that the referral threatened to undermine the fragile peace process in the country. As a result, the AU repeatedly pushed for the Security Council to consider deferring the Sudan investigations under its Article 16 authority but no response – and no deferral – was forthcoming.<sup>153</sup> Mounting frustration among members of the AU over the Council's intransigence led the AU to propose an amendment to Article 16 that vested a residual deferral power in the General Assembly instead.<sup>154</sup> Echoes of frustration and strategic moves to counter the Cold War paralysis of the Security Council are apparent here, and the AU has taken to routinely issuing pronouncements resisting the current application of ICL to African states.<sup>155</sup> From the perspective of less powerful states, there is an illuminating contrast between the exploitation of Article 16 at the behest of the United States in terms that

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interpreted as seeking to circumvent the jurisdiction of the Court.”); Benin (“We regret the fact that the text we have adopted contains a provision of immunity from jurisdiction, which runs counter to the spirit of the *Rome Statute*.”) and Brazil (“Brazil was also not in a position to support operative paragraph 6, through which the Council recognizes the existence of exclusive jurisdiction, a legal exception that is inconsistent in international law.”).

<sup>152</sup> Alvarez, *supra* 138.

<sup>153</sup> Charles Jalloh, Dapo Akande & Max du Plessis “Assessing the African Union Concerns about Article 16 of the *Rome Statute* of the International Criminal Court” (2011) *Afr J Leg Stud* 5 at 28.

<sup>154</sup> Appendix VI to *Report of the Working Group on the Review Conference*, vol 1, Annex II, ICC-ASP/8/20, “African Union States Parties to the *Rome Statute*”, 70.

<sup>155</sup> Every AU General Assembly since al-Bashir's indictment has included one or more statements on (a) the doctrine of universal jurisdiction and the immunities of foreign officials; (b) Security Council deferrals under Article 16 for Sudan, Libya or Kenya; and, (c) cooperation with the arrest warrants for al-Bashir and Muammar Gaddafi of Libya. See: Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.243 (XIII) (3 July 2009) (AU Dec 243) and Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc.

exceed the *Rome Statute*, and the associated disregard for African concerns about using the power within those terms of the *Rome Statute*.

The argument to delete immunity also discounts the enhancement of the Security Council's position: "This 'Security Council as legal demiurge view', which is controversial on its own grounds, is obviously difficult to transpose to the situation of the ICC where, in the relations of the Court with non-state parties, it would amount to no less than a sort of cosmopolitan hold-up."<sup>156</sup> Suspicion of and resistance to the Security Council's role is thus grounded in the Council's paradoxical ambivalence to justice and the rule of law, which connect the Lockerbie affair with contemporary the ICC and the Council's attempts to "[grant] itself greater authority than the Rome Statute envisaged over its proceedings."<sup>157</sup> Indeed, even the President of the ICC's ASP raised concern that the Council was attempting to assume political control of the Court's work.<sup>158</sup>

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Assembly/AU/Dec.245 (XIII) (3 July 2009) (AU Dec 245); Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC) Doc. Assembly/AU/Dec.270 (XIV) (2 February 2010) (AU Dec 270); Decision on the Progress Report of the Commission on the Implementation of Decision On the Second Ministerial Meeting on the Rome Statute of The International Criminal Court (ICC) Doc. Assembly/AU/Dec.296 (XV) (27 July 2010) (AU Dec 296); Decision on the Implementation of the Decisions on the International Criminal Court, Doc. Assembly/AU/Dec.334 (XVI) (31 January 2011) (AU Dec 334); Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. Assembly/AU/Dec.366 (XVII) (1 July 2011) (AU Dec 366); and, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. Assembly/AU/Dec.397 (XVIII) (30 January 2012) (AU Dec 397). (All documents online at <[www.au.int/en/decisions/assembly](http://www.au.int/en/decisions/assembly)>).

<sup>156</sup> Frédéric Mégret, "In Search of the 'Vertical': An Exploration of What Makes International Criminal Tribunals Different (and Why)" in Carsten Stahn & Larissa van den Herik, eds, *Future Perspectives on International Criminal Justice* (The Hague: TMC Asser Press, 2010) 178 at 220.

<sup>157</sup> Nigel White & Robert Cryer, "The ICC and the Security Council: An Uncomfortable Relationship" in José Doria et al, eds, *The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko* (The Hague: Brill, 2009) 455 at 457.

<sup>158</sup> David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014) 172 (quoting Christian Wenaweser, President of the ASP from 2008 – 2011).

Such politicization risks formalizing a capricious element in an ostensibly equitable criminal law scheme, as evidenced by the failed attempt to refer Syria to the ICC. The United States co-opted the language of geographic selectivity to ask why African peoples “deserve international and impartial justice, but the Syrian people do not? Why should the International Criminal Court pursue accountability for the atrocities in Africa but not those in Syria, where the worst horrors of our time are being perpetrated?”<sup>159</sup> It insisted that in addition to holding Syrian criminals to account, “there should be accountability for those members of the Council that have prevented such accountability.”<sup>160</sup> Not mentioned was that the United States had refused to support a Syria referral only six months earlier,<sup>161</sup> and only agreed to such a referral when it received assurances that it would not lead to Israel being investigated for its activities in the Golan Heights.<sup>162</sup> Russia – which along with China, vetoed the resolution referring Syria but did not object to the Sudan or Libya referrals – accused Western states of hypocrisy and attempting to “inflame political passions and lay the ultimate groundwork for eventual outside military intervention...[t]hey advocate fighting impunity but are themselves practicing a policy of all-permissiveness.”<sup>163</sup> Thus the Security Council became an instrument for exercising great power influence in the realm of international criminal justice, a site for East-West proxy battles, and a rhetorical tool with

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<sup>159</sup> UNSC Meeting Record, UN Doc S/PV.7180 (22 May 2014) 5.

<sup>160</sup> *Ibid.*

<sup>161</sup> Remarks by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, on Syria at the Center for American Progress, Washington D.C (6 Sept. 2013) online: <[www.usun.state.gov](http://www.usun.state.gov)> (“What would words – in the form of belated diplomatic condemnation – achieve? What could the International Criminal Court really do, even if Russia or China were to allow a referral? Would a drawn out legal process really affect the immediate calculus of Assad and those who ordered chemical weapons attacks?”).

<sup>162</sup> Colum Lynch, “US to Support ICC War Crimes Prosecution in Syria”, *Foreign Policy* (7 May 2014) online: <[www.foreignpolicy.com](http://www.foreignpolicy.com)>.

<sup>163</sup> UNSC Meeting Record, *supra* note 159 at 13.

which to attack states that are not implicated in the international crimes at issue. Indeed, it is hard to see what incentive will exist for three of the world's largest military powers to ratify the ICC Statute when they are able to perfectly insulate themselves and their allies from its reaches through their vetoes, while at the same time defeating all other treaty- and customary-law based attempts to preclude jurisdiction.

Ratification of the *Rome Statute* is therefore the only way for these states to truly risk being brought under ICC jurisdiction.<sup>164</sup> The three states and their proxies thus become essentially immune from liability while retaining the ability to potentially override the protections that ostensibly apply to any other state; this power is compounded when one considers aggression, which recognizes the veto power of all the permanent members.<sup>165</sup> While the Court would theoretically have universal reach, the practical upper limit of its jurisdiction for non-aggression crimes would be those permanent members of the Security Council who have not ratified the *Rome Statute*; for aggression, it would be a lower ceiling. This greatly limits the ability of the ICC to protect a great number of potential victims, and calls into question the legitimacy of an institution that not only is incapable of exercising jurisdiction over such major military powers, but actually reasoned itself into that situation. At that point, it matters little whether the ICC would ever have actually dared to indict Russian, Chinese or American officials for international crimes, just that because of circumstances of their own making, it would be virtually impossible for them to do so. This

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<sup>164</sup> The immunity is not absolutely complete. A secondary risk of liability arises through Article 12(2)(a) of the Rome Statute, *supra* note 47, under which the ICC possesses territorial jurisdiction over situations that are self-referred by States or investigated *proprio motu* by the Office of the Prosecutor.

<sup>165</sup> Leila N Sadat & SR Carden, "The New International Criminal Court: An Uneasy Revolution" (2000) 88 Geo. LJ 381 at 443.

approach adopts the hierarchy of states in international law, and unequal exposure to the jurisdiction of the ICC.<sup>166</sup>

### C. Resistance, Non-Cooperation and Reduced Protection

The immunity-related interplay between the Security Council, the ICC, and the AU is an intertwined story. The *Rome Statute* came into effect on July 1, 2002; the AU succeeded the OAU on July 9; and the first peacekeeping exemptions were granted on July 12. Partiality has thus been a continuing theme since the inception of both the AU and the ICC, with attendant concern about the role the Security Council plays in international law. These worries predate the ICC and the Article 16 inconsistencies and suggest that the Council's regular forays into lawmaking – including through the ad hoc tribunals – are of dubious legal provenance and quality.<sup>167</sup>

Above and beyond the Article 16 issue, one can see the deep-seated suspicion of the Security Council and its connection to international courts crystallize around the Lockerbie bombing of 1988 and the subsequent sanctions imposed against Libya. Originally positioning

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<sup>166</sup> Sarah Nouwen, "Legal Equality on Trial" (2012) 7 Neth YB Int'l L 151, 167 ("Irrespective of the political reasons, from a rule-of-law perspective the Council's message is that those with friends among the permanent members of the Security Council are beyond the reach of international criminal law.").

<sup>167</sup> Frederic L Kirgis, Jr, "The Security Council's First Fifty Years" (1995) 89 AJIL 506 at 531 ("The most serious legal or quasi-legal issues surrounding the post-Cold War Security Council have ... had much more to do with the possible abuse of power than with abdication of it. ... It has empowered the [war crimes] tribunals and the [compensation] commission to apply norms that do not necessarily reflect pre-existing international law. Council has made quasi-judicial determinations that go well beyond those inherent in its express authority to determine threats to the peace, breaches of the peace and acts of aggression. It has also gone beyond its readily implied authority to interpret and apply relevant Charter provisions or to interpret its own resolutions. It has done so despite its own non-judicial character, and without procedural safeguards"). See also Tetsuo Sato, "The legitimacy of Security Council activities under Chapter VII of the United Nations Charter since the end of the Cold War" in Jean-Marc Coicaud & Veijo Heiskanen, eds, *The Legitimacy of International Organizations* (Tokyo: UN University Press, 2001) 309 (highlighting the need for greater legitimation in the 'legally grey areas' of quasi-judicial and quasi-legislative activities, including more functional separation of powers and more active judicial review).

itself as a mediator between the Security Council and Libya, the Organization of African Unity (OAU)<sup>168</sup> eventually rejected the Council's position and declared that it would no longer comply with the sanctions against Libya on humanitarian grounds.<sup>169</sup> At the same time, the OAU was careful to defend its decision by reference to the legal framework governing the decision-making of the Security Council and the settlement of disputes under the UN Charter.<sup>170</sup> Similarly, the states of the Arab League, Organization of the Islamic Conference, and the Non-Aligned Movement all insisted that the sanctions regime was punitive, unnecessary and even illegal,<sup>171</sup> as did other commentators.<sup>172</sup>

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<sup>168</sup> The OAU became the AU on 9 July 2002, barely a week after the *Rome Statute* came into being.

<sup>169</sup> *The Crisis Between the Great Socialist People's Libyan Arab Jamahiriya and the United States of America and the United Kingdom*, OAU AHG/Dec.127 (10 June 1998) online: African Union <[http://www.africa-union.org/official\\_documents/Heads%20of%20State%20Summits/hog/8HoGAssembly1998.pdf](http://www.africa-union.org/official_documents/Heads%20of%20State%20Summits/hog/8HoGAssembly1998.pdf)>.

<sup>170</sup> *Ibid* at para 2, referring to Art 27(2) requiring concurring votes of all Permanent Members of the Security Council; Art 33, requiring the pursuit of pacific means of dispute settlement; and Art 36(3) the general rule that legal disputes should be referred to the International Court of Justice, which had recently decided it had competence to hear the case: see *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America)* Preliminary Objections [1998] ICJ Rep 9 & 115.

<sup>171</sup> See, e.g., *Communiqué of the Meeting of Ministers for Foreign Affairs and Heads of Delegation of the Movement of Non-Aligned Countries to the fifty-second session of the General Assembly, issued on 25 September 1997*, Annex, UN Doc A/52/447 (6 Oct. 1997) at 20–21 (that “the measures imposed on Libya are no longer justifiable” and “that the escalation of the crisis, the threat to impose additional sanctions and the use of force as a means of conducting relations among States are a violation of the Charter of the United Nations and the principles of the Non-Aligned Movement.”).

<sup>172</sup> See, e.g., Christine Gray, “The use and abuse of the International Court of Justice: cases concerning the use of force after Nicaragua” (2003) 14 EJIL 867 at 881 (“It seems obviously disingenuous for a permanent member of the Security Council to plead that the matter is one for the Security Council rather than the Court...when it may be able to secure a result favourable to itself through the Security Council even when the legality of its actions is at least open to question, as in the Lockerbie cases. This type of attempt by a permanent member to prevent a case going to the International Court of Justice is open to charges of bad faith in a way that could not apply to non-permanent members.”). See also Graefrath, *supra* note 79 at 187 – 188 (“[T]he most peculiar aspect of Council Resolution 731 (1992) [imposing sanctions on Libya] was the participation in voting procedures of interested parties”). Such behaviour is explicitly prohibited by Article 27(3) of the Charter. *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 27(3): “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”

This pattern of resistance, in response to a perceived pattern of instrumentalization of legal institutions and legal defects in their decision-making, is repeating itself with the ICC. The AU has instructed its member states to not cooperate in arresting al-Bashir, including – at one time – the possibility of a regionally organized withdrawal from the *Rome Statute*.<sup>173</sup> While that stance has been deferred, the potential for non-cooperation and withdrawal remains. This obstruction and non-cooperation can happen in less blunt and more legalistic ways. By way of example, the AU has become so frustrated with the ICC position on al-Bashir and immunities that it has taken its cue from the United States. It has begun advising member States to rely on Article 98(2) of the Rome Statute and draw up bilateral agreements confirming “the immunities of their Senior State officials”.<sup>174</sup> These agreements will increase the number of defendants claiming immunity from the Court, hindering cooperation between the ICC and states.

A related important effect of this resistance is its impact on ordinary citizens that bear the brunt of international crime. By concretizing and potentially expanding the pool of persons protected by immunities, these agreements – as with the Paragraph Six problem contained in the Security Council referrals themselves – will also reduce the protective scope of the ICC and ICL more generally. It also encourages more direct forms and statements of obstruction. The AU refused the ICC permission to open a liaison office in Ethiopia,<sup>175</sup>

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<sup>173</sup> See “African countries back away from ICC withdrawal demand” (10 June 2009), online: Sudan Tribune <[www.sudantribune.com](http://www.sudantribune.com)>; and, “Sudan says AU to agree on mass withdrawal from ICC” (24 May 2013), online: Sudan Tribune <[www.sudantribune.com](http://www.sudantribune.com)>.

<sup>174</sup> *Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Assembly/AU/Dec 419(XIX)* (16 July 2012) [AU Dec 419].

<sup>175</sup> *Ibid* at para 8.

pushed for local, non-ICC court processes in Libya and Kenya,<sup>176</sup> and asked states to unite behind particular judicial candidates in order to promote African representation on the ICC bench.<sup>177</sup> The AU has repeated its support for states that refuse to arrest al-Bashir, and further asked that African states work to “ensure that African proposals and concerns are properly considered by the UN Security Council and the Assembly of States Parties to the Rome Statute”.<sup>178</sup> In Kenya, parliament has twice voted to withdraw from the *Rome Statute*,<sup>179</sup> and the recent decision of the ICC Prosecutor to withdraw the charges against President Uhuru Kenyatta was predicated on what the OTP claimed was a lack of cooperation on the part of the Government of Kenya.<sup>180</sup> Even governments that are currently benefiting from group-based selectivity are signaling their objections to the ICC. Despite self-referring the Lord’s Resistance Army to the ICC, Uganda has turned against the Court, insisting that any trials take place through national courts in Uganda. At the swearing-in ceremonies for Kenyatta, Ugandan President Yoweri Museveni congratulated the Kenyan people for electing an opponent of the ICC:

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<sup>176</sup> See, e.g., *ibid* (on Libya) and *Decision on International Jurisdiction, Justice and the International Criminal Court (ICC)*, Assembly/AU/Dec 482(XXI) (May 2013) (AU Dec 482) (on Kenya) <[www.iccnw.org](http://www.iccnw.org)>.

<sup>177</sup> AU Dec 419 at *supra* note 174.

<sup>178</sup> AU Dec 397, *supra* note 155, at paras 3- 7.

<sup>179</sup> Associated Press, “Kenya votes to leave ICC days before deputy president’s Hague trial”, *The Guardian* (5 September 2013) <[www.guardian.co.uk](http://www.guardian.co.uk)>. The vote remains symbolic until and unless a legislative bill giving it effect is introduced and ratified by the government. Ugandan officials have also expressed their support for the Kenyan vote. “Uganda backs Kenya vote to quit ICC”, *New Vision* (8 September 2013) <[www.newvision.co.ug](http://www.newvision.co.ug)>.

<sup>180</sup> According to the OTP, the Kenyan government failed to respond to basic requests obtain and supply important evidence. *Prosecutor v Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11 at “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute” (3 Dec 2014); “Notice of withdrawal of the charges against Uhuru Muigai Kenyatta” (5 Dec 2014); and “Decision on the withdrawal of charges against Mr Kenyatta” (13 Mar. 2015).

I was one of those that supported the ICC because I abhor impunity. However, the usually opinionated and arrogant actors using their careless analysis have distorted the purpose of that institution. They are now using it to install leaders of their choice in Africa and eliminate the ones they do not like.<sup>181</sup>

Museveni's statement is audacious and perhaps even self-interested, but it retains greater plausibility and resonance as the ICC's detractors can point to dubious legal analyses to support their contention that the Court is not to be trusted. The al-Bashir indictment is no longer an isolated case; it is the first and most notorious example of general dissatisfaction with the ICC and its "race hunting" of African States.<sup>182</sup>

#### **D. The Third World as Legal Agent**

Overlooked in much of the debate about AU resistance is the possibility that this resistance can be politically self-interested and legally sound at the same time. Commentators have largely insisted there are no legal grounds for resisting the ICC – it is merely 'the impunity club'<sup>183</sup> disregarding legal principle and undermining the rule of law.<sup>184</sup> Yet the peacekeeper exemptions have been flagged by non-African states; the complaints about

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<sup>181</sup> "Museveni attacks ICC at Uhuru's swearing-in" (10 April 2013), online: Daily Monitor <[www.monitor.co.ug](http://www.monitor.co.ug)>

<sup>182</sup> According to AU Chairman (and President of Ethiopia) Hailemariam Desalegn, "The intention was to avoid any kind of impunity...but now the process has generated to some kind of race hunting." "African leaders accuse ICC of 'race hunt'" (28 May 2013), online: Al-Jazeera <[www.aljazeera.com](http://www.aljazeera.com)>.

<sup>183</sup> Luke Moffet "Al-Bashir's escape: why the African Union defies the ICC" (15 June 2015), *The Conversation*, online: <[www.theconversation.com](http://www.theconversation.com)> ("[T]he AU's position reflects nothing so much as pure political posturing and cronyism among its leaders.").

<sup>184</sup> Jens David Ohlin, "Al-Bashir Leaves South Africa" (15 June 2015), *Opinio Juris* online: <[opiniojuris.com](http://opiniojuris.com)> ("So what excuse can the South African government muster? It would seem that neither international nor even domestic law supports their position, thus weakening the rhetorical power of their arguments."). See also Rowland JV Cole, "Africa's Relationship with the International Criminal Court: More Political Than Legal" (2013) 14 *Melbourne JIL* 1, 27 ("The stance of the AU is clearly directed by political considerations. Thus the problem goes beyond the application of legal rules of procedure and evidence and the determination of criminal responsibility.").

Article 16 have led to proposed legal reforms; and, the immunity claims of the ICC are made in the absence of either state practice or convincing explanations as to the state of certain norms of customary international law. It is a perfectly valid legal question for African states to ask why foreign military forces receive unique protection from jurisdiction that even their own heads of state are not entitled to, and which contradicts the same anti-impunity arguments advanced to remove those immunities. It is also entirely appropriate to question the conception of criminal law that is at work in eliding the distinction between a substantive defence (of official capacity) and a procedural bar (such as immunity).

Here, the positivist analysis of Part III not only rejects the arguments in relation to al-Bashir, but also exposes the mask of neutrality that is drawn over that analysis. To the extent that the PTC attempts to identify legal doctrine as the basis for its position, it claims to be engaged in the same sort of ‘legal engineering’ that was identified and rejected as impossible in Chapter One. This analysis also recognizes the problem of excluding Third World actors as lawmakers. Even if one can contest their reasons as self-interested, it remains the case that states are central actors in the shaping of international law. It therefore matters that African or Asian or Latin American states resist the Council’s action or the ICC’s interpretations of customary international law. States’ views on whether the Security Council can bind them to treaties that they do not consent to are profoundly relevant to determining the legality of such acts; the same can be said for the questions of head of state immunity. As much as the al-Bashir case turns on the interpretation of how Article 98 of the *Rome Statute* views international custom and international treaties, so too does it affect its analogue, Article 103 of the UN Charter, where the custom/treaty distinction originates. To the extent it is the Security Council and the judges of the ICC that conclusively determine these issues, Third

World states once again find themselves on the periphery of international law-making, a position made more untenable by the fundamental nature of the concepts at issue.

There are myriad questions unanswered by the PTC analysis. By accepting the Security Council referral despite its effects upon treaty law implies a changing relationship between the UN and general international law, reshaping our understanding of the supremacy clause of the Charter in a way that contradicts past statements of the ICJ and the General Assembly. It is not clear from the al-Bashir case how this internal tension is to be resolved, and whether customary international law acts as a restraint on UN or Security Council action. Nor is it clear under what circumstances customary international law does *not* constrain one or both of these bodies. It is uncertain whether all deviations from customary international law need approval from the General Assembly, or simply a Chapter VII resolution. A similar point can be made about the ICC and its relationship to the AU. The PTC claims that the AU cannot use Article 98(1) to justify its non-cooperation with the ICC, and therefore cannot compel individual member States not to cooperate with the Court, because the ICC has determined that customary international law is in its favour.<sup>185</sup> The problems with this determination are manifold. A state's membership in the ICC Assembly of States Parties and AU are legally and conceptually distinct, and so while the ICC can contest the AU interpretation of customary international law, the Court comes perilously close to being judge in its own cause when it purports to resolve that question in its favour. Moreover, the ICC cannot legally exercise any jurisdiction over another international organization such as the AU or interpret the terms of the *AU Constitutive Act*, and any attempt to restrict the powers of the AU to issue binding obligations to AU members is *ultra vires*. Finally, the Court elides

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<sup>185</sup> See Malawi Decision, *supra* note 102 at paras 15 and 37.

the distinction between States and States Parties to the *Rome Statute* when it claims for itself the *ius puniendi* for the international community.<sup>186</sup> The ICC may have some rights to punish with respect to States that have accepted the Court's jurisdiction, but it is overstating the case by implying the existence of a residual global right to punish. There are numerous qualifiers to this right within the *Rome Statute* itself.<sup>187</sup>

These errors seem to stem from the Court's flawed conception of itself as occupying a privileged place in the hierarchy of global governance, albeit in the absence of anything resembling a supremacy clause such as Article 103 of the UN Charter. The effect of such pronouncements may be minimal in the short term, but a longer view of international relations suggests this will be interpreted as an arrogation of power that is controversial because it is of dubious legal pedigree, and made even less palatable by the fact of its exercise against African states both as individual entities and part of a collective. This alienation will likely increase if the ICC takes this position to heart and relies upon it in future cases.

In their prescient commentary, Anghie and Chimni reiterated that in the "TWAAIL concern for an inclusive and participatory international law, our view is that the law...should evolve in a manner which is fair and acceptable to all parties", and that the role of the Security Council was one of "several significant shortcomings" in the *Rome Statute* that subordinated "participation and democracy often give way to power."<sup>188</sup> In this way, TWAAIL scholarship foreshadowed the utility of formalist approaches as restraint on international

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<sup>186</sup> *Ibid* at para 46.

<sup>187</sup> E.g., Articles 98(1) and (2) and the admissibility restrictions in Article 17 of the Rome Statute, *supra* note 47.

<sup>188</sup> Anghie & Chimni, *supra* note 1 at 94 – 95.

institutions' appetite for eroding sovereign equality. From a TWAAIL perspective, assertions of sovereign equality may well be positivist, as weaker states (and their peoples) cannot rely on economic or political clout to resist infringements of sovereign equality; they must turn instead to the formal protections and language of the law. Relying on the progressive development of the law, through broad participation in its reform and through state recognition of the neutrality and impartiality of international legal institutions, is to be preferred to the damaging alternatives.

#### **E. An Interest in *Not* Prosecuting?**

Nonetheless, the idea that arresting, trying and convicting al-Bashir would serve the interests of ordinary peoples retains intuitive attraction. Appeals to the processes of international law-making seem removed from the day-to-day realities of the crimes committed by the Sudanese government. Yet it is too simplistic to insist that prosecuting offenders gives effect to the sum total of interests implicated by the criminal law. As noted in Chapter Three, criminal law is as much a social policy as any other, and the context within which it is enacted therefore matters.<sup>189</sup> Hence in that chapter it was noted that the interest in sovereignty is an important factor to be accounted for in the exercise of extraterritorial jurisdiction, and the formalist analysis of this chapter emphasizes the importance of sovereignty.

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<sup>189</sup> Antony Duff, Lindsay Farmer, Sandra Marshall & Victor Tadros, *The Trial on Trial: Towards a Normative Theory of the Criminal Trial*, vol. 3 (Oxford: Hart Publishing, 2007) at 155 – 156 (“There are undoubtedly some kinds of political condition where any criminal trial at all, which purports to be in the name of the state, is illegitimate. In other social conditions trials of some individuals might be illegitimate, or trials of certain kinds of act, even acts that would properly constitute criminal wrongs under other political conditions.”).

As much as sovereignty might shield some actors from prosecution, it remains a moral principle that seeks to restrain those who would otherwise act unbridled in the exercise of both their brute and ‘soft’ power. The morality is not in the restraint, however, so much as the protection it offers from the violence perpetrated by states whose ambitions — militarily, politically, and economically — exceed their territory.<sup>190</sup> In the eyes of those (poorer, less powerful) states whose sovereignty is the one sacrificed on the altar of good intentions, calls for international jurisdiction in the absence of state consent obscure the values protected by sovereignty. Sovereignty provides the basis for the peaceful instantiation of “a diversity of interests and values, and the protection of weak political communities from overbearing projections of peer by strong foreign states.”<sup>191</sup> Important legal dimensions of sovereignty, and their equally important rationales, are too easily put to one side on the basis that they prevent prosecution of international criminals. Faced with the prospect of impunity, no aspect of sovereignty is exempt: not liberal criminal law’s insistence on the principle of legality, the functional immunities of state officials, the personal immunities attached to state offices, or the freedom to respond to international crimes through alternate means - negotiated amnesties, local criminal and civil trials, or truth commissions.<sup>192</sup> The anti-immunity position erases the moral interest in local peoples and institutions deciding the appropriate response to international crimes.<sup>193</sup> Demands for the perfection of justice tend to justify authority without

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<sup>190</sup> Jeremy Rabkin, “No Substitute for Sovereignty: why international criminal justice has a bleak future - and deserves it”, in Edel Hughes, William A Schabas & Ramesh Thakur, eds, *Atrocities and International Accountability: Beyond Transitional Justice* (New York: United Nations University Press, 2007) at 99.

<sup>191</sup> Brad Roth, “Coming to Terms with Ruthlessness: State Sovereignty and International Criminal Law in Domestic Courts” in *Sovereign Equality and Moral Disagreement* (Oxford: Oxford University Press, 2011) at 228.

<sup>192</sup> Brad Roth, “Anti-Sovereignism, Liberal Messianism, and Excesses in the Drive against Impunity” (2001) 12 *Finnish YB Int’l L* 17 at 17 – 19.

reference to moral or political concerns,<sup>194</sup> and are especially indifferent to the hard choices that must be made in crime-affected states.<sup>195</sup>

By reasserting the importance of sovereignty against this legalist impulse to assert ICL, the positivist analysis looks past the insistence that removing immunities is an intrinsically good or beneficial act. Instead, it queries what benefits would be offered by prosecuting a head of state over and above the objections of that state and others. In isolation, and in the absence of other efforts to respond to the international crimes taking place within a state, it is unclear what benefits will actually accrue. It is unclear that an oppressive regime will actually be compelled to change, or change for the better. Instructive examples here are the recent regime changes initiated in Egypt, Libya, and Iraq, where oppressive regimes were either replaced with civil wars generating tremendous casualties (Libya, Iraq), or the continuation of the preceding regime with a new figure head (Egypt). Thus while interests in dignity and security might be affirmed through prosecution, those interests may well be simultaneously undermined by the consequences of subsequent regime change (or regime continuance). When coupled with the diminished conception of sovereignty that accompanies the removal of immunities and reliance on Security Council authority, the costs of prosecution may be quite high.

In this light, it is worth asking how committed states are to the prosecution of international offenders. As much as African states have posed an obstacle to the prosecution of al-Bashir, the Security Council has also failed to support the ICC. The OTP has been

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<sup>193</sup> Anghie & Chimnie, *supra* note 1, at 95 – 96.

<sup>194</sup> Judith Shklar, *Legalism* (Boston: Harvard University Press, 1964) at 16 – 17.

<sup>195</sup> Rabkin, *supra* note 190 at 118–121.

explicit that the lack of support from the Council in particular – chastised as in need of a “change of attitude and approach” – was central to the its decision to suspend its Darfur-related activities.<sup>196</sup> Again, this indifference resonates in the history of ICL, and particularly the sense that both the ICTY and ICTR were *mea culpas* for an international failure to act in the face of atrocity. Those tribunals at least were supported (albeit imperfectly) in their operation; it seems that the referral of Sudan to the ICC – without any concrete follow-up – is a contemporary manifestation of the same ambivalence.

A formalist approach to international law and sovereignty thus clears space for a more contextualized evaluation of the context of international crime, and the appropriate response. It is this formalist approach that explains why states such as South Africa can justifiably engage in truth and reconciliation instead of prosecution. In TWAIL fashion, it allows for the shaping of justice to fit local concerns, creates space to prioritize negotiation over prosecution, and points to the need for concrete engagement beyond the application of ICL.

## V. CONCLUSION

This chapter has addressed three issues that arise in the prosecution of international crime. First, it has outlined the main preconditions to punishment, and the particular importance of the question of a particular court’s standing to exercise extraterritorial jurisdiction over particular crimes. A strongly contested aspect of ICL, standing also

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<sup>196</sup> *Reports of the Secretary-General on the Sudan and South Sudan, Comments of Ms Fatou Bensouda, Chief Prosecutor of the ICC*, UN Doc. S/PV.7337 (12 Dec. 2014) (“[G]iven this Council’s lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching. It should thus be clear to this Council that unless there is a change of attitude and approach to Darfur in the near future, there shall continue to be little or nothing to report to you for the foreseeable future. The question for the Council to answer is what meaningful purpose was my reporting intended to serve and whether that purpose is being achieved?”).

intersects with basic concerns about the justifiability of extraterritorial jurisdiction raised in Chapter Three, and a failure to substantiate a court's standing may undermine that institution's jurisdictional claim over international crime.

The chapter then addressed the ICC's assertion of standing in the al-Bashir case. It argued that the ICC was wrong on the merits of the case, misinterpreting important rules of public international law (on the law of treaties, and the powers of the Security Council) and of international criminal law (on the law of immunities). While the analysis focuses on one particular case, it challenged the jurisdictional remit that may be claimed by a range of ICTs, including the ICC and the ad-hoc tribunals.

Finally, the analysis laid the foundation for Part IV's critique of more general issues that are presented in the development and enforcement of international law. It highlighted the ways in which power imbalances are integrated into ICL, particularly through the Security Council; the false assumption that international legal institutions and ICL norms are neutral; the disparagement of Third World perspectives as purely political, and the associated exclusion of Third World states from the development of ICL. This analysis also noted the danger that the questionable legal argumentation adopted in the al-Bashir case will reduce the protection offered by ICL to ordinary citizens, either by bowing to the preferences of powerful states, or by giving local dictators a legal platform from which to justify their obstruction of criminal justice.

In this way, this chapter offered a new twist on TWAIL's critical methodologies. It used a formal, positivist approach to law as a mode of resistance to international law's traditional inequities and frequent acquiescence to state power. At the same time, this resistance was not a wholesale rejection of ICL, but a concern about the instrumentalization

of the law and the ripple effects of particular legal arguments on the broader international legal architecture. It thus remained committed to the constructive criticism pointed to in this dissertation's Introduction.

## **Conclusion:** The Limits and Possibilities of TWAIL

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### I. A THIRD WORLD APPROACH?

This dissertation has outlined a Third World Approach to International Criminal Law, one that addresses the practical and normative problems of international criminal law (ICL), with a view toward developing a more coherent and effective discipline. Through this analysis, it has offered normative elements that are both prescriptive and descriptive. In this respect, its analysis has not only proposed changes, but explained central features of the existing system, which would be essential to any international criminal scheme in the Westphalian system. It thus points toward a preferable future whilst grounded in the normative features of the present.

A major focus has been to consider the possibilities of TWAIL as a means of analyzing ICL. This dissertation has consistently sought to eclipse TWAIL’s traditional focus on general public international law and emphasize the importance of criminal law theory and policy in ICL. At the same time, it has sought to infuse criminal law-oriented studies of ICL with the critical ethos and sensibilities of TWAIL. At the root of each chapter is a question about how a particular aspect or understanding of ICL can be investigated through the lens of

the criminal law. This methodological focus – on connecting TWAIL to the criminal law aspects of international criminal law – links every chapter.

The first chapter explained the relevance of a TWAIL and postcolonial approach to international law, and the second developed a methodological approach employed throughout the remainder of the dissertation. It emphasized five characteristics: using historical analysis; studying ‘international criminal law’ as an interdisciplinary phenomenon; decoding the ‘neutrality’ of legal regimes; critically analyzing not just the practice of ICL, but its normative foundations as well; and the importance of pluralism and self-reflectivity.

This approach was first applied in Chapter Two to the question of what constitutes an international crime, with a view to illustrating the various deficiencies in the current understanding. The primary deficiency highlighted here was that present definitions of international crime exclude from consideration the interests that many populations around the world have in investigating and prosecuting a broader range of crime, especially those that concern the economic context of atrocity crimes.

The third and fourth chapters picked up on this idea of interests, arguing that collective interests in dignity and security provided a sound basis for the general practice of criminal punishment. The third chapter noted that one of the benefits of an interest-based approach to punishment is that it allowed for the recognition of state sovereignty as a vital interest that is not absolute protection against extraterritorial punishment. At the same time, it described how sovereign jurisdiction might justifiably act as a bulwark against punishment of all domestic crimes. This compromise position reflected important TWAIL concerns about the state as both an agent of protection and an author of violence. It provided an alternate

perspective that mediated the all-or-nothing framing that often surrounds debates about sovereignty's limits.

Those chapters also focused on selectivity in current approaches to punishment. Chapter Four developed a typology of selectivity practices in international criminal justice, arguing that one subset in particular – that of group-based selectivity – undermined (perhaps fatally) the justification to punish because they suggested that individuals were being punished for reasons other than law-breaking. Importantly, TWAIL helped to explain why not all selectivity complaints are equal, and why common defences of selectivity – based in the practice of domestic criminal law, or the concepts of gravity and failed states – are themselves deeply flawed concepts. TWAIL thus helps reframe and reinvigorate the debate about selectivity practices in ICL.

Chapter Five expanded on the ideas of selectivity practices by considering them in relation to preconditions to punishment. Emphasizing the precondition of 'standing' built on the role of preconditions to punishment, turning away from its emphasis on criminal law to identify one specific way in which ICTs will violate these requirements through their position in broader the international law regime. Here, the TWAIL approach of this dissertation made the clearest interface with classic TWAIL views of public international law and institutions. It argues that in relation to the referral of non-States Parties by the Security Council, the ICC was violating the preconditions of punishment by actively embedding its inequities within the jurisdictional scheme of the Court. In addition to normative problems, this presented practical difficulties for the Court by reducing cooperation from aggrieved, primarily Third World states. As a matter of practice, ICL cannot simply disregard the incidents of sovereignty that pose obstacles to its work; these normative features of the

international law framework retain central importance for states and peoples that are protected – and sometimes not – by them.

Finally it was further argued that this doctrinal approach to public international law fit with TWAIL in that it asserted the formal equality of sovereign states and sought to restrain the reach of powerful international institutions. This positivist approach can be justified as a response to what is not a transition to a new mode of inclusive international criminal law, but the replication (in at least some important respects) of pre-existing patterns and biases of international law.

## II. LIMITS & POSSIBILITIES

An essential element to the methodological approach of this dissertation is to be self-reflective and question its own assumptions and gaps in its analysis. This section supplements the previous section's review of what this TWAIL analysis of ICL has offered, and then enquires into the limitations it offers.

### A. The Specter of the 'Political'

In defending an interest-based approach, TWAIL's interface with criminal theory helps dispel the myth of TWAIL partiality. To the extent that increased criminalization and more regular prosecutions of different types of violence helps restrict the occurrence of international crime, and seeks to expand the protective ambit of ICL across a wider range of people who suffer from serious human rights violations, the interests promoted by this TWAIL approach are often quite broadly shared, and less parochial than the 'Third World' moniker might suggest. One of the pressing issues in Chapters One and Two is to transcend

TWAIL's predominant focus on the public international law, prioritizing the criminal law aspect of ICL and the conceptualization of crime in criminological terms.

Moreover, this analysis has also confronted the idea of law's objectivity. It has helped show the falsity of the idea that legal norms, no matter how well 'engineered', are necessarily apolitical or expressions of purely rational perspectives. Importantly, and in keeping with an analysis that is always concerned with more than statist interaction, TWAIL has helped show that the normative inconsistencies in the law that have been produced by state's expressing their self-interest and, importantly, further ratified by legal theorists.

At the same time, two constraints remain for this TWAIL analysis. Having identified the subjectivity of ICL, and the pervasive influence of national and international political preferences, it remains to be explained why the particular subjectivity of TWAIL is to be preferred over others. Is it not as polluted as any other, and if so why TWAIL and not, for example, the present scheme of pragmatic major power accommodation? Relatedly, claims about broad interests in criminalization notwithstanding, is a 'Third World' approach not – given its explicit privileging of particular constituencies – tainted in ways that mainstream understandings of international law are not?

In response, it can be said that this dissertation has acted not as a critical vehicle seeking to privilege certain interests, but one concerned with reconstructing the normative foundations of ICL, and thus with institutional and practical reform. More to the point, it has done so on the terms of specifically Western conceptions of liberal criminal law. Indeed, the claims made here do not reject international criminal law; to the contrary, they offer a better general normative explanation of or direction for some of its most fundamental aspects. Crucially, it has done so with the core mission of recognizing the suffering and interests of

the most marginalized states and peoples of the world. That to be sure is a political stance, but to complain of it is to reject the premise of state-dispensed criminal punishment that - in Western legal conceptions - is *always* directed toward some political end (such as social cohesion). Moreover, there is something contradictory about thinking of TWAIL in contrast to ‘mainstream’ legal thought. While the idea of the ‘Third World’ seems parochial and limited, it is worth recalling that the condition of the Third World is in fact the shared condition of the majority of the world’s population.

To claim this TWAIL vision of international criminal law is somehow tendentious because it starts from a particular point of view of the world, and articulates a particular vision for that same world, is to say that it is tainted in the same way as virtually all other theories. Perhaps it might be said that TWAIL is a *worse* example of this predisposition, one that is more parochial, self-interested, or even duplicitous. The parallels between this claim and the attack on international legal feminism are striking. Feminists should be “taking law as it is, with all its rationality, objectivity and abstraction”;<sup>1</sup> their methods are a claim to partiality, not objective universality;<sup>2</sup> and, such specialist theories “dispense with neutrality and objectivity”.<sup>3</sup> The knowledge and perspectives offered by these critical approaches are devalued because they - unlike the mainstream, unlike the status quo - are politicized. This is not just a claim about whether the norms are the product of legal science or legalized politics, but about critical and epistemological authors. To say that the Third World concern with apartheid, aggression or other crimes is politicized is to make a comparable gendered

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<sup>1</sup> Anthony D’Amato, “Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives*” (1995) 89 AJIL 840, 843.

<sup>2</sup> Fernando Téson, “Feminism and International Law: A Reply” (1993) 33 Va. J. Int’l L 647.

<sup>3</sup> Bruno Simma & Andrea Paulus, “The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View” (1999) 93 AJIL 302.

criticism to that launched against feminist scholarship. Colonial masculinity defined itself by reference to the lack of masculinity of the colonized - the men of the colonial world were effeminate men, not-real men; they were feeble physically, spiritually, and intellectually. The inability to engage with the universal concerns of Western legal science further demonstrates this deficiency. The Western 'legal engineer' is therefore defined in contrast to the inferior Third World political agent, whose intellectual capacity is constructed as effeminate - in its irrationality, in its impurity, in its subjectivity - and therefore deficient in the same way these colonial powers would see feminists.

Yet while TWAIL can identify the 'political' in ICL, and can defend itself against charges of its own partiality – partly by acknowledging its subjectivity up front, in ways that many mainstream legal accounts do not – it cannot remedy those deficiencies. Political preferences are embedded in international law, and to an extent in international courts as well. Identifying the various ways in which these concerns manifest themselves is a first step toward minimizing or ameliorating their influence, but it cannot erase them from the discipline entirely. Perhaps TWAIL analyses can be the foundation for some political action, but they can neither eliminate the role of political choice in international law, nor compel reform.

## **B. The Underdevelopment of ICL**

In exposing the politicization and normative inconsistencies in ICL, this TWAIL approach has also problematized the concepts of human rights and violence that play instrumental roles in ICL. As a result, it has presented a theoretical basis from which to criminalize structural as well as spectacular violence. Yet it is easy for theorists to imagine a

broader-ranging criminal law, without regard to real world political and resource constraints. TWAIL can identify needs, but it cannot address those needs or fill resource gaps. This lack of resources, one supposes, is the eternal dilemma of the Third World, and hints at the problem of so many TWAIL analyses, in ICL and elsewhere: the feasibility of reform.

Perhaps TWAIL can point to creative solutions to at least some of these problems. To the extent that resource constraints mean that there is a lack of expertise and institutional infrastructure to engage in the investigation and prosecution of even a narrowly defined set of international crimes in the most war-torn of African states. Yet in way, this only points to the need for permanent international or regional criminal courts, that have the necessary infrastructure and expertise to respond to international crimes. In this way, the redundancy and excess costs implied by the establishment of the physical court itself, and the recruitment of personnel, is minimized. It is difficult, in fact, to imagine that any deficiencies in personnel will be long-lasting, given the burgeoning practice of ICL over the last twenty years, which has by necessity developed trained judges, prosecutors, defence attorneys, clerks, investigators and registrars. There is a veritable industry in training and developing future international criminal lawyers.<sup>4</sup>

It is also worth noting that while contemporary international criminal trials are primarily concerned with individuals in military positions, perpetrating or encouraging the kinetic violence of the paradigmatic international crime, this has not always been the case. The very first modern international criminal tribunal at Nuremberg, managed to not only prosecute the usual international crimes, but devoted a great deal of energy to securing the convictions of large numbers of businessmen and industrialists who were involved in the

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<sup>4</sup> Such as the author.

pillage of Europe. The expertise to conduct some trials is being excavated and resuscitated largely on the basis of those proceedings from 70-odd years ago.<sup>5</sup> Thus the scope of international criminal prosecutions has been wider in the past, and thus the present call is a motion to return to the more holistic understanding of international crime recognized at the end of the Second World War, and think about how those forgotten ideas of crime have evolved in a globalized economy.

Of course, criminalizing more crimes, and pursuing more actors than are currently pursued, implies more investigations and more prosecutions, and thus more costs. At the same time, international criminal trial costs can be marginal in comparison to peacekeeping and reconstruction costs.<sup>6</sup> Also, international prosecutions can be cost-efficient when compared to their domestic counterparts. As an example, the domestic trial of the two Oklahoma City terrorists cost approximately \$82.5 million, whereas the per-trial cost at the ICTY was around \$18 million.<sup>7</sup> The per-trial-day costs of the ICTY are actually comparable to domestic American criminal trials.<sup>8</sup> While the costs of individual trials are striking, this is in part a function of their complexity. Factoring in their length and complexity, international criminal trials are fairly efficient, and would likely be more so with centralized permanent international criminal courts, at either the supranational or regional level.

As noted in Chapter Three, this also forces international criminal institutions to think seriously about complementarity, and the relationship between national and international

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<sup>5</sup> See, e.g., James G Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (Open Society Foundation, 2011).

<sup>6</sup> Cesare P R Romano, "The Price of International Justice" (2005) 4 L. & Pract. of Int'l Cts. and Trib. 281, 303 – 304.

<sup>7</sup> David Wippman, "The Costs of International Justice" (2006) 100 AJIL 861, 862 – 863.

<sup>8</sup> *Ibid* at 863 – 872.

courts. Complementarity was how the capacity problem was addressed at Nuremberg, at Tokyo, in Rwanda and the former Yugoslavia. Of course, complementarity does not just mean additional court procedures, but reconsidering the set of tools available to respond to international crimes, and how we combine them effectively: hybrid tribunals, amnesties, truth commissions, reparations, lustration, disarmament and demobilization programmes, trade reforms, anti-corruption initiatives and so on. The point is that increasing the number of crimes that can be prosecuted does not necessarily mean increasing the number of prosecutions; defining international crimes is a separate question from deciding how best to respond to them in particular circumstances, and different approaches will have different costs and funding structures.

There is also a degree of cynicism in concerns about financial duress. In the case of the claims of financial strain that animated the completion strategy arguments is that the arrest and transfer to the ICTY of each of its three major suspects — Karadžić, Mladić and Slobodan Milošević — were precipitated by the profferal of major economic incentives. The day after Milošević's illegal transfer to the ICTY,<sup>9</sup> over \$1 billion in aid was promised to the Federal Republic of Yugoslavia.<sup>10</sup> Mladić and Karadžić, on the other hand, were only arrested and transferred once it was made clear that their attendance at the ICTY would be conditions *sine qua non* of Serbia's admittance to the common currency and open markets of

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<sup>9</sup> Konstantinos D Magliveras, "The Interplay Between the Transfer of Slobodan Milošević to the ICTY and Yugoslav International Law" (2002) 13 EJIL 661, 663 – 668.

<sup>10</sup> *Ibid* at 676, where the author notes that the Serbian government at the time (1) acknowledged that the transfer of Milošević would help secure large sums of international aid at a donor's conference, and (2) referred to Milošević as its 'most valuable export commodity'. The day after Milošević's transfer to The Hague, over \$1bn in aid was pledged to the Republic of Serbia. See "Milosevic Extradition Unlocks Aid Cooffers" *BBC News* (29 June 2001), online: BBC News <<http://news.bbc.co.uk/2/hi/europe/1413144.stm>>.

the European Union.<sup>11</sup> Thus, on the one hand the international community insisted that the ad hoc tribunal was too expensive to maintain; on the other hand, it relied on economic incentives and direct aid as inducements that prolonged tribunal work. If these trials were important enough for billions in aid and economic partnership to turn on them, then perhaps the trials themselves also warranted some further, direct funding.

A similar cynicism can be seen at the ICC, which is largely funded by contributions from members of the Court's Assembly of State Parties (ASP). While the ICC funding situation is not ideal, it has been placed in a difficult situation in some circumstances. One wrinkle to the funding scheme concerns referrals of situations to the Court by the UN Security Council. In such cases, the *Rome Statute* envisions (but does not mandate) shifting the financial burden of investigating and prosecuting any cases to the UN.<sup>12</sup> Yet in each resolution containing a referral, the Council has explicitly refused to do so.<sup>13</sup> In the case of Darfur especially, the ICC was itself paying for investigations that largely went nowhere but which poses serious threats to the Court's credibility. Thus while it may be that an expanded approach to international crime will cost more, it is also the case that funding problems are as

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<sup>11</sup> The Serbian ambassador to Germany described how the financial stick-and-carrot regime remained in place, noting that Serb accession to European Union membership depended upon the capture and transfer of suspected war criminal Ratko Mladic to the Hague: "We have no reason to protect Mladic. We have been prisoners of Mladic for a long time, for Serbian accession to the EU very much depends on this case." "Ambassador: Serbia expects 'fair treatment' from the EU" EurActiv (3 March 2010), online: EurActive.com

<<http://www.euractiv.com/en/enlargement/viskovic-serbia-expects-fair-treatment-eu-interview-299881>>.

<sup>12</sup> Article 115(b), *Statute of the International Criminal Court*, July 17, 1998, 2187 UNTS 90, 37 ILM 1002.

<sup>13</sup> See Operative Para. 7 of UNSC Res 1593, UN Doc. S/RES/1593 (31 Mar. 2005) (Darfur), and Operative Para. 8 of UNSC Res 1970, UN Doc. S/RES/1970 (26 Feb. 2011) (Libya). The same operative paragraph was included in Draft Resolution S/2014/348, which sought to refer Syria to the ICC but was vetoed by Russia and China. The identical text of all three paragraphs reads: "Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily".

much a result of the international community's lacklustre commitment to international criminal justice, as they are of the appetite of international criminal lawyers.

### **C. The Incorporeality of Political Will**

Of course, political will is perhaps the one resource that TWAIL theory of ICL (or any other aspect of ICL) cannot conjure. The continuing concern is that a more expansive ICL system is hopelessly optimistic in that it demands more of states than they are ready to give. State intransigence is the primary dilemma of international legal enforcement in all its aspects: crime, trade, whaling, pollution and so on. An ICL that wants to not only prosecute more individual actors of the same variety that are already sporadically prosecuted, but also more corporate actors, and more individual and institutional acts, will be frustrated by the shield of sovereignty – a shield this dissertation has reinforced in some ways. Desirable as it may be, the broader, more holistic ICL advocated herein is unrealistic; the system that currently exists already pushes states and other actors to the margins of what they will tolerate and support. Thus the world is not perfect, but it is the best possible one.

This argument is intuitively persuasive, in the sense that so much of the debate around international law concerns the struggles of enforcement. This dissertation has similarly focused on the inherent difficulties of transcending or piercing the formal boundaries of state sovereignty, in order to secure cooperation. Yet it seems premature to say we have pushed far enough, for three reasons. First, the objection that this dissertation adds too much to ICL conflates separate categories of “more”. To recap, this dissertation argues that a broader range of conduct should be seen as capable of giving rise to international crimes; that this range of conduct need not always have some nexus with spectacular atrocity,

but can include more subtle structural forms of violence; the related proposition that a broader range of actors should be seen as possibly responsible for international crime; that courts trying international crimes need to investigate and prosecute all parties to a conflict, especially when they are responsible for similar acts; and, that courts need to investigate a broader range of situations.

Of these five proposed vectors of expansion, the first three propositions represent where ICL *should* go in order to make it more responsive to the interests of the people it claims to protect; more preventative; more effective; and, to make a coherent whole out of the list-based approach to defining crimes. They deal with the idealization of the ICL system, whereas the latter two deal with minimal conditions. They do not require any reconceptualization of international crime or justice. Rather, they demand a redress of stark double standards that undermine the normative justification for punishment. To say then that this is not an expansion that can or should be undertaken is to default on the moral basis for punishment. To put it differently, these aspects of the future of international criminal punishment are non-negotiable because they directly attack the rationale for punishment in the first place. The distinction is between the basis of criminalization, and the practices of criminal enforcement, and the relative margin of appreciation afforded to the failure to meet the ideal standard in the first versus the second.

This is also relevant for the second problem with claiming too many demands are placed on states: if international criminal law is not applied with greater consistency, it will not be morally sustainable. The discipline must broaden in at least some respects if it is to be justified as a normative concern. To the extent that the exponents of ICL, whether defined narrowly or not, are interested in a more proactive system, one that stems instead of responds

to suffering - either by defenestrating the structural forces that produce it, or through the psychological impact of individual (or corporate) deterrence - then again the field and its practitioners must broaden their horizons. Furthermore, as argued in the previous chapter, greater consistency will go some way towards persuading reluctant states of the fairness and impartiality of those extraterritorial trials. In its absence, states will have a plausible - if self-interested - reason for decrying extraterritorial trials as aspects of a modern imperialism, and gaining popular support for their 'moral' position.

Yet moral arguments are no guarantee of political purchase. It is, after all, a troublesome moral argument that argues a man alleged to have committed genocide should *not* be put on trial; if political heavy-handedness is required to bring him to justice, then that seems a small price to pay. If it cannot overcome political power, can TWAIL offer anything to make its moral arguments more feasible?

It is possible that demanding more actors and acts be prosecuted will actually encourage greater cooperation. Not all actors are or will be protected by the state. States are generally happy to help in the prosecution of rebel groups to which they are opposed. As well, a more capacious approach to international crime may lead to more prosecutions by giving recalcitrant states and actors more avenues for cooperation with extraterritorial courts. States and leaders will have different protective interests depending on the act or actor who is investigated. Certain businesses, politicians or military leaders may not attract the same formal or informal protections of sovereignty (such as immunities) or state power; that cooperation may lead to further reinforcement of the prohibitions of criminal law, and greater internal pressure for more state cooperation. In other words, by shifting away from the high-stakes insistence on prosecuting a narrow band of those "most responsible" for a small range

of conduct, to a prosecutorial strategy with a broader understanding of both responsibility and criminality that focuses on a wider range of offenders, extraterritorial courts will give more opportunities for reluctant states to cooperate. This is an imperfect strategy, to the extent that it apparently acknowledges that certain “high-level” officials will be *de facto* immune from prosecution in spite of their culpability. At the same time, the normalization of extraterritorial criminal jurisdiction may have the effect of increasing domestic pressure on those same high-level officials. As well, the investigation and prosecution of those lower down on the chain of command will go some ways towards combatting the problem of group-based selectivity. Finally, as the history of international criminal justice has shown us, the prosecution of high-level leaders — Milošević, Mladić, Karadžić and Taylor among them — is often delayed.

And yet, this strategy is in some ways a moral wash with opposing arguments. The moral calculus that contemplates some immunities and some impunity for “high-level” offenders, even on a temporary basis, is an abstract one. This is a fundamental problem of the discipline of ICL – that its idealist pursuit of justice is regularly short-circuited by the pragmatic demands of remote prospects of peace or the simple pragmatism of political allegiances and self-interest. For all its insights, TWAIL cannot traverse this impasse.

#### **D. Abundant Indeterminacy**

Sovereignty has featured as a concern throughout this dissertation. In Chapters Three and Four, it was argued that, in keeping with TWAIL’s problematization of the state and its elites, sovereignty was defeasible under certain circumstances. The position in Chapter Five, however, was that to the extent the puncture of sovereignty by an ICT formalized pre-

existing inequities in the international order – the same inequities that preoccupy so many TWAIL studies of international law – it was to be resisted. While this position is defensible, it is not absolute, as suggested by the problem of moral argumentation raised earlier in this section. While statehood and its formal protections are, in a sense, a foundational problem in the international law, the Janus-face of sovereignty – that it sometimes affirms Third World peoples, that it sometimes represses them – points at an even more pervasive problem, the problem of indeterminacy that plagues international law.

For all it may offer to this study of ICL, TWAIL cannot overcome this dilemma. In part, this is because TWAIL is itself so diffuse, welcoming under its umbrella all manner of disciplinary approaches and theories. No theoretical tradition is analytically pure, in the sense of being free from subjective views and predispositions, but TWAIL seems particularly complex and amorphous because of its openness. This indeterminacy runs through this dissertation, starting with the idea of the ‘Third World’ in Chapter One; the instability that presents in Chapter Two’s calls for interdisciplinarity and self-reflectivity; the concern about the instrumentalization of interest-based approaches to criminalization and punishment in Chapter Three; and the understanding of the boundaries of sovereignty in Chapter Five.

Here, one can see why Koskenniemi prefers to engage in critical legal studies. The staking of a particular claim, advocating for a specific normative order or international law framework, demands making an imperfect choice. No move is perfectly defensible and thus opens itself up to further critique. The intellectual coherence of this position offers a certain luxury, but it is perhaps the one option that is foreclosed to TWAIL scholarship. As noted in the Introduction, a TWAIL ethos, one guided by concern for specific political and legal arrangements in the world and their impacts on marginalized populations, requires some

degree of concrete engagement with the law in its concrete forms. At some point, even if indeterminacy is the unbridgeable chasm of international law, choices must be made and positions defended. ICL is a real phenomenon, it acts in the world, and – to at least some theorists and ordinary peoples affected by international crime – offers some redress to the gross inequalities and suffering with which TWAIL concerns itself. As much as indeterminacy offers a site for critique of the status quo, it also enables the existing state of affairs. The paralysis of indeterminacy offers no tangible challenge to the problematized structures of international law; the perfect becomes the enemy of the good.

#### **E. Choosing Injustice?**

The risk then is the choices defended in this dissertation are not just uncertain, but actually dangerous. In the previous section, it was noted that this dissertation specifically adopted an approach grounded in Western criminal theory, one that took the vision of a liberal international criminal law on its own terms, partly in recognition of the need to blunt claims of intellectual bias that often extend to critical legal theorists including TWAIL scholars. The most potent general objection to this project seizes on this analytic approach as being compromised not for its radical approach, but for its connivance in the perpetration of the status quo. Where revolution and dismantling is warranted, this dissertation instead proposes episodic and gradual reform. It makes pragmatic concessions that at their core fail to deal with fundamental objections to the nature of criminal punishment itself, and particularly its projection in the absence of broader violence reduction and prevention initiatives. This final demurral from the thesis is thus of a different flavour in that it challenges the possibility of an international criminal law, full stop. Fault is found not with

TWAIL's demarcation of specific rules about crime, punishment or sovereignty, but in its preliminary choice to even engage in the field.

While this is not an uncommon position in critical scholarship, this discontent has been most clearly articulated by feminist scholars. The late Dianne Martin expressed her “distaste for a system that processes and reprocesses the same young men—and a few women—in and out of prisons, while failing to deliver on the promises made in its name to keep us safe from the harm they do....as a feminist, I am increasingly concerned that feminist ideas and credibility are being appropriated to strengthen an apparatus that I believe should be dismantled not supported.”<sup>14</sup> In this analysis, even a ‘reformed’ international criminal law will not necessarily be one worth retaining if it fails to address the myriad structural problems that characterize its practice, including: the narrow construal of violence; the group-based selectivity within situations; the broad-based tendency to ignore the crimes of powerful states, and focus instead only on actors and situations in the global South; and, the integration of international criminal justice with the Security Council. While this dissertation attempts to justify criminal punishment because it serves the interests of dignity and security, Martin warns that criminal law “dispenses punishment and preserves state authority so that existing power relations are legitimated and replicated....that system is anything but transformative.”<sup>15</sup>

The real concern is not that we might be unable to rely on criminal law to respond to international crimes, but that in our reliance on the criminal law, we will look past its uses and abuses. Victimized populations become the justification behind political opportunism

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<sup>14</sup> Dianne L Martin, “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” (1998) Osgoode Hall LJ 151, 152–53.

<sup>15</sup> *Ibid* at 155.

and appropriated expectations. The construction of victimhood - especially passive victimhood - in international criminal law dovetails with the erasure of defendant's rights - through illiberal extended liability theories, through deeply flawed jurisdictional claims, through the use of thoroughly unreliable evidence. Yet Professor Martin's claim runs deeper - it's not just these procedural problems *within* trials that are of concern, but the instrumentalization of criminal law as a tool of social control. In the international arena, this is exemplified by the selective application of international criminal law's coercive force: only certain conflicts are caught by international criminal law, and invariably they are ones that do not implicate Western actors; and within those conflicts, it is often the case that only certain parties to a conflict are pursued by international courts. In Libya, it is only the Gaddafis, not the atrocities of the National Transitional Council or the race-based murders of rebel groups. In Uganda, it is only the LRA, not the Ugandan military and its local auxiliary groups. And the same group-based selectivity is apparent in the Côte d'Ivoire, in Central African Republic, and historically at the Yugoslavia and Rwanda tribunals, and the post-war military tribunals as well.

These are powerful objections and are foundational problems with the discipline. Yet they are not necessarily a challenge to the thesis advanced herein, which flagged the same concern in Chapter Three's discussion of the *rechtsgüter* and security as an interest. To the extent that the "problem of more" means more of the *same* practice, one that has little structural effect within states or in the international community, this dissertation not only agrees with but adopts this critique. Indeed, the implicit argument starting in Chapters One and Two is that the current system wrongly focuses only on the low-lying fruit: the obvious crimes with spectacular effects, even if structural crimes are no less consequential in their

effects; and, soldiers and politicians from African states, targeted on the basis of their relatively weak position in the international system.<sup>16</sup> But in the absence of wholesale changes inside *and outside* the international criminal law system, the present set of compromises will only reproduce an unequal and unsustainable simulacrum of justice.

It is this last point that is critical. While Martin and others, including punishment abolitionists, rightly identify the role of criminal law in perpetrating unequal orders, they should not be understood as saying that reform (or, again, abolition) of criminal law will be a panacea for ailing political structures and their wide range of problematic effects. Criminal law is only an instrument; the challenge of Martin, and the one taken up in this dissertation, is to rethink the interests that this instrument serves, so as to resituate international criminal law as part of the process of broader reform and reshaping of the international order. Indeed, this was the direct position taken in Chapter Five - that the International Criminal Court has quite consciously enlisted itself in the service of a deeply problematic and unequal international hierarchy, one that manifests itself in both inter-state and institutional practice.

In other words, if international criminal law relies on the emasculation of procedural protections for defendants, or if international criminal law otherwise often reinforces power imbalances both in the international arena and within states, then the further criminalization of even more conduct - no matter how abhorrent it may be - threatens to unravel the emancipatory goals of the initial critical project precisely because it expands the reach of criminal law institutions.

Third World feminists have really grappled with a version of this problem, and how it thrusts critical scholars into a serious dilemma. Omar al-Bashir may be responsible for mass

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<sup>16</sup> Edwin Bikundo, *International Criminal Law: Using or Abusing Legality?* (Surrey: Ashgate, 2010) 22.

killings and mass rapes in Darfur but there are attendant risks if he can only be held accountable by reshaping public international law in a way that grants even more power to the UN Security Council and weakens the formal sovereignty of less powerful states. In another case, Germain Katanga was convicted of everything he was charged with except sexual violence, but was only convicted after judges in the case arguably rewrote the case against him.<sup>17</sup> From a feminist perspective, one possible wrong is that sexual violence complaints are still subject to higher burdens than other crimes. Another possible wrong done by the case is that Katanga did not receive a fair trial and was unjustly imprisoned. It is questionable whether a criminal law that has important secondary effects on the law, as in al-Bashir's case, or that tolerates the large degrees of judicial unfairness found in Katanga's, is one that should be expanded even further.

There is a profound dilemma here, to which TWAIL can offer no clear answer, aside from three points to guide further reflection. First, it is important for critical scholars to recognize how the structure of criminal law can create real fissures between ostensible allies. Even within TWAIL, there are some scholars who will reject this dissertation because it seeks to work within existing international structures, including those that privilege statehood, instead of rejecting or deconstructing them. Others will complain that it does not go far enough in challenging the moral problems attendant in all criminal punishment. Nonetheless, the specific understanding of criminal law put forth here is not an absolutist approach. It is, as stated in Chapter Two, open to the possibility of its own defects and the

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<sup>17</sup> See *Prosecutor v Germain Katanga*, ICC-01/04-01/07, Judgment – Minority Opinion of Judge Christine Van den Wyngaert (7 March 2014) para 1 (describing the process as “fundamentally unfair” and having “violated several of the accused’s most fundamental rights”); and, Kevin Jon Heller, “A Stick to Hit the Accused With’: The Legal Recharacterization of Facts Under Regulation 55’, in Carsten Stahn et al (eds), *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (OUP, Oxford 2014, forthcoming).

need for revision. Thus one avenue for future potential TWAIL-based ICL research is to consider the possibility of an ICL that is less tied to the concept of the state, and less dependent on delegated jurisdiction from territorial states, or the confines of arbitrarily-imposed postcolonial borders. In this light, the al-Bashir case could well become central again, in that one of the problems in the anti-immunity position might be that instead of going too far in unilaterally shifting the terms of international law, it did not go far enough. Instead of completely usurping a state-based system, the anti-immunity arguments simply introduced loopholes and inconsistencies into the current system. TWAIL scholarship could productively build on principles that in their current formulation seem opposed to the TWAIL ethos.

Second, in light of these concerns about the harms generated by (as opposed to resolved through) the practice of ICL, we ought to reconsider our commitment to criminal law and whether it is truly a vehicle for producing more security and more equality, particularly in a context “where the process would necessarily be heavily skewed by power politics.”<sup>18</sup> There is always the danger that the criminal theorist’s vision of the ideal criminal law system will be substantially or superficially similar enough to the realities of criminal law practice that the theory will be taken as confirmation of the status quo. Here, the TWAIL theorist must be alive to the consideration that, though there is a demand emanating from the Third World for reformed international criminal justice, this faith may be misplaced. It is less important to identify the red line that ICL must cross to validate this cynicism, than it is to note that the perceived benefits of criminal law cannot be assumed. Just as Chapters One and Two advocated for a criminological approach to identifying the connective threads between

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<sup>18</sup> Jonathan Graubart, “Rendering Global Criminal Law an Instrument of Power: Pragmatic Legalism and Global Tribunals” (2010) 9 J Hum Rts 409, 413.

various international crimes, so too should the criteria for a successful international criminal justice intervention be identified and measured. This is not for the purposes of designing a uniform system of international criminal justice to be reflexively applied in all instances of international crime, but to consider what goods – if anything – results from the practice of ICL in specific situations in the short, medium and long-term basis.

Third, and relatedly, the normative and practical changes defended in this dissertation will only be meaningful in the context of much broader systemic changes, of which the criminal law is only one part. Thus, a TWAIL study of ICL must be integrated with both critical studies of other aspects of international law, as well as political movements that give corporeal form to theoretical analyses that seek to support the ordinary people subject to ICL. Whatever successes may be attributable to ICL, it remains one aspect of a complex system. To the extent that ICL is a policy tool, then future research needs to examine how specific criminal and non-criminal policies are conceived of and coordinate with one another. Future ICL research should therefore be mindful of TWAIL's emphasis on interdisciplinary analysis.

While this dissertation consistently tried to turn TWAIL towards criminal law theory, it was also informed by other disciplines, including politics, economics, and postcolonial theory. As an example, the return to pillage demands considering important non-criminal legal issues: on property rights, ownership of natural resources, the structures of international trade; interstate sanctions; resource certification schemes; and the restrictions placed on self-determination movements. Each of these areas is an aspect of the law and international relations that demands further attention from TWAIL scholars who are interested not just in applying ICL to a broader range of actors, but in achieving goals of violence reduction, rights

affirmation, and dignity and security through a variety of means. Similarly, the position that corporations should be more frequently called to account for their role in international crime should be considered in relation to broader economic policies – such as trade agreements or the law of business associations – as well as criminal law doctrines of attribution and liability. In other words, a theory of corporate criminal liability for international crimes is not just a vision of how to hold businesses criminally responsible, but is a vision of corporate law writ large. In the same vein, theories and approaches to ICL – including this dissertation and its TWAIL view of ICL – are more than add-ons to the international system to hold certain actors accountable; they are articulations of the socio-political order to be defended.

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