

## SYMPOSIUM ON TWAIL PERSPECTIVES ON ICL, IHL, AND INTERVENTION

### THIRD WORLD APPROACHES TO INTERNATIONAL CRIMINAL LAW

*Asad G. Kiyani\**

#### *The Potential of TWAIL*

A pattern of affording impunity to local power brokers throughout Africa pervades the application of international criminal law (ICL) in Africa. The International Criminal Court (ICC) investigation into Uganda is a notorious but representative example, although similar analyses can be made of the Central African Republic, Côte d'Ivoire, the Democratic Republic of Congo, and Libya. In Uganda, only members of the rebel Lord's Resistance Army (LRA) have been indicted for international crimes, even though the United Nations, international human rights groups, and local NGOs have documented years of abuses perpetrated by government troops and local auxiliary units, often against the same populations victimized by the LRA.<sup>1</sup> The ICC is thereby implicated in the power structures and political arrangements of a repressive state that both combats the LRA and often brutalizes the civilian populations of northern Uganda. Inserting itself into Uganda, the ICC becomes a partisan player<sup>2</sup> in the endgame of a civil war that extends back over a generation, and is itself rooted in ethnic and tribal animosities cultivated through 19<sup>th</sup> century Euro-colonial benedictions of favor. Here, the ICC and the war it adjudicates become surprising bedfellows, repurposed by local elites for the consolidation of domestic power.

In this vein, ICL promises an idealization of Western liberal criminal law fused with a transcendently utopian ethos, but is often bogged down in the politics of unequal enforcement that seem to characterize international law. This selectivity manifests in a variety of forms: the predominant emphasis on crimes within African states and not outside of the continent; the unwillingness to pursue foreign and transnational arms dealers, corporate actors, and military forces involved in these African situations;<sup>3</sup> and, the focus on only some parties to a conflict and not others.

In this light, what should a Third World Approach to ICL (TWA-ICL) be? It might be only moderately critical of ICL, on the basis that ICL seeks to protect highly marginalized peoples. Alternatively, ICL's failings

\* *Assistant Professor, Western Law.*

Originally published online 17 March 2016.

<sup>1</sup> For a representative sample, see, e.g., UN Secretary-General, Report on children and armed conflict in Uganda, para. 36, UN Doc. S/2—7/260 (May 7, 2007); UN Comm. Against Torture, Conclusions and Recommendations, Uganda, para. 10(n), CAT/C/CR/34/UGA (June 21, 2005); HUMAN RIGHTS WATCH, UPROOTED AND FORGOTTEN: IMPUNITY AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA 35-37 (2005); and, HUMAN RIGHTS WATCH, STATE OF PAIN: TORTURE IN UGANDA 16 (2004).

<sup>2</sup> Sarah Nouwen & Wouter Werner, Doing Justice to the Political: The International Criminal Court in Uganda and Sudan, 21 EUR. J. INT'L L. 941, 962 (2011).

<sup>3</sup> One example being the exemptions from mandatory ICC jurisdiction that are granted to peacekeeping forces contained in Security Council resolutions that refer situations to the ICC. See, e.g., SC Res 1593, para. 6 (Mar. 31, 2005) and SC Res 1970 (Feb. 26, 2011).

might suggest an entirely deconstructive and oppositional approach. Such an approach would not take for granted the viability of and the need for ICL in the first place.

As natural as the existence of criminal law may seem within states, insisting on its necessity in international law risks devolving into what Edward Said described as the “corporate thinking” of intellectual practice.<sup>4</sup> It fails to interrogate the idea that indicting President Bashir of Sudan will necessarily lead to concrete benefits for Sudanese (rather than the eventual suspension of the prosecution). It also risks, through promises of universal justice, validating an ill-defined and unequally enforced normative system that is often susceptible to the particular demands of local and international power structures.

Sudan’s complaints of double standards and colonial practices stemming from the Security Council referral of Darfur to the ICC are self-serving.<sup>5</sup> Yet opposition to the referral rightly invokes concern about how it fractures important rules of international law on state sovereignty and personal immunity that function as guarantors of the independence of weaker and less powerful states—and their peoples—from external interference. These opponents are not indifferent to the suffering of marginalized peoples,<sup>6</sup> but are concerned with how complex, long-standing puzzles of sovereignty are “solved” through actions that amount to the rewriting of tenets of international law without consultation, without limiting the legal capacities of the international organizations involved, and without regard for the formalization of the power imbalances of interstate relations in the ostensibly independent, neutral and fair international criminal justice regime.<sup>7</sup> Requests by the African Union for the Security Council to consider a deferral of ICC investigations in Sudan, for example, have not even been rejected, but simply ignored.<sup>8</sup> While a legal problem may have been “solved,” the practical realities of the situation on the ground often remain unchanged. The referral of Darfur confirmed the infirmities of an international community that, having directed the ICC to Darfur, has done virtually nothing to support the referral.<sup>9</sup>

Perhaps this identification in ICL of international law’s traditional shortcomings favours its rejection. On the basis of Third World Approaches to International Law (TWAIL) critiques, it could be argued that ICL’s persistent inability to transcend great power accommodation, to involve the Global South in the shaping of international law, or to recognize the differential application and effects of the universalist proclivities of ICL, justify retreat from the ICL project. Though abolition might seem extreme, in truth, theorists of punishment writing in the context of national criminal law routinely either adopt or point to such positions.<sup>10</sup> The possibility of an idealized criminal law system does not excuse the important defects of an ICL that appears more concerned with fitting in than with upsetting the global balance of power—a balance of power to which TWAIL scholars have long objected.

In contrast to these petitions for renunciation, ordinary persons affected by selective prosecution sometimes point to the need for more, not less, justice; that is, to its application equally to the multiple perpetrators in every situation of armed conflict. It is telling, for example, that while northern Ugandans victimized by

<sup>4</sup> EDWARD W. SAID, *REPRESENTATIONS OF THE INTELLECTUAL* 31–32 (1996).

<sup>5</sup> UN Security Council, *Meeting Record, 5158th Meeting*, UN Doc. S/PV.5158 (Mar. 31, 2005).

<sup>6</sup> José E. Alvarez, *My Summer Vacation (Part III): Revisiting TWAIL in Paris*, OPINIO JURIS (Sep. 28, 2010, 6:13 AM).

<sup>7</sup> Asad G. Kiyani, *Al-Bashir & the ICC: The Problem of Head of State Immunity*, 12 CHINESE J. INT’L L. 467 (2013).

<sup>8</sup> Charles Jalloh et al., *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court*, 4 AFR. J. LEGAL STUD. 5, 28 (2011).

<sup>9</sup> Fatou Bensouda (Chief Prosecutor of the ICC), *Comments on the Report of the Secretary-General on the Sudan and South Sudan*, UN Doc. S/PV.7337 (Dec. 12, 2014).

<sup>10</sup> See, e.g., DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* (2006); TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS REVISITED* (2006); and, R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2003).

government troops and agents are deeply frustrated with the ICC's partial prosecutions (of offenders from only one party to the Ugandan civil war), some local peoples call for increased judicial activity that encompasses state criminality (by the state and its proxies).<sup>11</sup> There is simultaneously a call to pluralize responses to international crime: to look beyond ICL as the paradigm and incorporate alternative and local views on accountability, agency, and crime.<sup>12</sup> This is the first dilemma of the TWAIL scholar. TWAIL academics routinely assert that their scholarship is rooted in doing justice to lived experiences and uncovering marginality, and in advancing the interests of vulnerable third-world peoples.<sup>13</sup> This credo parallels Said's demand that the intellectual represent not only an *idea* but actual interests; representation is nothing if not advocacy.<sup>14</sup> Yet conclusions on the viability of ICL stand at odds with at least some of those whose interests are claimed to be paramount, and risks divorcing TWAIL scholarship from the concrete experiences and claims found in local spaces.

The second dilemma for the TWAIL scholar is whether she is only rehashing, not reimagining, old debates. Whilst ICL seems deeply and durably flawed at a foundational level, claims that ICL replicates the selectivity and exceptions of international law are nothing new. If that is the extent of the TWAIL analysis, then perhaps it is only going over old ground. Rather than TWAIL deciding to wash its hands of ICL, perhaps it is ICL that fails to see the need for an approach whose most potent arguments have already been aired.

#### *A Broader Method*

One possibility of recovering TWA-ICL—of finding something novel and meaningful in it—arguably lies in its ability to rehabilitate “selectivity” beyond the traditional complaint of Western exceptionalism. As described above, selectivity is a nuanced and multifaceted concept. The reason that Sudanese claims of double standards and colonialism have resonance is because of lived history of international law. Implicated in these claims are the institutional history of which Security Council members are privileged and why; the history of when international law is and is not enforced; and the history of whose views are privileged, even in multilateral decision-making and law-making fora. The problems of choosing and developing the law and its targets manifest in a variety of forms: the possibility that apartheid is not an international crime, and that aggression is only optionally and conditionally a crime; the assumption that the relevant legal sources for ICL are found largely in the American zonal trials after Nuremberg, but not in Islamic or Chinese law; and the interplay between the ICC and International Criminal Tribunal for Rwanda statutes that effectively creates a temporal zone of impunity between the two in which rest the victims of the Rwandan counter-genocide.

While they may be familiar, debates about selectivity have yet to be fully explored. In order to reclaim and fully reinvigorate this problem, TWA-ICL ought to turn towards the postcolonial state itself. A TWA-ICL analysis of selectivity will identify the familiar use of international law to override the sovereignty of weaker states, while shielding powerful ones and their allies,<sup>15</sup> and the growing role of domestic power and repressive

<sup>11</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* 86–87 (2006). See also, PHAM PHUONG & PATRICK VINCK, *TRANSITIONING TO PEACE* (2010) 38.

<sup>12</sup> KAMARI MAXINE CLARKE, *FICTIONS OF JUSTICE* 235 (2009).

<sup>13</sup> See, e.g., Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 78–79 (2003); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171 (2005), 176–177; and, Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WISC. INT'L L.J. 353 (1998), 397.

<sup>14</sup> SAID, *supra* note 4, at 11–13.

<sup>15</sup> As occurred after the Second World War, in the African examples cited above, in the former Yugoslavia (see, e.g., Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned From It*, 25 FORDHAM

local authorities in the practice of international criminal justice. In keeping with TWAIL's problematization of state sovereignty as Janus-faced, the problem is not only about international law's effects on states at the transnational level, but also about international law's role in hypostasizing the domestic legal orders and power arrangements of the contemporary postcolonial state.<sup>16</sup>

### *Internal Dissension*

A TWA-ICL is anchored not in "corporate" understandings of criminal law but the contradictions inherent to TWAIL, decolonization, and a universalist international criminal system. Whereas optimism in international law's emancipatory potential characterized early TWAIL,<sup>17</sup> preoccupations with formal decolonization and separation from Western rule, self-determination, and independent statehood, in contemporary times TWAIL is more suspicious of the possibilities of international law. Here, the postcolonial state in particular has come in for renewed criticism for its inability to enfranchise the dispossessed. As such, while ICL often accepts state impunity as the cost of pursuing nonstate actors in civil conflicts, a TWA-ICL ought to consider the need and risks of prioritizing the criminality of state actors.

For all the claims that ICL poses a real threat to state sovereignty, ICL practice is often closely aligned with state power. In each case noted at the outset, the unprosecuted parties are attached to the government of the state. This represents the inherent paradox of cosmopolitanism: "an attempt to transcend statehood while remaining largely reliant on particular instantiations of it."<sup>18</sup> International criminal institutions are functionally redundant here: the state may be able to hold some nonstate actors accountable, but the real impunity gap arises in respect of state action. If there is a need for international criminal intervention, it is most persuasive when the state avoids assigning responsibility for its own affiliates and acts. A meaningful international criminal process will point towards, not away from, the political power of the nation-state, whilst coupling itself with parallel processes addressed to nonstate parties.

Yet even a shift to a more state-confrontational approach would not relieve associated concerns about the practice of ICL. First, there are legitimate reasons to be suspicious of greater international criminal interventions into third-world states, notably its potential to erode the protection against external interference that third-world peoples historically prioritized. Second, one risk of targeting state actors is the short leap from assigning accountability to initiating broader regime change. International criminal interventions have broad reverberations, and courtrooms occlude the possibilities of nuanced, negotiated transition.<sup>19</sup> A third danger is that making the goal about even-handed enforcement will obscure the limits otherwise built into the design of ICL. So long as the debate is about double standards between Western and non-Western states, or between state actors and nonstate actors, it deflects attention from the fundamentally limited effects of ICL even if it applied equally to all actors. Equitable enforcement says little about whether ICL can come to terms with structural effects and antecedents of international crime, such as the unwillingness and inability to recognize violence beyond particular forms of bodily harm, notably the structural<sup>20</sup> or slow violence<sup>21</sup> that conditions

---

INT'L L.J. 95, 95-97 (2001)), after the Rwandan genocide and in other ICC situations (DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 75-76, 164-166 (2014)).

<sup>16</sup> As an example, see Mahmood Mamdani, *Kenya 2013: The ICC election*, ALJAZEERA, Mar. 14, 2013.

<sup>17</sup> Recognizing the peril in retroactively describing particular scholarship as "TWAIL" when the appellation was only formally developed many years later. Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT'L COMMUNITY L. REV. 355, 361-362 (2008).

<sup>18</sup> GERRY SIMPSON, *LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* 46 (2007).

<sup>19</sup> Mahmood Mamdani, *The Logic of Nuremberg*, 35 LONDON REVIEW OF BOOKS 33, Nov. 7, 2013.

<sup>20</sup> Johann Galtung, *Violence, Peace and Peace Research*, 6 J. PEACE RES. 167 (1969).

<sup>21</sup> ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* (2013).

the day-to-day realities of violence and criminality in the postcolonial state, all the while intersecting with transnational economic forces.<sup>22</sup>

In this light, it is imperative that TWA-ICL engage with the Criminal Chamber in the African Court of Justice and Human Rights (ACJHR), which responds to critiques of ICL whilst posing its own challenges. The ACJHR claims jurisdiction that other international tribunals have neglected, and which have special resonance in the Third World: aggression, drug-trafficking, election-rigging, and the recognition of corporate criminal liability among them.<sup>23</sup> Yet impunity for state actors remains a real possibility, including through the immunity accorded to senior state officials.<sup>24</sup> It may produce conflict through competing obligations to the ICC and the ACJHR, but it may be more effective at combatting international crime *and* the context within which that crime occurs because of its subject-matter jurisdiction, regional location, and linkages with the enforcement authority of the African Union and the noncriminal chambers of the ACJHR.<sup>25</sup>

In engaging with the ACJHR and ICL more broadly, a TWA-ICL should operate on three parallel tracks. On one track, the strategic use of existing ICL offers a response to immediate suffering, aimed at restraining the direct infliction of violence by the state on its subjects. Here, a TWA-ICL regards the political context of the conflict as justifying the adjudication of crime committed by or through state authority.

On another track, ICL norms and structures require decolonization, including in their understandings of violence, the range of actors seen to be responsible for crime, and the links between ICTs and traditional institutions of global power. One of the implications of this normative and structural decolonization is the requirement for greater interaction between ICL practitioners and criminal-law theorists, and other agents—including scholars, policy-makers and local community members—in order to generate not just a criminal law response but a criminological *understanding* of international crime.

Finally, a TWA-ICL operates to mitigate ICL's harms through a critical interrogation track. It remains sceptical of the aspirational and expressive justifications ascribed to international criminal punishment. The potential for ICL to cause tangible harm, whether through its legitimization of local autocracies or its sanctification of increased conflict through armed interventions or renewed conflict against so-called enemies of humanity is ever-present. This scepticism further suggests that the interposition of international criminal justice may well mask the role of international law in the production of violence. Instead, TWA-ICL is inducted into the Sisyphean effort to fundamentally reshape international society in the relative absence of noncriminal responses. Together, these three tracks offer a productive tension that focuses on the cultivation of a more inclusive and effective ICL.

<sup>22</sup> See, e.g., Phillipe Le Billon, *The political ecology of war: natural resources and armed conflicts*, 20 POL. GEOGRAPHY 561 (2001).

<sup>23</sup> African Union, Draft protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU Doc. No. STC/Legal/Min7(1)Rev.1 (May 14, 2014).

<sup>24</sup> See, e.g., Chacha Bhoke Murungu, Towards a Criminal Chamber in the African Court of Justice and Human Rights, 9 J. INT'L CRIM. JUST. 1067 (2011).

<sup>25</sup> Matiangai V.S. Sirleaf, Regionalism, Regime Complexes & International Criminal Justice in Africa, COLUM. J. TRANSNAT'L L. (forthcoming 2016).