

# A TWAAIL Critique of the International Criminal Court: Contestations from the Global South

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- Working Draft: comments are welcome, please do not cite. -

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## 1 Introduction

This paper considers whether postcolonial theory can usefully be applied to modern international criminal law and in particular the International Criminal Court. The criticisms that inspire this analysis are those surrounding the indictment of Sudanese President Omar al-Bashir, and emanate primarily from politicians<sup>2</sup> and political bodies such as the African Union.<sup>3</sup> This paper attempts to assess the legitimacy of such complaints by considering whether the development of modern international criminal law and institutions reflects the marginalization and domination of developing states by developed, Anglo-European states. This position is argued most forcefully by postcolonial theorists, who seek to reorient the Eurocentric focus of the social sciences to be more inclusive, and by legal scholars engaged in Third World Approaches to International Law (TWAIL), who argue that international law writ large engages and enables the processes of marginalization and domination.

To that end, this paper first outlines and adopts the broad parameters of postcolonial theory, and its relationship to Third World Approaches to International Law (TWAIL). It next sets out to problematize the concept of international human rights based on these critiques. The subsequent parts consider whether the development of modern international criminal law is similarly flawed. The paper focuses on the International Criminal Court and assesses whether it is part of an international criminal law system that contributes to the marginalization of developing nations. Finally, it considers the current justifications for international criminal law as problematic in their connection with international human rights. The subordination of international criminal law to a role as a protector of a narrow concept of human rights imports the complaints of the civilizing mission of the West into international criminal law.

The paper concludes by arguing that the current form of international criminal law dangerously connects justice to justification, as opposed to seeking justice for its own ends. In particular, the conception of international criminal law as a means for enforcing international

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<sup>2</sup> The decision to refer Sudan to the ICC was decried as colonialism by the representative of Sudan: “...The Council even goes so far as to affirm that exceptions are only for major Powers and that this Court is simply a stick used for weak States and that it is an extension of this Council of yours, which has always adopted resolutions and sanctions only against weak countries...”. See Meeting Record, UN S/PV.5158 (31 March 2005).

<sup>3</sup> The indictment of al- Bashir led to an African Union (AU) decision not to cooperate with the ICC in arresting him. *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* Doc.Assembly/AU/13(XIII).

human rights norms, especially in domestic conflicts in non-Anglo-European states, virtually guarantees that the application of international criminal law will result in the entrenchment of inequity, and reflects the Western exceptionalism and the false universality embedded in broader international law. Taken together, exceptionalism and false universality provide a serious challenge to the legitimacy of the ICC.

## **2 The Parameters of Analysis**

There is a degree of overlap between post-colonial theory and TWAIL, particularly when post-colonial theory is approached from the perspective of international law. The narrowing of disciplines in this sense seems to narrow the distinctions between the two, but postcolonial theory can be distinguished if not altogether separated from TWAIL by situating it in its broader context. TWAIL is arguably the application of post-colonial theory (and methodology)<sup>4</sup> to international law, and post-colonial theory itself is the intellectual forerunner.

### **2.1 Post-Colonial Theory**

Post-colonial theory focuses on the divide between Europe and the Third World. These terms are understood broadly, but at the same time are not intended to be essentialist in nature. The hegemony of Europe is probably better understood as Anglo-European dominance, if one understands Anglo as including the United States, Canada, Australia and New Zealand along with the United Kingdom. Of course, neither term is intended to suggest that the peoples of Anglo-Europe are all equally responsible for the dominance over the Third World. There are numerous marginalized and disenfranchised populations within the territory of all of these countries, particularly indigenous and Aboriginal peoples, who cannot be seen to be part of the hegemon. For similar reasons, the peoples of the Third World should not be considered as a unitary group with identical interests and roles to play. What is important is the positioning of one versus the other, with the groups conceived of in broad strokes for ease of reference as opposed to precision of description.

In broad terms, postcolonial theory suggests that the relationship between Europe and the Third World depends on the characterization of the two as different, which serves as both the

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<sup>4</sup> Obiora Chinedu Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2008) 10(4) ICLR 371.

impetus and justification for the elimination of that difference.<sup>5</sup> This difference is eliminated through the imposition of standards, primarily if not exclusively European in origin, upon the Third World to bring it into conformity with the enlightened and civilized West. The law then, is both determinate and responsive – determinate in its description and conception of the Third World, and responsive in its prognosis and prescriptions upon the Third World.<sup>6</sup> This desire for standardization is an indirect imposition of colonial domination, and differs mainly by the lack of official and acknowledged European dominance, ownership or governance over its former colonies. Fitzpatrick and Smith argue that what has changed is the form, not the substance of the relationship.<sup>7</sup> As Diane Otto describes it, “[h]uman rights then, is the new standard replacing civilization as the criterion for dividing and judging the world.”<sup>8</sup> It is similarly argued that ‘modernization’ and ‘development’ can be included as similar terminological substitutes for civilization.<sup>9</sup>

One of the consequences of this terminological substitution is that there is a new democratic imperative focused on the legitimacy of governance within states. The benefit of focusing on intra-state governance is that it ignores concerns about inter-state governance: it dodges the questions of representation, participation and legitimacy at the global level.<sup>10</sup> Such avoidance is enabled 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”.<sup>11</sup> It is here that the shared edge between postcolonial theory and TWAIL is arguably found, in the understanding of the relationship between domestic postcolonial domination and the role of the international system. As Otto and Anghie argue, international law is colonial at its core.<sup>12</sup> The UN Charter reflects European history and European domination, as it is arguably not based on global consent. This consent is

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<sup>5</sup> P. Fitzpatrick and E. Darian-Smith (eds.), “Introduction” in *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999) at 4 [Fitzpatrick & Smith, ‘Introduction’].

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

<sup>7</sup> Diane Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” in *Laws of the Postcolonial*, P. Fitzpatrick and E. Darian Smith (eds.) (Ann Arbor: University of Michigan Press, 1999).

<sup>8</sup> Fitzpatrick & Smith, ‘Introduction’ *supra* note 4 at 5.

<sup>9</sup> *Ibid.*

<sup>10</sup> Otto, *supra* note 6 at 145.

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

<sup>12</sup> Otto, *ibid* at 145 – 153. Antony Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” in *Laws of the Postcolonial*, Fitzpatrick, P and E Darian Smith (Ann Arbor: University of Michigan Press, 1999) [Anghie, ‘Colonial Origins’].

fictional, derived as it is from Eurocentric ideas of statehood that entrench colonial concepts of state along with the actual territorial boundaries and demographics of the nation-states that were imposed by the colonizers on the Third World.<sup>13</sup> The consequences of not consenting to this system were clear. As Anghie points out, the origins of international law were domination. If a ‘state’ did not meet the definitions of statehood, it essentially forfeited the right to self-determination, because lack of statehood corresponded to a lack of ‘civilization’. A lack of ‘civilization’, of course, is what justified intervention and direct domination by ‘civilized’ powers in the first place.<sup>14</sup> Decolonizing states wishing to participate in the international order were therefore forced to take on the attributes of their oppressors.

This postcolonial description of international law provides the foundation for understanding TWAIL scholarship, but there is another key element to postcolonial theory that also underpins TWAIL. This is the problem of historicism, which posits knowledge and understanding, particularly in the social sciences, as requiring the conception of the subject as a coherent unit that it is in the process of historical development or perfection.<sup>15</sup> Time is used as a measure of ‘cultural distance’,<sup>16</sup> and therefore implies universality to the subject and its ultimate perfection.<sup>17</sup> It is this implication of universality that again venerates the modern, developed European modes of knowledge and practice. Sovereignty, statehood, human rights and democracy are all concepts that are idealized by the European narrative that relates the European development of these concepts and suggests that they are in fact universal norms that having originated and been perfected in Europe, are beneficently emanating outward. The Third World is lacking in this perfection, and is receiving it from Europe in all aspects of life. The role of law in this, as Unger argues, is merely to underpin a broader system of governance and domination that is again European in nature and Eurocentric at heart.<sup>18</sup>

## **2.2 The TWAIL Perspective**

The colonial origins of international law (and indeed the international system), combined with the notion of historicism, point at the relevance of TWAIL as a vehicle for the postcolonial

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<sup>13</sup> Otto, *ibid* at 150 – 151.

<sup>14</sup> Anghie, ‘Colonial Origins’, *supra* note 11.

<sup>15</sup> Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2002).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* at 8 – 9.

<sup>18</sup> Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (New York: Verso, 1996).

understandings of international law. In this context, TWAIL is a theory and a methodology, a perspective and its application, aimed at understanding and advancing the interests of Third World peoples. Anghie and Chimni identify a number of key aspects of TWAIL scholarship from the past and present,<sup>19</sup> and state that early TWAIL scholarship focused on colonial oppression through international law, the depth of non-European international law, an optimistic stance towards modern international law, emphasis on sovereign equality and non-intervention, and the understanding that reforms of law and politics alone would not liberate post-colonial states, but that changes in the international economic order were also necessary.<sup>20</sup> The second strain of TWAIL distinguishes itself by critiquing the paradigm of the state and further theorizing the fundamentals of the initial TWAIL scholarship.<sup>21</sup> From this second strain, three points are of relevance for the subsequent analysis. First, that while the primary subjects of TWAIL as it is currently practiced are the peoples of the Third World (and not the states to which they nominally belong), TWAIL critiques do not automatically seek to assist them by invariably critiquing those states: “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>22</sup> Secondly, as noted above, in so far as international law claims to be universal, its universality is predicated on colonialism.<sup>23</sup> Finally, the aim of TWAIL scholarship is to advance the interests of Third World peoples by making international law (and the international system) more inclusive and participatory.<sup>24</sup> This focus on reform means that TWAIL scholars adopt a philosophy of skepticism towards international law as it is, no matter how benign it appears.<sup>25</sup>

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<sup>19</sup> Although Karin Mickelson argues that the distinction between TWAIL I and TWAIL II, as posited by Anghie and Chimni, is misleading and improperly subsumes a great deal of Third World scholarship under the unnecessarily large umbrella of TWAIL by expanding TWAIL beyond its origins. See: “Taking Stock of TWAIL Histories”, (2008) 10(4) ICLR 355. This paper adopts the distinction made by Anghie and Chimni for the purposes of discussing their analysis of TWAIL, but does not endorse it for the same reasons offered by Mickelson.

<sup>20</sup> Antony Anghie and B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflict” in *The Methods of International Law*, Slaughter, A M and Steven R Ratner (eds.), (Buffalo: William S Hein & Co, 2005) at 187 – 9.

<sup>21</sup> *Ibid.*, at 190 – 1.

<sup>22</sup> *Ibid.*, at 191.

<sup>23</sup> *Ibid.*, at 192.

<sup>24</sup> *Ibid.*, at 202.

<sup>25</sup> *Ibid.*, at 207.

### 3 Problematicizing Human Rights

International human rights law is a subset of international law of particular relevance to analyses of international criminal law, given the role of international criminal law in providing accountability for ‘human rights atrocities’.<sup>26</sup> Punishment for crimes against international law is really punishment for massive violations of human rights norms. These norms provide the justifications for all further actions of international criminal institutions, particularly the ICC, and problematizing them presents points of criticism and limitations that ought to have a bearing on the operation of international criminal law.

#### 3.1 The General Critique of International Human Rights Law

The postcolonial critique of international human rights law reflects important parts of the critiques cited above, although it arises in a different context. There is much to disagree with in the international human rights law corpus, but this disagreement does not include a desire to erase that tradition, or throw out the content of human rights law. There is much to be admired in this area of law, and true universal application of many human rights norms would undoubtedly be welcome by even ardent critics of the present state of international law.<sup>27</sup> Where post-colonial criticisms lose their force somewhat is in the more muddled intent that underlies these norms. While there is a clear European bias in the law, there is no clear intent behind it. The international law of Vitoria was a platform from which to justify and launch extractive and exploitative practices in the Third World, and many of these practices have carried over into other areas of the international law system.<sup>28</sup> The human rights tradition seems more closely aligned with a desire to ameliorate the living conditions of individual people including those living in the Third World. This unclear intent combined with the general desirability of much of the existing human rights literature, provides the law moderately more immunity against the otherwise potent charges of postcolonial theory.

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<sup>26</sup> See Steven R Ratner, Jason S Abrams & James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3d ed. (Oxford: Oxford University Press, 2009).

<sup>27</sup> Such as Makau Mutua in *Savages, Victims, and Saviors: The Metaphor of Human Rights* (2001) 42Harv. Int’l L. J. 201 at 201 – 205 [‘Savages’].

<sup>28</sup> See Otto, *supra* note 6, and B.S. Chimi, *International Institutions Today: An Imperial Global State in the Making* (2004) 15 Eur. J. Int’l L. 1.

Having said that, there are important problems with the doctrine. There are signs that the muddled intent behind at least some human rights norms is becoming clearer. Antony Anghie has highlighted such problems, noting that they arise generally in the context of non-state actors such as multi-national corporations seeking to obtain the protection of rights that traditionally accrue to natural persons.<sup>29</sup> In addition, the modes by which human rights models are transplanted to the Third World (and elsewhere) are of concern in so far as they are inextricably linked to particular political and economic models. As Mutua argues, international human rights are part of a Western cultural package that includes not just human rights, but a particular conception of democratic governance, which further includes a particular economic model.<sup>30</sup>

### 3.1.1 *The Western Origin of International Human Rights*

Mutua’s critique is echoed through the history of international human rights, whose first and foundational statements on human rights are found in what is colloquially referred to as the ‘International Bill of Rights’, which consists of one General Assembly resolution and its two implementing treaties. The informal name is misleading, however, as the two treaties were not established until eighteen years after the General Assembly passed the *Universal Declaration of Human Rights*<sup>31</sup> (*UDHR*) in 1948, and the treaties - *International Covenant on Civil and Political Rights*<sup>32</sup> (*ICCPR*) and the *International Covenant on Economic, Social and Cultural Rights*<sup>33</sup> (*ICESCR*) – did not enter into force until 1976.

The timing is important, for as the *UDHR* arose with the new United Nations at a time in which much of the colonized world was still under direct colonial occupation, there was no role for the vast majority of the Third World to play in the shaping of the *UDHR*. For example, 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>34</sup> The near-complete negation of an

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<sup>29</sup> Antony Anghie, “Governance and globalization, civilization and commerce” in *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 245 – 272 [*Imperialism*].

<sup>30</sup> Makau Mutua, *Savage*, *supra* note 26 at 237.

<sup>31</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [*UDHR*].

<sup>32</sup> *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [*ICCPR*].

<sup>33</sup> *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 [*ICESCR*].

<sup>34</sup> The drafting committee contained representatives from Australia, Canada, Chile and Lebanon, in addition to those from the five permanent members of the Security Council. See *Report of the Commission on Human Rights*, UN Doc. E/383 (27 March 1947).



African perspective (along with much of Latin America and Asia) undermines claims that the *UDHR* constitutes an actual ‘universal’ statement of international human rights.<sup>35</sup> This is not to say that there are not important norms and rights contained within the *UDHR*, but that it is an incomplete expression of Western cultural norms. While some or all of these norms may be shared with non-Western cultures, the implementation of human rights internationally has excluded any overlap by constructing these norms as being for the benefit of undeveloped nations (and therefore peculiarly Western in origin), and simultaneously presuming the completeness of them (and therefore denying the need to incorporate non-Western conceptions or priorities).<sup>36</sup>

The lack of completeness is only part of the problem with international human rights. The other part of the problem is with the two treaties that purport to implement the rights contained within the declaration itself. The intention of the drafters of the *UDHR* was that implementation would occur through a single treaty.<sup>37</sup> This intention was frustrated by the Cold War. The Soviet Union sought a single treaty, whereas the United States pushed for two treaties, with economic, social and cultural rights separated from civil and political rights.<sup>38</sup> The strength of Western opposition resulted in two treaties that differ substantially in their language of enforcement and therefore the nature and effectiveness of any obligations placed upon states.<sup>39</sup> Whereas the *ICCPR* places clear, immediate and unqualified obligations upon States Parties to ensure the protection of civil and political rights, the *ICESCR* gives individual states incredible latitude in determining which aspects of the covenant will be implemented and to what extent:

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>40</sup>

As Mutua’s ‘cultural package’ critique would suggest, Western opposition to a truly enforceable *ICESCR* stemmed from political beliefs. The opinion was that the recognition and enforcement

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<sup>35</sup> Articles 13 and 15, which reify the importance of nation-states, and Article 17, which entrenches ownership and property rights, are three parts of the *UDHR* that are vulnerable to postcolonial criticism.

<sup>36</sup> See in this regard Makau Mutua, *The Ideology of Human Rights* (1996) 36 Va. J. Int’l L. 589 at 603 – 607 [‘Ideology’].

<sup>37</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 19.

<sup>38</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 & Law 535 at 539.

<sup>39</sup> See Article 2 of each covenant, *supra* notes 31 and 32.

<sup>40</sup> Article 2(1), *supra* note 32.

of such rights would promote socialism and interfere with Western conceptions of liberal, free-market democracy.<sup>41</sup> The American position at the time has been described as viewing the ICESCR as ‘a socialist manifesto thinly veiled in the language of rights’.<sup>42</sup> This association of rights with political and economic systems continues to hold today, with charges that “the communist system promised to fulfill economic social and cultural rights but failed to deliver them”,<sup>43</sup> and the view that economic, social and cultural rights are “goals that can only be achieved progressively, not guarantees”.<sup>44</sup> Even human rights NGOs such as Human Rights Watch have maintained this bifurcation between the ICCPR and the ICESCR, relegating economic, social and cultural rights to policy-based “equities”.<sup>45</sup>

This led to two problems from a Third World perspective. First, it 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>46</sup> Second, it integrated human rights into a broader package of political and economic modernization that serves to promote stereotypical views about Third World peoples, and thereby enable their continued marginalization and exploitation.

### 3.1.2 *Human Rights, Democracy & Historicism*

While international human rights have been presented as universal, they are inextricably tied to Western political and economic ideals. The internationalization of the *UDHR*, *ICCPR*, and *ICESCR* reflect the standardization and Euro-centricity noted above. One key feature of this standardization is the targeting of non-Westerners as in need of human rights development. The other is the packaging of human rights with democracy as necessary for the realization of human rights.

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<sup>41</sup> Malcolm Shaw, *International Law* (6<sup>th</sup> ed.) (Cambridge: Cambridge University Press, 2008) at 309.

<sup>42</sup> Barbara Stark, *Economic Rights in the United States and International Human Rights law: Toward an “Entirely New Strategy”* (1992) 44 *Hastings L. J.* 79 at 81.

<sup>43</sup> Remarks by US Delegate Richard Wall, UN ESCOR, UN Commission on Human Rights, 59<sup>th</sup> Sess. Agenda Item 10 (2003).

<sup>44</sup> *Comments Submitted by the United States of America, Report of the Open-Ended Working Group on the Right to Development*, UN ESCOR, Commission on Human Rights, 57<sup>th</sup> Sess. UN Doc. E/CN.4/2001/26 (2001) at para. 8.

<sup>45</sup> See Mutua, *Ideology*, *supra* note 36 at 618 – 9 and accompanying footnotes. Mutua notes that it wasn’t 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.

In the *Age of Rights*, Louis Henkin argues that the American perspective on the human rights movement was that it was to target non-Western states and compel their compliance with these external norms. 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”.<sup>47</sup> Similarly, Philip Alston argues that the United Nations’ human rights efforts are largely focused on the Third World,<sup>48</sup> a point recognized by Rosalyn Higgins, who described Western exceptionalism in no uncertain terms:

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.<sup>49</sup>

Henkin further describes the deployment of human rights as a political tool, to supplant Communism with the Western political-economic model: “For the Reagan administration, the struggle between good and evil was itself a struggle for the values commonly associated with human rights. The overriding concern for the United States was to resist, contain, and defeat Communist expansion.”<sup>50</sup> Henry Steiner and Philip Alston further note the deep relationship between human rights and political democracy.<sup>51</sup> The Reagan government saw the promotion of “democratic processes in order to help build a world environment more favorable to respect for human rights”.<sup>52</sup> A former secretary general of Amnesty International described the relationship as follows:

This determination to establish impartiality in the face of human rights violations under different political systems led Amnesty International to shun the rhetorical identification of human rights with democracy. But in fact, the struggle against violations, committed mostly by undemocratic authoritarian governments, was closely bound up with the struggle for democracy.<sup>53</sup>

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<sup>46</sup> Lyon, *supra* note 38 at 539 – 540 and 556 – 557.

<sup>47</sup> Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at 74.

<sup>48</sup> Philip Alston, ‘Appraising the United Nations Human Rights Regime’ in *The United Nations and Human Rights: A Critical Appraisal*, (Philip Alston, ed.) (Oxford: Clarendon Press, 1992) at 1.

<sup>49</sup> Rosalyn Higgins, *Opinion: Ten Years on the UN Human Rights Committee: Some Thoughts Upon Parting* (1996) 1 Eur. Hum. Rts. L. R. 570 at 581 [‘Opinion’].

<sup>50</sup> Henkin, *supra* note 47 at 71.

<sup>51</sup> Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals* (Oxford: Oxford University Press, 1996) at 710 - 725.

<sup>52</sup> Department of State, Country Reports for Human Rights Practices for 1985, at 3 (1986) (Report submitted to House Committee on Foreign Affairs, and Senate Committee on Foreign Relations, 99<sup>th</sup>. Congress, 2<sup>nd</sup> Sess.) quoted in Mutua, *Ideology*, *supra* note x at 649 – 650.

<sup>53</sup> Ian Martin, Lecture by the Edward A Smith Visiting Fellow presented by the Harvard Law School Human Rights Program, (April 14, 1993), in *The New World Order: Opportunity or Threat for Human Rights* (Cambridge, MA: Harvard Human Rights Program, 1993) at 4 – 5 (quoted in Mutua, *Ideology*, *supra* note x at 625).

The attitude is perhaps best summed up 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. Franck described this aspect of the law as “that which deals with those fundamental procedural precepts which are the traffic rules of the economic-social-political road to modernization.”<sup>54</sup> What is emanating outward from the West then, is not just a neutral, universal standard concept of human rights, meant to bring the non-West up to Western standards, but the necessary standard political system. The two are inseparable aspects of the historicist perfection of the Third World.

In the language of the historicist mission, the non-West is seen as backwards and at a lower stage of development than the West, and in need of systemic standardization to bring it up to the universal benchmark. As Mutua argues then, the focus of human rights law is not on developing and implementing an objective, neutral source of universal law in abstract entities known as states, but on correcting cultural practices within those states and overriding them with other Western norms.<sup>55</sup> This constructs what he calls the savage-victim-savior metaphor, with non-Western institutions and governments the savages denying rights to their victimized peoples, and in need of saving by Western governments, institutions, and ultimately culture,<sup>56</sup> with the false neutrality of the ‘United’ Nations acting as the primary exporter of these European norms.<sup>57</sup> Thus, non-Western contributions to the development of human rights, particularly those predating the United Nations, are marginalized; nations that are not liberal democracies are by definition savages; savages, victims and saviors take on roles that correspond to racial stereotypes; and the use of human rights as tool of power is obscured by the ‘grand narrative’ of that same doctrine.<sup>58</sup> Human rights does not stand alone, but is entwined in the problematic international legal order.

## **4 Application to Modern International Criminal Law**

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<sup>54</sup> Thomas Franck, “Introduction” in *Human Rights in Third World Perspective* (New York: Oceana Publications, Inc., 1982) at xv.

<sup>55</sup> Mutua, *Savages*, *supra* note 26 at 202 – 203.

<sup>56</sup> *Ibid.* at 201 – 206.

<sup>57</sup> *Ibid.* at 214 – 216.

<sup>58</sup> *Ibid.* at 206.

In the international criminal law setting, the application of postcolonial theory and TWAAIL approaches focuses on the differentiation between states and peoples, and the intertwining of the criminal law with other aspects of the international system. The emphasis here is on the link between international criminal law and other aspects of the international system, and problems with international criminal law that go beyond questions of compliance with procedural norms or fundamental principles of justice. That is, while much of the scholarship on international criminal law seeks to go inside trials and tribunals and assess the description, development and application of the law to individual defendants within the apparently neutral institutions of criminal justice, this analysis is concerned with how international criminal law relates to peoples even though its formal mechanisms ostensibly only apply to (and through) individuals. Of particular concern is the relationship between international criminal law and international human rights. As it stands, the strongest criticisms of this relationship do not arise until the advent of the ICC.

#### **4.1 Universality and the ICC**

In examining the International Criminal Court (ICC), it becomes clear that despite its broad aims and mandate, the ICC can reproduce existing inequalities in international law. In fact, the current practice of the ICC suggests that it is in danger of becoming a vehicle for not just reproducing but entrenching inequality. A primary factor in this is the notion of universality and permanence that marks out the ICC as distinct from previous international criminal tribunals. This results in a much broader jurisdiction for the ICC than its predecessors, which greatly expands the authority of the ICC and bolsters its legitimacy as an institution that seeks to protect and promote international human rights norms by prosecuting violations wherever they occur. The unintended effect of justifying the ICC by reference to human rights is to circumvent criticism of ICC selectivity by tapping into traditional European narratives of exporting civilization to the uncivilized.

##### **4.2.1 Universal Jurisdiction & Human Rights**

What distinguishes the ICC from the military and *ad hoc* tribunals is that it is tied not to any particular situation, but has a broad jurisdiction to prosecute the same crimes as its predecessors.

This is based on the concept of universal jurisdiction, which permits courts in any country to try serious offences against international criminal law, regardless of where they occur. This broad reach is justified by reference to the nature of the crimes alleged.<sup>59</sup> While the desire to effect prosecutions against international criminals is laudable, universal jurisdiction does raise cause for concern. It is instinctively problematic from a postcolonial perspective because it reflects the ideas of universality that plague the rest of international law and historicist approaches to economics, politics, law and development that characterize the international system. It plugs into a discourse of ‘universality’ that is built on a problematic Eurocentric foundation, and is exacerbated by the fact that the concept of universal jurisdiction permits the exercise of judicial control by third parties over the nationals of sovereign states.<sup>60</sup>

Universal jurisdiction’s reaches have been tempered recently, so as to exclude application to most incumbent state officials,<sup>61</sup> but is back on the table with the ICC, even though the ICC is ostensibly a treaty and therefore consent-based institution.<sup>62</sup> Concerns about it therefore remain relevant as it replicates the Western exceptionalism and false universality of international human rights law. In short, ‘universal’ jurisdiction is not being applied universally. The ICC has yet to lodge indictments against any Western actor, and provides powerful states with the ability to insulate themselves from the ‘universal’ jurisdiction of the Court.<sup>63</sup> This universal jurisdiction is in fact therefore limited in its application to non-Western actors. Secondly, as noted above, the idea of universal jurisdiction justifies its necessity and virtue not by reference to direct involvement in conflict or the need to promote reconciliation and create historical records, but by reference to human rights norms. It is the nature and scale of the crimes, as ‘human rights atrocities’ that offend all humankind, which justify universal jurisdiction.<sup>64</sup> In this way, universal jurisdiction serves to enshrine and protect a problematic corpus of international human rights,

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<sup>59</sup> See Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1999) at 56 – 63, stating that the justification for universal jurisdiction is found in the nature of the crimes as being against the international community; and, Georges Abi-Saab, *The Proper Role of Universal Jurisdiction* (2003) 1 JICJ 596 at 599 – 603, arguing that universal jurisdiction is justified where the crime is an attack on the community of states.

<sup>60</sup> As in the arrest by Belgium under domestic law of the incumbent Congolese Minister for Foreign Affairs. See *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v Belgium)* 2002 I.C.J. 3.

<sup>61</sup> *Ibid.* at paras. 54 and 58, where the International Court of Justice held that domestic courts could not exercise international criminal jurisdiction over individuals possessing certain types of immunity.

<sup>62</sup> See the discussion in 4.2.4, below.

<sup>63</sup> See the discussion in 4.2.2 to 4.2.4, below.

<sup>64</sup> See in this regard: Ratner at al, *supra* note 25 at 9 -15, where the authors argue that while accountability mechanisms for international crimes draw from at least three distinct areas of law, they are in fact directed towards human rights abuses; and, Higgins and Abi-Saab, *supra* note 74.

and fails to address its inadequacies as applied in international criminal law. The consequence is that the range of crimes pursued by international criminal law and the ICC does not include a number of crimes that are of great concern to the peoples of the Third World, in part because these crimes are obscured by a focus on the ‘core’ civil and political rights. Instead, it focuses on a set of crimes whose archetypal perpetrators are the rebels, rogue army leaders and dictators of the developing world.

#### *4.2.2 Exceptionalism (1): The Inability or Unwillingness to Prosecute*

The fact that the ICC now possesses near universal jurisdiction seems odd, given that it is a treaty-based court, and there are very few universally applicable treaties, and even fewer that actually have any power to them. Yet the Rome Statute of the Court – and its subsequent interpretation in one particular case – has left the ICC with extremely broad powers. At the same time, we see that the traditional Great Powers remain *de jure* and *de facto* immune from this ‘universal’ jurisdiction. Both the structure of the international system and the interpretation of international law permit the continuation of this asymmetry.

Three of the five Permanent Members of the Security Council are non-parties to the Rome Statute, but the United Kingdom and France have both ratified it. Unsurprisingly, there is little reason for them to be concerned about prosecution. For one, when matters have been referred to the ICC, the Prosecutor has decided – just as the ICTY and ICTR prosecutors did – there is no need to prosecute. For another, the United Kingdom and France benefit indirectly from a clause that permits the exercise of jurisdiction only when the state of nationality or territoriality is unwilling or unable to exercise jurisdiction.<sup>65</sup> Under Article 17, all other cases are inadmissible.

The definition of unwilling is suitably elastic to permit subjective and differing applications of the rule to different states without causing too much of an uproar, but the question of inability is much more vexing from a TWAIL perspective. On the one hand, it can be taken to mean a lack of a law enforcement system and/or judicial regime to enable the prosecution of international crimes. On the other hand, it can easily be seen as reflecting an inherent deficiency in the Third World state, further proof of a ‘lack’ of sufficient infrastructure, development, modernity or

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<sup>65</sup> Article 17, *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90, entered into force July 1, 2002 [‘*Rome Statute*’].

commitment to human rights. The ICC can then save the deficient judicial system and the people it represents by assuming jurisdiction over the defendant. More than just contributing to the traditional civilized-uncivilized discourse that postcolonial theorists find so troubling, Article 17 provides a foundation for practical action to violate the sovereignty of Third World states in ways that it cannot do with states such as France or the United Kingdom. Those European states are protected by Article 17 because their legal systems are not just ‘able’ to engage in such prosecutions but are in fact the paradigmatic models for doing so. Third World countries need to aspire to achieve the same perfection of the judicial system that the ICC is now universalizing.<sup>66</sup>

#### *4.2.3 Exceptionalism (2): European Solutions for African Problems*

The practice of the Security Council suggests to the world that not only do judicial regimes need perfecting in the Third World, but that attitudes towards legal institutions and the rule of law are also deficient. The Security Council has used its privileged position as enshrined in the Rome Statute to further promote the discourse of colonial law by bypassing local, non-institutional solutions, suggesting that unlike Western powers, non-Western nations do not get to decide when the rules of international criminal law apply to them.

Article 16 of the Rome Statute permits the Security Council to defer investigations and prosecutions for a period of one year by requesting the Court to do so. The Council may renew these deferrals. In the case of Sudan, the African Union (AU) has made a number of requests to the Council to defer the ICC’s prosecution of the matter as it is hindering peace talks in the region. The AU, which has had thousands of peacekeepers in Sudan even when the Security Council refused to deploy UN troops, has been continually attempting to mediate the conflict in Darfur. It has objected to the indictment of the Sudanese president, and argued that peace will be impossible in the face of such coercive measures. Whether this is true or not is clearly a debatable point. What is of interest here is not that the debate was resolved in favour of the perspective adopted by the Security Council, but that there was no such debate in the first place. Nigeria, the chair of the AU at the time of the referral, proposed an alternative to the ICC route,

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<sup>66</sup> This arguably reflects the problem of connecting human rights with democracy, whereby ‘good governance’ – as measured by Western standards – becomes a norm in the cultural package. See Anghie, *Imperialism*, *supra* note 28 at 254 – 258.



but was not even consulted by the Security Council before the resolution was passed in 2005.<sup>67</sup> Subsequent requests by the AU for deferrals have gone ignored.

The message is clear. African states and African people are incapable of managing their own affairs. Without the supervision and support of civilized countries and institutions such as the ICC, the African savages would only live down to their reputation. That they refuse to submit to the law shows not only their lack of institutional capacity, but also their lack of interpretive commitment to principles of fundamental justice and norms of international human rights. In such circumstances, it is only natural that the Security Council and the machinery of the Hague use their idealized forms to ensure that justice is done.

#### *4.2.4 Exceptionalism (3): The Security Council Referral Mechanism & Article 98 Agreements*

Under the Rome Statute, the ICC is able to assume jurisdiction over a situation in one of four ways. First, states that are party to the treaty may refer a matter to the court. Second, states that are not party to the treaty may declare their acceptance of the court’s jurisdiction for the purposes of investigating and prosecuting a particular situation. Next, the Prosecutor may of his own initiative open an investigation into a situation taking place on the territory of any State Party. Finally, the United Nations Security Council may refer a matter to the Prosecutor, even if the situation is not taking place on the territory of a State Party. That is, non-parties may be made subject to the jurisdiction of the court notwithstanding that the Court itself is a treaty-based institution and therefore ought not to apply to any non-party. Also, even if one accepts that the statute can apply in some respect to non-parties, there remain problems with the referral of non-parties by the Security Council.

The case of Sudan demonstrates the two problematic aspects of the Security Council referral. The first is limited to those states that are not party to the treaty. Sudan is just such a non-party, and yet its President has been indicted on war crimes and crimes against humanity charges. While all heads of state whose states are party to the Rome Statute have waived their immunity, al-Bashir, as head of state of a non-party, retains immunity from prosecution. Yet the ICC has argued that it has the ability to exercise jurisdiction over him because the Rome Statute includes the waiver clause for State Parties. The fact that Sudan is not a party to the statute is treated as

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<sup>67</sup> Meeting Record, *supra* note 1.

irrelevant, and the Pre-Trial Chamber of the ICC argues that the Security Council referral is what legitimates the imposition of this particular provision on Sudan,<sup>68</sup> even though this seems to violate the customary and codified laws of treaties, which state that non-parties to a treaty cannot have its terms enforced against it. Article 35 of the 1969 *Vienna Convention on the Law of Treaties* precludes the application of treaties to third parties absent their consent, and is arguably a norm of customary international law as well.<sup>69</sup> It should also be noted that the idea that Al Bashir’s indictment is justified by the Chapter VII Security Council resolution that referred the case to the ICC is similarly flawed.<sup>70</sup> As a treaty body, the Security Council is itself constrained by the law of treaties in its operations, and so cannot bind a non-party state to a treaty, even by Chapter VII Resolution.<sup>71</sup> Beyond that, the Security Council arguably does not possess the power to directly remove an individual’s customary law immunities because it lacks the necessary judicial powers<sup>72</sup>. When it does act with respect to a legal situation, it cannot “alter unilaterally the principles of international law...it is able to go no further than reaffirm existing international law and suggest a particular application in a particular situation.”<sup>73</sup>

In moving forward with the indictment regardless, the ICC is simply ignoring a fundamental rule of customary international law against the interests of a Third World state as well as its people. There is no doubt that the people of Sudan deserve to see justice done, and to have those responsible for the alleged crimes in Darfur to be held accountable, but supporting the arrest of al-Bashir in these circumstance would appear counter-productive. It would legitimate and further entrench the second-class nature of Third World states under international law by denying them the legal protections that all other states may rely upon. It would demonstrate conclusively that the choices of Third World states – whether to participate in the ICC or in any

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<sup>68</sup> *Decision on the Prosecutor’s Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 (PTC I) 4 Mar 2009.

<sup>69</sup> While the ICJ has declared certain provisions of the 1969 Vienna Convention on the Law of Treaties as customary law, it has not done so with respect to Article 35. It has not, however, stated that Article 35 is not reflective of customary law. Rather, it is simply the case that it has never had to deal with the extraordinary situation where a treaty that did not reflect customary law was enforced against a non-party to that treaty, absent the consent of that non-party.

<sup>70</sup> The ICC did not rely on this argument when assessing the validity of the referral, but it has been raised by commentators. See Dapo Akande,

<sup>71</sup> Jochen Abraham Frowein & Nico Krisch, *Introduction to Chapter VII and Arts. 39 – 43*, in *The Charter of the United Nations: A Commentary* 701, at 742 (Bruno Simma, ed., 2d ed. 2002).

<sup>72</sup> *Ibid.* at 708 – 9 and 712 (Bruno Simma, ed., 2d ed. 2002).

<sup>73</sup> Malcolm Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function* in *The International Court of Justice: Its Future Role After Fifty Years* 219, 234 – 35 (Sam Muller, David Raic & Johanna Thuranszky, eds., 1997).

other international institution or arrangement – are subject to the override of other international institutions and powerful states.

The justification of al-Bashir’s indictment by reference to the Security Council is flawed not just because of the undemocratic nature of that body. Three of the five permanent members of the Council – China, Russia and the United States – have not ratified the Rome Statute. They are not, however in the same position as Sudan, liable to have their head of state indicted by an international court. By virtue of their vetoes, the three non-signatories are able to prevent any referral to the ICC and thereby insulate themselves from prosecution by the Court. In addition, the United States has in the past threatened to veto any Security Council resolution on peacekeeping if the Council did not provide for blanket immunity for all peacekeeping personnel, and continues to seek similar *ad hoc* clauses in each peacekeeping resolution.<sup>74</sup>

This veto power is supplemented by the reliance – primarily by the United States – on Article 98 agreements. Article 98 allows any two states to conclude a bilateral agreement that precludes the ICC from compelling the arrest or transfer of an individual from one state who is on the territory of the second. The way that such agreements have been concluded by the United States is by the threat of withholding aid – military or financial – from less powerful countries. Dozens of agreements have been signed on the basis of the same position adopted by international aid donors and the EU with respect to the former Yugoslavia,<sup>75</sup> highlighting again the importance of the international economic order to international criminal law. In light of the al-Bashir situation, it also shows that equal protection under international law is not dependent upon the state of customary law and the conditions of sovereignty, but on economic prosperity and influence.

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<sup>74</sup> The justification for this exemption, as proffered by the United States, is a paradigmatic example of Western exceptionalism. The United States does not believe that treaties should be applied to nationals of states that are not party to the treaty, but will not object when non-US nationals are involved. See Meeting Record, *supra* note 1. That UN peacekeepers ought not be exempt from prosecution is further justified by the distinction between *jus in bello* and *jus ad bellum*, which essentially states that the right to engage in military action does not mean that every action taken is legal.

<sup>75</sup> The Coalition for the International Criminal Court notes over 100 agreements as of December 11, 2006. See *Status of US Bilateral Immunity Agreements*, noting that of the 54 countries that refused to sign such agreements, 24 lost US aid in 2005, available online: <[http://www.iccnw.org/documents/CICCFB\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFB_BIAstatus_current.pdf)>. The *American Service Members Protection Act* prohibited military aid to ICC parties, but this prohibition could be waived if that state signed an Article 98 agreement. This provision was eventually replaced with cuts to economic aid instead. See, e.g. Title III, s. 671(a), H.R. 2764, available online at: <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:h2764eah.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2764eah.txt.pdf)>, signed into law on December 26, 2007. While these restrictions eventually lapsed in 2009 the Article 98 agreements remain in place.

#### 4.2.5 *False Universality: International Crimes*

The unequal application of the rules of international law and international criminal law is exacerbated by the inadequacies of international criminal law, and in this context, the Rome Statute. While there is no doubt great room for reform of the rules and procedures of the ICC, this critique is focused on the crimes over which the court has jurisdiction, and the consequences of that limited jurisdiction.

The ICC has jurisdiction over a number of horrific crimes, including genocide, ethnic cleansing and other war crimes and crimes against humanity. These crimes are certainly acts over which the court ought to have jurisdiction, and there ought to be no complaint about the ICC assuming such jurisdiction. The complaint, however, is that the declaration in the Rome Statute that these are “the most serious crimes of concern to the international community as a whole”<sup>76</sup> presents as exhaustive a list of crimes that is in fact incomplete. That list in fact is developed from the European law created by the Allied Powers after the Second World War, and the Western powers that developed the tribunals imposed by the Security Council in the 1990s. The list is misleading for it excludes crimes that are of great and continuing concern to Third World peoples. There are a number of additional crimes that ought to have been included if the drafters were truly concerned with ‘the international community as a whole’.

In the 1991 *Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code)*, the International Law Commission proposed a number of international crimes that ought to fall under the jurisdiction of a permanent international criminal court. First and foremost on that list is the crime of aggression – the waging of a war that is not in self-defense, and declared at the Nuremberg trials to be the ‘supreme crime’.<sup>77</sup> The crime is not defined in the Rome Statute, and indeed there is no clear definition elsewhere in international law, but the *Draft Code* proposed a definition that built upon the United Nations’ 1974 Declaration on Aggression.<sup>78</sup> Both conceived of aggression in terms of international conflict between states, and not conflict that is internal to a state: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter

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<sup>76</sup> Preamble, *Rome Statute*, *supra* note 80.

<sup>77</sup> The ICC does have jurisdiction over the crime, but the crime has not yet been defined so no one can be charged with it. It was defined at the Nuremberg Tribunal, as ‘the supreme international crime’, and is prohibited under Article 2 of the UN Charter. See Jonathan A. Bush, *The “Supreme... Crime” and Its Origins: The Lost Legislative History of the Crime of Aggressive War* (2002) 102 Columbia L. R. 2324 at 2325.

of the United Nations.”<sup>79</sup> The article also borrows the language of past UN declarations that makes clear that struggles for self-determination or independence, particularly against colonial, racist or alien domination, do not constitute aggression.<sup>80</sup> The list of prohibited conduct predictably includes invasion, occupation, annexation, bombardment and blockade as forms of aggression, but also creates liabilities for states who permit an aggressor to use their territory in carrying out acts of aggression against third states,<sup>81</sup> and who send irregulars or mercenaries on their behalf.<sup>82</sup> The inclusion of aggression would have offered dual protection to Third World peoples, by on the one hand helping protect them against the supreme crime of interstate aggression, and on the other reinforcing their right to self-determination and freedom from alien domination.

The failure to define aggression suggests that in fact the list of crimes is not as complete or comprehensive as the preamble would suggest. The 1991 Draft Code outlines other crimes of special concern to Third World peoples (but which are also of concern to all peoples). Article 16 outlaws threats of aggression, which includes declarations and communications along with actual demonstrations of force.<sup>83</sup> Apartheid is prohibited under the Rome Statute, but the Draft Code provided a far more detailed description of the crime, one that is not found in either the Rome Statute or the Elements of Crimes.<sup>84</sup> The Draft Code also takes particular care in criminalizing various types of interventions, including colonial domination,<sup>85</sup> the recruitment of mercenaries<sup>86</sup> and support for subversive or terrorist intervention in the domestic or foreign affairs of another state.<sup>87</sup> Foreign state support for rebels and imported dictators would thereby be criminalized. Given the history of Third World peoples as colonial subjects who are arguably still dominated in other ways by larger, powerful Western states, the criminalization and further clarification of all these activities would have legitimated the concerns and experiences of Third World peoples and offered greater protection to them.

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<sup>78</sup> *Definition of Aggression*, UN G.A. Res 3314 (XXIX) (14 December 1974).

<sup>79</sup> Article 15(2), *Draft Code of Crimes Against the Peace and Security of Mankind*, (1991) Yearbook of the International Law Commission, A/CN.4/SER.A/1991/Add.1, at 95 [*Draft Code*].

<sup>80</sup> Article 15(7), *ibid.* at 96.

<sup>81</sup> Article 15(4)(f), *ibid.*

<sup>82</sup> Article 15(4)(g), *ibid.*

<sup>83</sup> Article 16(2), *ibid.* at 96.

<sup>84</sup> Article 20, *ibid.*

<sup>85</sup> Article 18, *ibid.*

<sup>86</sup> Article 23, *ibid.* at 97.

<sup>87</sup> Article 17, *ibid.* at 96.

Finally, one of the great failings of the International Criminal Court is its lack of jurisdiction over what can broadly be labeled economic crimes, even where those activities enable or cause large-scale suffering and casualties. These crimes are not in the *Draft Code*, but are arguably of equal if not greater importance to the continuation and causation of the conflicts with which the ICC is concerned. One such crime of economic activity is the arms trading that supports the very individuals the ICC seeks to indict.<sup>88</sup> The Sudanese government, for example, is not committing the genocide alleged by the ICC Prosecutor with homemade weapons. The Sudanese are firing foreign-made weapons, but those foreign arms suppliers are not being held to account for supplying a dictator who has been indicted for crimes against humanity and war crimes, and for whom an indictment on genocide is currently being sought.<sup>89</sup> Another crime not present in the Draft Code but arguably of serious importance include head of state and governmental profiteering. The alienation of vast sums of public wealth by political leaders ought to be criminalized, given the impact that it can have on the well-being of people within a nation, and how it can exacerbate – especially in developing countries – state indebtedness, domestic deprivation and individual poverty.<sup>90</sup> Hosni Mubarak, according to some estimates, accumulated a personal fortune of \$70 billion while President of Egypt - some \$10 billion more than the total American aid given to Egypt in that same time.<sup>91</sup> According to the ICC Prosecutor himself, Omar Al Bashir - dodgy indictment notwithstanding - is alleged to have amassed \$9 billion, at least part of which is being used to fund militias operating in Darfur and South Sudan<sup>92</sup>. The Prosecutor is apparently trying to seize this money, but this seizure apparently depends on the use of the money to fund militias - not on the illicit enrichment at the expense of

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<sup>88</sup> See e.g. C G Weeramantry, “Traffic in Armaments: A Blind Spot in Human Rights and International Law?” in *Justice Without Frontiers: Furthering Human Rights* (Cambridge, MA: Kluwer Law International, 1998) at 228 – 249.

<sup>89</sup> Mike Lewis, *Skirting the Law: Sudan’s Post-CPA Arms Flows*, HSBA Working Paper 18 (Geneva: Small Arms Survey, 2009) and The Sudan Human Security Baseline Assessment (HSBA) Project, *Sudan Issue Brief: Supply and Demand – Arms Flows and Holdings in Sudan* (15 December 2009), both available online: <<http://www.smallarmssurveysudan.org/>>, noting that over 90 per cent of arms transfers to the Sudanese government in 2001 – 2008 came from either China or Iran, and that European arms suppliers were avoiding the EU arms embargo through indirect transfers of arms. Chinese arms transfers have been linked to interests in Sudanese oil reserves.

<sup>90</sup> See Ndiva Kofele-Kale, *International Law of Responsibility for Economic Crimes: Holding Heads of State and Other High Ranking Officials Individually Liable for Acts of Fraudulent Enrichment* (Netherlands: Kluwer Law International, 1995).

<sup>91</sup> Phillip Inman, *Mubarak family fortune could reach \$70bn, says expert*, The Guardian Online (4 February 2011), <http://www.guardian.co.uk/world/2011/feb/04/hosni-mubarak-family-fortune> (last accessed April 12, 2011).

<sup>92</sup> Diplomatic Cable from US Mission to the United Nations (New York) to US Secretary of State Hillary Clinton, “ICC’s Ocampo on Sudan: Go After Bashir’s Money and Call for His Arrest; Reassure China”, (24 March 2009), available online at: <http://213.251.145.96/cable/2009/03/09USUNNEWYORK306.html>.

impoverished peoples. Absent that connection, it is unclear what basis exists to pursue such funds.

Liability for corporate criminal activity is greatly limited in similar ways. Absent direct connection to conflict through participation by corporate agents or staff, corporate activity cannot be criminalized. Criminal negligence that causes severe casualties through environmental disaster, such as the Bhopal disaster or the dumping of toxic waste, is not criminalized. Under the present statute, Union-Carbide – the company whose plant caused the Bhopal disaster – would be precluded from international criminal liability as the Rome Statute requires either an attack on the civilian population<sup>93</sup> or some nexus with an armed conflict.<sup>94</sup>

#### *4.2.6 False Universality: The Narrative of Conflict*

A less obvious way in which international criminal law undermines its legitimacy is through the narrative of conflict that it produces. NATO actors have not been prosecuted by the ICTY, nor have French actors been prosecuted by the ICTR, despite evidence existing of crimes committed by both. Similarly, the ICC has to date only indicted African men. Should this trend continue, the narrative of conflict produced by the ICC will mirror that of the ICTY and ICTR: it will be a distorted historical record that fails to document the roles of European actors. At the ICTY and ICTR, the court processes constructed a narrative that ennobles Western armed intervention as ‘saving’ the helpless victims of the conflict. At the ICC, there will be no mention of the role of Western powers acting through international politics and bald colonial attempts at economic exploitation that laid the foundations for conflict in the first place. The decontextualized court record will suggest that the conflicts arose as a result of ‘ethnic tensions’ of the sort that continually simmer between savages and occasionally boil over. There will be no place for the international context of economic and political policies employed by Western governments, multinational corporations, and international economic institutions that directly or indirectly, intentionally and unintentionally, created and exacerbated ethnic tension or funded or enabled conflict. Yet the record produced by the ICC will tend to be seen as definitive, because - so long as military leaders are regularly convicted - the normative force of the law will legitimate the

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<sup>93</sup> Article 7(1), Rome Statute, *supra* note 80.

<sup>94</sup> Article 8(1), *ibid.*

Court’s output.<sup>95</sup> The criminal law process will be proffered as a ‘solution’ or ‘resolution’ to conflict. This misconstrues the nature of conflict by presenting it as primarily military in essence, and negating the roots of such military conflicts, as well as ignoring the ongoing conflict that affects the struggles of Third World peoples even in the absence of military conflict.

## **5 Justice and Justification in Modern International Criminal Law**

The previous sections outlined the deficiencies with three iterations of modern international criminal law, with particular emphasis on the drawbacks of the ICC. That emphasis reflected the permanent stature of the court and its resultant norm-setting ability. This section argues that the problems highlighted with the ICC reflect the development of international criminal law as part of the ‘cultural package’ that includes democracy and free-market economics, and that unless the ICC is cleaved from that flawed model, it will serve to act as a tool of that package and against the interests of Third World peoples, and indeed all peoples.

This argument is not reflected in those made by international human rights organizations. In its 128-page report on the importance of assigning international criminal responsibility, Human Rights Watch makes no mention of the economic, social and cultural factors that contribute to mass atrocity and prevent the formation of lasting peace.<sup>96</sup> Instead, it focuses on strengthened law enforcement, deterrence, and the end of immediate conflict. It is apparently pursuing the legal accountability of individuals for the violation of civil and political rights that will create peace.

Such a position fails to address the inherent flaws in the ICC’s approach to international criminal justice. These flaws, which can be broken down into two overlapping categories, reflect the fundamental problems with the doctrine of international human rights, including Mutua’s savage-victim-savior metaphor. The exceptionalism of the ICC means that its activities criminalize only the Third World, and the false universality of its Statute and procedures addresses only the actors at the fore of atrocities, and not the systemic causes behind them.

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<sup>95</sup> Robert Cover, *The Supreme Court 1982 Term - Foreword: Nomos and Narrative* (1983) 97 Harv. L. R. 4 at 12 – 18.

<sup>96</sup> See *Selling Justice Short: Why Accountability Matters for Peace* (7 July 2009), online: Human Rights Watch <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short-0>.



As suggested above, the justification for the universality of the ICC differs from that of previous international criminal courts and tribunals in two ways. Those courts and tribunals were jurisdictionally limited to particular conflicts, and generally sought to assign criminal responsibility after the particular conflict in question had concluded.<sup>97</sup> The ICC, however, is focused on conflicts that are mainly continuing even as the criminal process is underway. This is true in the Democratic Republic of Congo, Uganda, Sudan, and the Central African Republic. The fifth situation to be investigated, in Kenya, concerns election-based violence from 2006. The justification for this ongoing involvement is the protection of human rights norms.

None of this in itself is problematic, but the interpretation of the norms that are to be protected is troublesome and parallels the problems to be found with international human rights generally. Just as the bulk of human rights endeavours are concentrated on the Third World, so too is the work of the ICC, which is currently only investigating situations in Africa. This African focus is more than geographic – it also includes the nationality of the actors involved. Taking charge of a situation permits the ICC to investigate anyone connected with that conflict, regardless of nationality. However, the ICC has chosen not to do so. Those who represent the United Nations and African Union are formally exempt from investigation by the ICC,<sup>98</sup> presumably because peacekeepers (and the ICC itself) are properly understood as saviors and not savages. Similarly, Western actors, even when not operating under the ‘neutral’ front of international organizations, are not being investigated despite direct involvement in hostilities. The French military has troops involved in the Central African Republic, including warplanes and bombing raids,<sup>99</sup> but has yet to be investigated by the ICC prosecutor, even though France has ratified the Rome Statute and the matter was referred over five years ago.<sup>100</sup> The language of the Rome Statute itself suggests this exceptionalism, where Article 17 can almost exclusively be applied to non-Western states. In some ways, it is a codification of Rosalyn Higgins’ opinion that

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<sup>97</sup> Although the ICTY was issuing indictments before the signing of the Dayton Peace Accords in December 1995, the first trial did not begin until May 1996.

<sup>98</sup> See Paragraph 6 of the decision to refer Sudan to the ICC, UN S/RES/1593 (2005) 31 March 2005.

<sup>99</sup> For a description of the integral role of French military, economic, and political actors in the causation and continuation of the conflict in the Central African Republic, see *Inside France’s Secret War*, The Independent (5 October 2007), online: The Independent, <http://www.independent.co.uk/news/world/africa/inside-frances-secret-war-396062.html>.

<sup>100</sup> The dates of all referrals of situations and decisions to open investigations are available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/>.

liberal democracies do not see the rules as applicable to themselves.<sup>101</sup> Existing inequalities are further integrated formally into the statute through the Article 98 provisions, and the role given to the Security Council, which now seems to include the power to override the customary international law of treaties.

The presumed completeness and universality of human rights doctrine is also reflected in the Rome Statute. Just as the *UDHR* is presented as universal, the crimes listed in the Rome Statute are presented as being of the most serious concern to the international community as a whole, even though they are based on European-built laws. Similarly, that list of crimes fails to incorporate crimes of great concern to Third World peoples in particular. It is a list of crimes that faithfully prosecutes violations of civil and political rights, but fails to give weight to the need to preserve economic, social and cultural rights. In particular, a growing body of literature has shown that there is a relationship between economics and conflict. A growing body of literature is highlighting the correspondence between economic deprivation and relative poverty rates, and the incidence of conflict. Not only is conflict more likely where there is poverty<sup>102</sup> and income inequality<sup>103</sup> but 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:

[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 household assets; (3) strong intraregional inequalities; and, (4) combined presence of natural resources and relative asset deprivation.<sup>104</sup>

This increased likelihood of conflict holds whether the inequalities are across an entire country, or just across a particular region of a country.<sup>105</sup>

The implication is that the neglect of the sort of guarantees that ought to be protected by the *ICESCR* increases the likelihood of internal armed conflict. Conversely, the importation of the

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<sup>101</sup> See Part 3.1.2, above.

<sup>102</sup> See, e.g. Paul Collier and Anke Hoeffler, *On Economic Causes of Civil War* (1998) 50 *Oxford Economic Papers* 563; and Mirjam E. Sørli, Nils Petter Gleditsch and Håvard Strand, *Why is There So Much Conflict in the Middle East?* (2005) 49 *Journal of Conflict Resolution* 141.

<sup>103</sup> Robert MacCullough, “Income Inequality and the Taste for Revolution” (2005) 48 *Journal of Law & Economics* 93.

<sup>104</sup> Gudrun Østby, Ragnhild Nordås and Jan Ketil Rød, *Regional Inequalities and Civil Conflict in Sub-Saharan Africa*, (2009) 53(2) *International Studies Quarterly* 301 at 301.

<sup>105</sup> *Ibid.*, at 305. The authors studied 354 regions across 22 states in sub-Saharan Africa before drawing their conclusions.

cultural package of (civil and political) human rights, democracy and free-market economics has been shown to exacerbate tensions in developing countries.<sup>106</sup>

This is not to say that the ICC should necessarily criminalise the denial of economic, social and cultural rights, but that it needs to expand its understanding of the relationship between conflict and human rights<sup>107</sup>. As much as the denial of civil and political rights both enables and results from conflict, so does the denial of economic, social and cultural rights. To deal with the former while neglecting the latter will not solve the problems. In particular, the insistent and almost exclusive linkage of criminal responsibility with civil and political rights presupposes a direct proximity between the accused and a conflict. As noted above, this insistence on a nexus to ongoing physical violence forecloses the possibility of seeking justice in areas that impact on the well-being and suffering of Third World peoples even in the absence of conflict. TWAIL theory argues that there needs to be a recognition that human rights atrocities<sup>108</sup> can result from the violation of economic, social and cultural rights.

## 6 Conclusion

The point of this analysis is not to exonerate those Third World actors such as al-Bashir who are alleged to have committed mass atrocity, but to critique a justice system that purports to eliminate mass atrocity through a narrow definition of the criminal conduct that causes mass atrocity, and a narrow conception of the perpetrators who commit mass atrocity. The focus on Third World actors and actions is really a focus on savages and their savage acts. It precludes criminal liability for those first world individuals, governments and corporations who not only enable these atrocities, but also actively benefit from them. Ultimately, the success of modern international criminal law and the ICC will be measured by their ability to challenge the extant norms and systems of the international legal order. Mass criminal atrocity arises from somewhere in some context, but the decontextualized international criminal law suggest that this context is the dark heart of the postcolonial savage. The push for individual accountability has led to a situation where criminality can only be conceived of in the individual and his or her acts

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<sup>106</sup> Amy Chua, *Markets, Democracy and Ethnicity* (1998) 108 Yale L. J. 1.

<sup>107</sup> In part by criminalizing particular acts such as the economic crimes referred to in the previous section.

<sup>108</sup> To return to the phrase of Ratner et al, supra note 25.

of violence, when the production and power of these individuals are inextricably tied to systemic forces that are not necessarily violent.

This flawed international criminal law results from its relationship to international human rights law. The importance of human rights justifies the existence and activity of the ICC, but this justification is insufficient to achieve justice. While justice depends on the amelioration of a number of actors, including but not limited to the arrest and trial of the direct perpetrators and organizers of mass atrocities, the justification (and therefore the work of the ICC is problematically limited in focus. The limitations inherent to international criminal law reflect to a large extent the flaws in the international human rights regime, and manifest themselves in two ways. It is found first in the Western exceptionalism that formally and informally precludes the application of the rules of international criminal law to Western states and integrates the existing power imbalances of the international system into international criminal law. Secondly, those rules themselves purport to be universal and complete in their description of criminal conduct but in fact exclude a number of activities of special concern to Third World peoples. As Rajagopal argues, human rights is caught in the problems of colonial discourses:

First, the problematic relationship between colonialism and human-rights discourse has imbedded a series of representative practices within the latter, which produce a double effect: dismissal of the ‘Third World’ as a site of epistemological production of human rights, while rendering several forms of violence, such as that generated by development, invisible to the discourse.<sup>109</sup>

In order to make a significant contribution to justice and peace, the ICC and international criminal law will have to seek justification not in the narrow civil and political realm of human rights and the prosecution of individuals, but in broader understandings of the systems that produce these individuals and forms of violence hitherto unrecognized by international criminal law.

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<sup>109</sup> Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 231.