



## THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

*TWAAILR: Reflections ~ 51/2023*

### **Conscious or Unconscious? The issue of race within international criminal law**

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Ongoing academic debate highlights the dichotomous and mystified nature of the International Criminal Court (ICC).<sup>1</sup> There is issue to be had with the ICC's very formation, let alone the enactment of its mandate. I argue that this issue cannot be adequately fleshed out by a mere normative engagement with the Rome Statute.<sup>2</sup> Instead, building on the existing work of academics and theorists, our analysis must start from a deeper historical and socio-economic critique of the institution itself and the agendas and ideologies it perpetuates – specifically the racialising functions of neo-imperialism and capitalism. This Reflection will explore to what extent the ICC's deployment and enactment of racialisation is a conscious contributing factor to the inadequacy of international criminal law (ICL) generally, and the ICC specifically. The central claim I make is that capitalism and neo-imperialism have assisted in the (re)production of race, even in the temporal space of a seemingly race-neutral institution like the ICC.

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<sup>1</sup> See: Kamari Maxine Clarke, 'Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality' (July 2020) <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/> (accessed 26 April 2022); Randle C. DeFalco & Frédéric Mégret, 'The invisibility of race at the ICC: lessons from the US criminal justice system' (2019) 7:1 *London Review of International Law* 55; Emily Haslam, *The Slave Trade, Abolition and the Long History of International Criminal Law: The Recaptive and the Victim* (Routledge, 2019); Emily Haslam, 'Writing More Inclusive Histories of International Criminal Law: Lessons from the Slave Trade and Slavery' in Immi Tallgren & Thomas Skouteris (eds.), *The New Histories of International Criminal Law: Retrials* (OUP, 2019) 130.

<sup>2</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, <https://www.refworld.org/docid/3ae6b3a84.html> (accessed 26 April 2022).

## The Prevailing Nature of Capitalism

It is imperative that capitalism is understood as more than an economic theory. It is a ubiquitous structure, and its translation into various systems can only be described as hegemonic. Anievas and Nişancıoğlu outline capitalism as a 'set of configurations...or bundles of social relations...orientated around the systematic reproduction of capital..., but not reducible – either historically or logically – to that relation alone.'<sup>3</sup> In so understanding capitalism as the originating force behind racialisation, there comes an acute understanding: perseverance of neo-colonialism and neo-imperialism is rooted in the perpetuation of capitalism as a social phenomenon. The interdependent relationship is evident, then: racialisation perseveres *because* capitalism does. The capitalism that continues to adapt in a 21<sup>st</sup> century understanding is *racial* capitalism.<sup>4</sup> Through differentiated exploitation of the Global South, severe inequality exists due *to* and *alongside* racialisation. In a pamphlet published in 1899, Rosa Luxemburg vehemently opposed the assertion proposed by Eduard Bernstein<sup>5</sup> that capitalism (innately) has a 'capacity of adaptation'.<sup>6</sup> Equally, I argue that a conscientious allowance of capitalism to flourish in an elusive manner and entrench itself into a variety of legal (and non-legal) frameworks must be barred. So long as capitalism continues to be enabled,<sup>7</sup> such as in the instance of international criminal law, it becomes glaringly apparent that liberation cannot be achieved, specifically for marginalised people(s).<sup>8</sup> While much of Luxemburg's ruminations deal with an acute deconstruction of Bernstein's theory around social reform as a means for revolution, my contribution here aims to adapt their thoughts differently.

When transposed directly, Luxemburg's ideas assist in centralising the core argument integral to this Reflection: international criminal law's symbiotic relationship with capitalism serves as a conduit by which individualised responsibility becomes the core lens that the ICC adjudicates. Or perhaps, as Shirley Scott concretely notes, the

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<sup>3</sup> Alexander Anievas & Kerem Nişancıoğlu, *How the West Came to Rule: The Geopolitical Origins of Capitalism* (Pluto Press, 2015) 9.

<sup>4</sup> Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (University of North Carolina Press, 2000).

<sup>5</sup> Eduard Bernstein, *Evolutionary Socialism* (trans. Edith C. Harvey) (Independent Labour Party, London, 1907).

<sup>6</sup> Rosa Luxemburg, *Reform or Revolution* (Militant Publications, London, 1986) 6.

<sup>7</sup> Whether that be through the perpetuation of social democracy; neoliberal values; or a normative understanding that capitalism grows in its adaptability rate and therefore must be allowed to prosper even if morally we are juxtaposed to its thriving.

<sup>8</sup> On almost all accounts that this argument will explore, the 'liberation' discussed is owed to non-white bodies first and foremost, if not solely.

ICC (if not international criminal lawyers) are the 'chefs'<sup>9</sup>—necessary servants of a system which works to 'congeal capitalism'<sup>10</sup> while simultaneously maintaining 'some autonomy of action'.<sup>11</sup> Any radical critique of the ICC, as this essay contends, should emerge from contending with the budgeting processes of the ICL institutions in the first instance, for finance is not 'an external "fact of life" to ICL'.<sup>12</sup> The ICC's need for sustenance keeps it at the economic behest of member states and signatories, as was the case most prominently in the case of Special Court of Sierra Leone.<sup>13</sup> This aspect perseveres to this day in the continued workings of the Court,<sup>14</sup> but is only a microcosmic example. More concretely, and an aspect typically gleaned over by the literature, is the expectation that the ICC and other tribunals seek private (or otherwise, corporate) funding for their activities.<sup>15</sup> Anne Orford implores us to equally interrogate and study the independent auditor's recommendations as to the clarification of the roles of the Prosecutors and the Registrar of the ICC.<sup>16</sup> This analysis serves as insight into the possible budgetary constraints on the prosecutor's independence, or otherwise further consolidates an argument of the Court's conscious process of selectivity in its workings. These aspects serve to further flesh out a symbiotic relationship between international (criminal) law and capitalism: one which sees private donors (in the West) as the hidden adjudicators of those to-be prosecuted (in Africa and Asia). In essence, this mirage maintains the North/South dynamic that *itself* is a by-product of racialisation and capitalism.

Naturally, then, it comes as no surprise that the ICC is weaponised in ex-colonial states, paying tribute to the in-built link between colonialism and racialised capitalism. Furthermore, one of capitalism's most successful ideological tricks is consistently being reproduced in the context of international criminal law: the

<sup>9</sup> Shirley V. Scott, 'International Lawyers: Handmaidens, Chefs or Birth Attendants? A Response to Philip Alston' (1998) 9:4 *European Journal of International Law* 750, at 750.

<sup>10</sup> Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill, 2019) 240.

<sup>11</sup> Ibid.

<sup>12</sup> Grietje Baars, 'Making ICL History: On the need to move beyond pre-fab critiques of ICL' in Christine Schwöbel (ed.), *Critical Approach to International Criminal Law: An Introduction* (Routledge, 2014) 197, at 207.

<sup>13</sup> Kamari Maxine Clarke, 'The Rule of Law Through Its Economies of Appearance: The Making of the African Warlord' (2011) 18:1 *Indiana Journal of Global Legal Studies* 7, at 7.

<sup>14</sup> See: International Criminal Court, 'Understanding the International Criminal Court' (2020) <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> (accessed 25 April 2022); Thordis Ingadottir, 'The Financing of Internationalized Criminal Courts and Tribunals' in Cesare P.R. Romano, André Nollkaemper & Jann J. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP, 2004), 271-290.

<sup>15</sup> See: Rome Statute (1998); Carla Del Ponte, 'The Dividends of International Criminal Justice' (2005) [https://www.icty.org/x/file/Press/PR\\_attachments/cdp-goldmansachs-050610-e.htm](https://www.icty.org/x/file/Press/PR_attachments/cdp-goldmansachs-050610-e.htm) (accessed 25 April 2022).

<sup>16</sup> Anne Orford, 'In Praise of Description' (2012) 25:3 *Leiden Journal of International Law* 609, at 609-625.

individual is held solely to blame for atrocities committed. While this Reflection has no intention to alleviate or make light of such atrocity and crimes, we must interrogate how structural violence is obscured and how the very existence of the individual has been manufactured according to hierarchical definitions of power, capitalist rhetoric and individualised conceptualisations of Being (akin to the work of Sylvia Wynter).<sup>17</sup> Similarly, as Kamari Maxine Clarke reminds us, the spectacularisation of the rule of international criminal law 'reinforce[s] the apparent power of the rule of law to affirm guilt or innocence, and to individualise the violence of many and redirect it onto one individual.'<sup>18</sup> It is precisely through the (individualising and) governing logics of capitalism that responsibility, culpability, and adjudication are reimagined.

I argue that international criminal law serves to reinforce flawed and normative theories around individualised responsibility, the need for justice, and a perpetuation of carcerality, all influenced by neoliberal capitalist rhetoric. Alternatively, as Gramsci reminds us, '[n]eoliberal hegemony is not static and must continually renegotiate and re-establish itself as a result of complex social struggles and contradictions that emerge within, are shaped by, and shape, the structures and processes of capital accumulation'.<sup>19</sup> In the case of ICL, this renegotiation emerges most succinctly through the enactment of capitalist logic: international criminal law 'shapes our response to certain instances of suffering and not others'<sup>20</sup> as part of a 'broader liberal-capitalist hegemony.'<sup>21</sup> As this Reflection contends, the question of international criminal law should not be *who* is to be punished, but rather a deconstruction of *why* there exists a collective call for punishment originally. Drawing from the linearity of history, the Treaty of Versailles assists in illustrating the emergence of a call for punishment, specifically in the context of wartime. Deliberations were concretised in Article 227 of the Treaty of Versailles, which noted that future wars must ensure the protection of civilians in armed conflict, a particular fault of the German Empire in World War I. A special tribunal was held against Kaiser Wilhelm II for his 'supreme offence against international morality'<sup>22</sup>, though he was ultimately not prosecuted. The larger pattern and paradigm that this development set in motion is crucial, for justice cannot be achieved solely through retribution produced obscurely within a courtroom.

<sup>17</sup> Sylvia Wynter, 'Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, It's Overrepresentation—An Argument' (2003) 3:3 *The New Centennial Review* 257, at 257-337.

<sup>18</sup> Clarke (2011) 13.

<sup>19</sup> Antonio Gramsci, Quintin Hoare & Geoffrey Nowell Smith (eds.), *Selections from the Prison Notebooks of Antonio Gramsci* (International Publishers Co., 1971). See also: J. K. Gibson-Graham, 'Identity and Economic Plurality: Rethinking Capitalism and "Capitalist Hegemony"' (1995) 13:3 *Society and Space* 275, at 275-282.

<sup>20</sup> Baars (2014) 212.

<sup>21</sup> Ibid.

<sup>22</sup> Treaty of Versailles, Article 227 (1919).

Instead, the question which pushes at the gates remains partially understood, but not wholly answered. What structure does the mirage of justice serve? I argue: white supremacy.

In mainstream historical and pedagogical accounts, Nuremberg is typically presented as the first indicator of international criminal law's judicial scope and importance. Though, as Souheir Edelbi notes, international criminal law 'typically orientates towards European experiences of violence'.<sup>23</sup> Undeniably, the violence and pain of the Holocaust remains incomparable. Nonetheless, as Edelbi continues, making note of the Holocaust's 'colonial precursors and antecedents'<sup>24</sup> is of paramount importance. Highlighting that violence has existed *outside* a Eurocentric and white lens and has not solely been enacted on white bodies is integral to deconstructing our normative observation of international criminal law. Even in the shadow of Nuremberg itself, the process of ignoring situations outside the geographical and temporal space of Europe can altogether be equated to the process of *conscious* inaction. The Allies' awareness of colonial massacres such as the Herero and Nama Genocide<sup>25</sup> illustrates that historical inaction, in and of itself, has relegated non-white bodies to the margins of history, to which they (continue to) cling for life.<sup>26</sup> A modern conceptualisation of international criminal law is inherently flawed due to it being innately at the behest of white supremacy. I argue that a system of legal practice, such as that of international criminal law, serves its architect – the elusive white body. This is by no means the physical representation of the white body but rather what a *system of whiteness* has allowed for. The metaphorical white body remains elusive in the forms of neoliberalism, neoimperialism and capitalism. The systems of whiteness *supersede* the physical white body. Yet, the physical *benefits* from the abstract formulation of whiteness.

Capitalism individualises all of us.<sup>27</sup> Societal organisation operates through the lens of individualised discourse, which remains disconnected from the larger reality that this individualism is harmful and violent. Through penal hierarchies of power

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<sup>23</sup> Souheir Edelbi, 'Making Race Speakable in International Criminal Law: Review of Lingaas' The Concept of Race in International Law' <https://twailr.com/wp-content/uploads/2020/04/Edelbi-Making-Race-Speakable-in-International-Criminal-Law-Review-of-Lingaas'-The-Concept-of-Race-in-International-Criminal-Law-.pdf> (accessed 27 April 2022).

<sup>24</sup> Ibid.

<sup>25</sup> See: Hélé Béji, 'La Patrimoine de la Cruauté'(1993) 73:1 *Le Débat* 152, at 152-153; Christopher Gevers, 'Africa and International Law' in Kevin Heller, Frédéric Mégret, Sarah Nouwen, Jens Ohline & Darryl Robinson (eds.), *The Oxford Handbook of International Criminal Law* (OUP, 2020) 154, at 154-193; Christopher Gevers, "'Unwhitening the World": Rethinking Race and International Law' (2021) 67:1 *UCLA Law Review* 1652, at 1652-1685.

<sup>26</sup> Equally important to note here is situations which have equally been overlooked throughout the course of history. Iraq, Afghanistan, Chechnya, Colombia (amongst others) cannot be ignored.

<sup>27</sup> Daniel W. Bromley, *Possessive Individualism: A Crisis of Capitalism* (OUP, 2019).

manufactured through capitalism's clandestine involvement and encroachment into our social fabric, carcerality, punishment and retribution remain the victors in the metaphorical path towards egalitarianism. Any other form of critical analysis is relegated to last place. The path, let alone construction of this utopic understanding of equality, remains a mirage if the systems that govern us are not dismantled. Liberation cannot be attained if non-white bodies cannot also share in celebration. Though how can they, when historically violent structures have pushed them into the periphery (and continue to do so)?

### Neo-Colonialism and Neo-Imperialism

I argue that the Scramble for Africa has never ceased. The use of the ICC as a legal instrument within Africa itself is grounded within a colonial and imperialist legacy.<sup>28</sup> As Obiora Chinedu Okafor and Uchechukwu Ngwaba argue, 'the use of the ICC [is] far more robustly [advocated for] in Africa than has ever been done on any other continent.'<sup>29</sup> Important to note here is the historical driving aim of colonialism as being inherently attached to capitalist exploitation in order to benefit the coloniser. Only naturally then, this symbiotic relationship continues, irrespective of the 'decolonisation' of formal colonies. Instead, what becomes perhaps more interesting is the growing interest of the West<sup>30</sup> into West Asia.<sup>31</sup> White systems remain to racialize non-white bodies—which is to say that through the logics of capitalism, race has emerged as a tool to hierarchise individuals. To that end, white systems equally deracinate the reality of non-white bodies—particularly through the act of divorcing them from their indigeneity. Sylvia Wynter discusses the coloniality of Being,<sup>32</sup> and it is difficult to ignore Maria Lugones' argument that through a colonial introduction of social organisation, 'peoples, cosmologies, and communities'<sup>33</sup> have been destroyed in order to pave the way for the 'building ground of the "civilised" West.'<sup>34</sup> The Global North has wasted no time in its deconstruction of the Global South, specifically in the context of international criminal law's dispensation as a means to an end. The anti-Black and

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<sup>28</sup> See Stelios Michalopoulos & Elias Papaioannou, 'The Scramble for Africa and Its Legacy' in Matias Vernengo, Esteban Perez Caldentey & Barkley J. Rosser Jr (eds.) *The New Palgrave Dictionary of Economics* (Palgrave Macmillan, London, 2016) 1, at 2.

<sup>29</sup> Obiora Chinedu Okafor & Uchechukwu Ngwaba, 'The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections' (2015) 9:1 *International Journal of Transitional Justice* 90, at 91.

<sup>30</sup> This contribution makes use of the 'Global North' and 'the West' interchangeably as shorthand, cognisant of the limitations and generality of such categories.

<sup>31</sup> Taking for example the "War on Terror" and its covert aims in producing instability in the region.

<sup>32</sup> Wynter (2003) 257.

<sup>33</sup> Maria Lugones, 'Heterosexualism, and the Colonial / Modern Gender System' (2007) 22:1 *Hypatia* 186, at 186.

<sup>34</sup> Ibid.

anti-Muslim rhetoric existent within ICL is of importance in this regard. Or, as Philippe Le Billon reminds us, the dramatic spectacularisation of African and Arab leaders as 'warlords', if not 'tyrant leaders'<sup>35</sup> is particularly dangerous.<sup>36</sup> Furthermore, in stretching Anna Tsing's argument of an (omnipresent) 'economy of appearances',<sup>37</sup> I contend that rhetoric (or otherwise, language) has to be reconstituted in order to perpetuate the 'investment frenzy'<sup>38</sup> that (consistently) maintains the 'congealing [of] capitalism',<sup>39</sup> while simultaneously dramatizing the 'triumph of the rule of law'.<sup>40</sup>

To date, the ICC has issued indictments against fifty-two individuals, majority of whom are either Black and/or Arab-African.<sup>41</sup> The Court's process is blatantly and inappropriately racialised<sup>42</sup> and political. As a 'selective political instrument',<sup>43</sup> the ICC is unlikely to stand the test of time. In the words of Okafor and Ngwaba, 'the ICC's "geo-stationary orbit" over Africa<sup>44</sup> has wittingly...masked...the vast extent of...international crimes in other parts of the globe.'<sup>45</sup> Mahmood Mamdani argues that the deployment of an international criminal law order is a perpetuation of asymmetries in power and wealth, if not a means of continued subjugation. In Mamdani's words, 'the emphasis on big powers as the protectors of rights internationally [is] twinned with an emphasis on big powers as enforcers of justice internationally.'<sup>46</sup> The interdependency of neo-colonialism, neo-imperialism and capitalism is a simple Ouroboros.

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<sup>35</sup> Clarke (2011) 12.

<sup>36</sup> Philippe Le Billon, 'The Political Ecology of War: Natural Resources and Armed Conflicts' (2001) 20:5 *Political Geography* 561, at 561-579.

<sup>37</sup> Anna Tsing, 'Inside the Economy of Appearances' (2000) 12:1 *Public Culture* 115, at 115.

<sup>38</sup> Ibid, 118.

<sup>39</sup> Baars (2019) 240.

<sup>40</sup> Clarke (2011) 10.

<sup>41</sup> International Criminal Court, 'List of Defendants' <https://www.icc-cpi.int/Pages/defendants-wip.aspx> (accessed 29 April 2022).

<sup>42</sup> See: Matthew Happold, 'The International Criminal Court and the Lord's Resistance Army' (2007) 8:1 *Melbourne Journal of International Law* 159 (explaining criticism that the ICC was used as a political weapon by the Ugandan government); Charles Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *International Criminal Law Review* 445, at 462-65 (discussing criticism by African leaders that the ICC is political); William A. Schabas, 'Victor's Justice: Selecting "Situations" at the International Criminal Court', 43 *John Marshall Law Review* 535, at 535 (arguing ICC case selection decisions are blatantly political).

<sup>43</sup> Julie Flint & Alex de Waal, 'Case Closed: A Prosecutor Without Borders' (2009) 171: 4 *World Affairs Journal* 23, at 23-38 (expressing worry among Africans that the ICC 'may be turning criminal prosecution into a selective political instrument').

<sup>44</sup> And to a lesser extent, West Asia.

<sup>45</sup> Okafor & Ngwaba (2015) 101.

<sup>46</sup> Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (Crown, 2010) 334-335.

In addition, the ICC lauds its mandate as being in direct opposition of white supremacy; a champion in the fight against injustice globally. This impression, while self-sustaining, remains incorrect. As Kamari Maxine Clarke argues, white systems are 'rarely acknowledged as *shaping* (emphasis added) the conditions for (in)justice.'<sup>47</sup> Instead, neo-colonialism and neo-imperialism continue to thrive and operate, seemingly unbeknownst and undetected, due to the *conscious* decision to ignore them. International criminal law and the ICC exist as fans that fuel the flame of the continued prevalence of inequalities (economic, or otherwise) in the Global South. As the ICC continues to entrench itself into the legal orders of states within Africa and West Asia, the exacerbation of violence and totalitarianism of regimes can (and has) become increasingly prevalent. As the warning from global powers of possible investigation by the ICC increases, dangerous and violent leaders cling to power. I argue that the Global North's aggressive and imperialist aims in a contemporary setting intentionally positions and frames the Global South to be in need of saving by institutions like the ICC. Most pertinently, in postcolonial African states, the 'spectacle of the rule of law is linked to the spectacle of capitalism'.<sup>48</sup> The conscious crafting of racialised images such as that of the 'African warlord'<sup>49</sup> reinforce the notion that African (and otherwise diasporic Black) peoples<sup>50</sup> inherently *need* rescuing by Western frameworks and values. The charge of racism within an international criminal law context is framed through the obvious natures of neo-colonialism and white saviourism.

### **The West's Influence and the Conscionability of Race**

As I consider the ICC's inaction with regards to Iraq and Afghanistan in a latter part of this reflection, it is important to note the particular role of the United States of America (USA) in order to reflect on how its hegemony continues to extend as far as the ICC as an institution itself.<sup>51</sup> Unironically, the [hypocrisy remains evident](#). Clarke outlines that international tribunals 'have become mechanisms for one of the most radical types of polarization',<sup>52</sup> as well as racialisation. The influence of the Global North over institutions such as the ICC are indicative of neo-colonialism in an

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<sup>47</sup> Clarke (2020) para. 2.

<sup>48</sup> Clarke (2011), *introduction*.

<sup>49</sup> See, for example: *Kony* (Jason Russell (dir.), Invisible Children, Inc., 2012).

<sup>50</sup> This contribution makes note of Black people specifically but does not ignore the reality that Whiteness challenges and is violent to all non-white persons.

<sup>51</sup> While this paper deals with questions around the USA, this is due to its influence and larger socio-economic frameworks that pertain to other Western powers and systems. It is by no means an attempt at absolving the involvement of other GN systems and governments.

<sup>52</sup> Kamari Maxine Clarke, *Fictions Of Justice: The International Criminal Court And The Challenge Of Legal Pluralism In Sub-Saharan Africa* (CUP, 2009) 94.



international criminal law context. Remnants of imperialism and colonialism continue to plague areas of the Global South, allowing for the cultivation of instability and intervention. Without comprehension of the involvement of Western powers in Global South states, there cannot be acute critique of the flawed approach of the ICC and ICL. Manufactured instability in the form of coordinated political interference, precipitated by decades of colonialism and capitalist extraction, have manifestly bred *further* instability within Africa and West Asia.

### *Considering Iraq and Afghanistan*

The 2020 announcement of the Office of the Prosecutor (OTP) not to investigate the alleged crimes against Iraqi civilians committed by Britain's Royal Armed Forces (RAF) in Iraq was disturbing, but came as no surprise. Given the British courts' failure to submit '[one single case...for prosecution to date](#)', the OTP's fundamental reason for not enacting a genuine investigation into Britain's war crimes in Iraq is paradoxical, incompatible and wrong. The Final Report details various problems<sup>53</sup> with Britain's inability to appreciate the gravitas of the issue, let alone investigate accordingly. Despite this, the OTP found that British officers had not been shielded from prosecution, and suggested that '[if shielding had been made out, an investigation \[by the ICC\] would have been warranted](#).' Kevin Jon Heller articulates a glaring point: the OTP's decision is not legal standard – '[neither procedurally nor substantively](#).'

In the case of Afghanistan at the ICC, it was held that 'The Prosecutor is not required to present evidence to support her request and is not required to present information regarding her assessment of complementarity...'<sup>55</sup> *Unwillingness* is not a substantial requirement by the Pre-trial Chamber, and the Office's decision not to prosecute '[reinforces longstanding double standards...and shows once again that powerful actors can get away with systematic torture](#).' Shielding remains a 'distinct tradition within the UK and its armed forces',<sup>56</sup> further highlighting the issue behind the decision of the OTP.

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<sup>53</sup> International Criminal Court, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom' (December 2020) <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-iraq/united> (accessed 22 April 2023).

<sup>54</sup> Shielding here refers to the British government covertly obscuring the injustices enacted by the RAF.

<sup>55</sup> International Criminal Court, *Situation In The Islamic Republic Of Afghanistan*, ICC-02/17 OA4, 39, 5 March 2020, [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00828.PDF) (accessed 28 April 2022).

<sup>56</sup> Andreas Schueller, 'The ICC, British War Crimes in Iraq and a Very British Tradition', (December, 2020) <http://opiniojuris.org/2020/12/11/the-icc-british-war-crimes-in-iraq-and-a-very-british-tradition/> (accessed 25 April 2022).

*Considering the West*

As DeFalco and Mégret argue, the focus on the Levant and African Continent remains 'embedded within a larger project of Western judicial and military imperialism.'<sup>57</sup> In the same breath, the West's crimes are 'obfuscated...while highlighting the crimes in the Global South.'<sup>58</sup> As DeFalco and Mégret note, the convictions of 'Thomas Lubanga Dyilo, Germain Katanga, and Jean-Pierre Bemba have had the...effect of associating Black Africans with physical and sexual violence, the abuse of children through the recruitment and use of child soldiers, and the inability to hold 'civilized' elections.'<sup>59</sup> This contrasts with the persistent ignoring or euphemizing of, inter alia: acts of aggression by the United States in invading areas such as Iraq and Afghanistan; the torture of detainees in Guantánamo Bay; threatening states such as Iran that are assumed to have nuclear weapons; and funding conflict in various regions.

Representationalism is a mythical act and practice. The recruitment of Black or otherwise non-white bodies into white institutions does not automatically rectify, let alone answer, larger systemic issues. White institutions by my own definition entail the extensive apparatus of violence and surveillance that the modern conception of the nation-state has at its disposal. The most glaring example of this is the USA, which has often been criticised for its oppressive border regime,<sup>60</sup> its (historical, yet ever present) involvement in foreign affairs<sup>61</sup> and its gross individualisation of its citizens which translates into incarceration.<sup>62</sup> Taking Barack Obama's tenure as President as the prime example, we see that representation politics cannot be expected to rectify the legacy and active practice of US imperialism. The structurally discriminatory effects of racialisation cannot be alleviated through representationalism alone. John Powell argues that 'institutional practices and cultural patterns can perpetuate racial inequality without relying on [overtly]<sup>63</sup> racist actors',<sup>64</sup> as would be evident in the case of

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<sup>57</sup> DeFalco & Mégret (2019) 56.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid, 81.

<sup>60</sup> See: Harsha Walia, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism* (Haymarket, 2021); Shahram Khosravi, 'What do we see if look at the border from the other side?' (2018) 27:3 *Social Anthropology* 409, at 409-424.

<sup>61</sup> Global Policy Forum, 'US Military and Clandestine Operations in Foreign Countries' (December 2005) <https://archive.globalpolicy.org/us-westward-expansion/26024-us-interventions.html> (accessed 23 April 2022).

<sup>62</sup> See: Angela Y. Davis & Gina Dent, 'Prison as a Border: A Conversation on Gender, Globalization, and Punishment' (2001) 26:4 *Signs* 1235, at 1235-1241; Angela Y. Davis & Cassandra Shaylor, 'Race, Gender and the Prison Industrial Complex: California and Beyond' (2001) 2:1 *Meridians*; Angela Y. Davis, *Are Prisons Obsolete?* (Seven Stories Press, 2003).

<sup>63</sup> Emphasis added.

<sup>64</sup> John A. Powell, 'Structural Racism: Building upon the Insights of John Calmore' (2007) 86 *North Carolina Law Review* 791, at 795.

Obama's tenure, which saw '[ten times more air strike in the covert war on terror... than under George W. Bush.](#)' Devon W. Carbado and Mitu Gulati's analysis is useful in this regard, as the placement of a Black man within a system of whiteness is a faulty excuse for commentators that dub our modern world as a 'post-racial society'.<sup>65</sup>

### **Pan-Africanism and Liberation**

The final aspect this Reflection turns to is discussion of the theoretical differences embedded within liberation movements such as Pan-Africanism, which stand in direct contrast to institutions such as the ICC. While grassroots and transnational movements such as Black Lives Matter (BLM) and Pan-Africanism look to systematically confront social inequality, ICL serves an entirely different purpose. Adom Getachew argues that in order to reconstitute 'the international order',<sup>66</sup> promises of Pan-Africanism and solidarity with non-white bodies remain the 'radical rupture'<sup>67</sup> needed to achieve liberation. Transnational solidarity remains an increasingly enticing register, as it challenges the monolithic understanding of collective organisation and knowledge.<sup>68</sup> It resists conceptualisations of geographical temporality,<sup>69</sup> and it objects to the linearity enforced onto 'Third World citizens' collective (oppressive) histories.<sup>70</sup> Transnational (and 'translocal') assemblages, by definition, are 'emergent and nonlinear',<sup>71</sup> and recognising them as such teaches us valuable lessons in our conceptualisation, if not active praxis towards a better future. Or, as Saidiya Hartman reminds us: the potential for change is (always) possible, yet not squarely through a historiographical and speculative engagement with the past. 'Counter-histories'<sup>72</sup> (as those purported by TWAIL scholars) and a 'history of the present'<sup>73</sup> are 'inseparable'<sup>74</sup> as they both touch on an 'incomplete project of

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<sup>65</sup> Devon W. Carbado & Mitu Gulati, 'Working Identity' (2000) 85 *Cornell Law Review* 1259.

<sup>66</sup> Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (PUP, 2019) 5-6.

<sup>67</sup> *Ibid.*, 17.

<sup>68</sup> See Wynter (2003); Lugones (2007).

<sup>69</sup> To quote Ruth Wilson Gilmore, 'space always matters, and what we make of it in thought and practice determines, as is determined by, how we mix our creativity with the external world to change it and ourselves in the process' from *Abolition Geography: Essays Towards Liberation* (Verso, 2022) 92.

<sup>70</sup> Lola Olufemi, *Experiments in Imagining Otherwise* (Hajar Press, 2021).

<sup>71</sup> Colin McFarlane, 'Translocal assemblages: Space, power, and social movements' (2009) 40:4 *Geoforum* 561, at 566.

<sup>72</sup> Saidiya Hartman, 'Venus in Two Acts' (2008) 12:2 *Small Axe* 1, at 4.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

freedom'.<sup>75</sup> Our geopolitical present is consistently 'interrupted'<sup>76</sup> by the horrors of the past, and it is the very *enactment* of transnational solidarity which marks the initial stepping stone towards the destabilisation of hegemonic narratives and regimes—all inextricably linked to the neo-colonial capitalist machine.

Getachew writes that the USA's incessant aim to stifle and suppress the Global South with regards to economical means continues to be a systematic and intentional 'counterrevolution against the aspiration for an egalitarian global economy.'<sup>77</sup> Resistance to institutionalised and systemic oppression is given little to no attention in the context of ICL, save for key TWAIL theorists who have grappled with the colonial and imperial history of the Global North, subsequently cogitating its reproduction in our modern landscapes. Through generated solidarity out of the collective experience of racialisation, colonisation and forced displacement, non-white bodies continue to envision political possibility. Pan-Africanism, for example, endures as a global phenomenon, while remaining ever-present within the margins of history. I would argue that even though the theorists might be disregarded by the mainstream, the collective call to non-white bodies to continue to persist and oppose cannot be ignored. The ideas central to collective African freedom transcend any liberal construction of borders – from the Caribbean workers who dug the Panama Canal, to the African Americans who escaped to the North of the Americas in the Great Migration, to the vernacular of collective freedom featured in reggae and rap music, to the 21<sup>st</sup> century reverberations of 'Black is beautiful'.

Political ideals are rooted in visions, in dreams, in hopes for the future. Pan-Africanism and transnational solidarity has been rooted, first and foremost, in love. Love and community are quintessentially important in a discussion around liberation movements, prior to their characteristic roots in anti-imperialist, anti-colonial and anti-capitalist rhetoric. bell hooks argues that love is not only a practice of care, but rather also a 'practice of resistance'.<sup>78</sup> The active undertaking of (re)imagining our world is fundamental in building something that not only withstands the test of time, but also leads to more fulfilling future for generations to come. Global racialised inequality has only served to bolster white supremacy. This is in correlation with the gruelling manifestation of capitalism in the investors, bosses and shareholders who rake in profits at the expense of workers, and landlords who feed off of the precarious social landscape.

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Getachew (2019) 174.

<sup>78</sup> Hazel T. Biana, 'Love as an Act of Resistance: bell hooks on Love' in Soraj Hongladarom & Jeremiah Joven Joaquin (eds.), *Love and Friendship Across Cultures: Perspective from East and West* (Springer, 2021) 127, *abstract*.

## Conclusion

International criminal law is a (non?)legal liberal construct. It is a fluid material that consistently congeals and regurgitates hegemonic capitalist rhetoric. The mandate of the ICC, and even the basic aims of ICL, are simply not designed to address structural and systemic violence. Perhaps, then, it is more apt to say that ICL, as a concept, is intended to maintain the neoliberal capitalist status-quo. To that end, this Reflection has maintained that the world we exist in centres itself in carceral understandings of power, hierarchy and punishment. By drawing attention to the intersectionality of various socio-economical aspects (historical or otherwise) and their inherent relationship with capital, we come one step closer in our critique, gearing ourselves to actively pursue strategies that propel our political thinking forward. The politicisation of ICL and the ICC, inserted neatly into a global political economy that would prefer to mask the influence and importance of capital can only be viewed as coloniality persevering. Racialisation and the inherent question of race has been construed into a matter of law – which presents an inherent danger, as it largely ignores the legacies of colonialism. Rather than racialisation being viewed as a violent framework that needs to be dismantled, instead it is presented as a strict and confined construction—which simply serves to further codify an economy of (racialised) appearances in the first instance. This conceptualisation supersedes any discussion around the presumed importance of the ICC, which itself can be considered a violent institution perpetuating a colonial legacy.

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