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Symposium
Contemporary International Criminal Law After Critique

Contemporary International Criminal Law After Critique

Towards Decolonial and Abolitionist (Dis-)Engagement in an Era of Anti-Impunity

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ABSTRACT

Contemporary international criminal law (ICL) is a well-established field of scholarship and practice that wields significant influence in framing how certain events come to be understood and acted upon. Yet, as the field has increasingly captured the public's attention and imagination, a body of critical scholarship has risen in prominence that seeks to test and challenge ICL's underlying assumptions. In such a climate, this article suggests that ICL not only has moved beyond its inception and consolidation phases, but is beginning to emerge from its critical period towards a 'post-critical' phase where critique is becoming increasingly *normalized* within the field, with both reformist and structurally oriented reappraisals more readily acknowledged within ICL's imaginary. Situated in this 'post-critical' moment, this article examines the extent to which the vocabulary and institutions of ICL may be productively (re-)engaged in the pursuit of emancipatory ends. After providing an overview of the strands of critique that have become increasingly prominent, we reflect on three avenues for engaging with the field of ICL 'after critique': first, *critical engagement*, centred on a commitment to revealing and detailing silenced and marginalized experiences and methods within the field itself; second, *tactical and strategic engagement*, which points to the ways in which actors choose to engage with imperfect legal frameworks for particular struggles; and finally, *decolonial and abolitionist (dis-)engagement* which takes as its point of departure the rejection of both colonial and carceral logics *per se*, especially in light of their historical and persisting patterns of patriarchal and racialized domination. Ultimately, in linking ICL with historical and contemporary anti-colonial and anti-carceral struggles, we seek not only to disrupt ICL progress narratives, but also to show how earlier, often-sidelined ways of imagining forms

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of harm and their repair may provide potentially more productive ways of engaging with ICL 'after critique'.

1. INTRODUCTION

Contemporary international criminal law (ICL) is now a mature field of scholarship and practice entering its fourth decade — a period where international policy has discursively normalized the notion of anti-impunity even if its realization remains radically constrained. The rise of the anti-impunity framework for responding to certain large-scale atrocities was closely linked to a particularly narrow idiom of human rights that emerged in the late-1970s in the Global North,[1] which prioritized individualist civil and political rights as part of efforts to undercut, rollback, and displace broader claims to social redistribution and self-determination emanating from the Global South, and enabled a reactionary programme for neoliberal reform to emerge relatively unchallenged in its wake.[2] As Joseph Slaughter explains, this 'Western hijacking of human rights was only part of a larger derailment of Third Worldism, which diverted international law and the new international order from routes anticipated in the afterglow of formal decolonization'.[3]

Initially focused on naming and shaming states in opposition to the criminalization of political activity and abuses within domestic criminal justice systems, since at least the early 1990s, a number of prominent human rights groups in the Global North began to direct their resources towards promoting the *criminal* accountability of individuals as an indispensable requirement of securing justice in the aftermath of mass atrocities.[4] In this way, rising support for ending impunity formed part of a shift that aligned human rights *with* rather than against the carceral power of the state[5] — with human rights groups in essence 'moving from Defence (defending against the power of the state) to Prosecution (prosecuting on behalf of the state)'.[6] Situated in a climate of rising neoliberalism — characterized by deepening privatization and financialization, the undermining of systems of social protection, and a particular form of governance that protects the market from democratic demands[7] — the 'criminal turn' within the field of human rights also echoed the need for a strong punitive state to implement neoliberal restructuring projects around the world.[8]

The rhetoric of anti-impunity helped generate the institutionalization of the field of ICL in the 1990s, with the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), the permanent International Criminal Court (ICC), and later a range of hybrid courts and tribunals — a trend that formed part of a broader 'new tribunalism' within international law at the time.[9] Although anti-impunity is often most closely associated with an embrace of criminal prosecution and retributive punishment as a necessary

[1] S. Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).
[2] J. Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World', 40 *Human Rights Quarterly* (*HRQ*) (2018) 735, at 758.
[3] *Ibid.*, at 771. See also, M. Pinto, 'Historical Trends of Human Rights Gone Criminal', 42 *HRQ* (2020) 729, at 748.
[4] See generally, K. Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights', 100 *Cornell Law Review* (2015) 1069; and K. Engle, Z. Miller, and D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016).
[5] P. Alston, 'Criminalizing Human Rights', 15 *Journal of Human Rights Practice* (*JHRP*) (2023) 660.
[6] C. Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press, 2021), at 86.
[7] A. Kapczynski, 'The Right to Medicines in an Age of Neoliberalism', 10 *Humanity* (2019) 70, at 79 and 82.
[8] Engle, *supra* note 4, at 1073–1076 and 1123–1126.
[9] T. Skouteris, 'The New Tribunalism: Strategies of De-Legitimation in the Era of International Adjudication', 17 *Finnish Yearbook of International Law* (2008) 307.

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antidote to episodes of mass violence,[10] it may also be understood as a particular *mindset*, encompassing a set of assumptions that have permeated justice mechanisms beyond the criminal courtroom.[11] Referred to by Mahmood Mamdani as 'the logic of Nuremberg',[12] the anti-impunity mindset entails a concern for the accountability of *individuals*, a focus on *specific* incidents and events over structures,[13] the prioritization of addressing *spectacular* physical violence to the relative neglect of slower forms of violence, and an insistence on dividing the world into *adversarial binary categorizations* (guilty and innocent, perpetrators and victims, blamers and blamed).[14]

An initial sense of romanticism and faith in the transformative qualities of international criminal courts and tribunals (ICCTs) during their start-up phase helped cement this anti-impunity mindset,[15] with its assumptions in general and the vocabulary of ICL in particular becoming an increasingly dominant frame for articulating injustices and pursuing political struggles around the world.[16] Indeed, such has been the permeation of the struggle to end impunity within the field of human rights that nowadays 'expressing opposition to any particular international prosecution is sometimes seen as anti-human rights'.[17] This is in spite of the fact that, as Akhavan suggests, the very need for ICCTs is evidence of the most profound failure (to *prevent* harms), rather than success.[18]

As anti-impunity and ICL became more entrenched, so too did the expectations invested in ICCTs — whether in the form of deterring future atrocities, reconciling divided communities, writing history, or delivering justice for victims. However, as the gap between these 'exaggerated normative fantasies' of policymakers and what ICCTs could realistically achieve in practice became increasingly apparent,[19] the 'honeymoon period' for the anti-impunity movement and its accompanying institutions gradually drew to a close.[20] Since at least the mid-2000s, scholarship in the field of ICL took on an increasingly critical orientation.[21] This is not to suggest that critical scholarship was absent prior to this period,[22] but rather that as ICL was becoming an increasingly dominant frame, 'the criticism of it *grew louder*'.[23] Discussing scholarship related to the ICC, for example, Darryl Robinson has even suggested that while many scholars were initially over-protective of the ICC, hesitant to criticize a nascent institution that had seemingly been established against the odds, in more recent years,

[10] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (Norton, 2011).

[11] B. Sander, 'The Anti-Impunity Mindset', in M. Bergsmo et al. (eds), *Power in International Criminal Justice* (TOAEP, 2020) 325, at 326.

[12] M. Mamdani, 'Beyond Nuremberg: The Historical Significance of Post-apartheid Transition in South Africa', 43 *Politics & Society* (2015) 61, at 80.

[13] This is not to suggest that international criminal courts are completely decontextualized. The contextual elements of international crimes and the collective elements of modes of participation, for example, require an examination of the broader institutional contexts within which an accused operated. However, the underlying structural causes of mass violence often remain beyond the purview of international criminal courts. For further discussion, see generally B. Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts* (Oxford University Press, 2021), at Chapter 6.

[14] Sander, *supra* note 11, at 331–333.

[15] D.S. Koller, 'The Faith of the International Criminal Lawyer', 40 *NYU Journal of International Law and Politics* (2008) 1067.

[16] S.M.H. Nouwen and W. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', 13 *Journal of International Criminal Justice* (*JICJ*) (2015) 157, at 161.

[17] Engle, *supra* note 4, at 1118.

[18] P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice', 11 *JICJ* (2013) 527, at 530.

[19] *Ibid.*, at 529.

[20] D. Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice', 11 *JICJ* (2013) 505, at 506.

[21] See, for example, C. Kreß, 'Towards a Truly Universal Invisible College of International Criminal Lawyers', *FICHL Occasional Paper Series No. 4* (2014) 1, at 11 (identifying a critical turn in ICL scholarship following the Security Council's referral of the situation in Darfur to the ICC).

[22] For a discussion of earlier critical scholarship, see B. Sander, 'International Criminal Justice as Progress: From Faith to Critique', in M. Bergsmo et al. (eds), *Historical Origins of International Criminal Law: Volume 4* (TOAEP, 2015) 749, at 775.

[23] Schwöbel-Patel, *supra* note 6, at 93 (emphasis added). See similarly, S. Vasiliev, 'The Crises and Critiques of International Criminal Justice', in K.J. Heller et al. (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 626, at 633–634.

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critical ICL scholarship has 'come to dominate the discourse'.[24] While the continuingly large output of doctrinal reformist scholarship might undercut this argument to some extent,[25] it is undeniable that the field of ICL scholarship today is radically different from its inception phase.[26]

To participate within the field of ICL today is to operate within a far more self-reflexive and circumspect anti-impunity space where ICL's failings are readily acknowledged while often still called upon in a *reconstructive* posture. Here in this article and the symposium as a whole, we suggest that the field of ICL not only has moved beyond its inception and consolidation phases (the ICC is now over two decades old), but is also beginning to emerge from its critical phase (perhaps best-illustrated by an edited collection in 2014)[27] towards a 'post-critical' phase.[28] By 'post-critical', we do not mean to suggest that the task of critique is over or in decline, but rather a phase where critique is becoming increasingly *normalized* within the field, with both reformist and structurally-oriented reappraisals more readily acknowledged and understood within the field's imaginary. This is perhaps best illustrated by the large increase in critically oriented articles appearing in the field's leading forum — the *Journal of International Criminal Justice* — which earlier on had been dominated by doctrinal scholarship, including many contributions from ICCT practitioners.[29]

Against such a background, this article explores the extent to which the vocabulary and institutions of ICL may be productively (re-)engaged in the pursuit of emancipatory ends 'after critique'. After providing an overview of the different strands of critique that have become increasingly prominent in recent years (Section 2), we reflect on three avenues for (re-)engaging with the field of ICL in this 'post-critical' moment: first, *critical engagement*, which centres on a commitment to revealing and detailing silenced and marginalized experiences and methods within the field itself (Section 3); second, *tactical and strategic engagement*, which points to the ways in which actors choose to engage with imperfect legal frameworks for particular struggles (Section 4); and finally, *decolonial and abolitionist (dis-) engagement* which takes as its point of departure the rejection of colonial and carceral logics *per se*, especially in light of their historical and persisting patterns of patriarchal and racialized domination (Section 5). The article concludes by situating the contributions in this symposium within this tapestry of (re-)engagement within the field of ICL (Section 6). Ultimately, in linking ICL with historical and contemporary anti-colonial and anti-carceral struggles, we seek not only to disrupt ICL progress narratives, but also to show how earlier, often-sidelined ways of imagining forms of harm and their repair provide potentially more productive ways of approaching critique.

[24] D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', 28 *Leiden Journal of International Law* (*LJIL*) (2015) 323, at 324. See also, G. Simpson, 'International Criminal Law: The Next Hundred Years', in Heller et al. (eds), *supra* note 23, 841, at 846.

[25] We understand 'doctrinal reformist scholarship' as that body of ICL work that adopts an internal point of view on the law, typically engaging in close legal analysis of ICL jurisprudence. It is reformist as it displays a pronounced commitment to the goal of anti-impunity and thus often seeks to improve upon legal imperfections, rather than reflect upon the political stakes of ICL scholarship *per se*. See M. Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology', 14 *JICJ* (2016) 921, at 926–927.

[26] This also might be the result of employment trends: A large new pool of trained international criminal lawyers could not continue to be absorbed by ever more ICCT jobs. Christensen suggests that the field peaked in the late 2000s when around 4000 personnel were employed. Since then, it has been struggling to provide as many long-term career options. M. J. Christensen, 'From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and its Professional Practices', 43 *International Journal of Law, Crime and Justice* (2015) 609, at 610.

[27] C. Schwöbel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014).

[28] See similarly in the field of human rights, K. McNeilly, 'After the Critique of Rights: For a Radical Democratic Theory and Practice of Human Rights', 27 *Law and Critique* (2016) 269.

[29] See, for example, the following symposia: 13 *JICJ* (2015) 73–176 (on global justice and ICL); and 14 *JICJ* (2016) 915–1009 (on TWAIL and ICL).

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2. THE CRITICAL TURN IN ICL SCHOLARSHIP

In general, critical ICL scholarship has taken one of two forms: liberal or structural.[30] 'Liberal' critiques challenge ICCTs for not living up to liberal standards of justice — embodied in the principles of legality, culpability, and fairness — to which they claim adherence.[31] These critiques, which often adopt a doctrinal reformist methodology, tend to be characterized by a concern for improving the effectiveness of ICCTs, while leaving their underlying assumptions unchallenged. In this vein, difficulties and disappointments confronted by ICCTs 'continue to be posed as issues of implementation, not orientation–of communication, not perpetuation of inequalities'.[32] Often pragmatic and policy-oriented, liberal critiques also focus on inclusion — whether pressing for more inclusive enforcement, suggesting more crimes to be added to the core crimes catalogue, or advocating for more diverse voices to become part of ICL debates.[33] From this perspective, the lofty goals and ambitions of ICCTs have been undermined because 'there is *not (good) enough* international criminal law' yet.[34]

'Structural' critiques, in contrast, actively question the underlying assumptions on which ICCTs are based — revealing the ways in which these institutions are not only ineffective at achieving many of their aspirations, but also potentially detrimental to them.[35] This form of critique 'fundamentally questions the project's moral and epistemic credentials, its rationality, and virtuousness', seeking to 'upset the field's certainties, lay bare its contradictions, and arouse its anxieties'.[36] Unveiling the productive power and politics of ICCTs, structural critiques draw on a diversity of theoretical orientations ranging from Third World Approaches to International Law (TWAIL) to Marxism to ask 'who benefits from the existing parameters of international criminal law, who loses through them and why'.[37] In other words, structural critiques are concerned with examining ICCTs as significant institutions for the making of 'contestable, thoroughly political distributional choices–for creating winners and losers, prioritizing some voices at the expense of others'.[38]

To better illuminate the central tenets of structural critique, a useful starting point is the characterization of ICL as 'a double-edged sword', equipped to be 'a tool of the hegemon as well as a means to resist power'.[39] This duality reflects the malleability and indeterminacy of international law,[40] whose argumentative architecture enables plausible, contradictory claims to be advanced through its legitimating concepts.[41] At the same time, as Koskenniemi

[30] Several scholars have adopted this framing. See, for example, P. McAuliffe and C. Schwöbel-Patel, 'Disciplinary Matchmaking: Critics of International Criminal Law Meet Critics of Liberal Peacebuilding', 16 *JICJ* (2018) 985, at 989–991; and Vasiliev, *supra* note 23, at 633–635. For alternative typologies, see T. Dias, 'The Banality of Law: Reflections on *The Oxford Handbook of International Criminal Law*', 18 *JICJ* (2020) 1247; and Simpson, *supra* note 24.

[31] For discussion of such critiques, see generally, D. Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law', 26 *LJIL* (2013) 127, at 128–129; and McAuliffe and Schwöbel-Patel (ed.), *supra* note 30, at 989–990.

[32] McAuliffe and Schwöbel-Patel, *supra* note 30, at 989.

[33] Schwöbel-Patel, *supra* note 6, at 93.

[34] Pinto, *supra* note 3, at 752.

[35] For discussion of such critiques, see generally, Vasiliev, *supra* note 23, at 633–634 and 637–644; McAuliffe and Schwöbel-Patel, *supra* note 30, at 990–991; B. Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning', 32 *LJIL* (2019) 851, at 862–866; and Schwöbel (ed.), *supra* note 27.

[36] Vasiliev, *supra* note 23, at 634.

[37] McAuliffe and Schwöbel-Patel, *supra* note 30, at 990. See similarly, Engle, *supra* note 4, at 1117.

[38] B. Golder, 'Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought', 2 *London Review of International Law* (2014) 83.

[39] F. Jeßberger, L. Steinl, and K. Mehta, 'Hegemony and International Criminal Law—An Introduction', in F. Jeßberger et al. (eds), *International Criminal Law—A Counter-Hegemonic Project?* (TMC Asser Press, 2023) 1, at 4.

[40] Indeterminacy may be considered a characteristic of all law, on which see generally, J. Klabbers, 'The Meaning of Rules', 20 *International Relations* (2006) 295. However, the structural indeterminacy of international law centres on a particular tension between state sovereignty and the international community, on which see generally, D.M. Scott and U. Soirila, 'The Politics of the Moot Court', 32 *European Journal of International Law* (*EJIL*) (2021) 1079.

[41] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn., Cambridge University Press, 2005), at 60, 65, and 607. For an application of this dimension of Koskenniemi's work in the field of ICL, see Robinson, *supra* note 24.

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explains, even if logically speaking 'it is possible to justify many kinds of practices through the use of impeccable professional argument, there is a *structural bias* in the relevant legal institutions that makes them serve typical, deeply embedded preferences'.[42] Structural bias is, in itself, not controversial, but 'when the bias works in favour of those who are privileged, against the disenfranchized, at that point the bias itself becomes "part of the problem"'.[43]

Within the field of ICL, while it is indeed possible to characterize ICL as a double-edged sword, critical scholarship in recent decades has begun to surface several of its troubling structural biases. These include the alignment of ICCTs with the balance of power between and within States such that moments of anti-impunity tend to be accompanied by a significant degree of impunity often along racial, patriarchal, and (neo-)colonialist lines; the equation of ICCTs with a narrow decontextualized conception of responsibility that risks masking the collective dimensions of mass atrocities behind the depoliticized veil of the individuals under prosecution; and the occlusion of addressing structural and slower forms of violence in favour of more spectacular and immediate manifestations of violence.[44] Grietje Baars, for example, emphasizes the importance of recognizing that the so-called 'impunity gap' that characterizes the selectivity of ICL institutions is itself created by the relations of power that exist within the field.[45] As such, they argue that it would be more convincing to refer to this gap as 'planned impunity',[46] a term that acknowledges the structural bias of ICL institutions, which, rather than speaking truth to power, may be understood to be speaking 'a certain truth *of* power'.[47]

Viewed through the prism of these critiques, the dominance of ICL and the demise of its competitors appear to be at least partially rooted in what Christine Schwöbel-Patel has termed ICL's marketability, in particular 'the simplified international criminal justice messages of 'evil warlords' and 'corrupt statesmen/rebel leaders' (from the Global South) [which] appealed to those states holding economic power because … it placed questions of redistribution to tackle inequality firmly outside of the global justice remit'.[48] In this way, structural critiques have helped illuminate how 'alternative conceptions of justice have been pushed to the margins by the increasingly dominant use of international criminal law to frame and thus to understand political issues and by tendencies to equate international criminal law with global justice'.[49]

Although the impact of structural critiques on policy and practice is difficult to discern with precision,[50] we agree with Sergey Vasiliev that 'faced with growing intellectual opposition, the field has been thrown off balance and is struggling to regain it in a changed discursive context'.[51] And it is in this 'post-critical' climate, with structural critiques becoming increasingly normalized within the field of ICL that we ask whether and how ICL might productively be (re-)engaged towards emancipatory ends.

3. CRITICAL ENGAGEMENT

One possibility is *to continue to apply the analytical tools of critique* to ever-more dimensions of the field of ICL — striving to unveil the biases and blind spots of the dynamic practices,

[42] Koskenniemi, *supra* note 41, at 607.
[43] *Ibid.*, at 608–609.
[44] Sander, *supra* note 11, at 341–350.
[45] G. Baars, 'Making ICL History: On the Need to Move Beyond Pre-Fab Critiques of ICL', in Schwöbel (ed.), *supra* note 23, 196, at 208.
[46] *Ibid.*
[47] F. Mégret, 'International Criminal Justice: A Critical Research Agenda', in Schwöbel (ed.), *supra* note 27, 17, at 34.
[48] Schwöbel-Patel, *supra* note 6, at 91–92.
[49] Nouwen and Werner, *supra* note 16, at 173.
[50] McAuliffe and Schwöbel-Patel, *supra* note 30, at 987; Vasiliev, *supra* note 23, at 634–635.
[51] Vasiliev, *supra* note 23, at 635. See also, Simpson, *supra* note 24, at 842–843.

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sites, and situations in which the vocabulary of ICL is relied upon. In the contemporary climate, this form of engagement raises several questions.

A. Continuities of Critique? Guarding Against Amnesia in the Field of ICL

The first concerns the value of continuing to critique ICL institutions and related sites at a time when the field appears seemingly saturated with such work. Of particular interest in this regard are the reflections of Christine Schwöbel-Patel who recently observed how, during the finalization of her critically-oriented monograph, *Marketing Global Justice*, a creeping suspicion arose that 'perhaps ICL's moment had passed; that critique … had reached the "mainstream" of the academy and to some extent also practice … [and] global justice actors that were savvy in the attention economy preferred to place their bets on a different horse'.[52] Schwöbel-Patel immediately added, however, that her suspicions were soon dispelled with the revitalized enchantment for carceral internationalism that emerged in the wake of Russia's invasion of Ukraine in 2022.[53]

The Ukraine-induced renewal of enthusiasm for (a highly partial and selective) ICL response offers a clear example of how the field tends to develop 'in rhythm with [certain] geopolitical bolts and humanitarian cataclysms'.[54] Yet, as Hilary Charlesworth cautions, there are risks for scholars in following the lead of the crisis model of international law, notably the tendency 'to rediscover an issue constantly and to analyse it without building on past scholarship … [or] any real progression of thought or doctrine'.[55] We suggest that critical scholarship is particularly valuable in such moments for helping surface not only the discontinuities that may mark particular crisis situations, but also the continuities, guarding against amnesia of prior concerns and developments in the field.[56]

Ukraine is particularly instructive here. Patryk Labuda, for example, has recently explored how strong Eastern European support for a special tribunal for aggression does not fit into simple Global North/Global South binaries or familiar ICL narratives that celebrate the lessons and legacies of Nuremberg. In fact, Nuremberg 'whitewash[ed] the brutal crimes committed against Poles, Ukrainians and other people from the region … [whilst] also bestow[ing] legitimacy on the Soviet Union [as] a liberator from Nazi rule'.[57] Critical scholarship here means thinking more carefully about what Ukrainian support for ICL reflects at this juncture, particularly when read alongside its history of Soviet atrocities and Russian attempts at conquest not only in 2022, but since 2014. And importantly, this function of critique in guarding against amnesia of what past events reveal about the promise and perils of ICL is also supported by social–psychological scholarship, which illuminates the importance of ongoing, even repetitive, critical engagement within the field of international law. As Ingo Venzke explains:

> The practice of exposing the complicity of international law in contributing to instances and patterns of injustice–of seeing it as part of the problem — … counters a combination of powerful cognitive and social psychological dynamics that render the world seemingly just. *The persistence of those dynamics and the cognitive effects they produce demands that*

[52] C. Schwöbel-Patel, 'The '90s are Back', Legal Form, 10 October 2022, available online at https://legalform.blog/2022/10/10/the-90s-are-back-christine-schwobel-patel/ (visited 6 August 2023).

[53] See also, S. Vasiliev, 'Watershed Moment or Same Old? Ukraine and the Future of International Criminal Justice', 20 *JICJ* (2022) 893.

[54] *Ibid.*, at 894.

[55] H. Charlesworth, 'International Law: A Discipline of Crisis', 65 *Modern Law Review* (2022) 377, at 384.

[56] In the case of Ukraine, Patryk Labuda reminds us how the recent uptick in attention follows on from eight years of relative neglect following Russia's occupation of Crimea and the Donbass: P.I. Labuda, 'Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion', *LJIL* (2023) 1.

[57] P.I. Labuda, 'Countering Imperialism in International Law: Examining the Special Tribunal for Aggression against Ukraine through a Post-Colonial Eastern European Lens', 49 *Yale Journal of International Law* (2023, forthcoming), at 15–16.

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> *critique be repeated, rubbed in, as it were.* It is not, as is sometimes suggested, that critique, if once expressed, it is done, or that it is at best a first step before the real work begins. Omission and confirmation biases, just world and system justification theories are too powerful.[58]

As we continue to observe a flurry of ICL activity around Ukraine and now Gaza, it remains crucial to sustain critical impulses that can help dispel our own amnesia.

B. Expanding ICL Critique? New Actors and Challenges

Beyond reflecting on evolving crisis situations, critical engagement also has particular purchase in light of the diversity of new actors, intermediaries, and technologies that have emerged within the field of ICL. For example, recent decades have witnessed the rise of *social media platforms*, which have grown exponentially into important 'sites of encounter' where interactions between different actors within the field of ICL are 'materially and algorithmically intermediated'.[59] Notably, social media platforms are not only key *sites* of expression and communication within the field of ICL, but also, through their increasingly algorithmically powered architectures of data surveillance and content control,[60] significant *shapers* of expressive opportunities for actors that use their services.

In particular, platforms have become embroiled in enabling and amplifying hate speech and incitement to violence within mass atrocity contexts (the violence against the Rohingya Muslims in Myanmar being a prominent example),[61] amassing 'accidental and unstable archives' of atrocity-related content of potential relevance to investigatory work conducted by prosecutors, fact-finding missions, civil society groups and journalists,[62] and incentivising reductive messaging within public relations and advocacy campaigns of judicial institutions and civil society groups (the *Kony 2012* campaign video launched by US-based advocacy group Invisible Children offering a much-discussed illustration).[63] Critical engagement offers a particularly valuable lens for identifying and scrutinizing the structures of informational capitalism that underpin the design and operation of today's leading social media platforms, which generally serve to incentivize the prioritization of profit over the interests of preventing platform-enabled crimes,[64] preserving mass atrocity evidence,[65] and discouraging the commodification and spectacularization of justice.[66]

[58] I. Venzke, 'Cognitive Biases and International Law: What's the Point of Critique?' in A. Bianchi and M. Hirsch (eds), *International Law's Invisible Frames* (Oxford University Press, 2021) 55, at 63–64 (emphasis added).

[59] J.E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019), at 6.

[60] See generally, B. Sander, 'Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law', 32 *EJIL* (2021) 159.

[61] See generally, R.J. Hamilton, 'Platform-Enabled Crimes: Pluralizing Accountability When Social Media Companies Enable Perpetrators to Commit Atrocities', 63 *Boston College Law Review* (2022) 1349.

[62] Human Rights Center, *Digital Lockers: Archiving Social Media Evidence of Atrocity Crimes*, (University of California, Berkeley, School of Law, 2021), available online at https://humanrights.berkeley.edu/sites/default/files/digital_lockers_report5.pdf (visited 7 August 2023), at 2. See generally, D. Murray, Y. McDermott, and A. Koenig, 'Mapping the Use of Open Source Research in Human Rights Investigations', 14 *JHRP* (2022) 554; and F. D'Alessandra and K. Sutherland, 'The Promise and Challenges of New Actors and New Technologies in International Justice', 19 *JICJ* (2021) 9.

[63] See generally, D. Joyce, *Informed Publics, Media and International Law* (Hart Publishing, 2020), at 132–135; Schwöbel-Patel, *supra* note 6, at Chapter 6; and M.A. Drumbl, 'Child Soldiers and Clicktivism: Justice, Myths and Prevention', 4 *JHRP* (2012) 481.

[64] See, for example, J. Domino, 'Crime as Cognitive Constraint', 52 *Case Western Reserve Journal of International Law* (2020) 143; and Hamilton, *supra* note 61.

[65] See, for example, H. Hubley, 'Bad Speech, Good Evidence: Content Moderation in the Context of Open-Source Investigations', 22 *International Criminal Law Review* (*ICLR*) (2022) 989; M. Burgis-Kasthala, 'Assembling Atrocity Archives for Syria: Assessing the Work of the CIJA and the IIIM', 19 *JICJ* (2021) 1193; and L. Freeman, 'Digitally Disappeared: The Struggle to Preserve Social Media Evidence of Mass Atrocities', 23 *Georgetown Journal of International Affairs* (2022) 105, at 110.

[66] See, for example, Schwöbel-Patel, *supra* note 6, at Chapter 9. Akhavan, *supra* note 18 also notes how modern ICL is a form of 'spectator's justice'.

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While the privatized logics of platform profit-seeking present new challenges to anti-impunity, recent scholarship within the field is also exploring how such new technologies have supported the rapid rise of a range of *new accountability actors*[67] trying to carve out a niche within a highly competitive accountability market.[68] By the end of its first decade of operation, it was already clear to many legal and non-legal scholars that the ICC was hampered by its 'limited capabilities',[69] including restrictions in its capacity to collect evidence directly,[70] and its resulting reliance on intermediaries, such as NGOs. Once the Syrian civil war broke out in late 2011, these challenges could be reframed as opportunities by private accountability actors able to access evidence beyond the formal reach of international public bodies.[71] While the work of organizations such as the Commission for International Justice and Accountability (CIJA) focussed on familiar practices of document retrieval and witness interviews, its emergence coincided with the rise of user-generated evidence, which for Hamilton marked a 'fundamental disruption within the investigatory ecosystem'.[72] Thus, the Syrian conflict served as the training ground for a range of new techniques and actors that could then flourish and rapidly innovate, such as on the heels of Russia's invasion in 2022.[73]

Interdisciplinary scholarship has developed increasingly sophisticated accounts of how the ICL field is changing in light of contemporary developments. For the past decade or so, sophisticated sociological work, for example, has mapped the nature of ICL as a social field through its actors, institutions, and logics.[74] Such work explores how exogenous forces constrain and limit ICL's colonial and colonizing impetus[75] such that ICL actors — whether public or private and whether new or traditional — must compete for funding and attention within specific 'justice sites'[76] that in turn are linked to broader global governance trends.[77]

Recent anthropological work is also noteworthy for exploring how ICL practices are felt and experienced, as well as the role of emotions in mobilizing the uptake of and resistance to narrow ICL forms of justice.[78] Indeed, if, as Kamari Maxine Clarke suggests, 'judicial spaces operate within particular affective realms rooted in histories, memories, and experiences',[79] it becomes important to move beyond reflecting on the interpretation and application of rules of ICL towards an exploration of how international institutions gain their power and

[67] Hamilton, *supra* note 61; Murray, McDermott, and Koenig, *supra* note 62; D'Alessandra and Sutherland, *supra* note 62.

[68] For example, see M. Eilstrup-Sangiovanni and J.C. Sharman, *Vigilantes Beyond Borders: NGOs as Enforcers of International Law* (Princeton University Press, 2022), at 40–45.

[69] N. De Silva, 'Intermediary Complexity in Regulatory Governance: The International Criminal Court's Use of NGOs in Regulating International Crimes', 670 *Annals of the American Academy of Social Science* (2017) 170.

[70] N.A. Combs, 'Grave Crimes and Weak Evidence: A Fact-finding Evolution in International Criminal Law', 58 *Harvard International Law Journal* (2017) 47.

[71] A. Heinze, 'Private International Criminal Investigations', 2 *Zeitschrift für Internationale Strafrechtsdogmatik* (2019) 169; da Silva, *supra* note 69.

[72] M. Burgis-Kasthala, 'Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice', 30 *EJIL* (2019) 1165.

[73] Murray, McDermott, and Koenig, *supra* note 62, note the convergence in work between INGOs, users/witnesses, technologists and private lawyers.

[74] This work builds on Pierre Bourdieu and was first pioneered in general by Garth and Dezalay (such as in B.G. Garth and Y. Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996) before being considered in relation to atrocity actors, such as J. Hagan and R. Levi, 'Crime of War and the Force of Law', 83 *Social Forces* (2005) 1499; F. Mégret, 'International Criminal Justice as a Juridical Field', 13 *Champ penal* (2016) 5; E. Aronson and G. Shaffer, 'Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process', 46 *Law & Social Inquiry* (2020) 455.

[75] On the colonial resonances of ICL from a criminological perspective, see N. McMillan, *Imagining the International: Crime, Justice, and the Promise of Community* (Stanford University Press, 2020), at 126–130.

[76] Christensen, *supra* note 26.

[77] On the link between anti-impunity logics and global governance, especially see H. Sayed, 'The Regulatory Function of the Turn to Anti-Impunity in the Practice of International Human Rights Law', 55 *Stanford Journal of International Law* (2019) 1.

[78] See generally, K.M. Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press, 2019); K.M. Clarke, 'Affective Justice: The Racialized Imaginaries of International Justice', 42 *Political and Legal Anthropology Review* (2019) 244.

[79] Clark, *Affective Justice*, *supra* note 78, at 261.

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law gains its force 'through the various affects that are grounded in the deep-seated histories and inequalities whose dispositions are sometimes already inscribed in people's psychic or emotional worlds', including, for example, 'the absence of international institutions intervening into colonialism and apartheid'.[80]

Very much related to emotional registers of expression is a concern for the materiality of ICL.[81] Engaging with the deep entanglements of ICL with the material world encompasses not only exploring 'the material objects through which international law become embedded and implicated in the world', but also 'the role of international law and legal practice in constructing, authorizing, legitimizing, and giving force to those objects (or alternatively, destroying, delegitimizing, or preventing their coming into being)'.[82] As Eslava and Pahuja explain, to study international law as 'a specific kind of material practice: a practice which "creates" and "takes place" through the very materiality of the world' is to engage with 'the way in which international law unfolds on the mundane and quotidian place through sites and objects which appear unrelated to the international'.[83] In other words, examining the materiality of ICL may offer one pathway towards animating and connecting it with the everyday lived experiences of individuals and communities.[84]

Engaging with the sociological, emotional and material registers of the field of ICL can help generate not only a deeper understanding of ICL's limitations and injustices, but also its future potentialities.[85] While critical ICL scholarship — as a form of *internal* critique — has often relied on fruitful interdisciplinary insights,[86] it largely remains tethered to legal methods that arise from teaching and scholarly publishing constraints.[87] Looking beyond the discipline provides a fruitful register of critique and, possibly, renewal — particularly during a period of rapid technological change which has witnessed the emergence of new social media and accountability actors.

C. Does Critique Need to Be Reconstructive?

A further question that arises from critical engagement relates to the value of critique in the absence of reconstruction. To the question, 'What is to be done?', the response of the ICL critic is often to resist providing an answer.[88] There is no doubt that such a posture will alienate some. Yet, as several scholars have observed, critique and practice are often intimately intertwined. For Koskenniemi, for example, the reticence of critical scholars to propose new rules or policies in response to contemporary problems does not undermine the relevance of critical work to practitioners, many of whom 'do not carry the pretence that what is needed are more rules or policies but a better *understanding* of what goes on under the façade of rule-application or policy-implementation, especially in places conventionally

[80] *Ibid.*, at 8.
[81] See, for example, S. Stolk and R. Vos, 'International Legal Sightseeing as a Phenomenon and a Methodology', 3 *Journal of Law, Art and History* (2022) 173; R. de Falco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (Cambridge University Press, 2022); J. Hohmann and D. Joyce (eds), *International Law's Objects* (Oxford University Press 2018); I. Tallgren, 'Come and See? The Power of Images and International Criminal Justice', 17 *ICLR* (2017) 259; C. Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood', 4 *London Review of International Law* (2016) 247.
[82] J. Hohmann and D. Joyce, 'Introduction', in Hohmann and Joyce (eds), *supra* note 81, 1, at 8.
[83] L. Eslava and S. Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law', 3 *Trade Law and Development* (2011) 103, at 109.
[84] J. Hohmann, 'The Lives of Objects', in Hohmann and Joyce (eds), *supra* note 81, 30, at 33.
[85] Hohmann and Joyce, *supra* note 82, at 11.
[86] For example, as surveyed in Burgis-Kasthala, *supra* note 25.
[87] M. Burgis-Kasthala, 'Introduction: How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship', 17 *ICLR* (2016) 227.
[88] G. Simpson, *The Sentimental Life of International Law: Literature, Language and Longing in World Politics* (Oxford University Press, 2021), at 186–187.

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thought of as "legal institutions"'.[89] Thinking from a TWAIL perspective, Asad Kiyani has characterized this form of engagement as 'a critical interrogation track' which operates to mitigate the ever-present risk for ICL 'to cause tangible harms, whether through its legitimation of local autocracies or its sanctification of increased conflict through armed interventions or renewed conflict against so-called enemies of humanity'.[90] While for David Kennedy, rather than treating critique as a tool or instrument, it is important to imagine instead 'a humanitarianism whose *end* was criticism, whose *knowledge* was critique … a human rights movement which was not the vehicle for what we know justice to be, but a network for criticising the pretences of justice as it is'.[91]

And yet, while critical work is important, there is also a sense that, without more, it may prove inadequate in inspiring pathways towards emancipatory change and potentially even contribute towards a climate of 'fatalistic despair'.[92] In other words, there is the risk that critique may inadvertently exhaust rather than inspire transformative international law work and serve to stabilize rather than challenge the *status quo* that forms the object of critique.[93] Moreover, as Anne Orford has recently argued, there is also a sense that 'the relentless cynicism of many critiques of professional expertise seems out of touch with the contemporary situation, in which professionals are increasingly far from autonomous, in which scientific and other forms of expertise are increasingly disparaged, and in which cynical reason, far from being oppositional, has become an extremely powerful resource for dominant political forces'.[94]

To our mind, these critiques of critique are not to be understood as arguments against critical engagement. Rather, they suggest the importance of further reflecting on the relationship between critique and practice, particularly in terms of the extent to which critique is able to inform and inspire critically engaged professionals grappling with the structural bias of their institutions.[95] It is perhaps worth re-emphasizing then, as Koskenniemi does, that critical research is best understood as 'a useful and perhaps a necessary *preliminary* [step] for using the resources of international law for supporting efforts to change them'.[96]

4. BETWEEN TACTICAL AND STRATEGIC ENGAGEMENT

How else, then, to engage with the field of ICL against the background of its structural critiques? Across a range of critical traditions, this dilemma has tended to be characterized in the form of a tension between reform and resistance. The tension centres on whether one should seek to foster transformative change through reformist efforts from within the system of international law or whether one should work to resist the existing normative structures

[89] M. Koskenniemi, 'What is Critical Research in International Law?' Celebrating Structuralism', 29 *LJIL* (2016) 727, at 730. See also J.H.H. Weiler, 'International Legal Theory: A Dialogic Conclusion', in J.L. Dunoff and M.A. Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2022) 361, at 387 (noting how the decision to resist a policy-making impulse 'does not diminish one iota the importance of the unmasking enterprise which is inherent in the critical approach'); and J. Linarelli, M.E. Salomon, and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press, 2018), at 274.

[90] A. Kiyani, 'Third World Approaches to International Criminal Law', 109 *American Journal of International Law Unbound* (2016) 255, at 259.

[91] D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004), at 353. For reflections on Kennedy's critical reworking of human rights rather than thinking beyond them, see Golder, *supra* note 38.

[92] I. Roele, 'Policing Critique', 81 *Modern Law Review* (2018) 701, at 704.

[93] G.M. Lentner, 'Beyond Cynicism and Critique: International Law and the Possibility of Change', in B. Baade et al. (eds), *Cynical International Law?* (Springer 2021), at 37.

[94] A. Orford, 'Epilogue: Critical Intimacy and the Performance of International Law', in L.J.M. Boer and S. Stolk (eds), *Backstage Practices of Transnational Law* (Routledge, 2019) 174, at 174–175.

[95] See also, Vasiliev, *supra* note 23, at 642–644 (reflecting on the dangers of critical scholarship being co-opted by self-serving objections to ICL put forward by, for example, domestic elites targeted for prosecution).

[96] Koskenniemi, *supra* note 89, at 729.

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of international law in ways that aim to fundamentally reimagine and move beyond them.[97] The latter recognizes that legal frames and institutions can sometimes limit our moral horizons, a point which Martti Koskenniemi powerfully advanced in his analysis of the International Court of Justice's *Nuclear Weapons* Advisory Opinion.[98]

Both reform and resistance come with risks. Reform comes with the risk of only ever tinkering with the surface level of institutions, while legitimating and sustaining the structures of international law that underpin the suffering, exploitation and alienation it sometimes seeks to ameliorate.[99] Resistance is accompanied by the risk of over-ambition, while devoting inadequate attention to the ways in which tinkering with the system matters to the everyday lives of exploited groups — whether, for example, in preventing war or reducing people's hunger.[100] How, then, to navigate this tension?

A. Straddling Reform and Resistance

For many critical scholars, the path forward is to think through the ways in which reform and resistance 'flow into one another'.[101] Luis Eslava and Sundhya Pahuja, for example, suggest that for many TWAIL scholars 'a systematic process of resistance to the negative aspects of international law must be accompanied with continuous claims for reform'.[102] This unwillingness to exit — or give up on — the field of international law arises in part 'because of a fear that it would be dangerous to leave an undoubtedly powerful arena and look for another language in which to speak', and in part out of 'a certain hope, or faith in the transformative power of international law'.[103]

Drawing on Eve Sedgwick's technique of reparative reading, Odette Mazel suggests reading LGBTQIA+ peoples' efforts towards law reform reparatively, 'in terms of their empowering and productive capacities, rather than for their deficient or problematic elements'.[104] By paying attention to 'the middle ranges of agency' that emerge from queer experiences — understood as 'the ability to be empowered or disempowered without annihilating someone else or being annihilated' — Mazel suggests that to read LGBTQIA+ law reform efforts reparatively is to read them 'as something more complex than co-option'; it is to read them 'as creative pursuits for transformative social and legal change'.[105] Relatedly, thinking from a feminist perspective, Emily Jones suggests that 'there is a need to seek solutions from within international law *and* to resist international law's normative pull, working towards an international law otherwise'. For Jones, 'incremental change is one way of seeking transformation, and incremental change can occur with a larger goal in mind'.[106]

Thinking from a Marxist tradition, Ntina Tzouvala suggests that the argumentative opportunities afforded by international law 'matter hugely when it comes to the everyday life, or even survival, of the most exploited and marginalised groups of this world', even if such

[97] See, for example, E. Jones, *Feminist Theory and International Law: Posthuman Perspectives* (Routledge, 2023), at 154; Schwöbel-Patel, *supra* note 6, at 244–246; and Eslava and Pahuja, *supra* note 83, at 110.

[98] M. Koskenniemi, 'Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons', 10 *LJIL* (1997) 137, at 153.

[99] For example, see C. Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, 2005), at 316 (thinking from a Marxist perspective); and O. Mazel, 'Queer Jurisprudence: Reparative Practice in International Law', 116 *American Journal of International Law Unbound* (2022) 10, at 11.

[100] For discussion, see, for example, M.E. Salomon, 'Nihilists, Pragmatists and Peasants: A Dispatch on Contradiction in International Human Rights Law', in E. Christodoulidis, R. Dukes, and M. Goldoni (eds), *Research Handbook on Critical Theory* (Edward Elgar, 2019) 509, at 511; and J. Dehm, 'Review Essay: *The Misery of International Law: Confrontations with Injustice in the Global Economy*', 19 *Melbourne Journal of International Law* (2018) 763.

[101] Jones, *supra* note 97, at 160.

[102] Eslava and Pahuja, *supra* note 83, at 116.

[103] *Ibid.*, at 118. See also, U. Natarajan et al., 'Introduction: TWAIL—on Praxis and the Intellectual', 37 *Third World Quarterly* (2016) 1946, at 1948 (referring to the idea 'if you don't do international law, international law will do you').

[104] Mazel, *supra* note 99, at 12.

[105] *Ibid.*, at 12–13.

[106] Jones, *supra* note 97, at 160.

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engagement may involve foregoing 'the possibility of challenging imperialism and capitalism at their core'.[107] Similarly, Grietje Baars has clarified that they 'do not hold an entirely nihilistic view with regard to law', acknowledging that 'law, and the fulfilment of certain rights, is a life or death necessity for some/many people', while suggesting that 'we must look at [the law] defensively and tactically, but most importantly that we must look beyond it, as it alone or of itself is not going to generate the social change we want and need'.[108] Thinking with the work of socialist internationalist Rosa Luxemburg, Christine Schwöbel-Patel also suggests that 'reforms are not incompatible with revolution, but the reforms must be directed towards the ultimate aim of anti-imperialism and socialism'.[109] What matters, therefore, is that short-term tactical efforts of reform are framed by a longer-term strategic objective.[110] From this perspective, much contestation centres on what amounts to a legitimate tactical intervention given the wider strategic goal in any given context.

To focus on the reform-resistance continuum is thus to engage with international criminal law as *struggle*.[111] Various relational dimensions of ICL have often been overlooked in existing scholarship;[112] yet, similar to international human rights law, ICL may be characterized in terms of the relationships and concrete struggles of groups, communities and movements striving to articulate and pursue particular emancipatory claims as part of broader movements for social change.[113] While sociologists have developed these insights further, much of these efforts have yet to be fully recognized and engaged with by lawyers within the field.[114]

B. Expressivism and International Criminal Justice

Viewed from a struggle perspective, one avenue for navigating the reform-resistance continuum is to engage with the *expressive* dimensions of international criminal justice processes.[115] Expressivism is rooted in a range of ideas across a diversity of disciplines, but its animating assumption is simple: social practices carry meanings and transmit messages quite apart from their consequences. Importantly, from an expressivist perspective, *all* social practices are signifying practices. As the prominent criminologist, David Garland explains, 'even the most mundane form of conduct in the social world is also a possible source of expression, of symbolization, and of meaning communication—every action is also a gesture'.[116] While it is possible to examine the field of international criminal justice from a range of expressivist perspectives,[117] in order to navigate the reform-resistance spectrum, we suggest there is particular value in engaging with a *strategic expressivist* perspective — one which is concerned with whether and how different actors may mobilize the expressive power of the vocabulary and practices of international criminal justice processes to advance their strategic social and political agendas.

[107] N. Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020), at 41.

[108] G. Baars, 'Perfect Pandemic Reading', Völkerrechtsblog, 21 June 2020, available online at https://voelkerrechtsblog.org/de/perfect-pandemic-reading/ (visited 4 August 2023).

[109] Schwöbel-Patel, *supra* note 6, at 246.

[110] See generally, R. Knox, 'Strategy and Tactics', 21 *Finnish Yearbook of International Law* (2010) 193.

[111] On human rights as struggle, see generally, P. O'Connell, 'Human Rights: Contesting the Displacement Thesis', 69 *Northern Ireland Legal Quarterly* (2018) 19; P. O'Connell, 'On the Human Rights Question', 40 *HRQ* (2018) 962; B. Ibhawoh, *Human Rights in Africa* (Cambridge: Cambridge University Press, 2018).

[112] See, however, F. Jeßberger and L. Steinl, 'Strategic Litigation in International Criminal Justice: Facilitating a View from Within', 20 *JICJ* (2022) 379; F. Mégret, 'Immunities of Foreign Officials for International Crimes: The Dilemmas of Strategic Litigation', 15 *JHRP* (2023) 1; and N. Hodgson, 'International Criminal Law and Civil Society Resistance to Offshore Detention', 26 *Australian Journal of Human Rights* (2020) 449.

[113] See similarly in the field of human rights, Ibhawoh, *supra* note 111, at 24; O'Connell, *supra* note 111, at 26.

[114] See, in this regard, Christensen, *supra* note 26.

[115] The following paragraphs draw on Sander, *supra* note 13, at 318*ff*.

[116] D. Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, 1990), at 255.

[117] See generally, Sander, *supra* note 35, at 851; and C. Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press, 2020).

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In this context, the term 'strategic' may be understood in two senses. First, it refers to *perspective*. To intervene strategically is to engage in a particular process with a view to advancing a longer-term, structural goal that extends beyond the scope of the immediate case at hand.[118] As such, strategically oriented interventions tend not to be conducted in isolation but as part of broader struggles for social and political change enacted through multiple forms of advocacy.[119] Such interventions are often conducted as part of what Paul O'Connell has termed 'emancipatory multilingualism', namely campaigns in which social movements rely upon a particular emancipatory vocabulary, such as ICL, as part of a broader mobilization of multiple, complementary (and sometimes contradictory) discourses in their struggles for change.[120]

Secondly, 'strategic' also refers to *evaluation*. To intervene strategically is to form an evaluative judgment about the relative merits of intervening in any particular context, for example by weighing the risk that the vocabulary of ICL may prove redundant and may even legitimate interests to which a particular social movement is opposed. In other words, it is to acknowledge the limits and legitimating qualities of ICL and to recognize that, similar to the language of international human rights law, ICL constitutes 'a language of both power and resistance … of hegemony and counter-hegemony … and the fact that it is a terrain of contestation … for multiple deployments of both power and resistance'.[121]

Understood in this way, strategic expressivism directs attention towards a wide range of tactical interventions being pursued by different actors in the field attempting to rely on the vocabulary and institutions of ICL to advance their longer-term struggles for social and political change. Such interventions may be *proactive* (for example, the submission of a communication to the ICC Prosecutor in an effort to garner attention and condemn particular policies through the language of ICL), *defensive* (for example, a trial-of-rupture strategy whereby the defence of an accused is conducted in the form of an attack on the system represented by the prosecution's case), and/or *reformist* (for example, efforts to expand the personal and material jurisdictional mandates of ICCTs in accordance with the interests of the Global South).

C. Tactical and Strategic Engagement through the Malabo Protocol

To illustrate the types of debates that can arise from thinking about ICL from a strategic expressivist perspective, the adoption of the Malabo Protocol by the African Union Assembly of Heads of State and Government in June 2014 offers a useful illustration. The Protocol was proposed by the Pan-African Lawyers Union (PALU) as a way to expand the criminal jurisdiction of a future African Court of Justice and Human Rights.

An important dimension of the Protocol seeks to direct prosecutorial attention towards particular forms of violence 'by broadening the crimes of concern to Africa to include economic crimes and the modes of liability for perpetrators of such violence to include corporations'.[122] Examining these provisions, Kamari Maxine Clarke reveals how PALU's proposals may be understood as 'an affective Pan-African project', not only 'borne of colonial subjugation and contemporary inequalities tied to Africa's place in the world', but also 'a response to the lack of judicial activity in African jurisdictions for crimes of slavery, imperialism, colonialism, apartheid, and subsequent forms of economic plunder set against the contemporary

[118] Knox, *supra* note 110, at 227.
[119] H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart Publishing, 2018), at 41 and 46.
[120] O'Connell, *supra* note 111, at 19.
[121] B. Rajagopal, 'The International Human Rights Movement Today', 24 *Maryland Journal of International Law* (2009) 56, at 56.
[122] Clarke, *supra* note 78, at 205.

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anti-impunity campaigns that target individual Africans for criminal responsibility for crimes that operate within the afterlife of those spheres of structural inequality'.[123] Adam Branch also sees the potential for these provisions to provide a basis for an emancipatory politics within Africa, but cautions that certain provisions such as the criminalization of terrorism and 'unconstitutional changes of government' appear vulnerable to serving 'the interests of authoritarian states'.[124] Thus, while the Protocol is a 'potentially beneficial expansion of the crimes and actors to be held accountable under international law by the African court, [it] also represents a potentially dangerous intensification of the tendency to moralize and polarize politics seen with the ICC's international criminal law enforcement'.[125]

Beyond its innovative provisions concerning categories of crimes and persons, a further dimension of the Malabo Protocol is the much-scrutinized Article 46A *bis*, which provides for the immunity of heads of state and other senior state officials from criminal proceedings during their term of office. While emphasizing that dissensus exists amongst African stakeholders concerning the merits of the provision,[126] Clarke suggests that for at least some of its architects, Article 46A *bis* represents 'an expression of the goal to establish a contrary regional custom around international treaty norms that have rendered immunity for heads of state irrelevant in some cases (for Africans) yet relevant in others (for Western and various Asian powers)'.[127] In other words, Article 46A *bis* and the wider Protocol can be read as a 'protest treaty' — a provision which is 'not an objective legal doctrine but an emotionally relevant statement about inequality in global affairs'.[128] Importantly, Clarke's analysis of the Malabo Protocol is not intended as a defence of the provisions it advances.[129] Indeed, Clarke reveals contradictions in the wider project of which the Protocol forms a part, observing that a 'conundrum of contemporary AU Pan-Africanism is that alongside deep-seated conceptions of the Pan-African liberatory past is actually a deep desire to participate in contemporary neoliberal power, in global power'.[130] Thus, contestation over the Malabo Protocol is 'fundamentally related to the problem of power and history and the emotional regimes that structure the acceptability of particular responses',[131] and how 'those engaged in African political decision making and social change mobilizations live in a space where feelings, reactions, and histories all come together to explain practice'.[132] Adam Branch also reflects on the strategic stakes of Article 46A *bis*. On the one hand, Branch accepts that '[i]n an international context defined by major imbalances of power and resources, and in which the West arrogates to itself the authority to effect "regime change" in the Global South, preventing African heads of state from being subject to politically motivated international criminal prosecution is crucial if self-determination is to have substantive meaning'.[133] At the same time, however, Branch cautions that 'providing immunity to heads of state … also

[123] *Ibid.*, at 184 and 212.
[124] A. Branch, 'The African Criminal Court: Towards an Emancipatory Politics', in C.C. Jalloh, K.M. Clarke, and C.O. Nmehielle (eds), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press, 2022) 198, at 212.
[125] *Ibid.*, at 213.
[126] Clarke, *supra* note 78, at 247.
[127] *Ibid.*, at 244.
[128] *Ibid.*, at 251. See also M. Sirleaf, 'Regionalism, Regime Complexes, and the Crisis in International Criminal Justice', 54 *Columbia Journal of Transnational Law* (2016) 699, at 755; and M. Sirleaf, 'The African Justice Cascade and the Malabo Protocol', 11 *International Journal of Transitional Justice* (2017) 71, at 78.
[129] Clarke, *supra* note 78, at 181.
[130] *Ibid.*, at 215.
[131] *Ibid.*, at 251.
[132] *Ibid.*, at 265. See similarly, S. Kendall, 'Affective Justice Symposium: Other Geographies, Other Pushbacks—Affective Justice as a Diagnosis for International Criminal Law', Opinio Juris, 29 May 2020, available online at http://opiniojuris.org/2020/05/29/affective-justice-symposium-other-geographies-other-pushbacks-affective-justice-as-a-diagnosis-for-international-criminal-law/ (visited 27 July 2023).
[133] Branch, *s0upra* note 124, at 211.

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sets the stage for the [African Criminal Court] to replicate the worst of the ICC's problems, becoming simply a tool to be wielded by regimes against political opposition'.[134]

These reflections on the Malabo Protocol reveal the risks of relying on the vocabulary of ICL to achieve emancipatory aims.[135] As Helen Duffy cautions, it is important to remember that a legal intervention 'is not a neutral enterprise that at worst does little good, while not doing any harm'.[136] Any legal intervention, even if intended to positively contribute towards a strategic objective, has the potential to be counter-productive and generate negative repercussions — whether by over-inflating victim and community expectations, establishing regressive jurisprudence, or providing a veneer of legal legitimacy around the practices under scrutiny.[137] More broadly, even if the vocabulary of ICL is successfully relied upon in a targeted manner to achieve an emancipatory aim, the risk remains of legitimating the broader disciplinary practices of ICL and its institutions, which have often been exercised in ways that reproduce existing hierarchies and inequalities both within and between states.[138] In other words, when actors and social movements have recourse to the vocabulary and institutions of ICL, they must ask what are the broader distributive consequences of such engagement.

D. Moving Beyond Engagement?

In her recent work on feminist theory and international law, Emily Jones reflects on the possibility that feminists might seek to shape the development and construction of military technologies. She concludes that 'while resistance and compliance should be seen, not as binary options but a continuum, there are still always two opposite ends to a continuum'.[139] For Jones, working to support the development of killing machines would be 'too far along the compliance side for comfort', particularly since 'having feminists working to develop these technologies would only serve to help legitimise their use' as a form of co-optation of possible critique.[140] As such, '[w]hile staying with the trouble may sometimes be necessary, the trouble is sometimes too troublesome to be able to stay with'.[141] Thus, a key question for those reflecting on and practising within the field of international criminal justice is whether the vocabulary and institutions of ICL are simply too troublesome to abide. In that spirit, in the next section, we suggest that perhaps the time has come for those working within the field of international criminal justice to engage more directly with work from the distinct but interrelated decolonial and abolitionist movements.

5. DECOLONIAL AND ABOLITIONIST (DIS-)ENGAGEMENT

While we have shown that critique is now central to the field of ICL, we have also shown that there is little agreement on what to do in light of critique. If, as Lentner argues, cynicism and critique are not 'productive as such', but can only ever be a 'first step',[142] then what might the steps *after* critique look like? Here, in this final section, we gesture towards two interrelated and radical alternatives for thinking about the possibilities of ICL as redress and social transformation: decoloniality and abolitionism. Both approaches have emerged

[134] *Ibid.*, at 212.
[135] This paragraph draws on Sander, *supra* note 13, at 322.
[136] Duffy, *supra* note 119, at 5.
[137] *Ibid.*, at 5 and 77–80.
[138] M. Veličković, 'Doing Justice to History Symposium: On Plurality and Ideology', 11 August 2023, Opinio Juris, at https://opiniojuris.org/2023/08/11/doing-justice-to-history-symposium-on-plurality-and-ideology/ (visited 17 August 2023).
[139] Jones, *supra* note 97, at 109.
[140] *Ibid.*
[141] *Ibid.*
[142] Lentner, *supra* note 93, at 42.

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outside of and often in spite of legal scholarship and practice. While they have interrogated the limits and possibilities of liberal legalism, overwhelmingly, there has been a recognition of the need to go beyond the law and to build new categories and new practices of resistance. Thus, in thinking through ICL futures alongside decoloniality and abolition, we need to be alive to the possibility of its disappearance or perhaps, as Veličković suggests, its 'planned obsolescence': 'Whether this means refusing to commit to its future in our writing or de-centering ourselves as sources of knowledge in our teaching–it means that we are working towards a generation of international scholars and practitioners who would be more committed to their utopias than to the law'.[143] While scholars may help frame 'these new imaginaries and alternatives',[144] they will not be the key creators of what ensues. Instead, broad-based social mobilization will have to inform specific, contextualized ICL futures. For Akbar, it is in the 'places where people experience and organize around conflicts over dignity and resources, life and death, that mass insurgency must grow'.[145] In making sense then of the potentially transformative contributions of these two movements for the field of ICL, we introduce decoloniality and then abolitionism separately before concluding as to how they might inform (re-)imaginings of international criminal justice.

A. Race, Coloniality, and the Decolonization of International (Criminal) Law

While ICL scholarship from the 1990s onwards was perhaps slower than general international law literature to grapple with its persisting Eurocentric and racialized qualities,[146] this is no longer the case. TWAIL scholarship over the past two decades has striven to illustrate the (neo)colonial dimensions of international law,[147] including ICL.[148] In practice, this has played out most fiercely in relation to the controversies over Africa and the ICC.[149] This (unfinished) episode has forced even mainstream ICL scholars to confront a range of uncomfortable racialized dimensions of contemporary ICL policies and practices. We see similar concerns playing out in relation to the Gaza conflict as well.

More fundamentally, however, recent decades have witnessed a wholesale rethinking about the colonial nature of epistemology and learning in relation to a range of scholarly fields, including international (criminal) law.[150] Here, it is imperative to be clear on the meaning of the terms 'decolonial' and 'decolonization'. This is captured well by Adébísí who contrasts the period of decolonization — as an event of 'flag independence'[151] — with the far more profound process of decolonization of epistemology and 'global power structures' which remains unrealized. What occurred in the mid-twentieth century was only a 'performative gesture to decolonisation [*sic*]'.[152] As Adébísí explains, 'Physical and overt

[143] M. Veličković, 'Contingency in International Law Symposium: Planned Obsolescence of International Law—On Contingency and Utopian Possibilities', Opinio Juris, 17 June 2021, available online at http://opiniojuris.org/2021/06/17/contingency-in-international-law-symposium-planned-obsolescence-of-international-law-on-contingency-and-utopian-possibilities/(visited 7 August 2023).

[144] Lentner, *supra* note 93, at 45.

[145] A. Akbar, 'Non-Reformist Reforms and Struggles over Life, Death, and Democracy', 132 *Yale Law Journal* (2023) 2497, at 2534.

[146] M. Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism', 19 *Rechtsgeschichte* (2011) 152.

[147] For a magisterial survey of this work, see A. Anghie, 'Rethinking International Law: A TWAIL Retrospective', 34 *EJIL* (2023) 7.

[148] In particular, see the TWAIL symposium in this journal: A. Kiyani, J. Reynolds, and S. Xavier, 'Foreword', 14 *JICJ* (2016) 915.

[149] M. du Plessis and C. Gevers, 'The Role of the International Criminal Court in Africa: The Epic Fails?' in J. Sarkin and E. T.M. Siang'andu (eds), *Africa's Role and Contribution to International Criminal Justice* (Cambridge University Press, 2020) 191; Branch, *supra* note 124, at 198–219 and 203–208; C.C. Jalloh and I. Bantekas (eds), *The International Criminal Court and Africa* (Oxford University Press, 2017); and K.C. Clarke, A.S. Knotterus, and E. de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press, 2017).

[150] As surveyed in M. Burgis-Kasthala and C. Schwöbel-Patel, 'Against Coloniality in the International Law Curriculum: Eamining Decoloniality', 56 *Law Teacher* (2022) 485.

[151] F. Adébísí, *Decolonisation and Legal Knowledge: Reflections on Power and Possibility* (Bristol University Press, 2023), at 22.

[152] *Ibid.*, at 20.

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political manifestations of imperialism and unfree labour were removed from sight, but epistemological, geopolitical, and financial mechanisms remain in place'.[153] Persisting (Western) 'universalizing' structures of knowledge entail that the experiences and life-worlds of peoples across the Global South have been and continue to be irrevocably framed as deficient, deviant, and lacking.[154] Theoretically, this has resulted in the 'seemingly ingrained resistance to the idea that theory can be generated from the trajectories, dilemmas, and experiences of non-Western politics'.[155] Calling out these practices requires that we recognize all knowledges as situated, or what Mignolo calls 'geo-epistemology'.[156]

For researchers wishing not only to uncover but also to understand coloniality, this requires an explicit commitment to reflecting on our own *responsibility* in producing ways of seeing the world and the power and complicity embedded within the Global North academy.[157] Turning to decoloniality cannot simply entail the chance for us 'to create new comfortable canons, within which the subaltern still cannot speak'.[158] Lentner presents this burden of responsibility as arising from our role as experts who 'provide the (socially constructed knowledge of) facts, interests and forces that are understood to impinge on a decision or those that need to be considered'.[159] For example, in framing acts as atrocity crimes requiring ICCTs, we narrow the horizon of possibility for other ways to imagine types of harm and types of redress. For Al-Hardan, a form of decolonial responsibility:

> means paying attention to what happens "before" the research as an inherent part of the research process, taking into account the structural mechanisms embedded in the academy that guard and reinforce colonizing epistemologies that presume an unmarked universal position that masks its own colonial economy of power through disavowing it, and is anything but anti-oppressive for the colonized and stateless that we set out to research. The encounters with the academy's web of power relations and the implications that these encounters have on our research are further compounded by our encounters in the communities we set out to research, whether ours or not, and thus of the very conditions that make knowledge production itself possible.[160]

For ICL, this also plays out in the way it functions not simply as a regulatory tool of intervention within 'errant' Global South spaces,[161] but in the way lawyers are trained to understand and then apply seemingly neutral normative categories that were not generated and do not reflect experiences outside the Global North. Greater circumspection and humility are required before listening to a range of experiences and visions for what ICL does mean and could mean to those in the Global South. At times, this will entail a (re)turn to the criminal trial and specifically, the ICC, such as has been the case for many Tamil and Palestinian claimants.[162] While critical scholars of ICL can easily point to the ICC's failings, it is crucial

[153] *Ibid*.
[154] V.V. Weis, 'A Marxist Analysis of International Criminal Law and Its Potential as a Counter-Hegemonic Project', in Jeßberger et al. (eds), *supra* note 39, at 63, and 76.
[155] A. Getachew and K. Mantena, 'Anticolonialism and the Decolonization of Political Theory', 4 *Critical Times* (2021) 359, at 377.
[156] W. Mignolo, 'Modernity and Decoloniality', Oxford Bibliographies, 28 October 2011, available online at https://www.oxfordbibliographies.com/display/document/obo-9780199766581/obo-9780199766581-0017.xml (visited 2 March 2022).
[157] Adébísí, *supra* note 151, at 16.
[158] *Ibid*., at 29.
[159] Lentner, *supra* note 93, at 42.
[160] A. Al-Hardan, 'Decolonizing Research on Palestinians: Towards Critical Epistemologies and Research Practices', 20 *Qualitative Inquiry* (2014) 61, at 63.
[161] M. Burgis-Kasthala and A. Saouli, 'The Politics of Normative Intervention and the Special Tribunal of Lebanon', 16 *Journal of Intervention and Statebuilding* (2022) 79.
[162] J. Reynolds and S. Xavier, 'The Dark Corners of the World': TWAIL and International Criminal Justice', 14 *JICJ* (2016) 959, at 976–977.

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that they can also listen to and respect survivor desires not only through simple acceptance of extant institutions, but in working towards their radical improvement. Survivor-centred responses could also entail greater openness to plural 'adjunct' or 'extralegal strategies',[163] such as peoples' tribunals,[164] as well as (individualized and community-based) reparations.[165]

For ICL to move towards a decolonial future, it must democratize its constituency[166] and embrace particular justice struggles as a '*pluri*versity of knowledges'.[167] Time and again, these struggles are not necessarily concerned solely with contemporary atrocity crimes by aberrant Global South state and non-state actors. Instead, struggles over radical economic inequality within a global racialized capitalist world demand far, far greater recognition of *structural* harms in their historical and contemporary dimensions. Thus, for Reynolds and Xavier:

> Resistance from the periphery to the Hague's hegemony as the centre of international justice would benefit from the evolving organic intellectual traditions of indigenous social movements, alter-globalization and decoloniality. This can open space for the recognition and inclusion of non-Western epistemologies and legal cultures—on their own terms … and prepare the ground for top-down criminal processes to ultimately give way to anti-colonial sensibilities and indigenous notions of justice and restitution.[168]

While ICL scholars might find these suggestions to be 'unsettling', Kilroy, Lean and Davis stress that this is the point.[169] To decolonize is not only to unsettle our scholarly selves, but to unsettle the lands from which our privilege resides.

One option here would be for ICL to embrace a shift to 'non-reformist reforms'. Such an approach rejects reformism (as embodied in liberal legalism and the state)[170] because it 'consolidates the hand of those in power and deepen[s] preexisting inequalities'.[171] For Akbar, it has two key dimensions:

> First, a non-reformist reform aims to undermine the political, economic, and social system or set of relations as it gestures at a fundamentally distinct system or set of relations in relation or toward a particular ideological and material project of world-building. Second, [it] draws from and builds the popular strength, consciousness, and organization of revolutionary or agential classes or coalitions … It is part of a democratic project.[172]

In her most recent evaluation of this sensibility, Akbar delineates three key sites of struggle that embody this ethic: *decolonization and decommodification* (such as the cancel rent and cancel debt movements), *democratization*, and *abolition and decarceration*. While each of

[163] Akbar, *supra* note 145, at 2562–2563.

[164] W.L. Cheah, 'The Potential and Limits of Peoples' Tribunals as Legal Actors: Revisiting the Tokyo Women's Tribunal', 13 *Transnational Legal Theory* (2022) 8; A. Byrnes and G. Simm (eds), *Peoples' Tribunals and International Law* (Cambridge University Press, 2017); and D. Otto, 'Impunity in a Different Register: Peoples' Tribunals and Questions of Judgment, Law, and Responsibility', in K. Engle, Z. Miller, and D.M. Davis (eds), *supra* note 4, 291.

[165] C. Sperferldt, *Practices of Reparations in International Criminal Justice* (Cambridge University Press, 2022).

[166] See L. Corrias and G.M. Gordon, 'Judging in the Name of Humanity: International Criminal Trials and the Representation of a Global Public', 13 *JICJ* (2015) 97.

[167] Adébísí, *supra* note 151, at 36.

[168] Reynolds and Xavier, *supra* note 162, at 982–983.

[169] D. Kilroy, T. Lean, and A.Y. Davis, 'Abolition as a Decolonial Project', in C. Cuneen et al. (eds), *The Routledge International Handbook on Decolonizing Justice* (Routledge, 2023) 227, at 233. See also, A. Woodward, 'Decolonizing Genocide', in Cuneen et al. (eds), *ibid.*, 423, at 431.

[170] Akbar, *supra* note 145, at 2562.

[171] *Ibid.*, at 2520.

[172] *Ibid.*, at 2527. Davis et al. note that the idea of 'non-reformist reforms' was forged by André Gorz in the 1960s. For a helpful tabulation of these different approaches as they relate to abolition feminism, see A.Y. Davis et al., *Abolition. Feminism. Now* (Penguin, 2022), at 191–197.

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these strands shares many synergies and sympathies, it is to the last that we now turn for its particularly productive problematization of crime and criminalization whether at the domestic or international level.

B. Moving towards an Abolitionist Approach to ICL

At its core, abolitionism is deeply sceptical of the state with its mandate to criminalize and constrain the lives of various marginalized groups. The term historically is associated with the eradication of slavery and the attendant liberal legal ideal of realizing (formal) racial equality. While enslaved peoples were indeed emancipated in metropoles and colonies from 1794 onwards, a range of racializing policies and laws have ensured various forms of enduring structural and physical harm, such as Jim Crow laws in the US South, indentured labour for millions of 'freed' slaves required to 'pay back' their freedom, along with large-scale debt, such as Haiti's, which amounted to more than 300% of its national income in 1825 that was only paid off in 1947.[173] Black liberation movements such as the Black Panthers and the African National Congress in Apartheid South Africa have mobilized around ongoing forms of oppression that they have confronted on a daily basis across the globe.

Resisting practices of criminalization and incarceration have been central to the struggles of Black liberation movements seeking to radically confront the state's legitimation of violence. In his wonderful overview of these movements over the past century, Weber points to a range of rhetorical registers that activists have used to question and re-envision their lives. In contrast with Samuel Moyn's account of the birth of human rights occurring in the 1970s,[174] Weber shows how earlier Black radicals such as Marcus Garvey and Malcolm X intoned human rights in expansive and radical ways to frame their anti-carceral and liberationist struggles.[175] According to Weber:

> Far from only a bid for legal recognition or redress, this tradition of human rights activism has sought to pry open the very underpinnings of the unequal world system and ground an anti-carceral Black human rights tradition in a global framework of anti-racist, antisexist decolonization that seeks total transformation.[176]

These themes of *persisting* racialized logics resonate with decolonial sensibilities and highlight some points of convergence. They also provide a different genealogy through which ICL can (re)imagine itself.

Invoking the language of abolition today is a way to recognize and confront unaddressed *past* injustices centred on slavery and colonialism as well as *persisting* racialised, gendered and classist practices that coalesce around police violence and the 'prison industrial complex'.[177] Speaking of a 'complex' rather than a prison *per se* is crucial here as it points to a range of society-wide relations that support and legitimize (often-racialized) criminalization and incarceration (or death). Thus, for Kilroy, Lean, and Davis:

> … we cannot simply look at institutions of incarceration … The same is true of police abolition … We have to examine the afterlives of colonialism, slavery, and gender that are

[173] T. Picketty, *Capital and Ideology* (Harvard University Press, 2020), at 217 and on persisting racialized inequalities *after* slavery, see Chapter 6.

[174] In his seminal 2010 account, Moyn's historical reconsideration argues that it was only in the 1970s that there emerged a discourse and set of practices that would be familiar to us today as 'human rights'. Moyn, *supra* note 1.

[175] B.D. Weber, 'Anticarceral Internationalism: Rethinking Human Rights through the Imprisoned Black Tradition', 106 *Journal of African American History* (2021) 706, at 726.

[176] *Ibid.*, at 712.

[177] Davis et al., *supra* note 172, at 44–45.

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> products of and help to reproduce racial capitalism and heteropatriarchy, not only as they are expressed in the structures of imprisonment and policing, but also in healthcare, housing, education, political representation, etc[178]

With its history of slavery and ongoing racialized inequalities, the US is the epicentre of abolitionist activism and scholarship. The most prominent recent campaign against state-backed criminalization, incarceration, and death centred on the killing of George Floyd in 2020. The degree of rage that ensued in the wake of this killing of an unarmed Black man by the police, arose not because of its exceptional nature, but rather because it stood as a symbol for endemic police brutality. Widespread protests in the midst of a disproportionately lethal Covid pandemic solidified the symbolic and political potency of the Black Lives Matter movement, which had grown out of another White-on-Black killing seven years earlier.[179]

Whether for Floyd or the many other Black men and women incarcerated or killed, an abolitionist approach calls on us to focus on *structural* accounts of criminalization and incarceration. In the case of ICL, Gerry Simpson recently suggested that ICL's 'greatest ally' tends to be an intuition that it would be unconscionable to remain passive in the face of widespread atrocities. Yet, as Simpson explains: [180]

> This move, of course, forgets that we are already highly inactive: 'a catastrophic year for millions of people around the world' as a Radio Four headline announced in September 2015 (quoting an Amnesty International Report). We choose, therefore, between different forms of fatal inaction. It is true that you have to start somewhere. But do we have to start here? In a way this must be the critic's response to the incrementalist objection. Starting here, in this particular universe of possibilities, might itself be thought of as a form of giving up. Maybe we can hope for more.

Oumar Ba, Kelly-Jo Bluen, and Owiso Owiso similarly suggest, 'If the field and the [ICC] are both failing to perform and if what they are to perform is mired in violence, perhaps it is time for better questions'.[181] Perhaps some better questions to ask either in relation to racialized police brutality or ICL's failings would be to explore *who* is benefiting from such criminalizing practices and *how* we could change them.

C. Lessons from Abolition Feminism

This is where the work of feminist abolitionism is especially instructive for the way it juxtaposes fierce rejection of state 'protection' of women of colour from 'deviant' (usually Black) men, while seeking a radical post-patriarchal and post-capitalist set of social relations.[182] Carceralism is what abolition feminists have set their energies to disrupt and to eradicate not only in a gesture of *dismantling* the prison industrial complex, the police and capitalist relations of inequality, but also to *build* alternative futures for men and women alike.[183] In this vein, contemporary abolitionism tends to be oriented around a central question: 'What

[178] Kilroy, Lean, and Davis, *supra* note 169, at 232.
[179] L. Buchanan et al., 'Black Lives Matter May Be the Largest Movement in U.S. History', *New York Times*, 3 July 2020, available online at https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html (visited 7 August 2023).
[180] Simpson, *supra* note 24, at 848–849.
[181] O. Ba, K-J. Bluen, and O. Owiso, 'The Geopolitics of Race, Empire, and Expertise at the ICC', Oxford Research Encyclopedia of International Studies, 24 May 2023, available online at https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-717?rskey=hRFdyP&result=1 (visited 3 August 2023).
[182] A. Gruber, 'Colonial carceral feminism', in C. Cuneen et al. (eds), *The Routledge International Handbook on Decolonizing Justice* (Routledge, 2023) 235.
[183] Davis et al., *supra* note 172, at 52.

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would we have to change in our existing societies in order to render them less dependent on the putative security associated with carceral approaches to justice?'[184] Such a basic question resonates within both domestic and international criminal orders as at its core it forces us first to examine the impulse to criminalize.

Carceral narratives are so pervasive that abolition feminists suggest that any hint of improvement through reformist gestures is bound to fail. As Amia Srinivasan explains:[185]

> [O]nce you have started the carceral machine, you cannot pick and choose whom it will mow down. Feminism's embrace of carceralism, like it or not, gives progressive cover to a system whose function is to prevent a political reckoning with material inequality. This is not to say that there are no difficult choices to be made. There are poor women who want to see their abusive partners in prison, just as there are sex workers who long for violent johns to be arrested. Some opponents of carceralism think that no one deserves to be punished, that violence must never be met with violence. But feminists need not be saints. They must only, I am suggesting, be realists. Perhaps some men deserve to be punished. But feminists must ask *what it is they set in motion, and against whom, when they demand more policing and more prisons*.

Here, Srinivasan calls on us, whether as abolition feminists or as ICL scholars, to think through the implications of our advocacy of criminalisation.

The political stakes of acquiescing to any form of carceralism are so high that abolition feminists tend to embrace resistance and rejection of criminalization *per se* as their default stance. Even here though, messiness and contradictions will arise. For example, Davis, Dent, Meiners, and Richie emphasize that abolition feminism holds onto a 'both/and perspective' which aims to 'support our collective immediate and everyday needs for safety, support, and resources while simultaneously working to dismantle carceral systems'. [186]

Challenging certain aspects of anti-carceral feminism, McGlynn suggests that 'an anti-carceral approach that entirely disengages with criminal justice systems does not reflect the perspectives of some survivors, nor does it support their journeys seeking redress and accountability'.[187] Embracing the concept of 'kaleidoscopic justice' which speaks to 'the varied, nuanced, ever-changing experience and understandings of justice' of survivors, as well as the notion of 'continuum thinking' which seeks to move beyond a polarized stance of absolute acceptance or rejection of carceralism,[188] McGlynn suggests 'shorter-term engagements with criminal justice' may be necessary, even while 'still pursuing an overall strategy of decarceration'.[189]

While unlikely to embrace McGlynn's suggestion that such engagements should legitimately encompass the criminalization of emerging forms of abuse, such as online harms, abolition feminism does not appear to be totally opposed to engaging with criminal justice systems in ways that mitigate harms to survivors 'provided that these reforms do not expand carceral logics'.[190] Similar to the reform-resistance continuum discussed earlier in this article,

[184] *Ibid*, at 75.
[185] Srinivasan, *The Right to Sex* (Bloomsbury Publishing, 2021), at 170–171 (emphasis added).
[186] Davis et al., *supra* note 172, at 2–3 (emphasis added).
[187] C. McGlynn, 'Challenging Anti-carceral Feminism: Criminalisation, Justice and Continuum Thinking', 93 *Women's Studies International Forum* (2022) 1, at 3.
[188] *Ibid*., at 3–4.
[189] *Ibid*., at 3–6.
[190] B. Fileborn and R. Loney-Howes, 'Carceral Feminism in Australia: Activism, Victim-Survivors and Justice', paper presented at workshop *The #MeToo Movement and its Aftermath, Faculty of Law, Lund University*, September 2021, cited by McGlynn, *supra* note 187, at 5.

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the question becomes how to navigate 'between what might constitute changes that "mitigate harms" and what contributes to "carceral logics"'.[191] Yet, distinct from our examples of tactical and strategic engagements within the field of ICL, abolitionist thinking leans much more resolutely towards the resistance side of the spectrum. As Davis, Dent, Meiners, and Richie observe, 'reforms sold as "progressive" all too often function to mask expanding mandates, logics, and budget lines'.[192] From this perspective abolitionist movements 'require struggles about strategy and vision', inquiring, for example, into what are the 'non-reformist reforms … that make sustainable and material differences in the lives of people living under the control of oppressive systems'.[193]

While there is a well-established body of literature and grassroots activism broadly embracing abolition feminism in response to the *domestic* carceral state, this is far less the case at the *international* level vis-à-vis ICL.[194] Part of this arises from the politics of advocacy within international feminist circles and often, a particular emphasis on sexual violence within ICL.[195] Part of this may also be explained by the fact that carceral responses to atrocity crimes are far more recent and not as much the default as they are for serious domestic crimes.[196] Here, in this final section, we have highlighted important critical work on decolonization and anti-carceralism as a way to push ICL critique. While both decolonizing and anti-carceral approaches share many sympathies with the earlier structural critiques surveyed above, we suggest that their strategic outlook offers far more breadth not only in understanding accountability and the anti-impunity impulse, but in how to change it. Most simply this must entail a radical rejection of universalist scripts that have systematically excluded and silenced marginalized world views and experiences. This might result in pockets of fierce support for existing ICL or general carceral practices, but it might also call for their end. If the purpose of ICL is to work towards 'justice', then decolonial and abolitionist approaches call on us to think of justice beyond liberal legalism, beyond the penal state and in a time that is after colonialism. Some examples of these (re)imaginings follow in this symposium.

6. CONCLUSION

In this reflection, we have grappled with how ICL has been shaped by critique. We have also pointed to some possible pathways towards ICL futures. The following symposium takes up this invitation to re-envision the field in a number of innovative and inspiring ways that strive to think through how to approach harm and its redress.

Complementing our discussion of tactical and strategic engagements within the field of ICL, Natalie Hodgson turns to criminological work on state crime to unpack the expressivist implications of civil society's reliance on ICL for addressing state crimes of the Global North. Her close reading of advocacy discourse explores how alternative framings of criminality challenge and can sometimes expand the established remit of ICL. She suggests that ICL exhibits both hegemonic and counter-hegemonic qualities. In a world of perma-crisis, ICL's traditional focus on atrocity crimes is perhaps inadequate or out of touch.

In an era of rapid technological innovation, Sarah Zarmsky notes how a recent surge of online-generated harm does not currently fall within the ICC's remit. In a paper that

[191] McGlynn, *supra* note 187, at 5.
[192] Davis et al., *supra* note 172, at 67.
[193] *Ibid.*
[194] In general, see K. Engle, *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (Stanford University Press, 2020).
[195] Especially see *ibid*; and J. Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law* (2008) 1.
[196] B. Sander, 'Justifying International Criminal Punishment', in M. Bergsmo and E.J. Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts* (TOAEP, 2019) 167, at 232–237.

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resonates with some of McGlynn's critiques of abolition feminism noted above, she suggests that the significant and widespread harm that can ensue from acts such as hate speech and disinformation as well as the online publication of sexual violence call for their *incorporation* into ICL architectures.

Concerns with ICL's limits are visible in relation to technology and online harm in Zarmsky's paper. They are even more starkly identifiable in Daniel Bertram and George Hill's evaluation of 'ecocide', whose conception of the term 'victim' pushes beyond the comfort zone of ICL. They explore in particular the nature of visual advocacy around ecocide not only to evaluate its inclusion or exclusion within ICL's purview, but also to suggest that its 'subversive potential' is limited within the confines of the field of international criminal justice.

Finally, Sophie Rigney examines the defence of duress as a way to think through an abolitionist approach to ICL. Here she seeks to highlight the limitations of traditional, legalist registers afforded to the accused within the confines of the criminal trial. She invites us to build imaginaries of redress that can capture structural harm, especially as experienced in the Global South. Such structural concerns are perhaps felt most acutely by Indigenous people whose close connection to their lands is especially challenged in an era of coloniality and climate breakdown.

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