

11-20-2015

False Universalism of Global Governance Theories: Global Constitutionalism, Global Administrative Law, International Criminal Institutions and the Global South

Sujith Xavier

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False Universalism of Global Governance Theories:
Global Constitutionalism, Global Administrative Law, International Criminal
Institutions & the Global South

Sujith Xavier

A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF
Doctor of Philosophy

Graduate Program in Law
York University
Osgoode Hall Law School
Toronto, Ontario
November 2015

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Abstract

Why are theories of global governance unsatisfactory? Why are theories of global governance unable to integrate the lived realities of the people of the global South? International law and its institutions are growing at an unprecedented speed and this expansion has captured the curiosity of international lawyers and international law scholars. As international law and its institutions continue to grow, there are concurrent concerns regarding their democratic foundations. A large body of scholarship encapsulates these anxieties through the prism of global governance. In particular, two specific theories of global governance, global constitutionalism, and global administrative law, seek to introduce ideas of constitutionalism and administration as theories of governance. Global governance institutions seek to regulate the people of the global South, but both global constitutionalism and global administrative law are uninformed about the people living in these regions.

Two central arguments are pursued in this dissertation. First, as theories of global governance, both global constitutionalism and global administrative law ignore and obscure the colonial and imperial history of international law and its institutions. By ignoring international law's lineage, scholars are not able to accurately theorise contemporary global governance through constitutionalism and administration. Without the inclusion of the global South, global constitutionalism and global administrative law, as theories, are caricatures of western universalism embedded in international law. In this respect, these two theories represent a false universalism, which must be challenged. The second

argument is that there must be an engagement with the global South if global governance is to be theorised accurately and holistically. As part of the second argument, this dissertation turns to the question of how we might theorise global governance from the perspective of the global South.

In pursuing these two arguments, this dissertation is grounded in Third World Approaches to International Law. In order to present the foregoing arguments, this analysis will rely on three case studies from international criminal law and its respective institutions: the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for former Yugoslavia, and the International Criminal Court.

Acknowledgements

My long journey in completing this dissertation has been enriched by many people. It is no secret that it usually takes a village to complete such a task and thus I am grateful to the many wonderful teachers, scholars, and friends that have offered advice, support, “reality checks”, and a shoulder to cry on.

First I would like to thank my doctoral adviser, Professor Peer Zumbansen for his invaluable and often critical insights that pushed me to ask probing and difficult questions. His rigorous advice and comments helped shape this project, especially during those moments of self-doubt without a sharp vision of what I really wanted to argue. I am really thankful to Peer for his commitment to his students and his uncompromising demand for the best. Professors Craig Scott, Bruce Broomhall and Ruth Buchanan were instrumental in shaping some of the arguments, and I am thankful for their close reading of my text during the various stages of this process. I am grateful to Professors Sonia Lawrence, Liora Salter, François Tanguay-Renaud, Trevor Farrow, Chantal Morton, Obi Okafor and Janet Mosher for their mentorship, guidance and their invaluable time in offering advice on teaching, on career opportunities and for creating critical spaces for students of colour. Finally I am indebted to Professors Dayna Scott and Adrian Smith for their invaluable advice, support and mentorship over the years. Dayna, I cannot begin to express my gratitude for your interventions and offers to help during some of the most difficult moments throughout this journey. Adrian, thank you for being unapologetic in your scholarship and in how you view the world. I continue to learn from scholars like you both!

I am grateful to my friends and colleagues, far and wide, for their support. In particular, I want to thank Sakina Frattina and Joanna Erdman for their support and friendship over the past decade. May our paths cross again soon and often!

I am thankful to my graduate student friends Claire Mumme, Shanthi Senthe, Stu Marvel, Amaya Marin Alvez, Ruby Dhand and Mai Taha for their friendship and late night excursions. I also want to extend my heartfelt thanks to Coel Kirby, Mazen Masri, Tyler McCreary and Amar Bhatia for reading various drafts of my dissertation and offering significant feedback. In particular Mazen and Amar, thank you for your friendship, continued support and collaboration. From the Toronto graduate student community, I want to thank Igor Gontcharov, Micheal Fhakri, Patricia Hania, Fenner Stewart and countless others for creating an innovative learning space. I am also grateful to my new colleagues at Windsor Law for creating a stimulating intellectual environment. In particular, I want to thank Professors Gemma Smyth, Reem Bhadi, Jasminka Kalajdzic and David Tanovich for their invaluable mentorship, guidance and support of a new colleague that was desperately trying to complete his doctoral work, teach new classes etc.

I want to thank my partner, Tyler for his love and support during this process. To my mother, I owe you everything. Your courage, kindness, generosity, perseverance and patience have shaped my life and I am eternally grateful to you.

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Introduction: Framing the Narrative

Introduction

Why are theories of global governance unsatisfactory? Why are theories of global governance unable to integrate the lived realities of the people of the global South? International law and its institutions are growing at an unprecedented speed and this expansion has captured the curiosity of international lawyers and international law scholars. As international law and its institutions continue to grow, there are concurrent concerns regarding their democratic foundations. A large body of scholarship encapsulates these anxieties through the prism of global governance. In particular, two specific theories of global governance, global constitutionalism, and global administrative law, seek to introduce ideas of constitutionalism and administration as theories of governance. Global governance institutions seek to regulate the people of the global South, but both global constitutionalism and global administrative law are uninformed about the people living in these regions.¹

To some, global governance is governing with authority on the global scale.² For others, global governance is world politics.³ Scholars have thus sought to clarify

¹ David Kennedy, "Mystery of Global Governance" in Jeffrey L. Dunoff & Joel P. Trachtman eds, *Ruling the World; Constitutionalism, international law, and Global Governance* (Cambridge: Cambridge University Press, 2009) at 41 [D. Kennedy, "Mystery of Global Governance"].

² Lawrence Finkelstein, "What Is Global Governance?" (1995) 1:3 *Global Governance* 368 at 369; Finkelstein defined global governance as "governing, without sovereign authority, relationships that transcend national frontiers. Global governance is doing internationally what governments do at home".

the meaning and scope of global governance as a concept⁴ and have attempted to understand its contents.⁵ Even though the concept of global governance has been under the academic microscope for the past 20 years, a uniform meaning has yet to be agreed upon. Broadly, it is understood as a term used to identify and describe the transformation process in global politics.⁶ Global governance scholarship thus acknowledges “the emergence of autonomous spheres of authority beyond the national/international dichotomy”.⁷

Scholars working in global constitutionalism and global administrative law theorise global governance for two reasons. First, global constitutionalism and global administrative law scholars theorise global governance because of the effects of globalisation. Globalisation is a heuristic used to explain changes in our contemporary global society. It describes a process of change that spans centuries.⁸ It captures our social reality that is precipitated by the boomerang-type relocation of different actors, from local, to regional to international spaces and back again. The relocation of actors imbricated in the process of globalisation is intimately connected to the proliferation of international law and

³ James N. Rosenau suggests: “[g]lobal governance is conceived to include systems of rule at all levels of human activity- from the family to the international organization- in which the pursuit of goals through the exercise of control has transnational repercussions”; James N. Rosenau, “Governance in the Twenty-first Century” (1995) 1:1 Global Governance at 14.

⁴ Klaus Dingwerth & Phillip Pattberg, “Global Governance as a Perspective on Global Politics” (2006) 12 Global Governance 185 at 186 [Dingwerth & Pattberg, “Global Politics”].

⁵ Klaus Dingwerth & Phillip Pattberg, “How Global and Why Governance? Ambivalences, Blind Spots and Challenges for a Critical Global Governance Literature” (2010) 12 Intl Studies Rev 702.

⁶ Dingwerth & Pattberg, “Global Politics” *supra* note 4 at 196.

⁷ Dingwerth & Pattberg, “Global Politics” *supra* note 4 at 197.

⁸ William Twining, *Globalization and Legal Theory* (Cambridge: Cambridge University Press, 2000) at 6.

its institutions. Second, global constitutionalism and global administrative law scholars theorise global governance because of fragmentation of international law. Fragmentation of international law is caused by an increase in various international institutions making diverse and competing or overlapping interpretations about various principles of international law. The results have produced anxieties about the nature of the current global order.⁹

Globalisation and the fragmentation of international law have prompted international lawyers and international law scholars to theorise global governance through global constitutionalism and global constitutionalisation.¹⁰ These writers are using a constitutionalist lens to study, confront, and compete with the fast-paced evolution of international law and its institutions.¹¹ Scholars working on global constitutionalism argue that it is possible to use a constitutional vernacular to describe the emergence and operation of international law and its different institutions.¹² Similarly, global administrative law scholars characterise global governance as administration.¹³ For global administrative law scholars, global governance as administration allows them to

⁹ Martti Koskenniemi & Paivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 *Leiden J Intl L* 553 [Koskenniemi & Lenio, "Fragmentation of International Law?"].

¹⁰ Jeffrey L. Dunoff & Joel P. Trachtman, "A Functional Approach to International Constitutionalization" in Jeffrey L. Dunoff & Joel P. Trachtman eds, *Ruling the World; Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009) at 5-9.

¹¹ Anne Peters & Klaus Armingeon, "Introduction—Global Constitutionalism from an Interdisciplinary Perspective" (2009) 16:2 *Ind J Global Leg Stud* 385 at 385.

¹² Ronald St. John Macdonald & D. M. Johnston, eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005).

¹³ Benedict Kingsbury, Nico Krisch & Richard B Stewart, "The Emergence of Global Administrative Law" (2005) 68 *Law & Contemp Prob* 1 at 22.

“recast many standard concerns about the legitimacy of international institutions in a more specific and focused way”.¹⁴

Two central arguments will be pursued in this dissertation. First, as theories of global governance, both global constitutionalism and global administrative law ignore and obscure the colonial and imperial history of international law and its institutions. By ignoring international law’s lineage, scholars are not able to accurately theorise contemporary global governance through constitutionalism and administration. Without the inclusion of the global South, global constitutionalism and global administrative law, as theories, are caricatures of western universalism embedded in international law.¹⁵ In this respect, these two theories represent a false universalism that must be challenged.

The second argument is that there must be an engagement with the global South if global governance is to be theorised accurately and holistically. As part of the second argument, this analysis will turn to the question of how we might theorise global governance from the perspective of the global South. In order to present the foregoing arguments, this analysis will rely on three case studies from international criminal law and its respective institutions: the International Criminal

¹⁴ *Ibid* at 27.

¹⁵ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) at 1-9 [Pahuja, *Decolonising International Law*]; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 1-18 [Anghie, *Imperialism*].

Tribunal for Rwanda (ICTR), the International Criminal Tribunal for former Yugoslavia (ICTY), and the International Criminal Court (ICC).

Domestic criminal law represents the raw power of the state to exercise surveillance, coercion and ultimately, punishment over its citizens. The introduction of criminal law to the international realm¹⁶ may arguably be the quintessential example of the use of local governance tools on the global scale. Furthermore, international criminal law and these three international criminal institutions are viewed in global administrative law and global constitutionalism literature, and the field of international criminal law itself as one of the greatest achievements of international law.¹⁷ They are good examples of how the raw powers of authoritarian and dictatorial post-colonial states are tamed.¹⁸

International criminal law is one of the fastest evolving branches of international law. On the international political scene, some argue that international criminal prosecutions are frequently viewed as the best means to resolve divergent

¹⁶ For an overview of international criminal law, see Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2014) at 3-19 [Cryer *et al*, *An Introduction to International Criminal Law*].

¹⁷ D.M Johnston, "World Constitutionalism in the Theory of International Law" in Ronald St. John Macdonald & D. M. Johnston, eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005); M. Cherif Bassiouni, "International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice" in Antonio Cassese, ed, *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009); M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-five Years: the Need to Establish a Permanent International Criminal Court" (1997) 10 Harv Hum Rts J 1.

¹⁸ Bardo Fassbender, "The Meaning of International Constitutional Law" in Nicholas Tsagourias ed, *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press, 2007); Axel Marschik, "Legislative Powers of the Security Council" in Ronald St. John Macdonald & D. M. Johnston eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005) at 461-472.

violent conflicts and confront the perpetrators of international crimes.¹⁹ But this is a superficial account, as it is only true for non-Western states. With the fall of the Berlin Wall and end of the Cold War in 1989, there was a resurgence of the number of international institutions focusing on prosecuting international crimes. The emergence of these institutions confirms the anxieties about the fragmentation of international law.²⁰ Conversely, the desire to end impunity and prosecute those responsible for mass human rights violations is an illustration of the degree of interconnectedness and interdependence between and amongst communities across borders. One of central the tasks of these international regimes is to pierce the veil of immunity afforded to government officials under traditional international law. Holding government officials individually accountable for international crimes is a new phenomenon. International law doctrines such as state sovereignty and equality of states have traditionally resulted in a strict reading of the immunities bestowed upon incumbent heads of state and foreign ministers, applying even to their participation in mass human rights violations in times of conflict and peacetime. Another central task for international criminal law is to act as a tool against non-state actors operating with impunity.

¹⁹ Sujith Xavier "Looking for 'Justice' in all the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?" in Amarnath Amarasingam & Daniel Bass, eds, *Post-War Sri Lanka: Problems and Prospects* (Forthcoming New York: Hurst University Press, 2015).

²⁰ Koskenniemi & Lenio, "Fragmentation of International Law?" *supra* note 9.

International criminal law is at the forefront of jurisprudential innovation, where some of the more contentious issues such as sovereign immunity²¹ and other various international criminal law doctrines are deployed.²² There are numerous instances in which judges of these international criminal institutions have invented legal doctrines, for example joint criminal enterprise.²³ These innovations in international criminal law and procedure raise questions of legitimacy and the role of judges in crafting legal rules as opposed to applying existing international law.

The international criminal institutions created to prosecute state and non-state actors are predominantly focused on conflicts in the global South (for example the International Criminal Tribunal for former Yugoslavia; the International Criminal Tribunal for Rwanda, the International Criminal Court prosecutions in Africa, the Sierra Leone Special Court; the Special Tribunal for Lebanon). These institutions suffer from various criticisms.

Amongst these criticisms is a persistent anxiety that there is a crisis of legitimacy within the international criminal institutions about the law they create and apply. This crisis stems from a democratic disconnect from those populations most affected by the work of the international criminal institutions. This crisis is best

²¹ Asad G. Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12:3 Chinese J Intl L 467.

²² Beatrice I. Bonafé, "Finding a Proper Role for Command Responsibility" (2007) 5:3 J Int'l Crim Just 599.

²³ Cryer *et al*, *An Introduction to International Criminal Law* *supra* note 16 at 356-363.

articulated by scholars working on locating the global South in opposition to, and in distinction from the global North. These scholars, working under the banner of Third World Approaches to International Law (TWAIL), have sought to bring into focus the role of international law and its institutions in the subjugation and oppression of people of the global South through colonialism and imperialism.

I use the term global South to connote a particular, and contemporary, material reality. Granted, the popularity of the term has recently grown, especially as other descriptors of “developing”, “poor”, and “Third World” have fallen out of favour as “derogatory and anachronistic”.²⁴ I use it as both a placeholder of an imagined space in the here and now, and as progeny of the term Third World. Vijay Prashad has described the Third World in the following manner: “The Third World is not a place; it was a project”.²⁵ This project, the Third World, Prashad suggests had three goals: peace, bread and justice.²⁶ The emergence of the Third World thus must be placed within the Post-War period and the rise of newly independent states as a result of decolonisation, which encapsulate these three goals of peace, bread and justice. The three goals speak to a desire for peace in the aftermath of the WWII²⁷, greater redistribution of wealth and poverty alleviation²⁸ and greater access to justice at the broader conceptual levels. The end of the Cold War, neoliberalism and rise of Third World economies has

²⁴ Pahuja, *Decolonising International Law* supra note 15 at 261.

²⁵ Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New York London: The New Press, 2007) at xv; Vijay Prashad, *The Poorer Nations: A Possible History of the Global South* (New York London: Verso, 2012) at 1 [Prashad, *Poorer Nations*].

²⁶ Prashad, *Poorer Nations* supra note 25 at 1-3.

²⁷ *Ibid* at 2.

²⁸ *Ibid*.

significantly altered our landscape since 1989. All of these factors have resulted in the emergence of the term global South. Jean Comaroff and John Comaroff offer the following remarks in describing the global South:

In the upshot, ‘the South’, technically speaking, has more complex connotations than did the World formerly Known as ‘Third’. It describes a polythetic category, its members sharing one or more—but not all, or even most—of a diverse set of features. The closest thing to a common denominator among them is that many were once colonies or protectorates, albeit not necessarily during the same epochs. ‘Postcolonial’, therefore, is something of a synonym, but only an inexact one. What is more, like all indexical categories, ‘the Global South’ assumes meaning by virtue not of its content, but of its context, of the way in which it points to something else in a field of signs—in this instance, to its antinomy to ‘the Global North’, an opposition that carries a great deal of imaginative baggage congealed around the contrast between centrality and marginality, free-market modernity and its absence.

[...]

Which is why ‘the Global South’ cannot be defined, a priori, in substantive terms. The label bespeaks a relation, not a thing in or for itself. It is a labile signifier whose content is determined by everyday material and political processes. Analytically, though, to return to the point made by Homi Bhabha, whatever it may connote at any given moment, it always points to an ‘ex-centric’ location, an outside to Euro-America. [...] As such, what else it may be presumed to be, whatever political or economic ends its invocation may serve, “the south” is a window on the world at large, a world whose geography, *pace* Kant and Von Humboldt, is being recast as a spatio-temporal order made of a multitude of variously articulated flows and dimensions, at once political, juridical, cultural, material, virtual – a world that, ultimately, transcends the very dualism of north and south.²⁹

²⁹ Jean Comaroff and John Comaroff, *Theory From The South or, How Euro-America Is Evolving Toward Africa* (London: Paradigm Publisher, 2012) at 45 & 47.

In response to criticisms about their description of the global South³⁰, Comaroff and Comaroff added the following to their understanding of the global South:

It is not difficult to show that there is much south in the North, much north in the South, and more of both to come in the future. All of which is underscored by the deep structural articulation—indeed, by the mutual entailment—of hemispheric economies, not to mention by the labyrinthine capillaries of the world of finance, which defy any attempt to unravel them along geopolitical axes. In the complex hyphenation that links economy to governance and both to the enterprises of everyday life, then, the contemporary global order rests on a highly flexible, inordinately intricate web of synapses, a web that both reinforces and eradicates, both sharpens and ambiguates, the lines between hemispheres. As a result, what precisely is north, and what south, becomes ever harder to pin down.³¹

The global South is a condition brought about by various forces of history including colonialism, imperialism and capitalism. It describes a relationship between the colonised and coloniser, as shaped by the forces of globalisation. Ultimately, it captures power relations at all levels between communities inside and outside established borders. An important aspect of the term global South is recognition that there are multitudes of claims in various spaces. In particular, the possibility of a south in the North and a north in the South is important. This speaks to the recognition of indigenous groups in the global North as

³⁰ Srinivas Aravamudan “Surpassing the North: Can the Antipodean Avantgarde Trump Postcolonial Belatedness?” online: (2012) 5 The Salon <http://jwtc.org.za/salon_volume_5/srinivas_aravamudan.htm>.

³¹ Jean Comaroff and John Comaroff, “Theory from the South: A Rejoinder” online: (February 20012) Cultural Anthropology <<http://www.culanth.org/fieldsights/273-theory-from-the-south-a-rejoinder>>.

engendering a Fourth World.³² Global South thus encapsulates a number of various claims predicated on historical progress, which includes indigenous people, migrants, former slaves and their descendants in the global North.

There is another iteration of the global South that can be added to this complicated description. Vijay Prashad suggests that the global South signifies a form of resistance to the transformations described above as the coming together of various forces. He argues that given the manner in which world politics operates, especially as a result of neoliberalism, the global South has come to be identified with protests “against the theft of the commons, against the theft of human dignity and rights, against the undermining of democratic institutions [...]”.³³

This complex but nuanced description of the global South is important for this project and shapes its direction. As noted earlier, the following chapters first seek to detail how two theories of global governance inaccurately theorise the current state of global affairs. In particular, by focusing on global constitutionalism and global administrative law through the lens of the three cases studies on international criminal institutions, evidence can be gathered that indicates international lawyers and international law scholars are unable to describe the

³²Amar Bhatia “The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World” (2012) 14:1 Or Rev Int’l L 131.

³³Prashad, *Poorer Nations supra* note 25 at 9. This point was made earlier by Boaventura de Sousa Santos as insurgent cosmopolitanism; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (London: Butterworths LexisNexis, 2002) at 179.

complicated and often difficult-to-imagine dynamics of international institutions. The current scholarly literature that presents these theories of global governance emphasises the legislative and judicial functions of international institutions. However, by concentrating on these elements, these theories forgo the opportunity to truly examine how international institutions function. The functioning of these international institutions is part of the very nature of international law and its history.

International law was forged as a means to regulate the interactions between the Europeans and the inhabitants of the new world. When the Europeans arrived on the shores of the new world, they discovered social systems with their own norms and laws.³⁴ Rather than trying to learn about the values and traditions of the indigenous peoples of the new world, the Europeans set out to apply European norms and laws to the indigenous populations and their land.³⁵ The application of European norms to the indigenous groups facilitated the colonisation, occupation and genocide of the inhabitants of new world.³⁶ This

³⁴ Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World 1492-1640* (Cambridge: Cambridge University Press, 1997) at 16-40; Bruce G. Trigger & Wilcomb Washburn, "Native Peoples in Euro-American Historiography" in Bruce G. Trigger & Wilcomb Washburn, eds, *The Cambridge History of the Native Peoples of the Americas* (Cambridge: Cambridge University Press, 1996) at 61-81.

³⁵ Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947) at 86-92.

³⁶ Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, Executive Summary (online: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf) at 1-6.

process continues to this day. This practise was aided by the use of international law.³⁷

International law and its institutions have a significant effect on the people of the global South. Predictably, the two global governance theories of global constitutionalism and global administrative law do not take into account these key definitional elements of international law. In theorising global governance, global constitutionalism and global administrative law seem oblivious to the manner in which international law and international institutions were created and how they continue to function. Subsequently, by ignoring these foundational aspects of the international order, their contributions are incomplete.

Leveraging global governance from the perspective of the global South is one method of transcending the limitations of these theories. This is the second argument that this dissertation will unfold. By pursuing the possibility of theorising global governance from the global South, the central concerns that will be addressed are whether or not global governance should be theorised, and how can we theorise global governance from the perspective of the global South. By focusing on the “should” and the subsequent “how” questions, this analysis will suggest two specific methods that can be used to build bridges between the diverse body of literature on the global South and global governance theory. In this respect, this dissertation will offer two novel insights that can be used as a

³⁷ Anghie, *Imperialism supra* note 15 at 1-18.

means to construct these linkages from the current literature: ethnography³⁸ and ethics, intellectuals, and international law.³⁹ The first concentrates on international lawyers, international law scholars and their understanding of international law as a field of practice. There are forces that mould the manner in which international law doctrines and institutions are utilised and deployed. Ultimately, there is a need for greater understanding of this field of practice through the everyday operation of international law.⁴⁰ The second insight examines how international lawyers and international law scholars, as intellectuals, can shape the dynamics of their field.

In pursuing these two arguments, the focus is on scholars writing about global constitutionalism and global administrative in the respective chapters. I do not draw a distinction between lawyers and scholars writing on international law, given the very nature of international practice and scholarship and will further examine this particular point in the final chapter.

Methodology

This dissertation is grounded in Third World Approaches to International Law. Specifically, I use a TWAIL method to ground the argument that global

³⁸ Luis Eslava and Sundhya Pahuja, "Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law" (2012) 45:2 *Journal of Law and Politics in Africa, Asia and Latin America - Verfassung und Recht in Übersee (VRÜ)* 195 at 213; Audra Simpson, *Mohawk Interruptus {Political Life Across Borders of Settler States}* (Durham: Duke University Press, 2014).

³⁹ Edward Said, *Representations of the Intellectual: The 1993 Reith lectures* (New York: Vintage Books, 1996); Buphinder Chimni, "The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi's Hind Swaraj or Indian Home Rule" (2012) 23:4 *EJIL* 1159 at 1160.

⁴⁰ Luis Eslava, "Istanbul Vignettes: Observing the Everyday Operation of International Law" (2014) 2 *London Rev Intl L* (forthcoming).

governance theories of global constitutionalism and global administrative law ignore and obscure the history of international law. TWAIL's central epistemic claims can be characterised as follows: to unpack, deconstruct and then reconstruct international law.⁴¹ The constructive objectives of my research project to theorise global governance borrow from neighbouring disciplines to advance progressive and practical solutions to the challenges resulting from the exclusionary nature of contemporary international legal doctrines and international institutions.

Numerous rationales exist in adopting a TWAIL perspective about international law, international institutions and global governance. The first, and most relevant is the effect that international law and its institutions had, and continue to have, on the global South. The global South is where the decisions made by the World Trade Organisation or the International Criminal Court take direct effect. As David Kennedy has suggested, the global South is where the rubber of global governance hits the road.⁴² With reference to the ICC, all of the cases in the Court's docket at the moment pertain to the African continent. The Court's work will undoubtedly have significant effect on the manner in which the individuals and their respective countries conceptualise international criminal justice.

⁴¹ Makau Mutua "What is TWAIL?" (2000) 94 American Society of Intl L Proceedings 31; Antony Anghie "What is TWAIL: Comment" (2000) 94 Am Soc Int'l Proc 39; Obiora C. Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2010) 10 Intl Community L Rev 37.

⁴² D. Kennedy, "Mystery of Global Governance" *supra* note 1.

Structure

The two arguments identified above will be discussed in the following manner through the preceding five chapters. In the first chapter, a purposeful account of international law and international institutions is outlined by examining how international law and its institutions have evolved from the 17th to the 20th century in order to understand how they function. I offer the mainstream account of this evolution of international law and juxtapose narratives that seek to challenge these accounts. In this respect, I will detail how international law and its institutions were forged as response to the colonial encounter, how this encounter continues to shape international law and its institutions. The argument is centred on how international law and its institutions carry with them a particular western universalism as they travel to their respective destinations. Once this particular history of this field is presented, there will be an examination of how this practice continues by examining the three contemporary international criminal institutions identified earlier.

The second chapter explores globalisation and fragmentation of international law. In this chapter, I describe and engage with both theoretical discussions that seek to understand the rapid expansion of world order. Globalisation, a heuristic device, helps explain the expansion of international law and its institutions as part of greater connectedness and interconnectedness across borders and social interactions. As our public and private institutions expand on the global scene, we are witnessing a diversification of international norms by different adjudicatory bodies. Fragmentation of international law, coined as a postmodern

anxiety,⁴³ has inspired scholars to search for ways in which accountability and legitimacy can be introduced to international law and international institutions. These two chapters form the backdrop to the first central claim that the two theories of global governance, global constitutionalism and global administrative law, present a false universalism.

The literature on global constitutionalism and global constitutionalisation is vast. In the third chapter, the first section explores the four corners of global constitutionalism and global constitutionalisation. From this analysis, the chapter then tracks three specific camps in the current literature on global constitutionalism and global constitutionalisation. By using the case studies of the three international criminal institutions, the basic premises outlined by global constitutionalism scholars in their respective camps will be challenged. The challenge will be based how their versions of constitutionalism and constitutionalisation deploy and entrench the universalisms embedded in international law chronicled in the first chapter. In this chapter, I will briefly explore various avenues by which global constitutionalism can transcend its limitations.

The fourth chapter chronicles global administrative law. It examines two particular sets of claims housed in global administrative law. The first set of global administrative law scholars provide a detailed description of how

⁴³ Koskenniemi & Lenio, "Fragmentation of International Law?" *supra* note 9.

international institutions deploy administrative law in their everyday interactions. The second set of claims acknowledges and concedes to the challenges encountered by analogising in this manner, and proposes to read in accountability in how these institutions functions. Analogous to the third chapter on global constitutionalism, I will use the empirical evidence from the international criminal institutions to challenge the universalism embedded in global administrative law. The central argument in this chapter is that global administrative law ignores, obscures, and effaces the underlying context of international institutions. It presents a unique western understanding of administrative law as universal.

The final chapter seeks to build bridges between theories of global governance and the global South. In this chapter, the discussion turns to the recent scholarly interventions that engage with the lived realities of the people of the global South. This chapter asks: how can international lawyers and international law scholars learn from the global South? This prompts moreover another related question, what should we learn from the global South?

Chapter 1: Tracing the Evolution of International Institutions (and International Law) through the Dynamics of Difference

1.1 Introduction

In this chapter, I trace the evolution of international criminal institutions to provide the empirical backdrop to this dissertation. Contemporary global governance theories, such as global constitutionalism and global administrative law, omit and obscure the true nature of international law and its institutions. This is part of a larger trend in international law to present a particular and singular western perspective as universally applicable across the globe. This is not a new argument in international law¹, rather it is part of a rich history of arguments that unite under Third World Approaches to International Law. TWAIL is both theory and method² that traces the “glib universality narratives based on an ahistorical reading of international law and international relations”.³

In order to understand the glib universal narratives embedded in international criminal institutions and its significance to theories of global governance, it is important to study the history of international institutions. The history of

¹Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) [Anghie, *Imperialism*]; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

²Obiora C. Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2010) 10 Intl Community L Rev 37 [Okafor, *Theory or Method*].

³Obiora C. Okafor, “Re-Defining Legitimacy: International Law, Multilateral Institutions and the Problem of Socio-Cultural Fragmentation Within Established African States” (PhD Thesis, UBC, Faculty of Law, 1998) online: < <http://law.library.ubc.ca/abstracts/#1998>>.

international law has been recounted from various perspectives. Most often, as Martti Koskenniemi suggests, the history of international law is presented as a caricature.⁴ It is characterised as a narrative of conquest, colonisation and extreme violence through a placid perspective rooted in western notions of progress and development.

Generally, the history of international law has been presented as the search for universal law based on western legal traditions that would apply to everyone.⁵ International law's history has been conceptualised as epochs.⁶ It has been told through the rise and fall of international law and its profession.⁷ TWAIL scholars have challenged some of these historical accounts of international law. TWAIL scholars have argued that the traditional accounts that characterise the origins of international law as a search for universal law ignore the dark and barbaric realities of colonialism and imperialism facilitated by international law, and the continuing effects of these phenomena.⁸

To better understand the evolution of international criminal institutions, we must first study the evolution of international law and its institutions. This is not an

⁴ Martti Koskenniemi, "A History of International Law Histories" in Bardo Fassbender et al, eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2014) at 945.

⁵ Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947) [Nussbaum, *Law of Nations*].

⁶ Wilhelm Grewe, *Epochs of International Law* (Germany: Walter de Gruyter, 2000) [Translated and revised by Michael Byers].

⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001) at p. 4.

⁸ Anghie, *Imperialism*, *supra* note 1.

easy task. I acknowledge that this may be a difficult task given the challenges legal scholars have in writing history.⁹ I also acknowledge the dangers of this type of scholarship of cherry-picking historical events to demonstrate a particular outcome. Chimamanda Ngozi Adichie has articulated the problems with this type of approach as the dangers of a single story.¹⁰ Presenting certain historical events without the context is problematic and leads to narrow and particular interpretation. There are number of experts engaged in this debate that have explored these challenges.¹¹ Even though I acknowledge all of these dangers, for my purpose, it is crucial to trace the manner in which in international institutions and in particular international criminal institutions have evolved to demonstrate that there are relics of colonialism and imperialism embedded in contemporary international law and its institutions. Moreover, in presenting the materials ahead, I juxtapose the traditional understanding of international law and its institutions and then present an alternative TWAIL based reading. I do so

⁹ Quentin Skinner, "Meaning and Understanding in the History of Ideas" (1969) 8 *History and Theory* 3; Quentin Skinner, "Interpretation and the Understanding of Speech Acts" in Quentin Skinner, *Visions of Politics: Volume I, Regarding Method* (Cambridge: Cambridge University Press, 2002) at 103; George Cavaller, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?" (2008) 10 *J Hist Int'l Law* 181; Ian Hunter, "Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations" in Shaunnagh Dorsett & Ian Hunter eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (London: Palgrave Macmillan, 2010) at 11; Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (New Jersey: Princeton UP, 2011) at 14–15.

¹⁰ Chimamanda Ngozi Adichie, "Dangers of a Single Story" (TED TALKS, February 2009) online: < http://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story?language=en >

¹¹ Anne Orford, "On international legal method", (2013) 1:1 *London Rev Intl L* 166; Charlotte Peevers, "Conducting international authority: Hammarskjöld, the Great Powers and the Suez Crisis", (2013) 1:1 *London Rev Intl L* 131; Jacqueline Mowbray, "International authority, the responsibility to protect and the culture of the international executive", (2013) 1:1 *London Rev Intl L* 148.

as way to illustrate how contemporary global governance theories do not engage with the actual realities of international law and its institutions.

What follows is a deliberately cursory account of international law and its institutions. Relying on international lawyers and their assertions to narrate this historical account, I will first set out the evolution of international law and its institutions from the 17th to the 20th century. I will present the standard historical claims. Then I will posit insights that are critical of these accounts to demonstrate how international law and its institutions developed as part and parcel of colonialism and imperialism. International law and its institutions thus embody a particular western perspective that can be characterised as universalist. Sundhya Phahuja and Antony Anghie are two writers that have pioneered this approach.¹² Their respective contributions have explored the universalism of international law and its institutions in various historical moments. There are other TWAIL scholars that have embarked on similar journeys.¹³

In this chapter, I rely on the work of Antony Anghie to trace the universalism embedded in international law.¹⁴ Once I have presented this particular history of

¹² Anghie, *Imperialism*, *supra* note 1; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

¹³ Balakrishnan Rajagopal, "Counterhegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy", (2006) 27:5 *Third World Q* 767; Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press, 2014).

¹⁴ There are two specific reasons for this: First, Anghie's scholarship traces the evolution of international law back to the first contact between European colonisers and the indigenous communities. This is useful for my project as this analysis provides a window by which to examine the development of international law and its institutions that have now become an

international law and its institutions, I will illustrate the continuation of this practice of presenting a singular western perspective as universal in one of the fastest growing contemporary fields of international law: international criminal justice. In the first section I develop international law's universalism by tracing international law's origins back to the *Treaty of Westphalia* and then chronicling the development of international institutions. I focus on telling the story of international law through the lens of its institutions. Additionally I pay close attention the manner in which international criminal institutions emerged as part of the evolution of international institutions. Then I develop this second line of inquiry through case studies of three international criminal institutions: the International Criminal Tribunal for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).

1.2 Glimpses of World History: Evolution of International Law and International Institutions from the Treaty of Westphalia (1648)

It is suggested that the emergence of the modern nation state in the early 15th century prompted the proliferation of multifaceted governance regimes.¹⁵ The development of our modern sovereign¹⁶ engendered a seismic shift in how societies were regulated at that time, and more relevantly, how the international

important part of global governance discussions. Second, by exposing the relationship between international law and colonialism, Anghie develops the dynamic of difference. I adopt this concept as a means to illustrate how international criminal law has developed and importantly, the significance of the dynamic of difference as it relates to the efforts to theorise global governance through global constitutionalism and global administrative law; Anghie, *Imperialism*, *supra* note 1.

¹⁵ Helmut Willke, *Smart Governance: Governing the Global Knowledge Society* (Frankfurt New York: Campus, 2007) at 11; Willke defines governance as "the activity of coordinating communications in order to achieve collective goals through collaboration"; Nussbaum, *Law of Nations* *supra* note 5. .

¹⁶ Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiastical and Civil*, ed by J.C.A Gaskin (Oxford: Oxford University Press, 1996).

community is regulated now. In this section, the historical development of international law and its institutions will be presented in a chronological manner starting with the *Treaty of Westphalia* and concluding with the Post-War era and fall of the Berlin Wall.

The nation state's precise date of birth is contested; some trace it back to the *Treaty of Westphalia* in 1648,¹⁷ while others date it as early as the late 1400s.¹⁸ The discussion about the precise date of the birth of the modern nation state alludes to a broader theoretical disagreement between scholars as to the very origins of international law. By dating the emergence of the modern nation state to 1648 and placing the event in Europe, there is an obvious erasure of other potentials and possibilities. This erasure is indicative of a broader theme in the history of international law that omits or forgets that there were, and continue to be, thriving indigenous communities in the new world with advanced cultures.

Moving beyond the question of when and how the nation state, and by extension the international order, were created, the arrival of the nation state necessitated innovative means of creating agreement between different sovereigns. In Europe particularly, the end of the Thirty Years War in 1648 resulted in a landmark change in international relations with the *Peace Treaty of Westphalia* between

¹⁷ Anghie, *Imperialism supra* note 1.

¹⁸ Nussbaum, *Law of Nations supra* note 5 at 52; Martti Koskenniemi, "International Law and *Raison D'Etat*: Rethinking the Prehistory of International Law" in Benedict Kingsbury and Benjamin Straumann, eds, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010) 297.

the Holy Roman Emperor, the King of France, and their respective allies.¹⁹ The *Treaty* was Europe's central organising framework in the 17th and 18th centuries and ushered in the sovereigns' right to rule over their subjects without any external interference. The *Peace Treaty of Westphalia* guaranteed sovereign states exclusive control over their territories.²⁰ It stipulated that all sovereigns were to be treated as equal, and institutionalised the self-interested nature of the nation state.²¹

The consequential economic stability and growth stemming from the interactions between sovereign states allowed international law to flourish.²² The trade among the European sovereigns and, more importantly trade relations with their newly-colonised subjects in the new world, were essential to ensuring growth and stability.²³ Consequentially, there was potential for international regulatory control to limit the new sovereigns desire to enter into conflict with each other, particularly over human and natural resources.²⁴ The desire for peace and

¹⁹ Heinz Dunchhardt, "From the Peace of Westphalia to the Congress of Vienna" in Bardo Fassbender et al, eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2014) 628 at 629; Stephan Verosta, "History of International Law, 1648 to 1815", in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law*, (Oxford: Oxford University Press 2008 online edition) at 3-5.

²⁰ This principle was later codified in the *Montevideo Convention the Rights and Duties of States* 1933, 165 L.N.T.S 19; U.S.T.S 881.

²¹ *United Nations Charter*, 26 June 1945, 39 A.J.I.L. 190 Supp, (entered into force Oct. 24, 1945) [UN Charter].

²² Frank Walters, *History of the League of Nations* (Oxford: OUP 1952) [Walters, *League*] at 7; Walters suggests that "[E]xtraordinary increases in population, the revolutionary effects of the steamship, the railway and the telegraph, the enormous extension of external trade and internal wealth- these and other changes multiplied many times over the fields of contact between nations and between governments".

²³ Nussbaum, *Law of Nations supra* note 5 at 86-92.

²⁴ Richard Falk, "Introduction" in Charles S. Edwards, ed, *Hugo Grotius The Miracle of Holland; A study in Political and Legal Thought* (Chicago: Nelson-Hall, 1981) at 2.

conflict resolution was a central theme that animated the evolution of international law.²⁵ This desire would trigger the institutionalisation of dispute resolution mechanisms as early as 1815 in Europe. The development of these mechanisms would eventually pave the way for early international institutions of the 19th and 20th centuries that are now an important part of our global governance discussions.²⁶

Conversely, there was also a need to legitimise European occupation and conquest in the new world. In an attempt to contain the raw power of the new and all-powerful sovereign, early writers of international law formulated some of the key elements of modern international law.²⁷

Some of these early scholars of international law, such as Francisco de Vitoria (1480-1546) created governance mechanisms in the form of specific international law doctrines. Sovereignty was one of these newly formulated doctrines. The doctrine of sovereignty regulates relationships between the local inhabitants and the colonisers of the new territories. Arthur Nussbaum chronicles the emergence of the sovereignty doctrine in the 16th century. Nussbaum ascribes the development of sovereignty to the scholarship of Vitoria and his

²⁵ Nussbaum, *Law of Nations supra* note 5 at 86-92.

²⁶ Walters, *League supra* note 22 at 9: "In particular, the idea of arbitration acquired immense importance. Between 1815 and 1900, disputes and differences between States were submitted to arbitration on some two hundred occasions".

²⁷ Nussbaum, *Law of Nations supra* note 5 at 86 &107; Anne Orford, "The Past as Law or History? The Relevance of Imperialism for Modern International Law" in Emmanuelle Jouannet, Helene Ruiz Fabri and Mark Toufayan, eds, *Tiers Monde: Bilan et perspectives* (Paris: Société de Législation Comparée, 2013); Anghie, *Imperialism supra* note 1 at 13-31.

assessment of whether the “war of the Spaniards against the Indian aborigines was or was not just”.²⁸

Vitoria formulated some of the following questions: “Who is the sovereign? What are the powers of a sovereign? Are the Indians Sovereigns? What are the rights and duties of the Indians and the Spaniards? How are the respective rights and duties of the Spanish and [Indians] to be decided?”²⁹ Antony Anghie argues that Vitoria developed the sovereignty doctrine by answering these questions while focusing on the social and cultural practices of both the indigenous communities and the Spaniards. In doing so, Vitoria succumbs to what Antony Anghie has coined as the dynamic of difference. This is a process that creates a gap between two different cultures, characterising one as universal, the other as uncivilised and as a consequence developing techniques to bridge this gap.³⁰

The indigenous communities and the Spaniards had different cultures with two divergent conceptions of governance and ownership.³¹ In developing the early conceptions of sovereignty, Vitoria challenged the existing practice of applying divine law to the indigenous communities (or heathens).³² Subsequently, Vitoria removed the role of the Pope and divine law and replaced it with natural law. The argument is that if divine law does not apply to the indigenous communities and

²⁸ Nussbaum, *Law of Nations supra* note 5 at 59.

²⁹ Anghie, *Imperialism supra* note 1 at 15.

³⁰ *Ibid* at 4.

³¹ *Ibid* at 16.

³² *Ibid* at 17; Nussbaum, *Law of Nations supra* note 5 at 61.

they had recourse to natural law given their political institutions, then they were logically part of a different political and legal order. The central problem therefore was how to bridge the two divergent indigenous and Spanish cultures.

In bridging the cultural gap, or what Anghie terms as the “juridical problem of jurisdiction”, Vitoria uses two techniques: first he focuses on the personality of the indigenous communities and second, he looks at the application of the universal natural law system.³³ In Vitoria’s assessment, the indigenous communities of the Americas were not barbarians or sinners (as decided by divine law). Rather, they possessed reason because of their political and social order. The indigenous communities were able to establish “their own versions of the institutions” found in Vitoria’s world because they possessed reason.³⁴ By making natural law applicable to the indigenous communities, Vitoria extends natural law to the Spanish-Indigenous relationship.³⁵ Under natural law, the Spaniards had the right to travel, “to sojourn” in indigenous territory³⁶ provided that they “did not harm the Indians”.³⁷

Natural law is used as a means to legitimise a system of interaction between the indigenous people and European colonisers as equals. This interaction is characterised as occurring between two parties with equal and analogous

³³ Anghie, *Imperialism supra* note 1 at 19.

³⁴ *Ibid* at 20-21.

³⁵ Nussbaum, *Law of Nations supra* note 5 at 62.

³⁶ *Ibid* at 62.

³⁷ Anghie, *Imperialism supra* note 1 at 20.

understanding of the systems of governance premised on natural law. Yet this natural law is not predicated on an indigenous understanding of norms of land ownership (i.e. sharing of the land).³⁸ Rather it is predicated on a Spanish understanding of ownership and governance and this understanding is taken to be the universal understanding of ownership and governance. It is then used as the basis to determine the legality or justness of indigenous behaviour. Anghie captures the results of resolving the juridical problem of jurisdiction as follows:

Seen in this way, Vitoria's scheme finally endorses and legitimises endless Spanish incursions into Indian society. Vitoria's apparently innocuous enunciation of a right to travel and sojourn extends finally to the creation of a comprehensive, indeed inescapable system of norms which are inevitably violated by the Indians. For example, Vitoria asserts that to keep certain people out of the city or province as enemies, or to expel them when already there, are acts of war. Thus any Indian attempt to resist Spanish penetration would amount to an act of war, which would justify Spanish retaliation. Each encounter between the Spanish and the Indians therefore entitles the Spanish to defend themselves against Indian aggression and in so doing, continuously expand Spanish territory [...].³⁹

This illustration of the sovereignty doctrine⁴⁰ demonstrates that the development of international law was shaped by and intrinsically linked to colonialism and imperialism. Features such as the dynamic of difference, that is to characterise one culture as primitive and the other as universal, are deeply embedded within the structure of contemporary international law. These features can be traced

³⁸ Aimée Craft, "Living Treaties, Breathing Research" (2014) 26 Can J Women & L 1 at 4-7; Craft presents a good illustration, albeit in the late 1800's, of treaty negotiations between European colonisers and the indigenous people of what is now Manitoba, Canada.

³⁹ Anghie, *Imperialism supra* note 1 at 21-22.

⁴⁰ For Anghie, sovereignty doctrine is as follows: "[...] the complex of rules deciding what entities are sovereign and the powers and limits of sovereignty [...]"; Anghie, *Imperialism supra* note 1 at 16.

back to the origins of international law and continue have an effect on the manner in which international law has evolved and continues to function today.

By the 19th century there was an increase in positive law through bilateral and multilateral treaties and state practice. The evolution of international law, from the *Peace Treaty of Westphalia* to the 17th and 18th centuries, accelerated rapidly during the 19th century.⁴¹ The French and the American Revolutions and the Napoleonic wars had lasting effects well into the 19th century. The Congress of Vienna, held under the supervision of Great Britain, Prussia and Russia, sought to restore the balance of power that existed during the 17th and 18th centuries.⁴² The Vienna Congress ushered in a new 19th century political order.⁴³ At this time, there was a general trend towards conquest, exploitation and control of the rest of the globe, exasperating the relationship between the Europeans sovereigns. As suggested by Anghie, “the universalization of international law was principally a consequence of the imperial expansion which took place towards the end of the [19th] century”.⁴⁴

⁴¹ Most scholars see 1815 as the commencement of the 19th century; Martti Koskenniemi, “A History of International Law Histories” in Bardo Fassbender et al, eds, *The Oxford Handbook of the History of International Law* (Oxford; Oxford University Press, 2014) at 952-958 [Koskenniemi, International Law Histories]; Hans-Ulrich Scupin, “History of International Law, 1815-World War I” in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law*, 11 (Oxford: Oxford University Press, 2008, online edition) at para. 2.

⁴² For a discussion of the concert of Europe, see Walters, *League* supra note 22 at 7-9.

⁴³ Nussbaum, *Law of Nations* supra note 5 at 178; Hans-Ulrich Scupin, “History of International Law, 1815-World War I” in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition) at para. 3.

⁴⁴ Anghie, *Imperialism* supra note 1 at 32-33.

International law's progress is described in the following manner: the 19th century shift towards state practice and positive law can be seen through the creation of legal institutions, the prolific use of treaties as a means to regulate intercourse between states, and the embryonic "move to institutions".⁴⁵ These developments to codify international law - or in Lassa Oppenheim's words, "plough the fields of international law" - are arguably the first phase of the hyper-specialisation that has resulted in the contemporary proliferation of international regulatory regimes and global governance. The solidification of international law eventually leads to a ramping up in creating global governance regimes by the latter part of the 19th century.

As sovereign entities continued to interact through treaties and various agreements, there was a need to create dispute resolution mechanisms to resolve conflicts arising from these newly formed relationships. The first instance of institutionalisation occurred in the early 19th century, with the creation of the waterways commissions.⁴⁶ A multi-state organisation was established as result of the internationalisation of the Rhine and Danube waterways.⁴⁷ These commissions (or international institutions), especially the Danube Commission,

⁴⁵ David Kennedy, "The Move to Institutions" (1987) 8 *Cardozo L Rev* 841 [Kennedy, "Move to Institutions"]; Jose Alvarez, "The Move Away from Institutions: Introductory Remarks" (2006) 100 *Am Soc Int'l L Proc* 287.

⁴⁶ Anne Peters & Simone Peter, "International Organizations: Between Technocracy and Democracy" in Bardo Fassbender *et al*, eds, *The Oxford Handbook of the History of International Law* (Oxford; Oxford University Press, 2014) at 170 [Peters & Peter, "Between Technocracy and Democracy"].

⁴⁷ Walters, *League supra* note 22 at 7; *Ibid* at 173.

were powerful. They were granted “rule-making, executive and judicial powers”.⁴⁸ Similarly, in the 19th century, numerous international organisations, originally called Administrative Unions, were created.⁴⁹ For example, there was the Central Commission for the Navigation of the Rhine (1875), the International Telegraph Union (1875), the Universal Postal Union (1878) and the Berne Bureau for the Protection of Industrial Property (1883). These unions were given dispute settlement powers but they did not have the capacity to create laws. However their decisions had binding effects on the respective parties and potential new members. In effect, these international bodies, with their new international personality, were creating universally applicable international law through their policies and judicial decisions.⁵⁰

In describing the history of international law, scholars often succumb to a linear idea of progress (as can be seen in the previous two paragraphs) that suggests that there was a search for some form of universal law that would become globally applicable. Marti Koskenniemi describes this project as: “law that would recognize all humans as bearers of rights, citizens of their nations, organised as secular states [...]. This was a project for progress, for a global modernity –the dream of the entire world one day resembling Europe’s idealised image of

⁴⁸ Peters & Peter, “Between Technocracy and Democracy” *supra* note 46 at 173.

⁴⁹ This is often cited by the global administrative law scholars as clear evidence of the emergence of administration in international law; Benedict Kingsbury, Nico Krisch & Richard B Stewart, “The Emergence of Global Administrative Law” (2005) 68 *Law & Contemp Prob* 1 at 17 [Kingsbury *et al*, “Emergence of GAL”].

⁵⁰ Peters & Peter, “Between Technocracy and Democracy” *supra* note 46 at 173-176; Hans-Ulrich Scupin, “History of International Law, 1815-World War I” in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition).

itself".⁵¹ The search for universal law, characterised as the progress narrative of international law, is Eurocentric and is part of the universalism that is layered into the way international law operates. This layering process has consequences. This process has affected the very nature of law creation at the international level and importantly it has structured international law for the benefit of some. Subsequently there is an emphasis on the development of the doctrines and principles by European powers for their benefit as demonstrated by the dynamic of difference in Francisco de Vitoria scholarship and the creation of the sovereignty doctrine.

The idea of progress in international law obscures its violent use. Particularly the sovereignty doctrine was used as a tool to regulate the interactions of Europeans and non-Europeans.⁵² A handful of international lawyers have pointed to the monolithic universalising nature of international law.⁵³ Anghie and other scholars have thus historicised the evolution of sovereignty doctrine as part of the colonial encounter starting with the Spanish theologians dating back to the 15th century, as a means to subjugate the original inhabitants of the new world.⁵⁴

⁵¹ Koskenniemi, "International Law Histories" *supra* note 41 at 944; Thomas Scouteris, *The Notion of Progress in International Law Discourse* (The Hague: T.M.C. Asser Press, 2009).

⁵² Anghie, *Imperialism* *supra* note 1 at 1-35.

⁵³ Makau Mutua "What is TWAIL?" (2000) 94 Am Soc Int'l Proc 31 [Mutua, "What is TWAIL"]; Antony Anghie "What is TWAIL: Comment" (2000) 94 Am Soc Int'l Proc 39; Okafor, "Theory or Method" *supra* note 2.

⁵⁴ Anghie, *Imperialism* *supra* note 1 at 37.

The 19th century ended, by most accounts, immediately before the outbreak of the WWI in 1914.⁵⁵ During the 19th century, international law was loosely consolidated. Yet the existing international regulatory regimes could not prevent the escalation of the hostilities and the eventual collapse of the balance of power established by the great powers between 1815 and 1915.⁵⁶ The outbreak of WWI highlighted the urgency for the much-needed reforms of the international system. Reforming the international system was a possible technique to prevent future wars.⁵⁷ In the previous centuries, international law had concentrated on examining the interaction between nation states and how to control this relationship. Relying on the ideas encapsulated within the *Treaty of Westphalia*, and the subsequent drive to control and contain the sovereign nation states, international lawyers and international law scholars, activists and politicians had focused on the nature of the relationship between states.

As David Kennedy notes, most scholars engaged in historical examination have romanticised the 19th century as paving the way forward for the creation of the League of Nations.⁵⁸ The 19th century is characterised as classical, leading to the codification of international law. However, the turn to formalism away from

⁵⁵ Kennedy, "Move to Institutions" *supra* note 45 at 844.

⁵⁶ Martti Koskenniemi "History of International Law, World War I to World War II" in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition) at para. 1.

⁵⁷ Anghie, *Imperialism supra* note 1 at 124.

⁵⁸ David Kennedy "International Law in the Nineteenth Century: History of an Illusion" (1996) 65 *Nordic J Intl L* 385 (Reprinted in (1998) 17 *Quinnipiac Law Review* 99) [Kennedy, "History of an illusion"].

politics is highly contested.⁵⁹ Ultimately, the development of international law in 19th and 20th century was challenged.

For example, John Austin questioned the merits of international law. Austin asserted that “law properly so-called” could only emanate from a proper sovereign. International law regulated the behaviour of nation states, there was necessarily no international sovereign at the helm. International law could not amount to “properly so-called” law similar to the laws found within the nation state.⁶⁰ For Austin, international law was non-law and consisted “of opinions and sentiments current among nations generally”.⁶¹ Understandably, Austin’s views have haunted international lawyers throughout the 19th century and beyond. The development of the consent-based treaty system and state practices can be credited with countering Austin’s claims. Austin’s arguments about international law have found a contemporary home in the writings of the American international lawyers, like Eric Posner and Jack Goldsmith.⁶²

Kant’s idea of perpetual peace and the failure of 19th century international law inspired the creation of the first real international institution in the 20th century: the League of Nations. The League was created with the hope that it would

⁵⁹ Kennedy, “History of an illusion” *supra* note 58 at 103.

⁶⁰ Nussbaum, *Law of Nations supra* note 5 at 224.

⁶¹ John Austin, *The Province of Jurisprudence Determined*, ed by Walter Rumble (Cambridge: Cambridge University Press, 1995); Nussbaum, *Law of Nations supra* note 5 at 224.

⁶² Jack Goldsmith & Eric Posner, *Limits of International Law* (Oxford: Oxford University Press, 2005).

potentially prevent future wars and institutionalise peace on a global scale.⁶³ International lawyers, peace activists, and other various stakeholders, allegedly received their cue from Jan Smuts of South Africa, the founder of South African apartheid and United States President Woodrow Wilson. These two men are often depicted as supporting the internationalist ideals of formalism and legalisation that brought about the League of Nations. In fact, Smuts can be credited with attempts to institutionalise colonial mentalities through the Mandate System.⁶⁴ As the father of South Africa's apartheid, Smuts' involvement allude to broader problems in the creation of the League of Nations.⁶⁵

The end of the WWI signalled a remarkable shift in the desire for peace as articulated by the leaders of the United Kingdom and the United States.⁶⁶ Both Prime Minister Lloyd George and President Wilson (through his Fourteen Points) made references to the institutionalisation of peace through an international organisation.⁶⁷ The victors of the war agreed on the Armistice agreement but the resulting peace treaty would be controversial. The Allied and Associated Powers forced severe and draconian conditions upon the losers of the war that would

⁶³ Kennedy, "Move to Institutions" *supra* note 45; Martti Koskenniemi "History of International Law, World War I to World War II" in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition) at para. 9-14.

⁶⁴ Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United States* (Princeton: Princeton University Press, 2009) at 20 [Mazower, *No Enchanted Palace*].

⁶⁵ *Ibid* at 19-20.

⁶⁶ Walters, *League* *supra* note 22 at 20.

⁶⁷ *Ibid* at 20.

precipitate the next world war, less than a generation later.⁶⁸ Vladimir Lenin described the peace agreements as: “A peace of usurers and executioners has been imposed on Germany. This country has been plundered and dismembered. [...] All its means of survival were taken away. This is an incredible bandits' peace”.⁶⁹

One week after the commencement of WWI Peace Conference in January 1919, the Allied and Associated Powers created a commission to inquire into the causes and responsibilities for the recently concluded war.⁷⁰ The Commission, the first international investigative body of its kind, was tasked with determining responsibility for the start of the war and individual criminal responsibility for the violations of the laws of war.⁷¹ The Commission in its final report suggested that the Central Powers (essentially the German, Hapsburg and Ottoman empires) were responsible for starting the war and much more importantly, had committed violations of the laws of war. As such, the Commission recommended the “High Officials, including Kaiser Wilhelm II, to be tried for ordering such crimes and on the basis of command responsibility”.⁷² As result of the Commission’s report, the *Treaty of Versailles* included a provision (article 227) envisioning the prosecution Kaiser Wilhelm II and other high officials. This requirement of the treaty was not

⁶⁸ M. Cherif Bassiouni, “World War I: The War to End All Wars and the Birth of a Handicapped International Criminal Justice System” (2002) 30 Denv J of Intl L & Pol’y 244 at 247 [Bassiouni, “World War I”].

⁶⁹ Vladimir Lenin quoted in *Ibid* at 248.

⁷⁰ *Ibid* at 253.

⁷¹ Robert Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010) at 109 [Cryer, *An Introduction to ICL*].

⁷² *Ibid* at 110.

implemented.⁷³ The first signs of international criminal law can be seen through the Commission's attempts to institutionalise accountability for the violation of the laws of war.⁷⁴ The French and the British were strong supporters of this initiative.⁷⁵ Their attempts to prosecute Kaiser Wilhelm II were defeated by arguments that favoured sovereignty, championed by the Americans and the Japanese.⁷⁶

Moving beyond the responsibility for war crimes, the WWI Peace Conference and the resulting *Treaty of Versailles* ensured peace through the *Covenant of the League of Nations* and the concept of collective security.⁷⁷ The draft covenant of the League of Nations was negotiated in the 1919 Paris Peace Conference and the *Treaty of Versailles* established the League of Nations.⁷⁸ There were 22 original and associated members and 13 neutral member states of the League.⁷⁹ Germany joined in 1926 and the Union of Soviet Socialist Republics in 1934. The central aim of the League of Nations was to "promote international co-operation

⁷³ Kristen Sellers, "Trying the Kaiser: The Origins of International Criminal Law" in Morten Bergsmo et al eds, *Historical Origins of International Criminal Law: Volume 1* (Brussels: Torkel Opsahl Academic EPublisher, 2014) 193 at 195-196 [Sellers, "Trying the Kaiser"].

⁷⁴ *Ibid* at 196.

⁷⁵ *Ibid* at 196.

⁷⁶ Bassiouni, "World War I" *supra* note 68 at 269.

⁷⁷ Martti Koskeniemi, "History of International Law, World War I to World War II" in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition) at para. 22.

⁷⁸ See especially Chapter 4, "Drafting of the Covenant" in Walters, *League supra* note 22 at 25-64.

⁷⁹ Martti Koskeniemi, "History of International Law, World War I to World War II" in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition) at para 15.

and to achieve international peace and security”.⁸⁰ The lifespan of the League was short lived and by the late 1930’s, the League was in decline.

Even though the purpose of preventing future war was commendable, the League was nonetheless vulnerable to the same universalism-based critiques that we encountered with respect to international law in the earlier centuries. Marc Mazower has characterized the League of Nations as a “[V]ictorian institution, based on the notional superiority of the great powers, an instrument for a global civilising mission through the use of international law”.⁸¹ At the same time it was a way of understanding “British imperial world leadership and cementing its partnership with the United States”.⁸² Moreover these pragmatic aspects of this story are often ignored, especially at the beginning stages of the League of Nations. These pragmatic aspects, for example the political compromises, are relegated out of the story of the League. The politics are ignored as a means to present the break forward, as part of international law’s progressive response to the atrocities of war and cruelty.⁸³ In fact, politicians who held the balance of power at the Paris Conference endorsed a system that would

⁸⁰ Peters & Peter, “Between Technocracy and Democracy” *supra* note 46 at 184.

⁸¹ Mazower, *No Enchanted Palace* *supra* note 64 at 21.

⁸² *Ibid* at 21.

⁸³ Kennedy, “Move to Institutions” *supra* note 45 at 878: Kennedy suggests: “Unlike the war and peace, the rehetocircs of law and politics or idealism and realism seem to contrast idea and deed in various ways. By continually reinterpreting the break between war and peace in these terms, the move between them can be made to seem a transformation of thought, intention, or desire into practice. In this way, the move to institutions seems pragmatic and progressive. By repeating these characterizations as exclusions, the institutional regime is able to sustain its momentum by reference forward to the reappearance of the idea in its implementation”.

be deferential to politics through law, an outcome that would continue through to the United Nations.⁸⁴

The creation of the United Nations through the *Charter of the United Nations* ushered in a new era of specialisation in international law. The multiplication of international norms initiated in the 19th century, if not before gained further momentum with the creation of the League of Nations' successor, the United Nations. The first steps in creating the United Nations were initiated during the summer of 1944 at the Dumbarton Oaks Conference by representatives from Union of Soviet Socialist Republics, the United Kingdom, United States, and subsequently the Republic of China.⁸⁵ They were able to reach decisive conclusions on the "purpose and principles of the organization, its membership and its principal organs".⁸⁶

The development of the United Nations and its various branches continued the work of the League of Nations, especially as it related to the process of decolonisation of former colonies.⁸⁷ The doctrine of self-determination, an essential part of the decolonisation process was formulated as a response allowing former colonies to become independent, demonstrating fully the

⁸⁴ Mazower, *No Enchanted Palace* supra note 64 at 21.

⁸⁵ Ruth Russell, *A History of the United Nations Charter: The Role of the United States 1940-1945* (Menasha, Wisconsin: Brookings Institute, 1958) at 421.

⁸⁶ Jochen Frowein, "De Facto Regime" in R. Wolfrum ed., *The Max Planck Encyclopedia of Public International Law*, 12 (Oxford: Oxford University Press, 2010, online edition) para. 1-3.

⁸⁷ Anghie, *Imperialism* supra note 1 at 196-197.

universal applicability of international law.⁸⁸ Once their independence was gained for example, former colonies from the continents of Asia and Africa would be able participate as full sovereign entities within the United Nations and other international organisations. The primary purpose of the United Nations is: to maintain peace and security, peacefully resolve disputes, foster equality of member states and self-determination, foster social and economic cooperation, and finally promote and protect of human rights.⁸⁹ The ancillary purposes of the United Nations include disarmament and development and codification of international law. 90

In the next few pages, I will focus on one of the central purposes of the United Nations: human rights. I focus on human rights, as it is one of the central precursors to the contemporary international criminal justice regimes. Simultaneously, I recognise that there are other contributions to the development of the international criminal justice regime that is just as important as the United Nations and human rights. For example, Anne Orford's interventions about the origins of the responsibility to protect doctrine examines the role of the UN Secretary General in maintaining peace and order through an international executive rule in newly decolonised countries.⁹¹ The international executive rule and role of the UN Secretary General that commenced in the early 1960's would

⁸⁸ *Ibid* at 196-204.

⁸⁹ Antonio Cassese, *International Law, 2nd edition* (Oxford: Oxford University Press) at 320 [Cassese, *International Law*].

⁹⁰ *Ibid* at 320.

⁹¹ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011) at 27 & 28-34.

prove invaluable in creating the two ad hoc tribunals for Rwanda and the former Yugoslavia.⁹² It is important to keep all of these various factors at the forefront, especially in setting out the development of the international criminal justice regime.

The creation of the United Nations is heralded as the era of human rights.⁹³ The development of the different human rights protection regimes within the United Nations, the codification of the prohibition of genocide and other similar mechanisms as a result of WWII are used as indicia to support this claim. Yet, as Mazower argues, the result of such a claim is “if anything, to deepen the crisis facing the world organization and to obscure rather than illuminate its real achievements”.⁹⁴

Claims that the contemporary system of international human rights is connected to the creation of the United Nations are contested.⁹⁵ Samuel Moyn challenges the assertions that the human rights discourse emerged out of the Holocaust and subsequently through the creation of the United Nations.⁹⁶ Moyn on the other hand asserts that the history of human rights is rather recent and is imbricated with the development of international human rights organisations such as

⁹² *Ibid* at 32.

⁹³ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press 2012) [Moyn, *Last Utopia*].

⁹⁴ Mazower, *No Enchanted Palace* supra note 64 at 7.

⁹⁵ Moyn, *Last Utopia* supra note 93; Moyn suggests that the international human rights movement started in the 1970s and not with the creation of the United Nations.

⁹⁶ Moyn, *Last Utopia* supra note 93 at 6.

Amnesty International. Such a broad claim is not without its problems either.⁹⁷ Philip Alston argues that the “heated controversy that has been generated in the recent literature over whether and how the origins of human rights may be discerned is due primarily to a failure to acknowledge the polycentric nature of the human rights enterprise”.⁹⁸ He questions these “attempts to capture the alleged essence of that enterprise by viewing it through a single lens” and suggests that Moyn and others⁹⁹ arguments “are intrinsically flawed and potentially deeply misleading”.¹⁰⁰

That said, the United Nations legal framework did in fact foster the creation of the contemporary human rights regimes starting with the *Universal Declaration of the Human Rights* and its accompanying two covenants, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (collectively known as the *International Bill of Rights*).¹⁰¹ The *International Bill of Rights* has spawned a vast amount of jurisprudence through the various monitoring bodies of the two covenants as well as domestic jurisprudence as a result of its acceptance by the members of the United Nations. The international human rights regime is just one illustration of the growth of international law. Under the auspice of the United Nations, multiple and

⁹⁷ Philip Alston, “Does the Past Matter? On the Origins of Human Rights” (2013) 126 Harv L Rev 2043 at 2068-2072 [Alston, “Does the Past Matter?”].

⁹⁸ *Ibid* at 2045.

⁹⁹ Stefan-Ludwig Hoffmann, “Genealogies of Human Rights” in Stefan-Ludwig Hoffmann, ed, *Human Rights in the Twentieth Century* (Cambridge: Cambridge University Press, 2010).

¹⁰⁰ Alston, “Does the Past Matter?” *supra* note 97 at 2045.

¹⁰¹ *Universal Declaration of Human Rights*, GA Res. 217 (III), UNGAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948); *International Convention of Civil and Political Rights*, 19 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976).

fragmented subspecies of international law evolved. In particular, there was a strong push to create a specific field of international criminal law rooted in the successes of Nuremberg International Military Tribunal and the failures of the International Military Tribunal for the Far East.¹⁰²

The expansion of the United Nations was not the sole focus of the Post-War period proliferation of international law. For example, the World Bank, the International Monetary Fund and other international institutions emerged at the same time. There were universalising innovations in several other registers with the expansion of the international legal order through the processes of globalisation. The older image of the international order as a pyramidal structure with the nation state at the apex was no longer viable.¹⁰³ This image was replaced by a dense web of “overlapping and detailed prescriptions in subject areas as diverse as [...] human rights and international trade” through the expansion of international law and its different institutions in the late 20th century.¹⁰⁴

Self-contained regimes or highly specialised areas of law, such as diplomatic law, the law of the European Union and human rights instruments were unique subsystems that embraced in principle, full of exhaustive and definite rules of interpretation “concerning the consequences of breaches of their respective

¹⁰² M. Cherif Bassiouni, “From Versailles to Rwanda in Seventy-five Years: the Need to Establish a Permanent International Criminal Court” (1997) 10 Harv Hum Rts J 1 [Bassiouni, “From Versailles to Rwanda”].

¹⁰³ Bruno Simma & Dirk Pulkowski “Of Planets and the Universe: Self-Contained Regimes in International Law” (2006) 17:3 Eur J of Intl L 483 at 484 [Simma & Pulkowski, “Self-Contained Regimes”].

¹⁰⁴ *Ibid* at 484.

primary norms”.¹⁰⁵ The expansion of the international institutions through globalisation led to a unique set of anxieties about the very nature of international law. These anxieties would later shape the discourse.¹⁰⁶ I will explore the two concepts of fragmentation of international law and globalisation in the following chapter.

The Cold War stalemate between the Western powers and their communist counterparts significantly diminished the United Nations’ potential for success. While some of the self-contained bodies of international law grew as a result of expanding trade and the movement of people and goods, the body of law encapsulated under the rubric of international criminal law did not and the potential promise of Nuremberg did not take off.¹⁰⁷ The precedent of prosecuting the Axis and Japanese war criminals from WWII did not result in the creation of International Criminal Court or prosecution of war crimes until the early 1990s.¹⁰⁸

The Nuremberg and Tokyo Tribunals did have an impact. The United Nations General Assembly “unanimously affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgement of the

¹⁰⁵ *Ibid* at 485.

¹⁰⁶ Martti Koskenniemi & Paivi Leino, “Fragmentation of International Law? Postmodern Anxieties” (2002) 15 *Leiden J Intl L* 553.

¹⁰⁷ Cryer, *An Introduction to ICL supra* note 71 at 127. But see Hans Kelson, “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” (1947) *Intl L Q* 153 at 154-156.

¹⁰⁸ Cryer, *An Introduction to ICL supra* note 71 at 127-151.

Tribunal”.¹⁰⁹ Based on Nuremberg Tribunal’s decisions, the UN General Assembly subsequently asked the International Law Commission to draft a code of offences against the peace and security of mankind.¹¹⁰ The Law Commission formulated a number of international crimes and the notion of individual criminal responsibility, but its work was slow. By 1996, it drafted close to 20 provisions as part of the Code of Crimes against the Peace and Security of Mankind.¹¹¹

While during this Post-War period, there was little movement in the prosecution of war crimes similar to the Nuremberg and Tokyo Tribunals. There were however large-scale expansion of international human rights laws and the laws of war. For example, the European Court of Human Rights commenced its important work in 1959 along with other UN bodies that sought to monitor the application of specific treaties. The *International Covenant on Civil and Political Rights*, adopted in 1966, prohibits the crime of torture, an intrinsic component of war crimes, as well as crimes against humanity and genocide. In a similar vein, the adoption of the *UN Convention on the Prevention and Punishment of the Crime of Genocide* sought to prohibit genocide.¹¹² The 1949 Geneva Conventions regulated the conduct of war and most importantly entrenched the

¹⁰⁹ James Crawford, *Brownlie’s Principles of International Law* (Oxford: Oxford University Press 2012) at 673 [Crawford, *Brownlie*].

¹¹⁰ *Ibid* at 673.

¹¹¹ UN GA Resolution 51/60, 16 December 1996.

¹¹² *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] ICJ Rep. 1951.

prosecution of violation of the laws of war.¹¹³ There was a rapid expansion in both laws of war and international human rights during the Post-War era. But the same cannot be said about international criminal law. Cherif Bassiouni, one of the pioneers of international criminal law has captured the lull in international criminal law as follows:

Between 1919 and 1994 there were five ad hoc international commissions, four ad hoc international criminal tribunals, three internationally mandated or authorized national prosecutions arising out of World War I and World War II. These processes were established by different legal means with varying mandates, many of them producing results contrary to those original contemplated.

These investigations and prosecutions were established to appease public demand for a response to the tragic events and shocking conduct during armed conflict. Despite the public pressure demanding justice, investigative and adjudicating bodies were established for only a few international conflicts. Domestic conflicts, no matter how brutal, drew less attention from the world's major powers, whose political will has been imperative to the establishment of such bodies.¹¹⁴

Bassiouni's disappointment with international criminal law and its applicability to domestic conflicts alludes to a larger problem with the development of international law and its institutions in the Post-War context. On the one hand, there was the development of international law, the various subspecies of international law and the other relevant institutions noted above. All of these mechanisms, in principle, allowed newly-formed states to participate in the

¹¹³ Toni Pfanner, "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims" (2009) 91(874) Intl Rev Red Cross 279.

¹¹⁴ Bassiouni, "From Versailles to Rwanda" *supra* note 102 at 12.

international system as sovereign entities. But these newly-formed states were conceptualised, and their borders were demarcated, during the colonial period. They were then given their sovereignty either through the League's Mandate system or the United Nations' decolonisation process.¹¹⁵

These newly-formed states however included populations, and not infrequently, governments that challenged the delineation of borders by the colonial powers, which subsequently lead to mass rupture and violence in the Post-War era.¹¹⁶ In the context of the African continent, Obiora Okafor argues "[w]hether in Sudan or South Africa, Nigeria or Niger, Rwanda or Burundi [...] the post-colonial African State continues to be weakened, even torn apart by a multitude of dissociative forces".¹¹⁷ The colonial delineations constructed at the outset of the decolonisation process are seen by some as a "straightjacket with time bombs ready to explode."¹¹⁸

The central problem is that the colonisers crafted the borders of existing units of sovereign states. Such a process includes and/or excludes certain portions of the populations that may not or may have an allegiance to the newly formed

¹¹⁵ Martin Shipway, *Decolonization and its Impact: A Comparative Approach to the End of the Colonial Empires* (Oxford: Blackwell, 2008); Robert McNamara, Book Review *Decolonization and its impact: a comparative approach to the end of the colonial empires* (2008) 3:3 *Journal of Global History* 470; Yassin El-Ayouty "The United Nations and Decolonisation, 1960–70" (1970) 8 *Journal of Modern African Studies* 462–8.

¹¹⁶ Makau W. Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1994) 16 *Mich J Intl L* 1113 [Mutua "Redraw Map of Africa"].

¹¹⁷ Obiora C. Okafor, "Re-Defining Legitimacy: International Law, Multilateral Institutions and the Problem of Socio-Cultural Fragmentation Within Established African States" (PhD Thesis, UBC, Faculty of Law, 1998) online: < <http://law.library.ubc.ca/abstracts/#1998> > at 2 & 25-27 (for a detailed discussion of the crisis of legitimacy of the African state).

¹¹⁸ Mutua "Redraw Map of Africa" *supra* note 116 at 1114.

sovereign state. Conversely, the officials populating the state may have grievances with particular minority communities within their borders. In this context, the convergence of allegiance or grievance may lead to a stumbling roadblock of disagreements and disadvantages may potentially precipitate violence, as suggested by Okafor.

Anghie offers another layer of insight about the relationship between newly formed sovereigns and their respective minority communities in the Post-War period. He writes: “[...] we might see the relationship between the state and minorities, as it has been characterised in international law, as reproducing the dynamic of difference; the minority is characterised as the primitive that must be managed and controlled in the interests of preserving the modern and universal state”.¹¹⁹

Even though we see the continuation of the dynamic of difference in the Post-War period, the newly formed Third World States were not without agency. These states understood the role of international law and thus they attempted to use it as a force for justice and to challenge its very structures. Sundhya Pahuja characterises this move as: “a call for international law to transcend its imperial origins in the name of the universal”.¹²⁰ The attempts to use international law as a tool of emancipation by the international law scholars allied to the Third World

¹¹⁹ Anghie, *Imperialism* *supra* note 1 at 207.

¹²⁰ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) [Pahuja, *Decolonising*].

has been aptly denoted as the first incarnations of Third World Approaches to International Law.¹²¹

The dynamic of difference during this period can be summed up with the following: The logic of the Post-War system and the end of the Cold War gave way to an internationalist moment in 1989 with the fall of the Berlin Wall. The build-up of international institutions and their inability to function given the geo-political climate of the Post-War period created a vacuous space. Most international institutions were rendered powerless. They were captured by the politics between the West and the Soviet Block. The implosion of the Union of Soviet Socialist Republics and its Warsaw Pact caused a geo-political shift in the early 1990s. There was a proliferation of international justice regimes as result of the implosion of the Union of Soviet Socialist Republics and the conclusion of the Cold War détente.¹²² More importantly, from this period onwards, there was a rapid expansion of international criminal regimes and international criminal law.

Thus far, the narrative that I have presented demonstrates the evolution of international law and its institutions. In doing so, I have paid close attention to how the development of both international law and its institutions occurred. I exposed the inadequacies of international law and its institutions by illustrating the potential pitfalls of its universalising nature, which started at the early stages

¹²¹Antony Anghie and B.S. Chimni “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2:1 Chinese JIL 71.

of international law with Vitoria's concept of sovereignty. The move to international institutions in the global order that I have chronicled is the basis for a number of theoretical claims by international lawyers and international law scholars encapsulated within the theories of global governance. For example, some scholars use the development of the *Charter of United Nations* and the United Nations institutions as an illustration of global constitutionalism.¹²³ Global administrative lawyers trace the emergence of their specific theory of global governance back to the administrative unions of the 18th century.¹²⁴ I will explore these two theories in greater detail in the following chapters.

In this section, I traced the evolution of international law and its institutions from a broad historical perspective as means to introduce the universalism of international law and to trace the evolution of international institutions. Within this evolution, I paid particular attention to the development of international criminal law. In the next section, I turn to the three case studies from international criminal law. In this respect, I will trace the evolution of international criminal institutions and then I will chronicle the development of two ad hoc international criminal institutions of ICTR and ICTY and the International Criminal Court. By focusing on this particular subfield of international law, I will demonstrate the continued effects of the dynamic of difference and the subsequent false universalism in how we theorise global governance.

¹²³Bardo Fassbender, "The meaning of International Constitutional Law" in Nicholas Tsagourias, ed, *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press, 2007).

¹²⁴ Kingsbury *et al*, "Emergence of GAL" *supra* note 49 at 17.

1.3 Situating ICL institutions in Development of International Institutions:

Cherif Bassiouni dates the origins of international criminal law to the trials of Conradin von Hohenstaufen in 1268 and Peter von Hagenbach in 1474.¹²⁵

Robert Cryer has sought to trace the emergence of international criminal law all the way back to the antiquity. He suggests that some elements of criminal prosecution can be found in what are now China, Egypt, Greece and India.¹²⁶

Other scholars locate the first example of war crimes prosecution to the early 14th and 15th centuries, with the trial of William Wallace (Braveheart, 1305) and Joan of Arc (1431).¹²⁷ In the early 20th century there was one important instance of a potential international criminal prosecution:¹²⁸ the attempts by victors of WWI to establish an international criminal institution to prosecute the German and Ottoman war criminals.¹²⁹

Historical scholarship further supports the assertion that international criminal law started taking on its modern form right after WWI. Kristen Sellars for example

¹²⁵ M. Cherif Bassiouni, "Perspectives on International Criminal Justice" (2010) 50 Virginia Journal of International Law 269 at 296 [Bassiouni, "Perspectives on ICL"]; M. Cherif Bassiouni, "International Criminal Justice in Historical Perspectives: The Tension Between States' Interests and the Pursuit of Justice" in Antonio Cassese ed., *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 131 at 132 [Bassiouni, "ICL in Historical Perspectives"].

¹²⁶ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005) at 11 [Cryer, *Prosecuting International Crimes*].

¹²⁷ Richard J. Wilson "A History of Defence Counsel in International Criminal and War Crimes Tribunals" in Michael Bohlander *et al* eds, *Defence in International Criminal Proceedings; Cases, Materials and Commentary* (Transnational Publishers, Inc., 2006); See generally Michael Bolander, eds, *International criminal justice: a critical analysis of institutions and procedures* (London: Cameron May, 2007) at 31-34.

¹²⁸ For a detailed account of the various stages of international criminal law, see Bassiouni, "Perspectives on ICL" *supra* note 125 at 296.

¹²⁹ Bassiouni, "Perspectives on ICL" *supra* note 125 at 132.

examines the French and British desire to prosecute the deposed Kaiser Wilhelm II.¹³⁰ These attempts, as Justice Antonio Cassese, the former President of the Special Tribunal for Lebanon, argues, were fruitless owing to numerous different factors, such as sovereign equality of nation states. An international institution, therefore, was not created.¹³¹

Prosecuting the perpetrators of international crimes was not possible after WWI. The consensus to pursue justice on the part of the Allies resulted in the two different international criminal prosecutions of the German and Japanese perpetrators of mass atrocities for acts against “peace, security and well-being of the world”.¹³² The establishment of the Nuremberg International Military Tribunal (NIMT) and International Military Tribunal for the Far East (IMTFE) are frequently represented as an important policy shift in understanding state sovereignty in the international criminal law literature.¹³³ As seen through the WWI example, the grand narrative of state sovereignty prevented attribution of individual criminal

¹³⁰ Sellers, “Trying the Kaiser” *supra* note 73.

¹³¹ Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003) at 327 [Cassese, *ICL*]: “In 1919, the Commission on the Responsibility of the Authors of the War and Enforcement of Penalties proposed the establishment of a high tribunal. The victors agreed, through the peace treaty with Germany, to prosecute the leading figures responsible for war crimes and the Emperor. The Dutch however refused to extradite the Emperor. No Court was set up and eventually out of the 800 soldiers, 45 were selected for prosecution and 12 were indicted in 1921 before the Imperial Court of Justice sitting at Leipzig”; Morten Bergsmo et al eds, *Historical Origins of International Criminal Law: Volume 1* (Brussels: Torkel Opsahl Academic EPublisher, 2014).

¹³² Gerhard Werle “General Principles in International Criminal Law” in Antonio Cassese ed., *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 55.

¹³³ Hans Ehard, “Nuremberg Trial against the Major War Criminals and International Law”, (1949) 43 *AJIL* 223 at 227; Cryer, *An Introduction to ICL supra* note 71 at 115-125; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2014).

responsibility for conduct during war.¹³⁴ The sovereignty principle, developed through the scholarship of Vitoria, meant that states were immune from any outside interference, and individuals in power enjoyed immunity from prosecution for any acts conducted during their tenure as public officials.¹³⁵ Immunity (both functional and personal) is a fundamental doctrine of international law that is deeply contested in the context of international crimes.¹³⁶ State sovereignty was one of the central arguments used by the Americans for refusing to support the prosecution of the Kaiser Wilhelm II at the end of WWI.¹³⁷

The desire to prosecute the officials of the Axis Powers started as early as 1943, if not before.¹³⁸ Various official statements made by the Allies during the war demanded the prosecution of war crimes by the Axis Powers. The most significant of these statements was the *Moscow Declaration* of 1 November 1943, which provided the political backdrop for the creation of the international tribunal in Nuremberg.¹³⁹ A month prior to the *Moscow Declaration*, the Allies

¹³⁴ Sellers, "Trying the Kaiser" *supra* note 73.

¹³⁵ Gerhard Werle, "General Principles in International Criminal Law" in Antonio Cassese ed., *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 55 & 61.

¹³⁶ Asad G. Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12:3 *Chinese J Intl L* 467 .

¹³⁷ Sellers, "Trying the Kaiser" *supra* note 73.

¹³⁸ Cryer, *An Introduction to ICL supra* note 71 at 116-118; For earlier demands for prosecution, see Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes" (1944) 21 *Bri YB Intl L* 58 at 59; Philip M. Brown, "International Criminal Justice" (1941) 35 *AJIL* 118.

¹³⁹ Cryer summarizes the declaration as follows: "the . . . [United States, United Kingdom and USSR] . . . speaking in the interests of the 32 United Nations . . . decla[red] . . . at the time of the granting of any armistice to any government that may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of the liberated countries and of the free governments which will be erected therein . . . the above declaration is without prejudice to the Case of the major criminals whose

had created the United Nations War Crimes Commission. The Commission was tasked with investigating war crimes and providing advice on the punishment. The Commission operated from 1943 to 1948 to investigate war crimes and, later, to advise on the process for punishment.¹⁴⁰

The *Moscow Declaration* was a promise to punish those responsible for war crimes. There was considerable discussion about the type of punishment and in the end British Prime Minister Winston Churchill had to be convinced of the merits of an international trial rather than summary execution.¹⁴¹ Cassese suggests that “[A]fter the defeat of Germany, the British led by Churchill, stated that it was enough to arrest and hang those primarily responsible [...], without wasting time on legal procedures”.¹⁴² The Americans, and to some extent their Russian counterparts, had to convince Churchill of the advantages of prosecuting the war criminals.¹⁴³ There were various arguments that were advanced in support of the triumph of rule of law over barbarism.¹⁴⁴ The first and most important reason was to ensure that rule of law and democracy

offences have no particular geographical location and who will be punished by a joint declaration of the governments of the Allies”; Cryer, *Prosecuting International Crimes supra* note 126 at 37.

¹⁴⁰ Dan Plesch and Shanti Sattler, “Before Nuremberg: Considering the Work of the United Nations War Crimes Commission of 1943–1948” in Morten Bergsmo et al eds, *Historical Origins of International Criminal Law: Volume 1* (Brussels: Torkel Opsahl Academic EPublisher, 2014) at 437.

¹⁴¹ Cryer, *An Introduction to ICL supra* note 71 at 117.

¹⁴² Cassese, *ICL supra* note 131 at 320.

¹⁴³ Lippman presents a detailed discussion of the American position; Matthew Lippman, “Nuremberg: Forty Five Years Later” (1991) 7 Connecticut Journal of International Law 1 at 22-26.

¹⁴⁴ Cassese, *ICL supra* note 131 at 320.

prevailed by affording the accused with a fair trial.¹⁴⁵ The Chief Prosecutor of the NIMT, Robert Jackson in his opening address captured the triumph of rule of law in the following manner in 1945:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason. This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times-aggressive war. The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.¹⁴⁶

Upon this basis, the *London Agreement* established the NIMT, which was negotiated as a treaty between the Allies.¹⁴⁷ The NIMT was created through a multilateral agreement between the allied nations, United Kingdom, United States, Union of Soviet Socialist Republics and France.¹⁴⁸ The Agreement was the result of concessions between the Americans and their Soviet counterparts. The disagreements during the negotiations seemed so fundamental and often

¹⁴⁵ Other reasons include: historical documentation and historical records of the barbaric crimes committed by the Nazi war criminals; preserving the memories of the victims; for a detailed account of these reasons, see Cassese, *ICL supra* note 131 at 319-323; For an in-depth analysis of the rule of law rationale, see Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes" (1944) 21 *Bri YB Intl L* 58.

¹⁴⁶ Robert H Jackson, *Opening Statement Before the International Military Tribunal*, online: <www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/>, cited in *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg: IMT, 1947) 98.

¹⁴⁷ *1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal* 8 UNTS 279.

¹⁴⁸ *Agreement for the Prosecution and Punishment of Major War Criminal of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT)*, 8 August 1945, 82 UNTS (1951) 279; Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, GA Res 95 (1), UN GAOR, 1st Sess., pt. 2 at 1144, UN Doc. A/236 (1946).

turned on conceptions of law and legal process, such as the distinctions between the adversarial and inquisitorial legal traditions. The Tribunal included eight judges (one main and one alternate for each of the allied powers).¹⁴⁹ It received the indictments on 1 October 1945, which included four different charges based on the NIMT's *Charter*: the crime of conspiracy, crimes against the peace, war crimes and crimes against humanity. The four respective Allies each provided a 'chief prosecutor' responsible for the prosecution of these crimes.¹⁵⁰ The Tribunal indicted 24 defendants and seven organizations.¹⁵¹

Unlike their response to German actions, the Allies did not make statements of criminal responsibility regarding the Japanese until the latter part of WWII. The most important statement by the Allies is the Potsdam Declaration of 1945, which set out the terms of surrender of the Japanese.¹⁵² The IMTFE was created through an executive decree of General Douglas MacArthur, the supreme commander of the Allied Powers in Japan. He was acting under the authority of the United States Joint Chiefs of Staff.¹⁵³ This founding instrument of the IMTFE was, therefore, legally a matter of US domestic law.¹⁵⁴ Similar to the NIMT, the IMTFE included 11 judges and sought to prosecute 28 defendants with over 750

¹⁴⁹Cryer, *An Introduction to ICL supra* note 71 at 117.

¹⁵⁰*Ibid* at 117.

¹⁵¹Quincy Wright, "Law of Nuremberg Trial" (1947) 41:1 AJIL38 at 40-42.

¹⁵² Cryer, *Prosecuting International Crimes supra* note 126 at 42.

¹⁵³ International Military Tribunal for the Far East, Special Proclamation on the Establishment of an international Military Tribunal for the Far East.

¹⁵⁴ Robert Cryer, "Tokyo International Military Tribunal" in Antonio Cassese ed., *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 535 at 535; Bassiouni, "From Versailles to Rwanda" *supra* note 102 at 32-33.

individual charges. The Emperor of Japan was not prosecuted. These charges related to crimes against peace, war crimes and crimes against humanity.¹⁵⁵

These two examples of international prosecutions were replete with problematic procedure and practices. These problems take us back to Anghie's dynamic of difference that chronicled in the first section of this chapter. The problems centred on victors' justice, denial of due process rights, and violation of fundamental rights.¹⁵⁶ Trial fairness was a genuine concern for the IMT's Indian Justice Radhabinod Pal and this was included in his dissenting opinion. Justice Pal's dissent deemed the prosecution of the Japanese as 'vindictive retaliation' and an exercise of neo-colonialism by the war's victors.¹⁵⁷ He argued that the exemption from prosecution for the atomic bombing of Japan by the Americans, colonial aggression and territorial annexation by the Allies all rendered any attempts to punish the Japanese unjust. More importantly, he was highly critical of the decision to mandate the tribunal to prosecute undefined crimes:

To say that the victor can define a crime at his will and then punish for that crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants or take them away into captivity. When international law will have to allow a victor nation thus to define a crime at his will, it

¹⁵⁵ Cryer, *Prosecuting International Crimes supra* note 126 at 42.

¹⁵⁶ Alexander Zahar & Goran Sluiter, *International Criminal Law; A Critical Introduction* (Oxford: Oxford University Press, 2009).

¹⁵⁷ International Military Tribunal for the Far East, *United States et al. v. Araki Sadao et al.*, Dissenting Judgment of Justice Pal (Tokyo: Kokusho-Kankokai, 1999) [IMTFE Justice Pal Dissent].

will [...] find itself back on the same spot whence it started on its apparently onward journey several centuries ago.¹⁵⁸

Justice Pal's dissent then is encapsulated in the interruptions I presented in the earlier section vis-à-vis the universalism through Anghie's dynamic of difference endemic in international law and international institutions. Justice Pal dissent is perhaps the first TWAAIL based critique of international criminal law. The dissent represents a dark and often forgotten aspect of international criminal law.¹⁵⁹ Furthermore, in thinking about international prosecutions, we can see how a gap is created between distinct cultures, or parties at war, where the victors' ideals of justice are hoisted up as the universal and the losers' practices are deemed barbaric. Prosecuting the losers for international crimes then fills the gap.¹⁶⁰ This is even more illustrative in the context of the atomic bomb and its enduring effects on Hiroshima.

According to the traditional progress narrative of international law¹⁶¹, the two *sui generis* tribunals of ICTR and ICTY and the International Criminal Court are the

¹⁵⁸ *Ibid* 23-24.

¹⁵⁹ For recent attempts to examine the history and implications of IMFTE, see Yuki Tanaka, Tim McCormack & Gerry Simpson, "Editors' Preface" in Yuki Tanaka, Tim McCormack & Gerry Simpson, eds, *Beyond Victors Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011) xxvii; Kristen Sellars, Imperfect Justice at Nuremberg and Tokyo (2011) 21:4 EJIL 108; for Japanese perspective on Justice Pal, see Nakajima Takeshi, "Justice Pal (India)" in Yuki Tanaka, Tim McCormack & Gerry Simpson, eds, *Beyond Victors Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011) 127.

¹⁶⁰ Anghie, *Imperialism supra* note 1 at 4.

¹⁶¹ The progress narrative is clearly illustrated in Crawford's most recent *Brownlie's Principles of Public International Law* with the following: "It is not too much of an exaggeration to say that the United Nations era began with a trial and a promise. [...] But despite the Tokyo trials and some further trials in Germany, mostly under the auspice of the occupying powers, the arena of international criminal law became populated by conventions largely without implementation. [...] Then, in the early 1990's, the arena came to life: ad hoc criminal courts were created by the

direct descendants of the NMIT and IMTFE.¹⁶² The gap of nearly 60 years between the two instantiations of international prosecution is largely credited to the politics of this period.¹⁶³ It is often argued that a casualty of the Cold War was the desire to prosecute those responsible for mass human atrocities.¹⁶⁴ Bassiouni alludes to this with the following reflection: “[S]oon after World War II, the cold war began and efforts to advance international criminal justice gave way to the political conflict between East and West”.¹⁶⁵ Putting aside the linear progress-based narratives, there is some truth to the assertions that Cold War politics prevented the international community from acting to either prosecute those responsible for mass human rights violations or prevent such atrocities. For example, the United Nations Security Council, and even the United Nations General Assembly, was often unable to deliver concrete decisions given the voting patterns of the West and its allies and the Eastern communist block during the Post-War period. Ultimately, allegations of international crimes were often marshalled by one side against the other, with little benefit for those on the ground experiencing human rights violations.

Security Council decree, a permanent International Criminal Court was established at great speed, and there was much other activity”; Crawford, *Brownlie supra* note 109 at 671; See also, Cassese, *ICL supra* note 131 at 324-327; Bassiouni, “From Versailles to Rwanda” *supra* note 102; Cryer, *An Introduction to ICL supra* note 71 at 127.

¹⁶² Alexander Zahar & Goran Sluiter, *International Criminal Law; A Critical Introduction* (Oxford: Oxford University Press, 2009) at 6; Martti Koskeniemi, “Between Impunity and Show Trials” in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition) at 35;

¹⁶³ Bassiouni, *ICL in Historical Perspectives supra* note 125 at 137.

¹⁶⁴ *Ibid* at 139.

¹⁶⁵ *Ibid* at 137.

The following sections will provide an account of the process by which modern international criminal institutions have been created since 1989 as set out in the current academic literature. This account is provided to illustrate the history of these institutions. My central purpose is to present the ideals encapsulated in the creation of these institutions through their formal mechanisms. Subsequently, I will demonstrate how the institutions present a singular aspiration to promote a particular Western narrative of justice, that is part of the history of international law. This chapter (and the previous section specifically) established how international law and international institutions have evolved and how this evolution is described in the contemporary literature. Moreover, as is apparent in preceding descriptions of international law and international institutions, there is often an omission of certain key-facts. For example, international lawyers and international law scholars often ignore the role of colonialism and imperialism in the development of the sovereignty doctrine and international law in general. Our orthodox historical understanding of Vitoria does not include his role in theorising the relationship between the Spanish colonisers and the local indigenous inhabitants. This omission, as I argue in the chapters that follow, is a key feature of international law and its institutions and this feature is very relevant in how we theorise global governance today.

The manner in which three different international criminal institutions were created will be set out in the following sections. Some of the difficulties that these institutions have encountered will also be explored. I characterise these difficulties as part of international law's tendency to present the western

particular as universally applicable. These three case studies demonstrate that the repetition of the dynamic of difference is present at all levels of international prosecutions and adjudication. The dynamic of difference, for example, is visible in the selectivity both of creating these tribunals and of prosecuting particular (African) heads of state. Moreover, it is also visible in how the procedures are created and implemented within the institutions. In the following section, I focus on the ICTY, ICTR and ICC. I will not include the three other current institutions – the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, that form an intimate part of the international criminal justice regime.

In the first case study, the focus is on ICTY and its completion strategy as it relates to the rights of the accused. I will present the changes to the Rules of Evidence and Procedure as law-making by the judges of the tribunals and outline the deleterious effects of these initiatives on the rights of the accused in three registers: First, the amendments to the rules have repealed judicial decisions in certain cases; second, the changes to the rules have precipitated trial delay; and third, reformulation of the rules has allowed new evidence on appeal to be admitted. By honing in on these three aspects, what becomes demonstrable is the disparity between the goals of the ICTY in providing justice to the victims and bringing the accused to justice through the violation of the rights of the accused. In exploring these disparities, the dynamic of difference theorised by Anghie is once again made visible.

The dynamic of difference as noted earlier, is the creation of cultural differences between two cultures, characterising one as universal and the other as uncivilized, and thus bridging the gap between these two cultures. The ICTY *Statute* and international human rights standards prohibit trial unfairness. Trial fairness is jeopardised when judicial decisions are repealed through what may seem like a judicial fiat by changing the rules of evidence and procedure. But these international human rights standards are not applicable to the accused before the ICTY because they have allegedly committed barbaric atrocities against civilian populations. The barbaric war criminals are deemed unworthy of these basic fundamental rights. What emerges from this first case study is a dichotomy between ending impunity and doing so while affording the due process guarantees to the accused. The lens of the dynamic of difference allows us to see how the singular narrative of ending impunity, a universal aspiration encompassed in the development of international law, is extended to the barbaric acts of the perpetrators of war crimes, crimes against humanity and genocide. But simultaneously, the exercise of bridging the gap between the universal and uncivilized does not occur completely rather it is somewhat lackadaisical. Similarly in the second case study, I focus on ICTR and witness testimony and the role of experts, which demonstrates the dynamic of difference in operation. In the third case study, I explore the International Criminal Court and its prosecutorial policy as evidence of Anghie's dynamic of difference.

1.4 ICTY and ICTR: From Nuremberg to The Hague, the continuation of the progress narrative?

The break-up of the former Yugoslavia started in the early 1990's and eventually escalated into an international armed conflict with mass human rights violations.¹⁶⁶ In 1992, the UN Security Council (UNSC) requested that the UN Secretary General establish an impartial Commission of Experts to examine, analyse, and provide "conclusions on the evidence of grave breaches of international humanitarian law committed in the territory of the former Yugoslavia".¹⁶⁷ In its first interim report, the Commission, chaired by Cherif Bassiouni, concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of former Yugoslavia.¹⁶⁸ While the Commission undertook its important work, the UN Secretary General canvassed states about the creation of a future tribunal as a UN Security Council subsidiary organ, rather than a treaty based institution.¹⁶⁹ With the submission of the first interim report by the Commission of Experts,¹⁷⁰ the Security Council decided to prosecute those responsible for the crimes against humanity, genocide and war crimes. In response to a request by the UN Security Council through *Resolution 808*, the UN Secretary General recommended a tribunal by

¹⁶⁶ *Prosecutor v. Tadić* (2000) Case No. IT-94-1-T paras 70-126; Cryer, *An Introduction to ICL supra* note 71 at 127.

¹⁶⁷ UNSCOR, UNSC Resolution 780, 3119th Meeting, 780 S/RES/780 (1992); 15 yes and 0 No/Abstentions, non-permanent members: Austria, Belgium, Cape Verde, Ecuador, Hungary, India, Japan, Morocco, Venezuela and Zimbabwe.

¹⁶⁸ UNSCOR, Report of Secretary General, S/1994/674 (1994) at para 10; M. Cherif Bassiouni, "The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)" (1994) 88 Am J Intl Law 784 at 790-791.

¹⁶⁹ Cryer, *An Introduction to ICL supra* note 71 at 128.

¹⁷⁰ Bassiouni, "From Versailles to Rwanda" *supra* note 102.

resolution, rather a treaty based institution.¹⁷¹ The UN Secretary General's report included a draft statute for the tribunal, in which he laid out the possible language for the future statute based on "provisions found within the existing international law, particularly with regard to the competence of the *rationae materiae*".¹⁷² In some ways, this statute was modelled on "on the Nuremberg IMT's Charter".¹⁷³ The report also contained a brief commentary on each proposed provision of the statute. Pursuant to *Resolution 827*, the UN Security Council created the ICTY on 27 May 1992, relying on its *United Nations Charter* Chapter VII powers to maintain peace and security.¹⁷⁴

During the same time period, the conflict between the Rwandan Peoples Front (RPF) and the Hutu led Rwandan government escalated. By mid 1994, it was clear to the international community that genocide was occurring in Rwanda.¹⁷⁵ Even though many of the factors that precipitated the creation of the ICTY were present in the Rwandan context, there was some reluctance on the part of the world leaders to create an international tribunal because of the costs associated with such a project.¹⁷⁶ Cassese suggests the following:

¹⁷¹ Cryer, *An Introduction to ICL supra* note 71 at 128; UNSCOR, UNSC Resolution 808, 3175th Meeting, S/RES/808(1993); 15 Yes, 0 No/Abstentions, non-permanent members: Brazil, Cape Verde, Djibouti, Hungary, Japan, Morocco, New Zealand, Pakistan, Spain, and Venezuela.

¹⁷² UNSCOR, Report of Secretary General, S/1994/674 (1994) at para 17; Cryer, *An Introduction to ICL supra* note 71 at 128

¹⁷³ Cryer, *An Introduction to ICL supra* note 71 at 128.

¹⁷⁴ ICTY *Statute*, UNSC Resolution 827, UNSCOR, 3217th Meeting, S/RES/827 (1993) [ICTY *Statute*]; 15 Yes, 0 No/Abstentions, non-permanent members: Argentina, Brazil, Czech Republic, Djibouti, New Zealand, Nigeria, Oman, Pakistan, Rwanda and Spain.

¹⁷⁵ Virginia Morris & Michael P. Scharf, *International Criminal Tribunal for Rwanda Volume 1* (New York: Transnational Publishers, 1998) at 59 [Morris & Scharf, *ICTR V1*].

¹⁷⁶ *Ibid* at 62.

“[S]ensitive to the criticisms that the establishment of the ICTY represented yet another illustration of the disproportionate attention paid to the problems of Europe vis-à-vis the developing world, the international community was also anxious to establish a Tribunal for Rwanda so as to assuage its conscience and shield itself from accusations of double standards”.¹⁷⁷

Almost 18 months later, through *Resolution 935*, the UNSC established the Commission of Experts to investigate the atrocities committed during the Rwandan genocide from January 1994 to December 1994.¹⁷⁸ The Secretary General of the UN appointed three experts from the region to the Commission of Inquiry, and a final report was submitted to the UN Security Council in October 1994. According to the Commission of Experts, “since 6 April 1994, an estimated 500,000 unarmed civilians have been murdered in Rwanda”.¹⁷⁹ *Resolution 955* established the ad hoc International Criminal Tribunal for Rwanda along with its empowering *Statute*.¹⁸⁰

Leading up to the resolution, the issue of whether the Rwandan conflict was an international armed conflict or non-international conflict was fervently debated by the various parties. The Commission of Experts report clearly states that the Rwandan conflict was a non-international conflict.¹⁸¹ The severity of the

¹⁷⁷ Cassese, *ICL supra* note 131 at 327.

¹⁷⁸ Morris & Scharf, *ICTR V1 supra* note 175 at 63-64; Cryer, *An Introduction to ICL supra* note 71 at 139; Payam Akhavan “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment” (1996) 90:3 *AJIL* 501 at 504 [Akhavan, ‘ICTR: The Politics’].

¹⁷⁹ UNSCOR, Report of Secretary General, S/1994/1125 (1994) at para. 43.

¹⁸⁰ *ICTR Statute*, UN SCOR, UNSC Resolution 935, 3400th mtg. (49th Sess.), UN Doc S/RES/935 (1994) [ICTR Statute]; 13 yes, 1 no (Rwanda) 1 (ab. China): non permanent members: Argentina, Brazil, Czech Republic, Djibouti, New Zealand, Nigeria, Oman, Pakistan, Rwanda and Spain.

¹⁸¹ UNSCOR, Report of Secretary General, S/1994/1125 (1994) at para. 91.

atrocities, however, caused the United Nations Security Council to utilise its *Chapter VII* powers to create the institution. In the context of the ICTR, the United Nations Security Council followed a one-step process in creating the tribunal, rather than the two-step process that was followed with the ICTY.¹⁸²

The negotiations within the United Nations Security Council were spearheaded by the United States and New Zealand, including the drafting of the statute. Even though the RPF initially supported the Tribunal, once it formed the Unity Government, there was an attempt to rethink its commitment to international prosecutions.¹⁸³ Rwanda voted against the resolution at the end. It did however promise to co-operate with ICTR, while China abstained.¹⁸⁴

The ICTY *Statute* has 34 provisions and *ICTR Statute* has 32 provisions, which delineate the international crimes, the organisational structure and the composition of the tribunal.¹⁸⁵ The statutes set out four punishable crimes (genocide, grave breaches of the 1949 Geneva Convention, war crimes, and crimes against humanity¹⁸⁶). Since both institutions were temporary, the judges initiated the completion strategy in 2003 (ICTR) and 2004 (ICTY)¹⁸⁷ respectively so that both tribunals were expected to complete their cases in the following

¹⁸² Akhavan, "ICTR: The Politics" *supra* note 178 at 502.

¹⁸³ Morris & Scharf, *ICTR V1 supra* note 175 at 66.

¹⁸⁴ Roy Lee "The Rwanda Tribunal" (1996) 9 *Leiden J Intl L* 37 at 43.

¹⁸⁵ ICTY Statute *supra* note 174.

¹⁸⁶ Article 2, 3 and 4, *Ibid.*

¹⁸⁷ See ICTR/ICTY Completion Strategy in Sarah Williams, "ICTY and ICTR (Completion Strategy)" in Antonio Cassese ed, *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 362-363; Cryer, *An Introduction to ICL supra* note 71 at 133-136 & 141-142.

years. The ICTY is set to deliver its final judgment in 2016 (trial level), while the ICTR hoped to deliver its final appeal decision in July 2015.¹⁸⁸ Both institutions have also adopted a policy to strengthen the national judicial system of each respective institution.

ICTY is the catalyst for creating war crimes chambers in Bosnia and Herzegovina, Serbia, and Croatia with the support of the United Nations Security Council. These chambers focus on the intermediate and lower-level officials accused of committing serious human rights violations, and are also part of ICTY's completion strategy. Similarly, the Rwandan regular and *Gacaca* courts are in the process of prosecuting intermediate and lower-level officials.¹⁸⁹

As set out in the resolutions, the purpose of these institutions is: (i) to bring to justice persons allegedly responsible for the violation of international humanitarian law, (ii) to render justice to the victims, (iii) to deter future crimes and (iv) to restore peace by ending impunity.¹⁹⁰ It is certain that these goals of international criminal institutions are part of the larger universalising mission of international law that was discussed in the previous section.

¹⁸⁸ ICTY Completion Strategy, online: <<http://www.icty.org/sid/10016>>.

¹⁸⁹ Cecile Aptel "Gacaca Courts" in Antonio Cassese ed, *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 330; The Gacaca court is the domestic Rwandan court used to prosecute those suspected of having participated in the Rwandan Genocide in 1996. These courts exist and function parallel with the regular courts.

¹⁹⁰ Sarah Williams, "ICTY and ICTR (Completion Strategy)" in Antonio Cassese ed, *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 362-363 [Williams, "Completion Strategy"].

1.4.1 The Costs of Justice: International Criminal Tribunal for former Yugoslavia as a Case Study

The creation of the International Criminal Tribunal for former Yugoslavia in 1993 was a pivotal moment for the international community: the violation of inalienable human rights reached traumatic levels in specific regions of the country and thus the international community decided to intervene.¹⁹¹ But as early as 1997, commentators and member states of the United Nations started to raise concerns about the efficiency and the costs associated with the Tribunal.¹⁹² Some writers argue that these concerns originated from within the Tribunal and as a response to the 1997 annual report of ICTY.¹⁹³ As the growing dissatisfaction with the efficiency of ICTY germinated, the members of the Security Council were concerned because of the costs associated with prosecuting war criminals.¹⁹⁴ There were several flaws in the very design of the Tribunal that precipitated these criticisms.¹⁹⁵ Concerns over efficiency and costs associated with the Tribunals day-to-day operations gave rise to significant

¹⁹¹ Norman Farrell, "ICTY" in Antonio Cassese ed, Oxford Companion to International Criminal Justice (Oxford: Oxford University Press, 2009) at 357; Cryer, *An Introduction to ICL supra* note 71 note at 127.

¹⁹² Ralph Zacklin, "The Failings of Ad hoc International Tribunals" (2004) 2:2 Journal of International Criminal Justice 541 at 543-545; Cryer, *An Introduction to ICL supra* ICL *supra* note 71 at 137.

¹⁹³ Daryl A. Mundis "The Judicial Effects of the 'Completion Strategies' on the Ad hoc International Criminal Tribunals" (2005) 99 AJIL142 at 143; Daryl A. Mundis, *New Mechanisms/or the Enforcement of International Humanitarian Law* (2001) 95 AJIL934.

¹⁹⁴ Williams, "Completion Strategy" *supra* note 190 at 154.

¹⁹⁵ There was no specific end date set out in the Statute; ICTY Statute *supra* note 174. Furthermore the UN Security Council established the mandate of the Tribunal. With reference to the ICTY, there was no specific temporal jurisdiction and thus there was a possibility of prosecuting a vast number of suspects. The enabling resolution did not provide clear guidance as to the personal jurisdiction of the institution. The resolution indicated that the *ad hoc* Tribunal was charged with prosecuting persons responsible for serious violations; Williams, "Completion Strategy" *supra* note 190 at 155.

results. These outcomes serve to illustrate how the mandate of this institution quickly morphed from ending impunity to ending impunity quickly and cheaply.

While on the surface, the descriptive and normative elements of this international criminal institution may signal the concretisation of a constitutional moment¹⁹⁶, the reality is different. The internal dynamics of the Tribunal are plagued with contradictions. This is not surprising, given what we know from the history of international law and its institutions discussed earlier in this dissertation. The central purpose of the Tribunal is purportedly to deliver justice to the victims and bring the perpetrators to justice. However financial constraints necessitated a different ethos, one where corners were cut as a means to ensure expedient and efficient trials. In laying the foundation for this argument, it is appropriate to examine the powers of the judges to create and amend the rules of evidence and procedure. Judges of both ad hoc Tribunals have this power, but in this section I will focus on the ICTY. Article 15 of the ICTY *Statute* states:

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.¹⁹⁷

This significant legislative power granted to judges has enabled approximately 40 amendments to the Rules after its initial drafting. Ultimately, the Rules are there to fill in the gaps of the *Statute*. They consist of ten sections, with 127

¹⁹⁶ See chapter 3, section 3.3, 3.4 & 3.5..

¹⁹⁷ ICTY *Statute supra* note 174.

provisions. The Rules cover every aspect of the Tribunal's work from investigations, trials to appeals and thus form the background operating system of the Tribunal as a whole. The powers of the judges of this particular Tribunal to legislate exceed those of domestic and International Criminal Court judges in drafting and amending the rules of evidence and procedure.¹⁹⁸

For example, the separation of powers within national jurisdictions is defined by the various domestic constitutional arrangements. The arrangements prohibit violations of fundamental rights enshrined therein by state agencies or governmental omission and any such violations are deemed justiciable.¹⁹⁹ There are constitutional orders that vary in how they envision the role of their judges. What is certain however is that the judges cannot make laws or amend laws explicitly in these jurisdictions. Yet this is the standard practice at the ICTY.²⁰⁰

From the perspective of the accused, the *Statute* along with the Rules do not include specific provisions to challenge changes to the rules in the judicial review

¹⁹⁸ See for example s. 46 of *Federal Courts Act, R.S.C.*, 1985, c. F-7. The rules committee can: Subject to the approval of the Governor in Council and subject also to subsection (4), the rules committee may make general rules and orders (a) for regulating the practice and procedure in the Federal Court of Appeal and in the Federal Court [...].

¹⁹⁹ Craig Scott and Patrick Macklem define "justiciability" as a matter suitable for judicial determination. For them this refers to the "ability to judicially determine whether - person's right has been violated or whether a state has failed a constitutionally recognized obligation to respect, protect and fulfill a persons right"; Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitutions" (1992) 141 (1) *U Pa L Rev* at 17; Robin L. West, "Ennobling Politics", in H. Jefferson Powell & James Boyd White eds, *Law and Democracy in the Empire of Force* (Ann Arbor, Mich.: University of Michigan Press 2009).

²⁰⁰ Jerome De Hemptine, "Amendments to RPE" in Antonio Cassese ed, *Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) at 241-243.

sense.²⁰¹ Once a rule has been amended, no matter the effects on the rights of accused, there is no way to challenge the rules application. However, there are possibilities to review particular decisions using the regulations and directives of the Tribunal.²⁰²

There is an appeal procedure, as set out by the *Statute* to challenge judicial decisions based on the standards of review. On the surface, as set out in the enabling ICTY *Statute*, there are no implicit methods to challenge the decisions of the Tribunal, unless it relates to a matter of fact, law or procedural error (encapsulated within the appeals provisions). There is no other possibility to challenge any decisions before any other competent international body either.²⁰³

The legislative powers of the judges to amend the rules do have significant consequences on the manner in which the Tribunal functions. I will provide three illustrative examples that have resulted in law-making by the judges. These amendments have resulted in the judges legislating. These three illustrations, from the accused's perspective demonstrate that a singular and universal narrative of human rights is only applicable to some and not all. That is, even though the Tribunal is bound to protect the fair trial rights of the accused, it does

²⁰¹ ICTY Statute *supra* note 174 arts. 2–5.

²⁰² Gideon Boas, James L. Bischoff, Natalie L. Reid & Don Taylor III, *International Criminal Law Practitioner Library: International Criminal Procedure* (Cambridge: Cambridge University Press, 2011) at 37 [Boas *et al*, ICP].

²⁰³ The only visible exception is the dispute settlement regime set up in the International Criminal Court's *Rome Statute* where state parties can refer any conflicts amongst each other to the International Court of Justice; Article 119, *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 3 [*Rome Statute*]

not do so for a whole host of reasons. Anghie's dynamic of difference in particular helps us understand this more explicitly.

1.4.1.1 Repealing Judicial Decisions & Judicial Law-making

There are instances in which the judges have amended the Rules in order to overrule the decision of the ICTY Appeals Chamber.²⁰⁴ The most significant example is the Appeals Chamber's decision to overturn the Trial Chamber's decision to proceed without the third member of its panel in *Prosecutor v. Zoran Kupreskic et al.* During the trial proceedings in February 1999, the presiding judge informed the parties that one of their judicial colleagues was ill and was "unlikely to be able to attend the hearings during the remainder of the week".²⁰⁵ In light of these circumstances and for effective time management purposes, the presiding judge enquired whether the parties were prepared to "request that depositions pursuant to Rule 71 be taken from the defence witnesses scheduled to be heard during this time-period".²⁰⁶ The prosecutor made such an application against the wishes of the accused. The remaining members of the panel went ahead with the deposition.²⁰⁷ The witness' evidence was taken by way of deposition with the two judges present, acting as presiding officers.

²⁰⁴ Boas *et al*, *ICP supra* note 202 at 33.

²⁰⁵ *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic and Vladimir Santic*, Case No. IT-95-16-AR73.3 at para. 4.

²⁰⁶ *Ibid.*

²⁰⁷ "We rule that in spite of the opposition of the Defence counsel and the accused, Rule 71 is fully applicable because according to this Rule the request of one party is sufficient, and we feel that we are confronted with exceptional circumstances and that the interests of justice command that a fair and expeditious trial be held"; *Ibid* at para. 6.

The accused appealed this decision to include the testimony. The Appeal Chamber agreed with the accused, noting that “[G]iven the plain and ordinary meaning of the latter provision, a Trial Chamber is only competent to act as a Trial Chamber per se if it comprises three Judges”.²⁰⁸

Four months later, the judges, acting in plenary, amended Rules 15 and 71 and created Rule 15 *bis*. This new rule overturned the ICTY Appeals Chamber’s five-member panel decision in *Kupreskic*. The new rule allowed the judges, in the event that one of their panel members is ill or unable to attend the hearing, to order “the hearing in the case continue in the absence of that judge”.²⁰⁹ This amendment’s direct effect was to overturn the ICTY Appeal Chamber’s decision in *Kupreskic*. There are other examples in which the judges acting in plenary have sought to overturn decisions. Gideon Boas suggest that judges have overturned the chambers decisions in “core areas of the law, including the procedure for the delivery of discrete sentences for each finding of guilt by a trial chamber; amending the provisions on the right of appeal [...]”.²¹⁰

In the example of *Kupreskic*, the accused’s right to a fair trial, as set out by the *Statute*, is irrelevant. The judicial practice to amend the rules²¹¹ demonstrates what matters most: the expediency and efficiency of the ICTY. The universalist

²⁰⁸ *Ibid* at para. 14.

²⁰⁹ Boas *et al*, *ICP supra* note 202 at 34.

²¹⁰ *Ibid* at 35, especially footnotes 60 & 61.

²¹¹ Maximo Langer & Joseph W. Doherty “Managerial Judging Goes International but its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms” (2011) 36 *Yale J Intl L* 241 [Langer & Doherty, “Managerial Judging”].

arguments in favour of ending impunity takes over, where the judges palpably ignore the rights of the accused set out in the *Statute*. Getting the job done (prosecution), spending less money and moving on to the next case are the ultimate goal. The judges, and other participants of the Tribunal are able to forgo the rights of the accused based on the alleged barbaric acts perpetrated against the victims.²¹² By deeming the perpetrators uncivilised, the Tribunal is able to transcend its human rights requirements.

Anghie's dynamic of difference thus helps us understand how the desire to end impunity trumps the fundamental rights of the accused. The central goal of the Tribunal was to deliver justice to the victims and bring the perpetrators to justice. As noted earlier, the conflict was precipitated by the collapse of the Union of Soviet Socialist Republics and the collapse of Communist Yugoslavia. In one of its first decisions, *Prosecutor v. Tadić*, the Tribunal, after having detailed the colonial history of the region, notes the following:

The years from 1945 to 1990 had no tales of ethnic atrocities to tell. Marshal Tito and his communist regime took stern measures to suppress and keep suppressed all nationalist tendencies. Under its Constitution of 1946, the country was to be composed of six Republics: Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro and two autonomous regions, Vojvodina and Kosovo, these two being closely associated with Serbia. The peoples of the Republics other than Bosnia and Herzegovina were regarded as distinct nations of federal Yugoslavia. The situation of Bosnia and Herzegovina was unique; although it was one of the six Republics, it, unlike the others, possessed no one single majority ethnic grouping and thus there

²¹² For an account of pro-conviction bias, see Nancy A. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010) [Combs, *Fact-Finding*].

was no recognition of a distinct Bosnian nation. However, by 1974 the Muslims were considered to be one of the nations or peoples of federal Yugoslavia.²¹³

As noted by the Tribunal, the Balkan region has a unique cultural history that is rooted in the colonial history of the Ottoman Empire.²¹⁴ In creating the Tribunal well before the end of the conflict in 1995²¹⁵, the Security Council dictated the process by which justice was to be rendered. The Security Council believed that the new breakaway sovereign states (or the former republics under the Communist Constitution) could not handle their own sovereign affairs.²¹⁶ The decision to create the Tribunal as a subsidiary organ of the Security Council and not a treaty-based body is illustrative of the dynamic of difference. There was a fear amongst those pushing for the creation of the tribunal that the new sovereign states of the former Yugoslavia would not ratify the treaty.²¹⁷ The Secretary General in his report to the Security Council thus states:

20. As has been pointed out in many of the comments received, the treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratification will be received from those states which should be parties to the treaty if it is to be truly effective.

[...]

22. In light of the disadvantage of the treaty approach in this particular case and of the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes

²¹³ *Prosecutor v. Tadić* (2000) Case No. IT-94-1-T at para. 65.

²¹⁴ *Ibid* at para. 64.

²¹⁵ Cryer, *An Introduction to ICL* *supra* note 71 at 127.

²¹⁶ Antony Anghie and B.S. Chimni, "Third World Approaches to International and Individuals Responsibility in Internal Conflicts" (2003) 2:1 Chinese J Intl L Law 71.

²¹⁷ Cryer, *An Introduction to ICL* *supra* note 71 at 128.

that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. Such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.²¹⁸

The Security Council therefore created the Tribunal. In doing so, it grants the judges, similar to the NIMT, the power to amend their rules of evidence and procedure. Two cultures are present in this context. One is deemed superior and universal and the other is seen as unable to handle their domestic affairs and render justice to the victims and bring the perpetrators to justice. Thus the Security Council bridges this gap by creating the Tribunal. It does so as a means to ensure that the Tribunal implements the superior culture's standards and renders justice to the victims by prosecuting those responsible for the violation of the laws of war.²¹⁹

In the *Kupreskic* example, the alleged perpetrators are before the Tribunal facing charges of genocide, war crimes and crimes against humanity as part of that goal of rendering justice. But simultaneously, because of costs, their fundamental right to a fair trial, as set out by the *Statute* (drafted and implemented by the UN Security Council), is ignored through the law-making capacity of the judges. The judges of the Tribunal were granted the power to amend the rules as they saw fit in fulfilling their goal of ending impunity. In this instance they choose to do so at

²¹⁸ Report of the Secretary General Pursuant to Paragraph 2 in Security Council Resolution 808 (1993), UN Doc. S/1994/674 of 27 May 1994, para 20 & 22.

²¹⁹ Anghie, *Imperialism supra* note 1 at 4.

the expense of the accuseds' right to a fair trial. Viewed from this perspective, the accused, given their alleged complicity in the most heinous crimes are not worthy of having their rights guaranteed. This takes us back to Justice Pal's concerns over the changes in the rules in IMTE.²²⁰

1.4.1.2 Significant Trial Delays and the Completion Strategy

The desire to control the exponential growth of the budgets commenced after both ad hoc tribunals began their important task of prosecuting those responsible for the most serious crimes in the former Yugoslavia.²²¹ With the then President Cassese's alarming annual report²²², the UN General Assembly requested the Secretary General to assemble a group of experts to conduct a review of the operations of ICTY and ICTR. In November 1999, the expert group delivered its report to the Secretary General with over 40 substantive recommendations, most of which were adopted by both institutions to curb their expenses.²²³ As a result, in April 2000, Judge Jorda presented a report to the United Nations General Assembly that sought to limit the trials to 16 years. Moreover he asked to change both ICTR and ICTY's jurisdiction to only cover senior leaders accused of committing grave crimes. This was the starting point of the completion strategy, as set out by the United Nations Security Council.

After numerous consultations and reports from the Tribunal's President and the ICTY prosecutor, UNSC Resolution 1503 ended the temporal jurisdiction of both

²²⁰ IMTFE Justice Pal Dissent *supra* note 157 at 23-24.

²²¹ Williams, "Completion Strategy" *supra* note 190.

²²² Funding is provided through Article 17 of the UN Charter and it is approved by the Budget committee of the United Nations General Assembly; *UN Charter supra* note 21.

²²³ Williams, "Completion Strategy" *supra* note 190.at 158.

tribunals and called for both institutions to complete their cases by 2010.²²⁴

UNSC Resolution 1534 reaffirmed previous commitments and required both tribunals to “take all necessary measures” to achieve the completion strategy.²²⁵

The underlying factors pushing the United Nations Security Council and the United Nations General Assembly to limit the activities of the tribunals were financial. Even though we may view ascribing monetary value to international justice as vulgar,²²⁶ the reality is that international institutions are governed by how much they spend. In 2011, it was forecasted that the cost of international criminal justice will reach close to \$6.5 billion by 2015.²²⁷ The costs associated with ICTY alone are staggering. The ICTY has managed to indict 161 accused (141 concluded proceedings, excluding potential review proceedings and contempt proceedings). In the fiscal year of 2010, ICTY spent \$301,895,900. On average, the ICTY has spent close to \$18M on each accused.²²⁸

²²⁴ The completion strategy can be summarised as follows: The introduction of a seniority requirement of the accuseds was to be handled by the tribunal. The low level accuseds were transferred to the domestic war crimes courts set up in the former Yugoslavia. The judges were to initiate reforms to the reforms to Rules of Evidence and Procedure. The tribunals were asked to join the charges and cases as a means to expedite the adjudicatory process. The tribunals were encouraged to use plea bargaining and finally new *ad litem* judges were appointed; UNSCOR, 4817th mtg., 1503S/RES/1503.

²²⁵ UNSCOR, 4935th 1534 S/RES/1534.

²²⁶ Mark Drumbl, “International Criminal Law: Taking Stock of a Busy Decade” (2009) 10:1 Melbourne J Intl L 38.

²²⁷ Stuart Ford, “How Leadership in International Criminal Law is Shifting from the U.S. To Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts” (2011) 55 Saint Louis ULJ 953 at 956.

²²⁸ David Wippman, “Notes and Comments: The Cost of International Criminal Justice” (2006) 100 AJIL861 at 862.

In 1997, ICTY President Cassese noted in the annual report that: “[T]he Tribunal must find new ways of working that will enable it to try all of the accused within a reasonable time.”²²⁹ By 1998, ICTY had over 28 accused in custody but had only managed to deliver two judgments.²³⁰ Thus questions about efficiency turned to whether the rules, favouring the adversarial model, could be amended to make way for new, more efficient trial proceedings. Such proceedings needed the judges to have more of a managerial role. The turn to managerialism coincides with a civilist judge taking control of the presidency of the tribunal in 1999.²³¹

The United Nations Security Council’s reaction to the exorbitant costs of international justice forced ICTY (and ICTR) to find feasible alternatives to how they conduct their trials. To prevent pre-trial and trial delays, precipitated by both the prosecution and the defence, judges introduced reforms that would allow increased judicial access to information about the parties’ cases. Simultaneously, the reforms to the rules provided the judges with new powers to set deadlines and work-plans, thereby limiting the number of witnesses and legal issues. The changes therefore “would reduce the length of both pre[-]trial[s] and trial[s]”.²³²

²²⁹ Seventh Annual Report of the ICTY, UNSCOR (7 August 2000), A/55/273–S/2000/777 at para. 7.

²³⁰ Langer & Doherty, “Managerial Judging” *supra* note 211 at 246.

²³¹ Daryl A. Mundis “New Mechanisms/or the Enforcement of International Humanitarian Law”, (2001) 95 AJIL934.

²³² Langer & Doherty, “Managerial Judging” *supra* note 211 at 247.

In fact, the move to managerial judging at the ICTY did not lead to more efficient trials.²³³ To the contrary, the changes to the rules, with the added new steps, prolonged the duration of the trials and thus lead to the following conclusion: “[T]he results of these regressions reveal that the managerial judging reforms did not deliver any of their promised outcomes”.²³⁴ The rationale for this assertion is that the judges lacked specific information about their cases. Furthermore the prosecution and defence counsel resented and resisted their diminished roles.

Based on the available data, an accused before ICTY can be incarcerated for close to six years from the pre-trial to the conclusion of the appeal process.²³⁵ In this instance, even though there are significant trial delays, the accused can mount a challenge within the tribunal structure, utilising the enabling *Statute* and the respective rules as a means to challenge the delays. Nonetheless, it is the same judges that amended the rules who then decide if their changes resulted in the violation of fundamental rights guarantees afforded to the accused. The

²³³ *Ibid.*

²³⁴ *Ibid* at 246.

²³⁵ Carla Sapsford & Ana Uzelac, “Lengthy Hague Trials Under Scrutiny” online: (January 7, 2005) Global Policy Forum, Institute for War and Peace Reporting: “According to IWPR’s calculations, based on trial summaries provided by the tribunal on its website, the average Hague accused spends one year and five months in pre-trial detention. Once the trial starts, he or she can count on an average of 108 working days in court. These are often clustered in several active weeks interspersed with occasional adjournments for technical or personal reasons, ranging from the unavailability of a scheduled witness to the poor health of those involved in the trial. Because of the long wait between the end of the trial and the delivery of its judgment, a total of average of 17 months can pass between the first trial day and the time when the defendant learns his or her fate. To reach this point, the average indictee will have spent just under three years in Scheveningen. If he or she chooses to appeal the judgment, another two-and-a-half years may pass before the tribunal’s highest chamber makes a final decision on the case. So an average trial lasts a total of five-and-a-half years from the indictee’s initial appearance to the judgment of the appeals chamber”.

accused is left in a precarious position of challenging the law-making function of the judges.

From a cursory and uncritical domestic criminal law perspective, the fundamental rights guarantees afforded to the accused are a central tenet of the national codifications of criminal procedure and constitutional protections. Constitutional provisions of the *Canadian Charter of Rights and Freedoms* have been interpreted by the Canadian courts as prohibiting any erosion of the rights of the accused.²³⁶ In the Canadian jurisprudence, the Supreme Court has focused on the whether the delay is reasonable.²³⁷ The jurisprudence balances the interests of the public, the accused and administration of justice. In the United States, the Supreme Court and the Constitution are highly protective of the rights of the accused.²³⁸ Similarly, the European Court of Human Rights has developed an expansive jurisprudence protecting the rights of the accused in criminal matters.²³⁹ Meanwhile, there is a long tradition of affording fundamental rights protection in international human rights law.²⁴⁰ However, the customary nature of

²³⁶ See for example *R. v. Grant*, [2009] 2 S.C.R. 223; David Paciocco & Lee Stuesser, *The Law of Evidence* 6th ed. (Toronto: Irwin Law, 2011) at 352.

²³⁷ *R. v. Smith*, [1989] S.C.J. No. 119; *R. v. Askov*, [1999] S.C.J. No.106.

²³⁸ Sandra Guerra Thompson, "Judicial Gatekeeping of Police-Generated Witness Testimony" (2011) University of Houston Law Center No. 2011-A-8; Caleb Mason "Jay-Z's 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps" (2012) 56: 567 St. Louis University Law Journal 45.

²³⁹ See for example *Jalloh v Germany* (2006) Appl. No. 54810/00; *Funke v France* (1993) Appl. No. 10828/84; *Saunders v United Kingdom* (1996) Appl. No. 19187/91; *Khan v United Kingdom* (2000) Appl. No. 35394/97, 12 May 2000.

²⁴⁰ *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171; *Universal Declaration of Human Rights*. GA Res. 217 (III), UNGAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948).

the right to a fair trial, which includes the rights of the accused, is still debateable.²⁴¹

The fundamental guarantees afforded to the accused, therefore, embody a central organising feature of how the international criminal regime is conceptualised within the *Statute* and other international human rights standards established in the Post-War period. Within the context of ICTY however, there is a certain level of relaxation of these fundamental tenets that adversely affect the rights of the accused. Arguably, the relaxation of the rights of the accused stems from the behaviour of judges as they legislate using their powers to amend the Rules. The decision of the judges to regularly tamper with the Rules – sometimes in response to political pressure from the Security Council - has had a significant effect on the rights of the accused in terms of trial delays.²⁴²

Similar to the earlier example, the significant trial delay has a serious effect on the rights of the accused. The Tribunal was set up by the Security Council as a means to bridge the divide between the Western superior culture and the barbarism of Balkan conflict. Nonetheless, the universal attempts to prosecute war criminals through the ICTY tests the international communities commitment to international justice and the desire to end impunity. The serious work of

²⁴¹ Judge Patrick Robinson, “The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY”, (2009) (Fall) 3 *Publicist Berkeley J Intl L*.

²⁴² For a debate about the merits of ICC vs. ICTY/ICTR rules of evidence and procedure, see Maximo Langer, “Trends and Tensions in International Criminal Procedure: A Symposium” (2009) *UCLA J Intl L & Foreign Aff* 1.

prosecuting international war criminals challenges both the international community to fund the Tribunal and maintain its support for these efforts. This tension between costs and justice operationalises the dynamic of difference even further by denying the accused, their basic fundamental rights guaranteed by law. What we can learn from this example is how the dynamic of difference is embedded in international law and its institutions. These conclusions have significant effects on the manner in which we choose to theorise global governance, in particular global constitutionalism.

1.4.1.3 Rights of the Accused & New Convictions on Appeal

Christoph Safferling identifies trial fairness as one of the main problems of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East.²⁴³ Trial fairness is exemplified through new convictions and sentences on appeal before the ICTY. In certain instances, the new convictions arise through the production of new evidence facilitated through the changes to the rules. Rule 115 of the ICTY Rule of Evidence and Procedure allows a party to present, with the permission of the ICTY Appeals Chamber, new additional relevant evidence on appeal.²⁴⁴ This rule was amended twice. In conjunction with the interpretation of the appeals provisions, this rule has precipitated a fierce debate amongst the judges of the ICTY Appeals Chamber. The judges debated whether or not they are allowed to impose a new conviction

²⁴³ Christoph Safferling, *International Criminal Procedure* (Oxford: Oxford University Press, 2012) at 15 [Safferling, *ICP*].

²⁴⁴ Relevancy is determined by Rule 89 of the Rules of Evidence and Procedure; Safferling, *ICP supra* note 243 at 463-512.

on appeal.²⁴⁵ There are exceptions; for example in *Tadić*, the Appeals Chamber quashed acquittals by the Trial Chamber and entered a new conviction on appeal but the Appeals Chamber remitted the matter of sentencing back to the Trial Chamber.²⁴⁶ The general practice however is clearly contrary to contemporary international human rights norms to admit new evidence on appeal. The International Criminal Court's *Rome Statute* is different.²⁴⁷

Justice Pal's powerful dissent from the International Military Tribunal for the Far East focused on the haphazard nature of trial fairness as a result of allowing the judges to draft and amend the rules.²⁴⁸ The Tokyo Tribunal faced a similar situation as the ICTY in which the sitting judges were able to amend the rules of

²⁴⁵ *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment, 26 May 2003, Separate Opinion of Judge Meron and Judge Jorda (May 26, 2003); See *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment, 26 May 2003, Dissenting Opinion of Judge Pocar; *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment, 26 May 2003, Separate Opinion of Judge Shahabuddeen; *Galic v. The Prosecutor*, Case No.: IT-98-29-A, 30 November, 2006, Separate Opinion of Judge Shahabuddeen; *Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, 20 May 2005, Separate Opinion of Judge Shahabuddeen and Judge Guney.

²⁴⁶ In so doing, the Appeal Chamber noted that it had the competence to decide on sentencing, but found that the circumstances of the case dictated remittal; *Prosecutor v. Tadić*, Case No. IT-94-1-A, Order Remitting Sentencing to a Trial Chamber, 10 Sept. 1999, p. 3.

²⁴⁷ Article 21(3) of the *Rome Statute* necessitates that the Court conduct itself consistently with international human rights norms; *Rome Statute supra* note 203; The ICC Appeals Chamber judgment in *Dyilo* offers some insights with reference to the statutory provision to contemporary standards of human rights: "[A]rticle 21(3) of the Statute makes the interpretation as well as the law applicable under the Statute subject to internationally recognised human rights"; *The Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06 (OA4); Daniel Sheppard "The International Criminal Court and "International Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute" (2010) 10 Intl Crim L Rev 43-71; The judges of the two *ad hoc* tribunals have oscillated between adopting an expansive or a restrictive approach to incorporating international human rights standards; *The Prosecutor v. Delalic.*, IT-96-21-T of 25 September 1996; *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment, 26 May 2003, Separate Opinion of Judge Shahabuddeen, para. 8; See *Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment, 26 May 2003, Dissenting Opinion of Judge Pocar page 3.

²⁴⁸ Elizabeth Kopelman "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", (1991) 23 New York University Journal of International Law & Politics 373.

procedure. In his dissent, Justice Pal states: “[T]hough the Charter sought to makes us independent of all artificial rules of procedure, we could not disregard these rules altogether. The practical conditions of the trials necessitated certain restrictions. This however might not have yield[ed] happy results”.²⁴⁹ The unhappy results that Justice Pal refers to is the burden placed on the accused and its significance to trial fairness. Arguably the baseline requirement for trial fairness for war crimes prosecution is greater given the significance to the victims and the community that has experienced severe trauma.

In all three ICTY examples, the dynamic of difference is front and centre. It a process by which a gap is created between two cultures.²⁵⁰ In the instance of ICTY, the Security Council and the former Yugoslavian states are presented as the embodiment of two different cultures. The West is often presented as the universal while the Yugoslavian states, and the respective officials are presented as the barbarians that committed the mass atrocities against their own people.²⁵¹ The only means to bridge the gap between the two is to prosecute those responsible for the mass human rights violations using the universalism of international law (and international criminal law) through the Tribunal. But simultaneously, in this example, we know that these war criminals committed the mass atrocities and thus there is really no need to extend the rights that are guaranteed in the *Statute*.

²⁴⁹ IMTFE Justice Pal Dissent *supra* note 157 at 923.

²⁵⁰ Anghie, *Imperialism supra* note 1 at 4.

²⁵¹ See historical account of the conflict by the Tribunal, *Prosecutor v. Tadić* (2000) Case No. IT-94-1-T at paras. 53-97.

The recognition of these modalities should not be surprising. It serves to illustrate the manner in which universalist claims operate in international law. In the example of new evidence on appeal, prosecutor of the Tribunal can present new evidence on appeal against the accused. It is ultimately, the prosecutor's second attempt to prosecute a convicted war criminal. Much more importantly, the ICTY Appeals Chamber is asked to act as a second trier of fact, without the ability to test the evidence that was proffered at first instance. Ultimately, the accused is left in the precarious hands of the judges.

1.4.2 Locating the Cultural Local in Rwanda: Case Study of Witness Testimony in Administering Justice before the ICTR

The ICTR's mandate, as set out in the respective United Nations Security Council Resolution,²⁵² sought to bring to justice persons responsible for the violation of international humanitarian law, to render justice to the victims, to deter future crimes, and to restore peace by ending impunity in the region.²⁵³ The respective statutes of the both ad hoc tribunals require the judges to draft and adopt Rules of Evidence and Procedure.²⁵⁴ Focusing on the issue of witness testimony, the Rules Committee has, on numerous occasions, amended and revised the rules relating to the standard of admitting evidence and witness testimony.

²⁵² ICTY *Statute supra* note 174.

²⁵³ Sarah Williams "ICTY and ICTR (Completion Strategy)" in Antonio Cassese ed, *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 362–3.

²⁵⁴ Art 15, ICTY *Statute supra* note 174.

Empirical evidence from the ICTR suggests that the changes to the rules have not been successful. The changes have not been successful in terms of flexibility for the benefit of the two opposing parties, expeditious trials or more importantly in protecting the rights of the accused.²⁵⁵ Rather, the anomalies reported by these interdisciplinary insights may be attributable to the flexible nature of the rules and the role of the judges.²⁵⁶ In the discussion that follows, I focus on the role of witness testimony and the experts as a means to demonstrate the perpetuation of the singular western narrative as the universal. This particular drive to use a western form of adjudication has had a decisively negative impact on the manner in which ICTR conducts its trials and taints the jurisprudence and the entire perusal of justice, especially as it relates to the rights of the accused.

In the first section, I explore the faulty witness testimony before the ICTR. By describing the witness testimony, it is illustrative that the Tribunal's use of western form of adjudication is incompatible with the manner in which the witnesses experienced the horrific events during the Rwandan genocide. Moreover, the use of the witness testimony by the experts of the tribunals further substantiates the perpetuation of Anghie's dynamic of difference. The western adjudicatory model is the prevalent universal tool that is used in all of these

²⁵⁵ Langer & Doherty, "Managerial Judging" *supra* note 211.

²⁵⁶ Combs, *Fact-Finding* *supra* note 212; Kamari M Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009) [Clarke, *Fictions of Justice*]; Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009).

institutions. In the examples below, I chronicle how the Tribunal must contend with faulty witness testimony but nonetheless convict the alleged perpetrators.

1.4.2.1 Locating the Cultural Local: Witness Testimony In Administering Justice

There are various empirical studies that explore the diverse ways in which international criminal tribunals function.²⁵⁷ A witness' ability to narrate who did what to whom is a fundamental tenet of any justice system. Moreover, this is one of the central components of the ICTR's mandate as encapsulated within the goal of delivering justice to the victims. ICTR has struggled with witness testimony and this struggle stems from the specific culture of Rwanda and its colonial past.²⁵⁸ By using the adjudicatory process, there is an imposition of western understandings of how to conduct investigations, trials and elicit witness testimony, which may diverge from the local customs.²⁵⁹ My assertions are premised on the culture and context in which the ICTR operates and my central concern is the inability of witnesses to accurately convey their stories to the trier of fact.

A number of scholars have examined witness testimony before the two ad hoc tribunals. Already in 1999, scholars worried about perjury before the international

²⁵⁷ *Ibid.*

²⁵⁸ Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism and Genocide in Rwanda* (New Jersey: Princeton University Press, 2002).

²⁵⁹ Combs, *Fact-Finding supra* note 212 at 3.

criminal tribunals.²⁶⁰ For example, Alexander Zahar has recorded the role of perjury in the 2006 *Rwamakuba* decision by the ICTR Trial Chamber. Moreover, he suggests that the Trial Chamber in *Rwamakuba* did opt for the relaxed approach to witness testimony by taking stock of “time elapsed, translation discrepancies, the manner in which the prior statements were taken or the impact of trauma inflicted upon the witnesses”.²⁶¹ This is one of the ways in which the Tribunal has generally dealt with the faulty witness testimony due to a number of practical constraints brought about because of the witnesses’ fading memory resulting from the passage of time and witness trauma due to the horrific nature of the events.

Nancy Combs reviewed the transcripts of witness testimony from the ICTR.²⁶² She points to a systematic hurdle that has plagued the institution: how to grapple with local witnesses? More relevantly, she demonstrates that there is a direct disjuncture between evidence that is provided by witnesses and the adjudicatory process. She states: “[I]n sum, Trial Chambers often seem content to base convictions on highly problematic witness testimony.”²⁶³ As a result, the Chambers fails to find “reasonable doubt in some of the most doubtful instances and as a consequence, convict just about every defendant who comes before

²⁶⁰ Alexander Zahar “The Problem of False Testimony at the International Criminal Tribunal for Rwanda in André Klip and Göran Sluiter, eds, *Annotated Leading Cases Of International Criminal Tribunals*, Vol. 25 International Criminal Tribunal For Rwanda, 2006-2007, (Cambridge: Intersentia, 2010) at 515.

²⁶¹ *Ibid* at 515.

²⁶² Combs, *Fact-Finding supra* note 212 at 4.

²⁶³ *Ibid* at 222.

them”.²⁶⁴ By reviewing trial transcripts, Combs concludes that witnesses are often unable to provide detailed accounts of the dates, times, and specific location of the events or, more importantly, they are unable to place the perpetrator accurately at the scene of the crime. This is a necessary requirement of any criminal adjudication. Combs notes that these discrepancies are a result of educational, cultural and translation related factors.

In jurisdictions where witnesses are called in testify, they are expected to provide a detailed account of who did what to whom. However, scholars working in domestic criminal law jurisdictions have pointed out that witness testimony is deeply flawed based on insights from race, gender and feminism, and mental health angles.²⁶⁵ cursory review of American and Canadian criminal law suggests that these national jurisdictions are heavily protective of the rights of the accused. Americans prohibit the use of the death penalty in cases that rely solely on eyewitness testimony.²⁶⁶ Examples from specific jurisdictions in the United States illustrate that each prosecuting state must produce DNA evidence, which can be buttressed by witness testimony in order to utilise the death

²⁶⁴ *Ibid*; Combs suggests that the judges are not “convicting innocent defendants”. Rather “the Trial Chambers’ cavalier attitude towards fact finding impediments is inconsistent with the beyond-a-reasonable-doubt standard of proof as that standard is traditionally understood”.

²⁶⁵ David M. Tanovich “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 *Supreme Court Law Review* (2d) 655; David M. Tanovich “Moving Beyond “Driving While Black”: Race, Suspect Description and Selection” (2005) 36 *Ottawa Law Review* 315; Sandra G. Thompson “Judicial Gatekeeping of Police-Generated Witness Testimony” (2011) *University of Houston Law Center* No 2011-A-8.

²⁶⁶ Sandra G. Thompson “Judicial Gatekeeping of Police-Generated Witness Testimony” (2011) *University of Houston Law Center* No 2011-A-8.

penalty.²⁶⁷ These types of insights about the unreliability of witness testimony have yet to find their way into international criminal law.²⁶⁸

The primary focus within international criminal law debates has been on the substantive legality of international criminal adjudication. The literature thus far has concentrated on setting out and developing specific areas of substantive international criminal law.²⁶⁹ There are numerous accounts of problematic features of institutional practices from defence counsel²⁷⁰ and academics with specific institutional knowledge of international mechanisms,²⁷¹ and interdisciplinary insights from political scientists and anthropologists.²⁷² The focus on the mechanics of the institutions, especially as they relate to international criminal procedure is minimal.²⁷³ There are various calls to incorporate diversity into the existing framework²⁷⁴ or criticisms of the problematic nature of admitting faulty evidence.²⁷⁵ Nonetheless, very little

²⁶⁷ *Ibid.*

²⁶⁸ For a discussion of witness tampering through intimidation before the ICC, see Robert Cryer, "Witness Tampering and International Criminal Tribunals" (2014) 27:1 *Leiden J Intl L* 191.

²⁶⁹ M. Cherif Bassiouni, *Introduction to International Criminal Law* (London: Transnational Press, 2004); Cassese, *ICL supra* note 131; Cryer, *An Introduction to ICL supra* note 71.

²⁷⁰ Wayne Jordash "The Practice of "Witness Proofing" in International Criminal Tribunals: Why the International Criminal Court should Prohibit the Practice" (2009) *Leiden J Intl L* 22.

²⁷¹ Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2009).

²⁷² Clarke, *Fictions of Justice supra* note 256; Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009).

²⁷³ Safferling, *ICP supra* note 243.

²⁷⁴ Jessica Almqvist, "The Impact of Cultural Diversity on International Criminal Proceedings" (2006) 4(4) *Journal of International Criminal Justice* 745.

²⁷⁵ Alexander Zahar "The Problem of False Testimony at the International Criminal Tribunal for Rwanda" in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals Vol 25: International Criminal Tribunal For Rwanda* (Cambridge: Intersentia, 2006) at 509.

attention is paid to the critical insights emerging from domestic criminal jurisdictions with regard to witness testimony.

The rationale behind the absence of interdisciplinary and other critical analysis in international criminal law is twofold. First, unlike the Nuremberg Tribunal prosecutors who relied entirely on documents prepared by Nazi officials to establish guilt, the ICTR prosecutors rely exclusively on witness testimony.²⁷⁶ Combs suggests that the prosecutor of NIMT did not have to rely on witness testimony as their perpetrators had meticulously detailed all of their criminal actions in their records. The onerous task presented to the NIMT was to sieve through the thousands of documents. Modern day international criminals, especially those indicted by the ICTR, did not leave a trail of documentary evidence that could be used by the prosecution. The prosecutors had to rely on witness testimony. Secondly, the rules of the ad hoc tribunals were drafted and amended by the judges, prosecutors, and other officials of the tribunals. The debates have therefore focused on the institutional and meritorious aspects of the rules and the degree to which common law and civil law traditions have influenced the development of these rules.²⁷⁷ Ultimately the exclusion of critical

²⁷⁶ Combs, *Fact-Finding supra* note 212 at 6.

²⁷⁷ Gabrielle K. McDonald "Trial Procedures and Practices" in Gabrielle K. McDonald and Olivia Swaak-Goldman eds, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (The Hague: Kluwer, 2000); Fausto Pocar "Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?" in Janet Walker and Oscar G Chase, eds, *Common Law, Civil Law and the Future of Categories* (Toronto: LexisNexis, 2010); Patrick L. Robinson "The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia" (2009)16 ILSA J Intl & Comp L 5.

insights from the domestic context, which questions the viability of using witness testimony, were omitted or ignored.

The role of experts in this omission is significant. The prosecutors and most international staff conducting the investigations, trials and legal research are western.²⁷⁸ Based on my own experience of working in the Appeals Chamber of ICTY and ICTR, most of the staff that populated the Tribunals in The Hague hailed from Europe or North America. Other similar accounts point to an overrepresentation of staff members from Europe and North America.²⁷⁹ This is relevant when the prosecution prepares the witnesses for testimony.²⁸⁰ All of these arguments point to the fact that there is a strong tendency to rely on western adjudicatory models.

Even though the ICTR witnesses understood that the Rwandan President's plane was shot down on 6 April 1994, precipitating the genocide (this is the most significant date for the Tribunal), the witnesses are not able to place the perpetrators at the scene of the crime on a specific date. The reason why the witnesses are unable to situate the perpetrator at the scene of the crime is simply cultural. Some witnesses cannot recount events based on the western calendar, or they lack the formal western-style education needed to respond to

²⁷⁸ Elena A. Baylis, "Tribunal-Hopping with the Post-Conflict Justice Junkies" (2008) 10 Or Rev Int'l L 361 [Baylis, "Tribunal-Hopping"].

²⁷⁹ *Ibid.*

²⁸⁰ Wayne Jordash "The Practice of 'Witness Proofing' in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice" (2009) Leiden J Intl L 22.

questions about specific dates and times put to them by the parties to the adjudicatory process.

For example, in the Nahimana proceedings, a trial witness testified that Colonel Rwendeye had attended two death-squad meetings in 1993-4. When the witness was confronted with evidence that the Colonel had in fact died in 1990, the witness rejected the evidence and maintained that the Colonel had in fact died in 1992. 'When it was pointed out that the [witness's] revision nonetheless made [the Colonel] the only dead man at the meetings, [the witness] claimed that he had testified that the meetings had taken place at the end of 1992 and 1993.'²⁸¹

More significantly, Rwandan witnesses often use cultural practices to identify events. Witnesses rely on the seasons to determine the time of the year and then subsequently place the perpetrator at the scene of the crime based on the time of the year. These types of practices are culturally specific and culturally contingent. Similarly, the notion of temporality or temporal sequences of events is another issue of contention, where witnesses are unable to provide the exact timeline in which an alleged incitement to genocide may have occurred.

The judges of the Tribunal have proceeded to accept faulty witness testimonies for compelling reasons. The accused Hutu perpetrators were clearly involved in the Rwandan genocide given their political affiliations, which is the central basis

²⁸¹ Combs, *Fact-Finding supra* note 212 at 27.

for conviction. The judges rely on these factors to credit witness testimonies. There is an 85 per cent conviction rate in the ICTR, which corroborates Combs' claims that the judges have a pro-conviction bias. Even when there are glaring inconsistencies in testimonies, Combs notes that the "[T]rial Chambers explain these [inconsistencies] away as products of the passage of time, the frailty of memory and errors introduced by investigators and interpreters."²⁸²

From a broader perspective, the adjudicatory process envisioned by these tribunals is predicated on the traditions of western adversarial common law and inquisitorial civil law.²⁸³ Both these traditions rely heavily on witness testimony. The judges, and the Tribunal as a whole, have adopted these traditions as the *modus operandi*. Thus, by using the western trial form, "international criminal proceedings cloak themselves in the form's garb of fact-finding competence, but it is only a cloak, for many of the key assumptions that underlie the [W]estern trial form do not exist in the international context".²⁸⁴

As noted earlier, the UN Security Council granted the judges of the two ad hoc tribunals the power to draft (and amend) their own respective rules of evidence and procedure, which may have provided the perfect tool to rectify these anomalies.²⁸⁵ Moreover, the very design of the trial process, and even pre-trial

²⁸² *Ibid* at 221.

²⁸³ Baylis, "Tribunal-Hopping" *supra* note 278.

²⁸⁴ Combs, *Fact-Finding* *supra* note 212 at 179.

²⁸⁵ Karl-Heinz Ladeur, "The Emergence of Global Administrative Law and Transnational Regulation" (2013) 3:3 *Transnational Leg Theory* 243.

investigation, was left to the judges of the two tribunals to determine as they saw fit. Given these conclusions, what we have is a lack of connection between the substantive evidence (based on witness testimonies) and the mandate of the tribunals to prosecute those with the gravest responsibility for the mass atrocities, whilst respecting the rights of the accused to due process.

The changes to the rules are predicated on efficiency and expeditious trials that would not run up the costs of international justice. This disconnect is based on the bias of the judges and the tribunals.²⁸⁶ The pro-conviction partiality of the judges may possibly stem from their personal background and their expertise. Within the Rwandan context, political and ethnic affiliations signal to the Tribunal the potential culpability of the accused. These factors ultimately lend support to the belief that the accused participated in the genocide, even without the 'beyond-reasonable-doubt' threshold given the faulty witness testimonies.

As I noted earlier, the Tutsi-led Rwandese government supported the creation of a tribunal once the conflict had ended. During the conflict, RPF proposed the creation of a tribunal as early as September 1994 for a number of reasons.²⁸⁷ The end of the conflict, Tutsi-led Rwandese government favoured international prosecutions to avoid victors' justice, the international recognition of the prohibition of genocide and to end impunity as a means to build a better

²⁸⁶ Combs, *Fact-Finding supra* note 212 at 167–88 & 221.

²⁸⁷ Akhavan, 'ICTR: The Politics' *supra* note 178 at 504.

future.²⁸⁸ But ultimately, the Rwandese government voted against UN Security Council *Resolution 955* for two reasons: largely because of the erosion of Rwandan sovereignty²⁸⁹ and the potential, given the Tribunal's structure to only appease "the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of the genocide [...]".²⁹⁰ As the above analysis demonstrates, Rwandan government's fears have now become a reality.

Once again, we observe the influence of Anghie's dynamic of difference. The manner in which the UN Security Council created the Tribunal serves as the starting point. At the outset, there was reluctance to even set up the tribunal given the costs associated with such an exercise.²⁹¹ Moreover, there was a sense of Western guilt over the creation of the ICTY. Some commentators have highlighted that the creation of the ICTY would be seen as a "disproportionate attention paid to the problems of Europe vis-à-vis the developing world".²⁹² Nonetheless, the Security Council went ahead to bridge the gap between the superior western culture and uncivilised, backward Rwandans by creating the Tribunal to render justice. In doing so, they adopted, as in the case of the ICTY, a western adjudicatory model premised on the *Nuremberg Charter*.

²⁸⁸ *Ibid* at 504.

²⁸⁹ *Ibid* at 505.

²⁹⁰ *Ibid* at 506.

²⁹¹ Morris & Scharf, *ICTR V1 supra* note 175 at 64.

²⁹² Cassese, *ICL supra* note 131 at 327; for a similar assertion, Akhavan, "ICTR: The Politics" *supra* note 178 at footnote 12.

The western adjudicatory model is used as the universal truth mechanism that would deliver justice to the victims and bring the perpetrators to justice. But fundamentally, the universal model is unable to understand and incorporate the local within its own binaries. The forces that drive the universal model are incapable of communicating with the local as they are both literally speaking two different languages. Superficially, the Tribunal is able to receive the witness testimony. This information nonetheless has to be managed by taking stock of extraneous factors such as passage of time and trauma.

The Tribunal relies on its specific and singular understanding of the conflict as a means to navigate and contend with what may seem like faulty witness testimony. The next section will take a look at the role of experts in perpetuating the dynamic of difference.

1.4.2.2 International Expert Class and Understanding the Local?

The employees of these ad hoc tribunals are central to the pro-conviction bias dealt within the earlier section and the central reason why faulty witness statements are accepted. The staff members of the ad hoc tribunals are United Nations employees. They range from legal associates and prosecutors to in-house translators. From this cohort, there has emerged a class of international employees who work on post-conflict justice issues and who maintain an itinerant lifestyle in pursuit of that work, moving from one conflict hotspot to

another within these tribunals.²⁹³ The judges of the tribunals are also part of this cohort. Judges are elected by the United Nations General Assembly.²⁹⁴ The United Nations Security Council provides the United Nations General Assembly with a list of shortlisted candidates prior to their election. Most judges move from one tribunal to another given the scarcity of expertise in international criminal law.²⁹⁵

Expertise is the subject of intense theory generation. In particular, legal anthropologists have chronicled the role of experts in various domains from the World Bank to over-the-counter derivative markets. With specific reference to international organisations, Galit Sarfaty has suggested that ethnographic research can illuminate the rationale for specific policy choices. For example, the question of the World Bank's human rights policy therefore is not contingent on the role of the member states; rather it is about the internal dynamics of the Bank.²⁹⁶ Sarfaty provides the following insights:

The World Bank typifies the multiple-principals problem, where member governments serve as principals that collectively form the Board of Executive Directors. The board is composed of twenty-four executive directors who represent countries or country groups. Under the Bank's Articles of Agreement, the board serves as the institution's policymaking organ, while the president and senior management are responsible for operational, administrative, and organizational issues. The executive directors thus serve as principals that delegate certain tasks and responsibilities to agency

²⁹³ Baylis, "Tribunal-Hopping" *supra* note 278 at 364; Thomas Skouteris "The New Tribunalism: Strategies of (De)Legitimization in the Era of Adjudication" (2006) XVII Finnish YB of Intl L 307 at 312.

²⁹⁴ Article 13 bis ICTY *Statute supra* note 174; Article 12 bis, ICTR *Statute supra* note 180

²⁹⁵ Baylis, "Tribunal-Hopping" *supra* note 278 at 361–89.

²⁹⁶ Galit Sarfaty, "Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank" (2009) 1033:4 AJIL647 at 649-650 [Sarfaty, "Culture Matters"].

officials. When member countries hold competing preferences and cannot achieve consensus on a policy, bureaucratic drift may ensue. In view of their difficulty in exerting oversight, the member countries are forced to delegate authority to the agency officials. My study of the Bank's internal decision-making process confirmed these dynamics, showing that employees operate quite independently of the board. They carry out certain sensitive management issues without board approval or involvement.²⁹⁷

Elena Baylis' interventions in the context of international criminal institutions allude to a similar significance of the role of the experts from a socio-legal perspective. Baylis chronicles young aspiring activists and advocates trying to make a difference by transferring their social activist legal training from western institutions to conflict-ridden places and international criminal institutions. These good intentions, however, are clouded by what Baylis demonstrates as the known unknowns.²⁹⁸ These known unknowns are characterised as a "lack of local knowledge of post-conflict settings, whether that is knowledge of the local legal system, local facts, local culture or any other relevant information".²⁹⁹ Furthermore, Baylis argues that these known unknowns are notoriously challenging to deal with because there are issues of lack of timing, false expertise, complexity, and size of the local context.

False expertise stems from the very nature of the work that is undertaken by these experts and their ability to transfer these skills to other hotspots. For

²⁹⁷ *Ibid* at 655.

²⁹⁸ Baylis, "Tribunal-Hopping" *supra* note 278 at 383; Sujith Xavier "Looking for 'Justice' in all the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?" in Amarnath Amarasingam & Daniel Bass, eds, *Post-War Sri Lanka: Problems and Prospects* (Forthcoming New York:Hurst University Press, 2015).

²⁹⁹ *Ibid*.

example, Tribunal staff members may work as Associate Legal Officers in the ICTR for two years and then they may move to another tribunal adjudicating similar crimes in a different location such as Freetown in Sierra Leone (Sierra Leone Special Court). The substantive law may be similar but the nature of the conflict and the associated history of the regions are vastly different. These international experts spend no more than two to three years at each tribunal as they follow the spread of international criminal justice.

The role of experts within networks is not neutral similar to Sarfaty's World Bank employees.³⁰⁰ Their roles are deeply political, embedded with a particular universalistic ethos of ending impunity for mass human rights violations. David Kennedy's insights suggest that the background norms of international institutions are more important than we had originally thought.³⁰¹ The political values of experts within the tribunals in effect shape the outcome of the process. The process nonetheless is supposed to be objective enough to ensure that the accused are given a fair trial. These experts within the Tribunal however manage the background norms that permeate the value-structure of the tribunals. As Kennedy has highlighted, what really matters at the global institutional level is not what is in the foreground (the tribunals) or the context (Rwanda and the former Yugoslavia). Rather,

[t]he work of the background has colonized the foreground and the context. The foreground increasingly seems a mere spectacle—a

³⁰⁰ Sarfaty, "Culture Matters" *supra* note 296.

³⁰¹ David Kennedy "Challenging Expert Rule: The Politics of Global governance" (2005) 27 Sydney J Intl L 8.

performance to which we attribute agency, interest and ideology. At the same time, it is difficult to locate elements of context, which are not constructed by people managing background norms and institutions. Indeed, the foreground and the context may well turn out to be effects of background practices.³⁰²

The judges and their experts (Associate Legal Officers and Interns) have a pro-conviction bias, which may be rooted inherently in the way international law is constructed, as part of the civilising mission and the dynamic of difference.³⁰³ Lack of training and cultural competencies with regard to the local context has a significant influence on outcomes. What are the interests that are driving the jurisprudence of the ICTR? Are the judges and the Tribunal staff biased? Have the accused been afforded sufficient substantive and procedural rights protections? These questions are important indicators in calibrating the calculus of accountability and legitimacy production.

Much more importantly, the role of the experts in driving the pro-conviction bias further illustrates my point about the operation of the dynamic of difference within international criminal law. The creation of the Tribunal by the Security Council is the first step in bridging the gap between two distinct cultures. Then by institutionalising the appointment of judges and their experts through the Chambers, the Security Council has ensured that the logic of western universalism is entrenched deep within the institutions structure. The experts are an essential feature of the western adjudicatory model as it furthers the search

³⁰² *Ibid* at 12.

³⁰³ Anghie, *Imperialism supra* note 1.

for the truth and justice. But again, this model is unable to understand and incorporate the specific local context.

1.5. Universal Prosecutions? Case Study of the International Criminal Court and Prosecutorial Selectivity

The international criminal justice regime has rapidly evolved over the past 20 years and culminated in the adoption of the ICC through the 1998 *Rome Statute*. The road to the creation of the International Criminal Court however started much earlier. As discussed earlier in this dissertation, the desire for an international court to prosecute war criminals from WWI and WWII is clearly documented.³⁰⁴ This desire was not possible until the end of the Cold War. The idea of an international criminal court was brought back to life, after a long hiatus, by Trinidad and Tobago.³⁰⁵ They made this request as a means to address concerns over drug trafficking. The UN General Assembly requested the UN International Law Commission to “address the question of establishing an international criminal court in 1989”.³⁰⁶ By the time the International Law Commission had completed the draft statute in 1994, there were signs that the international community would be receptive to the idea of an International Criminal Court. Cryer suggests that the Commissions’ draft arrived at a fortunate time for the following reasons:

³⁰⁴ Hersch Lauterpacht, “The Law of Nations and the Punishment of War Crimes” (1944) 21 *Bri YB Intl L* 58; Sellers, “Trying the Kaiser” *supra* note 73.

³⁰⁵ Cassese, *ICL supra* note 131 at 328; Cryer, *An Introduction to ICL supra* note 71 at 146-148.

³⁰⁶ Cassese, *ICL supra* note 131 at 328.

Cold War divisions had thawed, there was enthusiasm for international criminal tribunals, and the international community had embarked on several treaty-based initiatives strengthening human rights and humanitarian law. Scepticism about the prospects of a permanent international criminal court was diminishing.³⁰⁷

In this context, UN General Assembly established an *ad hoc* committee to examine the issue further. Within a year, there was sufficient support to create a Preparatory Committee to draft the treaty. Based on the Law Commissions' draft, the Preparatory Committee was able to create a new statute that "served as the basis for negotiation at the World Conference held in Rome in 1998".³⁰⁸ The aim of the five-week conference was to create consensus amongst states and to iron out controversies within Preparatory Committee's draft statute. A mix of states, non-governmental organisations, international governmental organisations in conjunction with the United Nations, helped draft the International Criminal Court's *Statute*.³⁰⁹ Most of the negotiations were carried out in small committees composed of states and their delegations.³¹⁰ There were significant issues of contention at the conference. Some of these issues for example included the role of the UN Security Council³¹¹, the breadth and scope of the various crimes and the role of gender.³¹²

³⁰⁷ Cryer, *An Introduction to ICL supra* note 71 at 148.

³⁰⁸ *Ibid* at 148.

³⁰⁹ William Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) at 13-20 [Schabas, *Introduction to ICL*].

³¹⁰ Cassese, *ICL supra* note 131 at 329-330; *Ibid* at 13-20.

³¹¹ Cryer, *An Introduction to ICL supra* note 71 at 148.

³¹² Janet Halley, "Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law" (2008-2009) 30 *Mich J Intl L* 1.

The states gathered at the conference adopted the draft text and the *Rome Statute* entered into force on 1 July 2002. The *Rome Statute*, with over 128 provisions, delineates the four international crimes over which the Court has jurisdiction. The *Statute* doubles as a multilateral treaty. The *Rome Statute* is the result of years of efforts by human rights activists and policy makers to curtail impunity enjoyed by state actors and non-state actors in the commission of genocide, war crimes and crimes against humanity and the international crime of aggression.³¹³

As of 5 August 2015, there are 123 states party to the *Statute*. It has a special but at times tense relationship with the United Nations Security Council.³¹⁴ The permanent International Criminal Court, for its part, is a tribunal of last resort in the cases of states that are party to its *Statute*. The ICC's complementarity provision allows the Court to prosecute perpetrators of international crimes if the State party is unwilling or unable to do so.³¹⁵

There are essentially three ways by which the Court's jurisdiction can be triggered so that it can exercise its territorial or personal jurisdiction over alleged international crimes. The Court, through the Office of the Prosecutor can receive

³¹³ Article 5, *Rome Statute supra* note 203; Schabas, *Introduction to ICL supra* note 309 at 13-20.

³¹⁴ Article 13, *Ibid*.

³¹⁵ *Ibid*; The Statute provides for the creation of the permanent International Criminal Court, sets out the international crimes over which it can have jurisdiction, and doubles as a multilateral treaty; Sharon A. Williams "The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond" (2000) 38 *Osgoode Hall LJ*1.

referrals about a situation (as opposed to a case³¹⁶) of grave concern by a state party to the *Rome Statute*.³¹⁷ United Nations Security Council can similarly refer a situation.³¹⁸ In the third method, the prosecutor (currently Fatou Bensouda) can commence investigations *proprio motu* (on her own initiative) based on communications submitted by states, non-governmental organisations and concerned individuals.³¹⁹ All three mechanisms automatically trigger the powers of the prosecutor but to different degrees.

If the prosecutor receives state or Security Council referral, the *Statute* requires a preliminary investigation. Here, the prosecutor must first conduct an analysis of information in order to determine whether the statutory threshold to start an investigation is met (art.53). When the prosecutor receives a communication for the purposes of the *proprio motu* trigger, the standard is the same but the starting point is reversed: the prosecutor shall not seek to initiate an investigation unless she first concludes that there is a reasonable basis to proceed, which is supervised by the Pre-Trial Chamber of the ICC. Once a decision to initiate an investigation is made, all of the parties concerned (including those that submitted

³¹⁶ The *Statute* allows for referrals of situations as opposed to cases. It was believed by the drafters that such an approach would prevent States Parties to the *Statute* from engaging referrals as a form of retaliation; Philippe Kirsch & Darryl Robinson "Referral by States Parties" in Antonio Cassese, Paola Gaeta & John Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 623.

³¹⁷ Article 12 (3) & 14, *Rome Statute supra* note 203.

³¹⁸ Article 13(b), *Ibid*.

³¹⁹ Articles 13(c) and 15, *Ibid*.

the initial communication) are promptly informed of the decision, with supporting reasons for the decision.³²⁰

There is an embedded hierarchy in the *Statute's* procedures to trigger jurisdiction. At the top of this hierarchy are Security Council referrals. With this type of referral, the *Statute* makes the preconditions of jurisdiction, based on nationality or territoriality, inapplicable (art.12). The drafters of the *Statute* placed the Security Council at the apex of the Court referral mechanism because of its powers stemming from Chapter VII of the UN *Charter*. These referrals are considered to be the most authoritative. In this instance, the *Statute* does not require approval by the Pre-Trial Chamber of the Court.³²¹

The second trigger mechanism arises from state referrals under Article 14 of the *Statute*. There is no need to seek Pre-Trial Chamber approval to commence a preliminary investigation as such, but there is the possibility that a State referral can be found to have no reasonable basis to proceed.

The third trigger mechanism arises from communications received from any other source (for example non-governmental organisations) or on the initiative of the prosecutor through her vested *proprio motu* powers in the *Statute*.³²² This

³²⁰ Guiliano Turone "Powers and Duties of the Prosecutor" in Antonio Cassese, Paola Gaeta & John Jones eds, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) at 1145; Article 53, *Rome Statute supra* note 203

³²¹ *Ibid* at 1145.

³²² Articles 13 (c) & 15, *Rome Statute supra* note 203.

mechanism requires the Pre-Trial Chamber's approval prior to deciding whether to investigate based on the preliminary evidentiary findings. It is a weaker basis for prosecution than state party or Security Council referrals, subject to two different types of review mechanism under Article 53 of the *Statute*.

The Court has been actively seized of nine situations in which investigations or prosecutions are underway, and is adjudicating close to 21 cases, all of which involve African states.³²³ Of the nine situations, the state party referral by the Union of the Comoros against Israel (a non state party) is an anomaly. Comoros made the referral on the basis of alleged crimes committed on vessels registered in Comoros and other state parties. On 5 July 2013, the Presidency of the International Criminal Court assigned "the Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia" to Pre-Trial Chamber I, but the Court stressed that this "is a procedural matter only, and is not the beginning of an investigation".³²⁴ On 06 November of 2014 ICC prosecutor, based on the available information, declined to proceed with an investigation. Even though her office determined that the Israeli Defence Force may have committed war crimes on Mavi Marmara.³²⁵ The prosecutor however did not believe that a potential case would emerge from this investigation. The

³²³ Obiora Chinedu Okafor and Uchechukwu Ngwaba, The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections (2014) Intl J Transitional Justice 90 at 99 [Okafor & Ngwaba, "ICC and TJ"].

³²⁴ International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities 2014, online: <<http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>> para. 246-268.

³²⁵ International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities 2014, online: <<http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>> para. 257.

acts of violence perpetrated by the Israeli Defence Force were not of sufficient gravity “to justify further action by the court”.³²⁶

Within the formal structures set up within the *Statute*, a highly contingent process exists in which some situations are selected for investigation and prosecution, while others are not. With reference to the nine situations before the Court; by honing in on what has been included and excluded from those situations, I pursue the dynamic of difference as it relates to how the ICC functions.³²⁷ In the ensuing discussion, I will hone in on the manner in which cases are selected to demonstrate how Anghie’s dynamic of difference continues to operate. In doing so, I will focus on the manner in which the UN Security Council is deploying its powers similar to what it did with the ICTR and ICTY.

1.5.1 Politics of Selection: ICC’s Prosecutorial Policy

Six of the situations before the Court involve state parties to the *Statute* who were deemed by themselves, or the prosecutor, as unable to take charge of prosecuting those alleged to have committed war crimes, crimes against humanity, or genocide within their respective territories. Of these, the Central African Republic, Uganda and Mali involved self-referrals. With reference to the Democratic Republic of Congo, the prosecutor was in the process of initiating an

³²⁶ International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities 2014, online: <<http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>>

³²⁷ The arguments I deploy in the following section are part of a research project I am engaged with John Reynolds; John Reynolds & Sujith Xavier, “TWAIL and International Criminal Law’s Selectivity” (Under review in Journal of International Criminal Justice).

investigation *proprio motu* when the country's President, Joseph Kabila, referred the situation to the Court in April 2004. The prosecutor has subsequently initiated two *proprio motu* investigations in relation to post-electoral violence in Cote d'Ivoire and Kenya.³²⁸ There are, however, numerous other areas where the Office of the prosecutor has been asked to initiate a *proprio motu* investigation: Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria.³²⁹

In addition to the six state party situations, Libya and Sudan are not state parties but have been referred to the Court by the UN Security Council. The Security Council referred the situation in Darfur, Sudan to the prosecutor through *Resolution 1593* on 31 March 2005.³³⁰ This culminated in the issuance of the arrest warrant in 2007 against Ahmad Muhammad Harun, Minister of State for Humanitarian Affairs (since 2006) and Ali Muhammad Ali Abd-Al-Rahman (the

³²⁸ In 2009, the prosecutor filled a request to commence an investigation into the electoral violence in Kenya. The request was granted. Similarly in 2011, the prosecutor filed a request for authorisation to initiate an investigation into the situation in the Republic of Côte d'Ivoire in relation to post-election violence in the period following 28 November 2010. The Pre-Trial Chamber granted the request.

³²⁹ International Criminal Court, Office of the prosecutor Communications, Referrals and Investigations, online: International Criminal Court <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/>>; Guinea ratified the Rome Statute on 14 July 2003; Iraq is not a state party; Kenya ratified the Rome Statute March 15, 2005; Venezuela ratified the Rome Statute on June 7 2000.

³³⁰ UN Security Council, *Security Council Refers Situation in Darfur Sudan to Prosecutor*, UNSCOR, 5158 Meeting, S/RES/1593; "On 31 March 2005, the Security Council, by a vote of 11 in favour to none against, with four abstentions (Algeria, Brazil, China and the United States), adopted Res. 1593 (2005)". Moreover the Res. 1593 does not specifically rely on the ICC Rome Statute article 13 (b) powers of the UN SC, rather it only specifies that the referrals is rooted in the UNSC's Chapter VII powers; Luigi Condorelli and Annalisa Ciampi "Comments on the Security Council Referral of the Situation in Darfur to the ICC" (2005) 3 (3) *Journal of International Criminal Justice*.

alleged leader of the Militia, Janjaweed).³³¹ In 2009, the Pre-Trial Chamber of the Court issued the first ever arrest warrant against a head of State: Omar Hassan Ahmad Al Bashir.³³²

The international politics of the Security Council referral started in 2004 with the creation of the International Commission of Inquiry on Darfur, headed by Antonio Cassese. Acting under its Chapter VII powers, the Security Council adopted *Resolution 1564* asking the UN Secretary General to establish a commission of inquiry to investigate the violation of human rights, violation of international humanitarian law and to determine whether acts of genocide were perpetrated by the parties to the conflict.³³³ The Darfur Commission, in its final report, found that there were serious violations of human rights and international humanitarian law. It did not however find that Sudan had committed acts of genocide. Nonetheless, the Commission strongly recommended that the "Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the ICC Statute".³³⁴ On 31 March 2005, the Security Council passed *Resolution 1593* referring the situation in Darfur to the prosecutor³³⁵ by a vote of 11 in favour to none against, with four abstentions.³³⁶

³³¹ *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") & Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/07.

³³² *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09; Asad G. Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity" ((2013) 12:3 Chinese J Intl L 467.

³³³ Darfur Commission, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN SC Resolution 1564, UNSCOR, 5040th mtg, S /RES/1564 (2004) [Darfur Commission Report]

³³⁴ *Ibid* at 5.

³³⁵ UN Security Council, *Security Council Refers Situation in Darfur Sudan to Prosecutor*, SC Res. 1593, UNSC 5158 Meeting, S/RES/1593 (2005).

On 12 December 2014, ICC Prosecutor Bensouda announced that she would halt the investigations into the Sudanese President Bashir because of the lack of cooperation by the United Nations Security Council, states party and other international organisations.

The civil unrest that started in several Middle Eastern and North African countries in late 2010 spread into Libya in early 2011. The Gaddafi regime in turn pursued a policy of brutal crackdown on protesters. The civil war that followed triggered a UN authorised air and naval intervention by the international community based on the responsibility to protect doctrine. The Gaddafi regime was overthrown in 2011. In the midst of this acute crisis, the UNSC in Resolution 1970 referred the situation in Libya to the Court.³³⁷

On 27 June 2011, the Trial Chamber I of the Court issued three arrests warrants for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya from 15 February 2011 until at least 28 February 2011, through the Libyan state apparatus and security forces. The Chamber terminated the case against Muammar Mohammed Abu Minyar Gaddafi in November 2012 due to his death. The Chamber further found that

³³⁶ UN SC Resolution 1593, UNSCOR, 5158th mtg, S /RES/1593 (2005); Abstentions by Algeria, Brazil, China and the United States.

³³⁷ *The Prosecutor v. Thomas Lubanga Do*, ICC-01/04-01/06; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07; *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06; *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05 -01/08; *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiamband Dominic Ongwen*, ICC-02/04-01/05.

Saif Al-Islam Gaddafi as Muammar Gaddafi's "unspoken successor and the most influential person within his inner circle and, as such, he exercised control over crucial parts of the State apparatus, including finances and logistics and had the powers of a de facto Prime Minister".³³⁸

Libya challenged the admissibility of the case against Al-Senussi before the ICC. The Court decided that since Libya is able and willing to carry out the investigation against the accused, the "case is inadmissible before the Court, in accordance with the principle of complementarity enshrined in the *Rome Statute*, founding treaty of the ICC".³³⁹

By focusing on the two United Nations Security Council referrals (Darfur and Libya), what becomes visible is the potential power of the ending impunity narrative made visible in the discussions about the ICTY and ICTR. This narrative, as encapsulated within the power of the United Nations Security Council's referral powers is particularly useful in demonstrating how the dynamic of difference operates within the ICC. This is even more important given the prominence of the UN Security Council in ICC referrals. The atrocious acts perpetrated by the Libyan and Sudanese leaders are deemed sufficiently barbaric that the United Nations Security Council has to act to bridge the gap between the deplorable actions of these outlier states and the international

³³⁸ International Criminal Court Case Information Sheet online: <http://www.icc-cpi.int/iccdocs/PIDS/publications/SaifAllIslamSenussiEng.pdf>.

³³⁹ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-CPI-20131011-PR953.

community. The Court is used as the means to control the behaviour of these states and bring the perpetrators to justice.

The referral of Sudan and the Bashir arrest warrant are an indication of a double standard. In light of this double standard, the African Union is in the process of creating a specialised human rights court to sidestep the ICC's selectivity of cases.³⁴⁰ The selectivity of referral of Sudan and Libya, and not other situations in places like Palestine and Sri Lanka is too significant to ignore. This is even more relevant when there are two international fact-finding investigations that demonstrate mass human rights violations and international crimes in Palestine and Sri Lanka, similar to Darfur that should invite a quick response by the United Nations Security Council.

The Goldstone Report of September 2009, commissioned by the UN Human Rights Council, alleges that Israeli soldiers targeted civilians and specifically destroyed non-targetable infrastructure during Operation Cast Lead and the Israeli war on Gaza between December 2008 and January 2009.³⁴¹ The Goldstone Report recommended that the United Nations Security Council refer the case to the ICC using its universal jurisdiction powers set out in the *Statute*. The recent Israeli attacks on Gaza in July 2014 have precipitated another international inquiry with yet another report detailing the commission of war

³⁴⁰ Okafor & Ngwaba, "ICC and TJ" *supra* note 323 at 103.

³⁴¹ Report of the Independent Fact Finding Commission on Gaza, *No Safe Place*, presented to the League of Arab States, 30 April 2009.

crimes by both parties to the conflict. What is noteworthy however is the analogous nature of the investigation undertaken by the Goldstone Commission to Darfur Commission and the commissions of inquiry that called for the creation of two ad hoc international criminal institutions. This illustrates the selectivity in creating ad hoc tribunals and referring cases to the ICC. I am not suggesting that the ICC should launch investigations immediately in Palestine or Sri Lanka as it would perpetuate western universalism that I am critiquing. Rather the example of Palestine and Sri Lanka serves to demonstrate the double standard in prosecuting international crimes.

With the termination of hostilities in the Gaza Strip in 2009,³⁴² the Palestinian Authority's Minister of Justice, Dr. Khashan, lodged a declaration pursuant to article 12 (3)³⁴³ of the *Rome Statute*.³⁴⁴ Article 4 (1) of the *Rome Statute* establishes the legal personality of the Court and the second limb of this provision delineates the applicability of the *Statute* to states party.³⁴⁵ The ICC and its *Statute* must be ratified by a state in order for the Court to have the requisite jurisdiction through either state referral or through the initiative of the prosecutor.³⁴⁶ The ICC Prosecutor conducted the pre-investigative analysis to determine if the Palestinian Authority has the requisite ability to transfer

³⁴² Al-Haq, "Operation Cast Lead: A Statistical Analysis" (August 2009) online: <<http://www.alhaq.org/pdfs/gaza-operation-cast-Lead-statistical-analysis%20.pdf>>.

³⁴³ *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 3; Pursuant to rule 44, sub-rule 2 of the *Rules of Procedure and Evidence*, ICC-ASP/1/3.

³⁴⁴ International Criminal Court Office of the Prosecutor, "Declarations Art. 12(3)" online: <<http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Registry/Declarations.htm>, accessed on May 30, 2009>.

³⁴⁵ *Rome Statute supra* note 203.

³⁴⁶ *Ibid*

jurisdiction to the Court, invoke the *Rome Statute* and prosecute those responsible for the alleged war crimes and crimes against humanity committed during Operation Cast Lead. Luis Moreno-Ocampo, the former ICC Prosecutor rejected this request as he did not want to determine if Palestine was a state for the purpose of the *Statute*.³⁴⁷

In December 2014, the Palestinian Authority attempted to gain statehood with United Nations Security Council resolution. This resolution was intended to upgrade Palestine's status before the United Nations. The failure to pass this resolution precipitated the Palestinian Authority to ratify the Court's *Rome Statute* and submit a declaration under Article 12 (3) to accept the jurisdiction of the Court.³⁴⁸ The Court can only exercise its jurisdiction once a state is party to the Statute and thus the Palestinian Authority made the declaration as a means to ensure that the Court can have jurisdiction to investigate the events during Operation Protective Edge in July 2014.³⁴⁹ Palestine was accepted as a state party on 01 April 2015.

The Sri Lankan government defeated the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers) in May 2009. During the lead up to the defeat of the Tamil Tigers, there were approximately 70,000-100,000 civilian casualties. The

³⁴⁷ International Criminal Court, Office of the Prosecutor, Situation in Palestine (Update) April 2012 online: <<http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>>.

³⁴⁸ Daphné Richemond-Barak, "Double Duty at the ICC" (2015) EJIL Talk! online: <http://www.ejiltalk.org/double-duty-at-the-icc/>.

³⁴⁹ Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict, 387/SituationinPaleSupp No 52, UN Doc A/HRC/29/52 (2015).

Secretary General and the former President, His Excellency Mahinda Rajapaksa, agreed to a commitment to human rights and accountability.³⁵⁰ Subsequently, the United Nations Secretary General appointed a Panel of Experts to advise him on accountability for the violation of international human rights and humanitarian law during the final phrase of the war in 2011.

The Panel's recommendation calls for the establishment of an independent international mechanism to monitor the Sri Lankan Government's initiation of accountability proceedings to investigate the alleged violations and to collect evidence of past crimes. The international community, especially non-governmental organisations³⁵¹ and the Tamil diaspora³⁵² are eager for the prospects of delivering justice and ending impunity in Sri Lanka.³⁵³ On 27 March

³⁵⁰ UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, Report UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, UNSGOR, September 2011, SG/SM/13791 HR/5072. SG/SM/13791 HR/5072.

³⁵¹ Amnesty International, "Sri Lanka: Reconciliation at a crossroads: Continuing impunity, arbitrary detentions, torture and enforced disappearances: Amnesty International Submission to the UN Universal Periodic Review", 1 April 2012; Amnesty International, No Real Will to Account: Shortcomings in Sri Lanka's National Plan of Action to implement the recommendations of the LLRC, 30 August 2012, ASA 37/010/2012; International Crisis Group (ICG), *Sri Lanka's Authoritarian Turn: The Need for International Action*, 20 February 2013, Asia Report N°243, available at: <http://www.unhcr.org/refworld/docid/5124deb32.html>; Human Rights Watch, *"We Will Teach You a Lesson" - Sexual Violence against Tamils by Sri Lankan Security Forces*, 26 February 2013, ISBN: 1-56432-993-3, available at: <http://www.unhcr.org/refworld/docid/5130850f2.html>.

³⁵² For example see Kubes Navaratnam, "Post-conflict Sri Lanka needs Canadian R2P", Embassy (28, 03, 2012); Vani Selvarajah, "Sri Lanka on notice: Where do we go from here?" (2013) Toronto Star; Harini Sivalingam, "Canada can help Sri Lanka" The Sun (Jan 17, 2013); CTC, Statement at the Press Conference held at the Canadian Parliament on November 15, 2012, online < <http://www.canadiantamilcongress.ca/article.php?lan=eng&cat=pr&id=74>>; See also Center for War Victims and Human Rights, "War Victim Documentation" Project, online< http://www.cwvhr.org/web/index.php?option=com_content&view=article&id=68&Itemid=55>.

³⁵³ Sujith Xavier "Looking for 'Justice' in all the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?" in Amarnath Amarasingam & Daniel Bass, eds, *Post-War Sri Lanka: Problems and Prospects* (Forthcoming New York:Hurst University Press, 2015).

2014, the United Nations Human Rights Council adopted a resolution calling for accountability. This Resolution tasks the United Nations High Commissioner for Human Rights with conducting another investigation into the alleged international crimes. The High Commissioner has yet to conclude the investigation and will most likely have more success than the Panel in getting the newly elected Sri Lankan government to cooperate.

Even though there was clear and demonstrable evidence from the 2011 Panel's report of war crimes and crimes against humanity by the parties to the conflict, the United Nations Security Council was silent. In the lead up to the end of the civil war in May 2009, the Security Council could only muster a weak statement; first demanding that the LTTE surrender. Second, that the Security Council expressed "deep concern at the reports of continued use of heavy calibre weapons in areas with high concentrations of civilians, and expect the Government of Sri Lanka to fulfil its commitment in this regard".³⁵⁴

Ultimately, what these case studies reveal is that there are only certain instances in which the United Nations Security Council is willing to utilise its powers of referral and bring a situation before the ICC. This vague, ambiguous, and highly selective decisions making process is fraught with politics. The politics is often fuelled by the self-interest of the Security Council's permanent members. In the Sudanese and Libyan examples, the Council was compelled to act as part of its

³⁵⁴ UN Security Council, Press Statement on Sri Lanka (09 May 2009) online: <<http://www.un.org/News/Press/docs/2009/sc9659.doc.htm>>.

role to maintain peace and order. But simultaneously, it is unwilling to use its powers when it concerns one of the longest conflicts and enduring illegal occupation in modern international law (Palestine³⁵⁵) and one of the bloodiest recent civil wars (Sri Lanka).

This highly selective process in determining who is referred to the Court, and who is not, clearly illustrates Anghie's dynamic of difference. There two cultures present: the cultures of those that are allies and the cultures of those that are not. With reference countries in Africa, they have very little political influence in the eyes of the Security Council. In Libya's case, it is of little utility and thus, the Security Council is willing to bridge the cultural difference through the ICC and prosecute those responsible for war crimes and crimes against humanity. But in the case of Sri Lanka, a geo-political ally of China, India and Iran, the Security Council is unwilling to act. Similarly with Israel, the western members of the Security Council are unwilling to act against one of their strongest allies in the Middle East.

1.6 Conclusion

This chapter provides the empirical backdrop to my arguments in challenging current theorising of global governance institutions through global constitutionalism and global administrative law. I traced the evolution of international law and international institutions. I relied on international lawyers

³⁵⁵ Victor Kattan From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949 (London: Pluto Press, 2009).

and international law scholars to set out the evolution of international law and its institutions from the 17th to the 20th century. In doing so, I presented the standard historical account and then posited insights that reveal a divergent narrative. In taking of stock of the different perspectives, the discussion focused on how international law and its institutions developed as part of colonialism and imperialism of the European colonial settlers in the new world. The encounter between the European sovereigns and the local inhabitants engendered a relationship that was regulated by international law. This particular regulatory framework then became a central feature in the development of international law and subsequently was embedded within the respective international institutions. The development of our current global order, in particular international institutions thus embody a western universalism. I then traced the continuation of this phenomenon in practice by examining one of the fastest growing contemporary fields of international law; international criminal justice regimes. Setting out the continuation of international law's universalism provides the historical background and contemporary empirical evidence to support my central arguments that I will unfold in the forthcoming chapters: contemporary theories of global governance, such as global constitutionalism and global administrative law ignore and obscure international law and its institutions' past.

Chapter 2: Globalisation and Fragmentation of International Law

2.1 Introduction

In this chapter, I will focus on globalisation and fragmentation of international law. They are twin concepts that must be studied in conjunction to better understand the manner in which international lawyers and international law scholars are theorising global governance. In the previous chapter, I traced the evolution of international law and its institutions. I was able to locate, based on historical accounts, the colonial past of international law and its institutions. By taking international criminal law and its institutions as case studies, I demonstrated how international law and its institutions function using a universalist register through Anghie's dynamic of difference.¹ Moreover the discussion in the previous chapter examined how this past continues to affect the manner in which international law and its institutions perform their duties today.

I first looked at the origins of international law, starting with the *Treaty of Westphalia* and other developments in international law and its institutions by focusing on the evolution of specific doctrines and institutions. The central theme of the previous chapter is the capacity of international law and its institutions' to make the particular western narrative into a universalism that is applicable to all.

¹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 4 [Anghie, *Imperialism*].

I then turned to one of the fastest growing fields of international law as my case study: international criminal law. The case studies illustrate how international law is haunted by its tendencies to perpetuate universalism. I focused on the field of international criminal law, its three recently created institutions and how these institutions embody the dynamic of difference in how they function. The anatomy of this process is to create a universal narrative that becomes applicable to all cultures.

The early 18th century move to institutions is celebrated in traditional public international law scholarship. It is seen as a pivotal moment in creating dispute resolution mechanisms that foster peace through the institutionalisation of conflict resolution.² The international community also celebrates the creation of the international criminal institutions as a tremendous achievement. But the creation of the NIMT and IMTFE at the end of WWII did not prompt an expansion of international criminal law. Rather, during the Post-War period, the Cold War between the two superpowers limited any prospects of ending impunity and prosecuting international crimes. Ending impunity however was one of the central rallying cries of the international human rights movement in the Post-War period. The international human rights movement evolved as part and parcel of the various United Nations bodies created at the end of WWII.³

² Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947).

³ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press 2012).

The expansion the UN international human rights treaties and their respective monitoring bodies were part of a broader trend in international law and international relations to create institutions to resolve disputes. The rapid expansion in various international institutions in the Post-War era, as demonstrated in the previous chapter, has captured the imagination of many scholars. On the one hand, the proliferation of international institutions and their respective legislative, administrative and judicial powers has enabled the development of highly specialised areas of international law. On the other hand, the subfields, or what scholars have aptly coined as the self-contained units, are so highly specialised that their various adjudicatory decisions either corroborate or contradict existing understanding of international law and its principles.⁴

Globalisation and the fragmentation of international law have,⁵ for international lawyers and international law scholars, accelerated the search for public authority, legitimacy, and accountability in international law and its institutions.⁶ The concept of globalisation was coined in the 1970s, and in the same period as global governance.⁷ It is an amorphous term with multiple and often contested

⁴ Bruno Simma "Self-Contained Regimes" (1985) 18 Netherlands YB112.

⁵ Martti Koskenniemi & Paivi Leino, "Fragmentation of International Law? Postmodern Anxieties", (2002) 15 Leiden J Intl L 553 [Koskenniemi & Leino, "Fragmentation"].

⁶ Antje Wiener, Anthony F. Lang, James Tully et al. "Global constitutionalism: Human rights, democracy and the rule of law" (2012) 1:1 Global Constitutionalism 1 at 8.

⁷ Henk Overbeek, "Global Governance: From Radical Transformation to Neo-Liberal Management" in Henk Overbeek et al, "Forum: Global Governance: Decline or Maturation of an Academic Concept?" (2010) 12 Intl Studies Rev 696; The 1995 Commission on Global Governance (CGG) report defined global governance as: "Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to

meanings. In short, the term globalisation is used to describe the changes our global society has witnessed, and continues to experience. More specifically, globalisation is considered to be the process of transformation that stretches over several centuries.⁸ Globalisation describes changes in our social reality precipitated by the relocation of different actors, from local, to regional to international spaces. Furthermore, it describes a destabilisation of the public/private distinctions and the evolution of actors and norms beyond the reach of the traditional nation state.

One of the consequences of the social, economic, legal and political interaction fostered by the nation state⁹ is the hyper-specialisation in specific areas of international law.¹⁰ As the social, economic, legal and political interaction expands at all levels of our global society, the nation state agrees to delegate some of its core functions to international organisations and other non-state actors. Globalisation helps us understand the role of international institutions and

or perceive to be in their interest"; The Commission on Global Governance, *Our Global Neighbourhood* (New York/Oxford: Oxford University Press, 1995) at 2; The term is a both a heuristic device that captures and describes the fast-paced development of our international system and a normative concept that details how societies should address global problems; Klaus Dingwerth & Phillip Pattberg "Global Governance as a Perspective on World Politics" (2006) 12 *Global Governance* 185 at 191 & 193; Robert W. Cox and Timothy J. Sinclair, *Approaches to World Order* (Cambridge: Cambridge University Press, 1996) at 3-18; Lawrence Finkelstein, "What Is Global Governance?" 1 (3) (1995) *Global Governance* 368; James N. Rosenau "Governance in the Twenty-first Century" (1995) 1:1 *Global Governance* 14.

⁸ William Twining, *Globalization and Legal Theory* (Cambridge: Cambridge University Press, 2000) at 6.

⁹ Saskia Sassen, "The State and Globalization" in Rodney Bruce Hall & Thomas J. Biersteker, eds, *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002) 91 [Sassen, "State and Globalization"]; Saskia Sassen, "The Emergence of Electronic Markets: The Case of Global Capital Markets" in Karin Knorr Cetina & Alex Preda, eds, *The Sociology of Financial Markets* (Oxford University Press, 2005) 27 [Sassen "The Emergence of Electronic Markets"].

¹⁰ Frédéric Mégret, "Globalization and International Law" in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition).

international law in facilitating the growth of global governance. Much more importantly, as the scale of global interactions stretches, we are witnessing a change in how we are regulated. There is a shift in how legislative, administrative, and judicial decisions are made at the global level. In fact, there is a transformation of governance at the global level. In the international sphere, there is no state-like sovereign, given the very nature of international law. This realisation has led scholars to turn their attention to creating accountability and legitimacy through for example global constitutionalism and global administrative law in global governance.

Simultaneously, as we encounter greater connectivity between places through economic and social exchanges, we are witnessing a bifurcation of international norms by different adjudicatory bodies in our expanding global space. Scholars worry that the various international adjudicatory bodies are rendering different and contradictory decisions. Coined as a postmodern anxiety,¹¹ the fragmentation of international law has prompted scholars to search for ways in which accountability and legitimacy can be included in the dynamics of international law and its functionaries. Global constitutionalism and global administrative law are two such attempts to theorise global governance.

In what follows, I will describe globalisation and fragmentation of international law and engage with the theoretical discussions that seek to comprehend the

¹¹ Koskenniemi & Leino, "Fragmentation" *supra* note 5.

rapid expansion of global governance. I will first present the orthodox understandings of globalisation and then I will challenge these claims using the scholarship of Boaventura de Sousa Santos and Saskia Sassen. In the following section, I will examine fragmentation of international law. Globalisation and fragmentation of international law are used as the rationale to theorise global governance from a constitutional law or administrative law perspective. The ensuing discussion will first introduce these important concepts of globalisation and fragmentation. Simultaneously, the following analysis will also seek to challenge some of the basic assumptions embedded in these discussions as means to open up a space to challenge global constitutionalism and global administrative law in the following chapters.

2.2 Globalisation and the Turn to International Institutions

There are multiple understandings of the contents of the term globalisation. Fundamentally, the term seeks to capture the changes in our every day modern life. It speaks to the deterioration of public/private distinctions and the evolution of actors and norms. It involves a process of interconnectedness that is far beyond what is achieved through technological or economic progress.

Scholars from law, sociology, politics and other disciplines, use varying approaches to understand this concept. There is agreement amongst these scholars that globalisation is a recent phenomenon that has managed to alter our daily experiences. But there is no agreement on “which dimensions contain the

essence of globalisation”.¹² The exact contours of the processes of globalisation are the subject of major disciplinary battles. This frustration over globalisation has spilled into the streets of Geneva, Rio, Cancun, Seattle, London and Toronto as well.¹³ The continuously expanding markets and capital has pushed national citizens affected by these changes on to the streets. The frustration over globalisation reflects its real life significance on individuals from various regions and cities that are directly affected by its consequences, which then precipitates the above referenced protests. Yet there are those that remain steadfastly unconvinced by such claims. They suggest that arguments about the extension of interdependence are dangerously overblown.¹⁴

A description of the significance of globalisation for scholars writing in various fields will be provided below. This will be positioned as the mainstream description of globalisation. Upon establishing this context, focus will then turn to the writings of Boaventura de Sousa Santos and Saskia Sassen as a means to

¹² Manfred B. Steger, *Globalization, A short Introduction* (Oxford: Oxford University Press, 2009) at 11 [Steger, *A Short Introduction*].

¹³ David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (London: Polity Press, 2004 & 2013) at 2.

¹⁴ Specifically, they argue that: “the present highly internationalized economy is not unprecedented; genuinely transnational companies appear to be relatively rare (most are multinationals imbricated in their home countries’ political economies); contemporary capital mobility is not producing a massive shift of investment and employment from the advanced to the developing countries; foreign direct investment is actually highly concentrated among the advanced countries and the Third World remains marginal in both investment and trade; the world economy, far from being genuinely global, concentrates investment and trade flows within the economies of the core; and perhaps most importantly, global markets are by no means beyond societal capacity to regulate transnational capital, instead it is elite preferences and power which prevent such measures. They do not deny trends towards increased internationalism, nor that there are important constraints on nationalist industrial policy; their claim is rather that there is still a major role for nation–state level policy measures”; William K. Tabb “Questioning Globalization”, online: (2001) 53:5 Monthly Review <<http://monthlyreview.org/2001/10/01/questioning-globalization/>>; Paul Hirst & Grahame Thompson, *Globalization in Question* (Cambridge: Polity Press, 1996).

interrupt this mainstream account. By presenting the writings of both Santos and Sassen, I seek to challenge the assumptions about the very nature of globalisation in international law scholarship. Broadly, this particular discussion about globalisation leads to the rationale of the search for public authority, legitimacy and accountability that is encapsulated with various theories of global governance.

For some scholars, globalisation signifies that we now live in one world.¹⁵ The argument is that “not only is globali[s]ation very real, but its consequences can be felt everywhere”. More importantly, “[N]ations have lost their sovereignty they once had and politicians have lost most of their capability to influence events”.¹⁶ Similarly David Held and Anthony McGrew posit that “simply put, [globalization] denotes the expanding scale, growing magnitude, speeding up and deepening impact of interregional flows and patterns of social interaction”.¹⁷ There is a shift in the scale of human social organisation that links distant communities together. This shift further expands the reach of power relations across the world’s major regions and continents.¹⁸ For others, this type of interpretation of globalisation simply ignores the very essence of the unequal manner in which it operates. In this context, globalisation is seen as a set of social processes that transforms current social conditions. It is exemplified by “weakening nationality into one of

¹⁵ Anthony Giddens, *Runaway World: How Globalization is Reshaping Our Lives* (New York: Rutledge, 2003) at 6.

¹⁶ *Ibid* at 8.

¹⁷ David Held & Anthony McGrew, *Globalization/Anti-Globalization: Beyond the Great Divide*, 1st Edition (London: Polity Press, 2002) at 4.

¹⁸ David Held & Anthony McGrew, *Globalization/Anti-Globalization: Beyond the Great Divide*, 1st Edition (London, Polity Press, 2002) at 4.

globality”.¹⁹ At the centre of this claim is idea that globalisation is about “shifting forms of human contact”.²⁰

Globalisation thus is envisioned as a force that has somehow changed the manner in which states operate based on economics. For instance, the claim that states have lost their sovereignty is premised on a limited conception of state behaviour. The various scholars writing under the descriptive camp of global constitutionalism suggest that international law has been developing in various regional and functional pockets in an amorphous and non-hierarchical system.²¹ These same scholars suggest that economic, social and cultural forces of globalisation motivate international law and its institutions.²² Global administrative lawyers also adopt such a vision of globalisation that underpins their move to global governance as administration.²³

This conventional account of globalisation presented above is simply not true, especially in a post-911 world.²⁴ The terrorist attacks on New York City in the United States on 11 September 2001 ushered in a new regulatory era. Governments are reconceptualising a number of different policies in their territories and abroad. In particular, there has been merger of domestic criminal

¹⁹ Steger, *A Short Introduction supra* note 12 at 9.

²⁰ *Ibid.*

²¹ Jeffrey L. Dunoff & Joel P. Trachtman, eds, *Ruling the World; Constitutionalism, international law, and Global Governance* (Cambridge: Cambridge University Press, 2009).

²² *Ibid.*

²³ See chapter 4, False Universalism of Global Administrative Law.

²⁴ I have elaborated on this point in: Shanthi Senthe and Sujith Xavier, “Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada” (Forthcoming) (2015) Windsor YB Access Just.

law, immigration and administrative law that regulates foreign nationals through such schemes as national security certificates. Yet what is accurate about this conventional account is that there is a large-scale expansion of social interaction at the global level. This expansion is made possible by both existing and new infrastructures through global governance regimes.

Sassen rightly rejects the idea that the nation state is losing its sovereignty.²⁵ For Sassen, the globalisation debate incorrectly centres on a duality between the national and global state.²⁶ She points to key contemporary government institutions, for example the ministry of finance and banks, and other types of institutions that do not fit well into this picture.²⁷ For Sassen, this is an impetus to reimagine the globalisation debate. She contends that her “position is not comfortably subsumed under the proposition that nothing has changed in terms of state power nor under the proposition of the declining significance of the state”.²⁸

The continuous participation of states within the global economic system has ensured that they have undergone a “significant transformation”.²⁹ The state is the guarantor of the rights of global capital, but its role has been relegated to the background. Sassen argues that this is indicative of the state’s technical and

²⁵ Sassen, “State and Globalization” *supra* note 9.

²⁶ *Ibid.*

²⁷ *Ibid* at 104.

²⁸ *Ibid* at 106.

²⁹ *Ibid* at 93.

administrative role, and this role cannot be mimicked or performed by any other institution. More importantly, this capacity, as Sassen points out, is backed by military and global power for most states.³⁰

For scholars writing on the global South, globalisation is directly related to imperialism. Bhupinder Chimni suggests that the “[t]he threat of recolonisation is haunting the world... The process of globali[z]ation has had deleterious effect on the welfare of third world peoples”.³¹ International law and its institutions facilitate this process of recolonisation. Through such mechanisms as good governance, international law and its institutions furthered the flow of globalisation.³²

Santos, writing in the same vein, defines globalisation by taking it outside the sole arena of economics. He notes “the process of globali[z]ation is [...] selective, uneven and fraught with tensions and contradictions. But it is not anarchic”.³³ For Santos, globalisation is “the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival condition or entity as local”.³⁴

There are two specific methods in which globalisation is produced.

³⁰ *Ibid.*

³¹ B.S. Chimni, “Third World Approaches to International Law: A Manifesto”, (2006) 8 Intl Community L Rev3 at 3.

³² Anghie, *Imperialism supra* note 1 at 246.

³³ Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (London: Butterworths LexisNexis, 2002) at 179 [Santos, *New Legal Common Sense*].

³⁴ Boaventura de Sousa Santos, “Globalizations” (2006) 23 Theory Culture Society 393 at 396 [Santos, “Globalizations”].

The first mode of production are: *globalised localism and localised globalism*. Globalised localism depicts the process by which a given local phenomenon is successfully globalised. The latter “depicts the specific impact of transnational practices and imperatives on local conditions that are thereby altered”.³⁵ These two processes operate in tandem to constitute the hegemonic neoliberal and top-down globalisation. Law generally, and international law and its many institutions in particular, is an example that fit nicely in the first mode. Criminal law is exemplary in this manner.

The second mode of production of globalisation is *insurgent cosmopolitanism*.³⁶ It includes “transnationally organised resistance against the unequal exchanges produced or intensified by globalised localisms and localised globalisms”.³⁷ The resistance is organised through local and global linkages between social organisations and movements representing those classes and social groups victimised by hegemonic globalisation. A good illustration is the protests around the world against the expanding markets and capital. Various social movements are united in concrete struggles against “exclusion, subordinate inclusion, destruction of livelihoods and ecological destruction, political oppression, or cultural suppression, et cetera”.³⁸ In this analysis, the core countries produce and

³⁵*Ibid* at 396; Santos, *New Legal Common Sense supra* note 33 at 262-263.

³⁶Santos, “Globalizations” *supra* note 34 at 396; Santos Santos, *New Legal Common Sense supra* note 33 at 263.

³⁷Santos “Globalizations” *supra* note 34 at 397 Santos Santos, *New Legal Common Sense supra* note 33 at 263-265.

³⁸Santos, “Globalizations” *supra* note 34 at 397.

market globalised localism. Countries on the periphery are forced to receive these localised globalisms.³⁹

Santos' description of globalisation situates the different forces that are involved in the creation of this particular social condition. His analysis closely traces the diverse and unequal distribution of wealth and power between the global North and the global South. By characterising the effects of globalisation as both cause and effect of the distribution of unequal wealth and power, Santos offers a much more nuanced perspective of how recent social interactions and the rapid expansion of international law and its institutions can be understood. Much more importantly, he captures a particular unequal tendency to delegate legislative, administrative and judicial functions to international organisations and the ensuing dynamic of difference that follows. Ultimately, Santos' theoretical construction allows us to understand the multifaceted nature of globalisation rather than presenting a one sided perspective.

Some writers have noted that globalisation is a "vehicle by which European public law was projected on to the rest of the world".⁴⁰ European public law, the once coveted and revolutionary ideals of a single region, is now, to use Santos' term, a globalised localism. Similarly, the notion of the nation state that was born

³⁹ William Twining, *Globalisation and Legal Theory* (Cambridge: Cambridge University Press, 2000) at 5.

⁴⁰ Frédéric Mégret, "Globalization and International Law in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition) at 6.

out of the *Treaty of Westphalia* is also a globalised localism.⁴¹ To invoke Sassen's contribution, it is through the state that localised globalism and globalised localisms are now possible.

In this complicated and contested intellectual map of globalisation, what is clear is that globalisation is a process rather than an end result. International lawyers and international law scholars at times are silent about this type of processes. It has been argued that their domestic counterparts were the first to sense the importance of globalisation as it affected their domestic areas of legal practice.⁴²

As international lawyers and international law scholars became more attuned to the forces of globalisation and the role of the state, they realised the significance of its role and consequences for their discipline. One of the central consequences is the recognition that the process of globalisation is generating multiple and often overlapping systems of governance. Once these regimes are created, often with the consent of the nation state, they operate and function without oversight, as I illustrated in the previous chapter. Undoubtedly, there is a lacuna in accountability⁴³ and legitimacy⁴⁴. The preoccupation with both

⁴¹ Makau W. Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1994) 16 Mich J Intl L 1113.

⁴² Frédéric Mégret, "Globalization and International Law" in R. Wolfrum ed, *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008, online edition) at 4; While this claim is plausible, the opposite has been argued by Peer Zumbansen and Craig Scott, "Foreword: making a case for comparative constitutionalism and transnational law (2008) 46 (3) Osgoode Hall LJvii at xix.

⁴³ Benedict Kingsbury, Nico Krisch & Richard B Stewart "The Emergence of Global Administrative Law" (2005) 68 Law & Contemp Prob 1.

legitimacy and accountability will be the focus of the following two chapters. The process of globalisation, global constitutional and global administrative scholars argue, is one of the main reasons why they are seeking to discover, either through meta constitutional or administrative norms or principles, the constitutional and administrative tendencies within international law and its international regulatory regimes. By discovering these norms, the scholars working on global governance theories hope to curb, mediate and moderate these institutions using domestic law analogies. Yet these writers simply ignore the very nature of globalisation narrated by Santos. In ignoring this aspect of globalisation, these scholars are also able to forgo and omit any discussions about the context (and the dynamic of difference) in which these global governance regimes operate.

2.3 Fragmentation of International Law

The evolution of international law, as demonstrated in the previous chapter, illustrates a struggle for cohesion and uniformity. International law started out as a means to regulate the relationships between equal European sovereigns. Another reading could be that international law concretised the framework in which European sovereigns could interact with their conquered subjects. International law expanded drastically from the *Treaty of Westphalia* to the current system in which there are multiple norms, actors, and processes. By the

⁴⁴ Ronald St John Macdonald and Douglas M Johnston, eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005).

late 1990s to the early 2000s, scholars and practitioners, in particular the judges of the International Court of Justice, worried about the proliferation of self-contained units and the possibilities of having multiple and competing interpretations of international law.⁴⁵ Their anxieties can be illustrated through two examples of contradictory judicial interpretations by different international courts.

The first is the competing interpretation of territorial reservations by the European Court of Human Rights and the International Court of Justice.⁴⁶ The second example is conflicting judicial interpretation state responsibility between the International Court of Justice and the ICTY. In this example, one of the first ICTY decision conflicted with the state responsibility test created by the International Court of Justice in its landmark decision in *US v Nicaragua*.⁴⁷

The real danger, according to judges, scholars and the international law's epistemic community, is "that international law as a whole will become fragmented and unmanageable".⁴⁸ In thinking about this particular issue, Rosalyn Higgins suggests writes the following:

⁴⁵ Mario Prost, *The Concept of Unity in Public International Law* (Oxford: Hart Publishing, 2012) [Prost, *Unity of PIL*]; Koskenniemi & Leino, "Fragmentation" *supra* note 5 at 553-555.

⁴⁶ *Loizidou v. Turkey* (1995) ECHR (Ser. A) No. 3101; Koskenniemi & Leino, "Fragmentation" *supra* note 5 at 555.

⁴⁷ *Prosecutor v. Tadić*, IT-94-1, [2000]; *Nicaragua v. United States*, ICJ Reports 1984; Koskenniemi & Leino, "Fragmentation" *supra* note 5 at 555.

⁴⁸ *Ibid* at 555.

“Judicial findings that are inconsistent with the judgments of the International Court of Justice would present particular problems for the role of international law in international relations, given that the International Court is the judicial arm of the United Nations and the only judicial body vested with a universal and general subject matter jurisdiction”.⁴⁹

This problem is significant for the discipline of international law, its institutions and practitioners of international law. The presence of conflicting interpretation of specific rules of international law by various tribunals and courts simply creates a lack of coherent and predictable rules that can be generally applied. The International Law Commission’s study of fragmentation suggests that there are three potential places of conflict: there are tensions between different interpretations of general law, tension between general law and special law, and tension between two types of special law.⁵⁰

The hyper-specialisation of international law has compelled certain scholars to question the self-contained units of international law.⁵¹ In order to overcome the issue of hyper-specialisation, some scholars have used the metaphor of international law as a highway between the different and “isolated villages of international environmental law, international criminal law, international trade

⁴⁹ Rosalyn Higgins “The ICJ, the ECJ, and the Integrity of International Law” (2003) 52 Intl L & Comptemporary Leg Q at 18.

⁵⁰ International Law Commission, *Report of the Study Group of the International Law Commission ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UNGAOR, Fifty-eighth session, A/CN.4/L.682 (2006) at para. 483.

⁵¹ Bruno Simma “Self-Contained Regimes” (1985) 18 Netherlands YB112.

law, et cetera”.⁵² The literature suggests various methods of tackling this particular issue, ranging from specific construction of the conflicting treaties to applying the hierarchy of rules found in the International Court of Justice’s *Statute*.⁵³

It is difficult to describe the emergence of new global governance actors that are not wedded to the nation state using our international law vernaculars. These regimes, with their particular rules and regulatory norms, have further exacerbated our conceptions of the strict divisions of labour between the executive and legislative arms of government. Our conceptions of governance moreover are wedded to orthodox understandings of our existing national worlds.⁵⁴ The division of labour in this instance is the various roles taken on by the judiciary, the legislative and executive branches of government in the nation state through the constitutional separation of powers. In light of these concerns about the bifurcation of international law, scholars, primarily in Europe have unsurprisingly sought to unify the field of international law through ideas embedded in constitutions and constitutionalism and administration.⁵⁵

⁵² Oscar Schachter, *International Law in theory and Practice* (The Hague, Martinus Nijhoff, 1991) at 1; Jan Klabbbers “Setting the Scene” in Jan Klabbbers, Anne Peters & Geir Ulfstein eds, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) at 11.

⁵³ Campbell McLachlan “The Principle of Systemic Integration and Art. 31 (3) (c) of the Vienna Convention” (2005) 54 ICQL 279 at 280; Joost Pauwelyn “Fragmentation of International Law” in R. Wolfrum ed., *The Max Planck Encyclopedia of Public International Law*, 11 (Oxford: Oxford University Press, 2013, online edition).

⁵⁴ Peer Zumbansen “Transnational Legal Pluralism” (2010) 1: 2 *Transnational Leg Theory* 144 at 147; Philip C Jessup, *Transnational Law*, Storrs Lectures in Jurisprudence at Yale Law School (New Heaven: Yale University Press, 1956).

⁵⁵ Bruno Simma “Fragmentation in a Positive Light” (2003-2004) 25 *Mich J Intl L* 845 at 845-846; Benedict Kingsbury, Nico Krisch & Richard B Stewart “The Emergence of Global Administrative Law” (2005) 68 *Law & Contemp Prob* 1.

For the purpose of this analysis, it is useful to define fragmentation as the “branching out and gaining some form of quasi-independence” of various international mini regimes and orders.⁵⁶ Fragmentation is described as “having developed in two distinct periods”.⁵⁷ Mario Prost suggests that the first period can be visualized through two themes: “the functional automisation of special regimes” and “the multiplication of international tribunals”.⁵⁸ Within each thematic space, scholars oscillate between having strong views on how special international regimes, which were created with their own rules of interpretation, are self-contained units, to those that view self-contained units as being dependent upon a general body of international rules. With reference to the second theme, there are those that view the proliferation of different institutions as creating “problems of overlapping and conflicting jurisprudence in a way that undermines the coherence, foreseeability and efficacy of the international legal order”.⁵⁹ The first period, which would ultimately start from the rapid of expansion of international law and international institutions in the Post-War era is concerned with the predictability of the international legal order.

But what is missing from these debates, as illustrated from the previous chapter, is the manner in which international law and its institutions were constructed and

⁵⁶ Jan Klabbbers “Setting the Scene” in Jan Klabbbers, Anne Peters & Geir Ulfstein eds, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) at 14.

⁵⁷ Prost, *Unity of PIL supra* note 45 at 9.

⁵⁸ *Ibid* at 9 & 9-14.

⁵⁹ *Ibid* at 11.

how they continue to act. Even though there were concerns about the specific rules and their applications in the broader international legal order, there was very little emphasis on how these rules affected the global South.

In the second period of fragmentation, important questions centre on the search for coherence and unity in international law. If these are legitimate objectives, then how can this complex web of interactions and interrelations between all of these different actors, norms and processes be organised? The aim is to find “principles, methods and techniques that can be used to put the pieces of the puzzle together and bring order to multiplicity.”⁶⁰ Oddly enough, as Prost has pointed out, postmodern anxiety has focused solely on one side of the debate: fragmentation. It has ignored the concept of unity, “a graded concept for it can be taken from different angles and standpoints, and it possesses various semantic layers”.⁶¹

Similar to the reactions about globalisation, what emerges from the literature on fragmentation is the desire, in some way, to piece together often-conflicting parts of international law and its institutions through a unifying theory. These various components of the international legal order had to be unified in a manner that would resemble domestic incarnations of a legal system.

⁶⁰ *Ibid* at 11.

⁶¹ *Ibid* at 17.

The search for what Prost has suggested as unity in international law can be discovered in attempts to find accountability and or legitimacy through ideas of constitutionalism or delegation and accountability as principles encapsulated within administrative law. Yet this search for unity does not take stock of the challenges of international law. To bring Santos back into the discussion, there is complete omission of the second mode of *insurgent cosmopolitanism*.⁶² Fundamentally, the anxieties about fragmentation have prompted scholars to search for some means of unifying the various international legal orders.

2.4 Conclusion

The aim of this chapter was to position globalisation and fragmentation of international law as the reason behind the surge in scholarship focused on public authority, accountability and legitimacy in international law. This search can be broadly encapsulated under global constitutionalism and global administrative law. Arguably, the effects of both globalisation and fragmentation have lead scholars to search for new ways of imaging our international order. In the next two chapters, I trace how scholars are articulating these measures. I detail how scholars are theorising global governance through global constitutionalism and global administrative law.

⁶²*Ibid* at 396; *Ibid* at 263.

Chapter 3: False Universalism of Global Constitutionalism and Global Constitutionalisation?

3.1 Introduction

Globalisation and fragmentation of international law have inspired international lawyers and international law scholars to theorise global governance through global constitutionalism and global constitutionalisation.¹ It is not surprising that international lawyers and international law scholars are using the constitutionalist lens as a means to understand, mitigate and contend with the fast-paced evolution of international norms and international institutions.² Lawyers and scholars who adopt this perspective are suggesting it is possible to use constitutional vernaculars to describe the emergence and operation of international law and its various institutions.³ International criminal law and its institutions are an illustrative example in this exercise.⁴

¹ Jeffrey L. Dunoff & Joel P. Trachtman, "A Functional Approach to International Constitutionalization" in Jeffrey L. Dunoff & Joel P. Trachtman eds, *Ruling the World; Constitutionalism, international law, and Global Governance* (Cambridge University Press, 2009) at 5-9 [Dunoff & Trachtman, "Functional Approach"].

² Peters & Armingeon regard it as "constitutionalist spectacles"; Anne Peters & Klaus Armingeon, "Introduction—Global Constitutionalism from an Interdisciplinary Perspective" (2009) 16:2 *Ind J Global Leg Stud* 385 at 385 [Peters & Armingeon, "Introduction"].

³ Ronald St. John Macdonald & D. M. Johnston, eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005) [Macdonald & Johnston, *World Constitutionalism*].

⁴ Axel Marschik, "Legislative Powers of the Security Council" in Ronald St. John Macdonald & D. M. Johnston eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005) 457 at 461-472 [Marschik, "Legislative powers of SC"].

Arguably the emergence of various global constitutionalism and global constitutionalisation perspectives is indicia of the concretisation of international norms. An example of this concretisation is the development of the prohibition relating to the commission of genocide. The prohibition of genocide can pierce the veil of immunity often afforded to incumbent heads of state and their foreign ministers. As such it prohibits officials from violating internationally accepted principles. The prohibition of genocide is similar to a constitutional arrangement within the domestic/national legal frameworks with guaranteed rights, duties and other such protections against arbitrary use of public power. Another example is the cosmopolitan project of creating the federal European state.⁵ A large number of scholars writing about constitutionalism (and surveyed in this dissertation) are inspired by the European integration project that started with the nuclear agreements during the early Post-War period.⁶ The recent European Union debt crisis has further spurred on this curiosity and the potential viability of the Union as a constitutional project.

The purpose of this chapter is to study global constitutionalism and global constitutionalisation as a unified field of inquiry. The current literature on global

⁵ Claus Offe, *Europe Entrapped* (Cambridge: Polity Press, 2015); Claus Offe, "Europe entrapped"(2013-02-06) Eurozine Review < <http://www.eurozine.com/pdf/2013-02-06-offe-en.pdf>>.

⁶ Christine Schwöbel, "The Appeal of the Project of Global Constitutionalism to Public International Lawyers" (2012) 13:1 German LJ1 at 5; See below for an in depth discussion of Anne Peters & Geir Ulfstein eds, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

constitutionalism and global constitutionalisation is tremendous.⁷ In what follows, the first section will introduce the various components of global constitutionalism and global constitutionalisation. Based on this analysis, the second section will identify three specific camps within the current literature on global constitutionalism and global constitutionalisation: normative, descriptive and pluralist. I will provide a detailed description of the arguments in each camp while paying close attention to the various scholars that push the normative and descriptive agendas housed therein. My selection of the different scholars is based on their contributions to their respective camps. Simultaneously, by using the case studies detailed in the first chapter, I will challenge key assertions made by these scholars. In particular, I will delve into the way in which global constitutionalism and global constitutionalisation are being deployed in unison to further entrench the universalisms embedded in international law chronicled in the first chapter.

I argue that global constitutionalism and global constitutionalisation ignore, obscure, and efface the underlying context and histories of international law and its international institutions. Global constitutionalism presents a particular western understanding of constitutionalism as universally applicable in diverse contexts and thus, scholars writing in this genre of global governance theory re-enact Antony Anghie's dynamic of difference. By presenting such an image of

⁷ Christine Schwöbel, *Global Constitutionalism in International Legal Perspective*. (Leiden/Boston: Martinus Nijhoff, 2011).

the current world order, these scholars miss an important opportunity to take stock of on-the-ground realities within contemporary international institutions.

3.2 Global Constitutionalism: Introducing Three Perspectives

The popularity of global constitutionalism and global constitutionalisation in international law coincides with Sujit Choudhry's reflection that there is a globalisation of modern constitutionalism.⁸ The rise in comparative constitutionalism is demonstrable through the adjudication process where judges rely on interpretative techniques from foreign jurisdictions as guidelines for their own adjudicatory practices. Comparative constitutionalism is often utilised as tool to examine the proliferation of human rights protection across jurisdictions. Scholars have coined this as the rights revolution.⁹

The rise in comparative constitutionalism can be credited, rightly or wrongly, to a number of reasons, including the transition to democracy in different countries.¹⁰ As countries emerge from Post-War, post-conflict, and post-authoritarian contexts, they are searching for ways in which to structure their institutions, their politics and their society. Good governance practices are used by international

⁸ Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74:3 Indiana Law Journal 819 at 821.

⁹ Sujit Choudhry, "Introduction: Integration, Accommodation and the Agenda of Comparative Constitutional Law" in Sujit Choudhry ed, *Constitutional Design for Divided Societies: Integration or Accommodation?* (New York: Oxford University Press, 2008) at 8.

¹⁰ *Ibid* at 8; Ran Hirschl, *Towards Jurisocracy: The Origin and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

development agencies as part of an arsenal of tools to support these countries.¹¹ Some jurisdictions are attempting to move forward from a debilitating past marred with mass human rights violations. At times these particular countries want to confront individuals that may have participated in the commission of mass atrocities.¹² The use of democratic governance in these countries, especially after an intense period of authoritarian rule, repression, or conflict, has been challenged. The challenge is three-fold predicated on who makes decisions about the choice of procedures in democratic governance, how these decisions are made, and in whose interests these decisions are made.

The transition from a violent past to a peaceful future has been the central focus of the dynamic field of transitional justice. The field of transitional justice seeks to understand how to move forward from times of acute crisis. Moreover, transitional justice is often a catalyst to transition to democratic rule from post-authoritarian, post-communist, and post-conflict societies. There is an attempt in this context to transition from moments of acute crisis by moving forward through the prosecution of those responsible for human rights violations as a means to heal the divisions in the respective communities.¹³

¹¹ Terence C. Halliday, "Architects of the State: International Financial Institutions and the Reconstruction of States in East Asia" (2012) 37:2 Law and Soc Inquiry 265 at 272.

¹² Rama Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development" (2008) 2 Intl J Transitional Justice 25; Vasuki Nesiah, "The Trials Of History: Losing Justice In The Monstrous And The Banal" in Peer Zumbansen and Ruth Buchanan, eds, *Law in Transition: Development, Rights and Transitional Justice* (Oxford: Hart Publishing, 2013).

¹³ Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); Ruti G. Teitel, "The Transitional Apology" in Elazar Barkan and Alexander Karn, eds, *Taking Wrongs Seriously: Apologies and Reconciliation* (Palo Alto: Stanford University Press, 2006); Paige Arthur, "How

International prosecutions are part of the legal formalist answer to violence. There are numerous alternatives to the formalist responses in transitional justice, ranging from national prosecutions, truth commissions, sanctions, reparations, amnesties and pardons.¹⁴ Earlier debates in international law, vis-à-vis large-scale violence, focused on the creation of a right to democracy and the promotion of democratic values.¹⁵ The right to democracy was both celebrated and criticised. It was celebrated for its embedded values of democracy and the potential for democracy to allow for participation. It was criticised for its universalising nature, analogous to claims I set out in the first chapter.¹⁶

In a similar vein, the rise of global constitutionalism and global constitutionalisation in international law is important. Constitutionalism, as understood by constitutional scholars, is the theory associated with various models of constitutions and norms that permeate any constitutional order. It is the theory of governmental structure, limits of public power¹⁷ and procedures

Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice” (2009) 31 Hum Rts Q 2; Nicola Palmer, Phil Clark & Danielle Granville, *Critical Perspectives in Transitional Justice* (Cambridge: Intersentia, 2012).

¹⁴ Jose E. Alvarez, “Alternatives to International Criminal Justice” in Antonio Cassese, ed, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 25 [Alvarez, “Alternatives to ICL”].

¹⁵ Thomas Frank, “Emerging Right to Democratic Governance” (1992) AJIL46; James Crawford, *Democracy in International Law* (Cambridge: Cambridge University Press, 1994).

¹⁶ Susan Marks, *The Riddle of all Constitutions* (Oxford: Oxford University Press, 2000).

¹⁷ The term public power is specifically used by those advocating for and against global constitutionalism; Martin Loughlin, “What is Constitutionalisation” in Petra Dobner and Martin Loughlin eds, *Twilight of Constitutionalism* (Oxford, Oxford University Press 2010) 47 at 63-68 [Loughlin, “What is Constitutionalisation”]; Neil Walker, “Constitutionalism and Pluralism in Global Context” in Matej Avbelj and Jan Komarek, eds, *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing 2012) 17 [Walker, “Constitutionalism and Pluralism”]. The

through which public power can be exercised. The key principles of constitutionalism are independence of the judges, delineation and separation of the various branches of government, the protection of fundamental rights, and the role of judges in policing the boundaries of public power.¹⁸

If constitutionalism is the political theory of constitutions, constitutionalisation can be then described as a “process born of a reconfiguration of the political theory of constitutionalism”.¹⁹ Martin Loughlin argues that constitutionalism is being repackaged as western liberal-legal constitutionalism and is presented as a free-standing set of norms²⁰ that legitimises our fragmented and globalised social order at all jurisdictional levels. Loughlin states:

Constitutionalism is no longer treated as some evocative but vague theory, which expresses a belief in the importance of limited, accountable government, to be applied flexibly to the peculiar circumstances of particular regimes. It now is being presented as a meta theory which establishes the authoritative standards of legitimacy for the exercise of public power wherever it is located.²¹

Modern-day global constitutionalism can be traced back to Cicero and the Roman Republic.²² Some scholars argue that Alfred Verdross and Hans Kelsen

reliance on the term public is the subject of a larger debate in critical legal studies; see for example, Joseph Singer, “Legal Realism Now” (1988) 76 (2) Cal L Rev 465 at 477 & 534-535.

¹⁸ Loughlin, “What is Constitutionalisation” *supra* note 17 at 55.

²⁰ *Ibid* at 61-62.

²¹ *Ibid* at 61.

²² D. M. Johnston, “World Constitutionalism in the Theory of International Law” in Ronald St. John Macdonald & D. M. Johnston, eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005) 3 at 16 [Johnston, “World Constitutionalism in Theory”].

were the first international lawyers to look to constitutionalism.²³ Some credit the scholarship of Immanuel Kant and other philosophers of the 17th and 18th century as inspiring the use of constitutionalism in international law.²⁴ The creation and development of international institutions during the mid-19th century, such as the Danube Commission to regulate the international waterways, is emblematic of the ideas expressed in Kant's *Perpetual Peace*.²⁵ International institutions were a potential catalyst for dispute resolution. Arguably, the expansion of the nation state through colonialism and imperialism facilitated the development of international institutions. As demonstrated in the first chapter, the expansion of the nation state, through conquest and colonisation of the new world, solidified the unequal distribution of wealth and power. Global constitutionalism, as an international legal discourse, seeks to contend with the modern-day incarnations of these international institutions that make up the dense web of inchoate regulatory actors, norms, and processes.²⁶

²³ Bardo Fassbender, "The Meaning of International Constitutional Law" in Nicholas Tsagourias, ed, *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press, 2007) at 312 [Fassbender, "The Meaning of International Constitutional Law"].

²⁴ Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization" (2007) 8 *Theor Inq L* 9 at 12; Petra Dobner, "More Law, Less Democracy? Democracy and Transnational Constitutionalism" in Petra Dobner & Martin Loughlin, eds, *The Twilight of Constitutionalism?* (Oxford University Press, 2010) at 141.

²⁵ Immanuel Kant, *Perpetual Peace; A Philosophical Essay* (London: Swan Sonnenschein, 1903) [Translated by Mary Campbell].

²⁶ Peer Zumbansen, "Transnational Law, Evolving" in J. M. Smits ed, *Elgar Encyclopedia of Comparative Law* (Surrey: Edward Elgar Publishing Ltd, 2012).

José Alvarez observed that different disciplines have different methods of examining the proliferation of international law and its institutions.²⁷ The literature on global constitutionalism is akin to an interdisciplinary attempt to tackle the fast-paced growth of international law and its institutions.²⁸ International lawyers, political scientists and scholars from other disciplines are leading the charge in encouraging the conceptualisation of the constitutionalisation of international law because of globalisation and fragmentation.²⁹

Alec Stone Sweet describes global constitutionalisation as thick and thicker to illustrate the varying perspectives that can be discerned within the current literature on global constitutionalism.³⁰ Proponents of the thick version of constitutionalism have a foundational notion of how “we organi[z]e the state, constitute our government, provide for representation and participation, protect minorities, promote equality, and so on”.³¹ The thicker version depicts a much more cultural view of constitutionalism that is conceived “as an overarching ideology of politics, community, citizenship, and the state”.³²

²⁷ Jose E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences", (2003) 38 Texas Intl LJ 405 [Alvarez, "The New Dispute Settlers"].

²⁸ Mattias Kumm, Anthony F. Lang, Jr., James Tully & Antje Wiener, "How large is the world of global constitutionalism?", (2014) 3:1 Global Constitutionalism 1 at 1 [Kumm *et al*, "How large is the world"]; Anthony F. Lang, Jr., Mattias Kumm, Antje Wiener, James Tully, & Miguel Poiares Maduro, "Interdisciplinarity: Challenges and opportunities" (2013) 2 (1) Global Constitutionalism 1 [Lang *et al*, "Interdisciplinarity"]; Antje Wiener, Anthony F. Lang, Jr., James Tully, Miguel Poiares Maduro & Mattias Kumm, "Global constitutionalism: Human rights, democracy and the rule of law" (2012) 1 (2) Global Constitutionalism 1 [Wiener, "Global Constitutionalism"].

²⁹ Alvarez, "The New Dispute Settlers" *supra* note 27.

³⁰ Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes" (2009) 16:2 Ind J Global Leg Stud 621 at 627; Sweet uses the language of thick and thin versions of constitutionalism to identify the possible critique of constitutionalism.

³¹ *Ibid* at 627.

³² *Ibid* at 627.

As alluded to earlier, irrelevant of whether one is operating at the thick or thicker register of constitutionalism at the global level, there remains a tendency to obscure the history of international law and its institutions. Discussions about the organisation of various international institutions (thick version) or the cultural views of constitutionalism (thicker version) simply ignore the manner in which international institutions were forged and have evolved. By disregarding these foundational aspects of international law and its institutions, scholars working in global constitutionalism simply forgo any analysis of how western values of constitutional arrangements, such as separation of powers, have become the bedrock of their constitutional analysis.

In light of the burgeoning interdisciplinary literature, scholars have more recently suggested yet another characterisation to understand global constitutionalism. In a recent editorial in *Global Constitutionalism*, one of the leading international interdisciplinary journals, the editors suggest that the current scholarship can be grouped within the following three registers: normative school; functional school; and pluralism school.³³ Those working under the moniker of the normative school view global constitutionalism as a “legal or moral conceptual framework that guides the interpretation, progressive development or political reform of legal and political practices beyond the state to reflect a commitment to constitutional

³³ Wiener, “Global Constitutionalism” *supra* note 28.

standards”.³⁴ The functional school focuses on the manner in which international organisations are created through different bargaining processes and negotiations. Their task is to investigate how international institutions function. The pluralist school houses some of the more contested claims and arguments. Here the literature is concerned with both describing the current fields of global governance and creating new global governance regimes found within the normative and functional schools of global constitutionalism. The literature “emphasize[s] the importance of distinct, ancient, modern and post-modern eras of constitutionalism”.³⁵

In addition to José Alvarez’s depiction of the state of affairs based on disciplinary methods, Stone Sweet’s thick and thicker constitutionalism and the three different schools’ models described above, there are other taxonomies that augment the contemporary attempts to understand global constitutionalism.³⁶

These recent shifts in the taxonomies of global constitutionalism are subject to both admiration and contestation. It is admired because of its uniqueness. Scholars have been busy building the frameworks necessary to understand the different claims being articulated in the vast literature of global constitutionalism that describe constitutional formations in the global context. It is challenging in

³⁴ *Ibid* at 7.

³⁵ *Ibid* at 7-8.

³⁶ These taxonomies of the current literature include for example: Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); Christine Schwöbel, *Global Constitutionalism in International Legal Perspective*. (Leiden/Boston: Martinus Nijhoff, 2011).

that there are multiple ways to organise the literature ranging from the above-discussed typology of thick and thicker versions to the three different schools. There are also suggestions that the literature can be organised under the idea of strands³⁷ or under the headings of mappers and shapers.³⁸ Some have suggested that supranational constitutionalisation can be viewed as trying to reform the way in which international institutions function.³⁹ Additionally, the same scholars argue for a “reconfiguration of the basis of the constitutionalism in light of late modern conditions”.⁴⁰

I have elected to pursue global constitutionalism and global constitutionalisation through the prism of three schools or camps outlined by the editors of *Global Constitutionalism*. The normative, functional (or what I have reformulated as the descriptive) and pluralist camps capture the major themes encapsulated within the current literature on global constitutionalism and global constitutionalisation. Moreover, the themes contained in these three camps are an accurate characterisation of the various strands of literature in global constitutionalism as opposed to other descriptors.

³⁷ Jan Klabbbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) [Klabbbers *et al*, *Constitutionalization of IL*].

³⁸ Garrett Wallace Brown, “The Constitutionalization Of What?” (2012) 1 *Global Constitutionalism* 201.

³⁹ Loughlin, “What is Constitutionalisation” *supra* note 17 at 63; Rob Howse and Kalypso Nicolaidis “Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?” (2003) 16 *Governance* 73; Jeffrey Dunoff, “Ehard: The WTO’s Constitution and the Discipline of International Law (2006) 17 (3) *Eur J of Intl L* 647 [Dunoff, “Constitutional Conceits”].

⁴⁰ Loughlin, “What is Constitutionalisation” *supra* note 17 at 64.

The normative camp seeks to understand the proliferation of international law and its institutions as part of the process of greater interconnectedness brought on by globalisation.⁴¹ The writers in this camp focus on moulding the foundations and practices of global constitutionalism and global constitutionalisation as a normative exercise.⁴² Their project promotes compliance with notions of the rule of law as it is embodied in international law. More importantly, the scholars envision global constitutionalism as a response to the acute crises presented by globalisation and fragmentation, which generates a legitimacy gap in international law and its institutions. In this regard, the normative camp wants to transcend the democracy deficit through global constitutionalisation.

The democracy gap stems from both fragmentation of international law and globalisation of international law in which international institutions are not accountable to a constituent population. In our modern global order, international institutions are making decisions without having the consent or validation that stems from democratic practices found at the local national level.

The writers grouped under the descriptive camp want to understand and identify the production of international law and its institutions as a form of constitutionalisation in multiple jurisdictional levels.⁴³ These scholars attempt to

⁴¹ Jürgen Habermas, *Divided West* (Cambridge: Polity Press, 2006) [Habermas, *Divided West*]; David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (London: Polity Press, 2004) [Held, *Global Covenant*].

⁴² Garrett Wallace Brown, "The Constitutionalisation Of What?" (2012) 1 Global Constitutionalism 201 at 204.

⁴³ Jeffrey L. Dunoff & Joel P. Trachtman, eds, *Ruling the World; Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009)[Dunoff & Trachtman, *Ruling*

disentangle the existing structures of international institutions and understand how multiple actors, norms, and processes operate. It is possible to simply characterise those writing in this genre as providing a descriptive account.⁴⁴ By envisioning the constitutional imperative, scholars in this camp are attempting to provide a baseline from which the current international order can be vested with legitimacy.

The pluralist camp has both empirical and normative elements. The empirical project in this camp is concerned with describing the “competing claims of ultimate political and legal authority raised in the names of different political communities”.⁴⁵ The normative perspective affirms and demands commitments to political pluralism by thinking about constitutionalism as a doctrine and as a potential to imagine a new and better world.⁴⁶

In examining the three camps, I will pursue the scholarship of writers that have actively engaged in expanding their research on global constitutionalism. I selected the following scholars for a number of reasons ranging from clarity of their respective claims, to the importance and significance of their contribution to the discussions on global constitutionalism. I have included a diverse set of scholars writing from various perspectives. For example, in the normative camp,

the World]; Macdonald & Johnston, *World Constitutionalism supra* note 3; Klabbers *et al*, *Constitutionalization of IL supra* note 37.

⁴⁴ Wiener, “Global Constitutionalism” *supra* note 28 at 7.

⁴⁵ Zoran Oklopcic, “Provincializing Constitutional Pluralism” (2014) 5:2 *Transnational Leg Theory* 200 at 203 [Oklopcic, “Provincializing”].

⁴⁶ *Ibid* at 203.

I have solely focused on the scholarship of David Held and Jürgen Habermas, two interdisciplinary scholars that have made enormous contributions to our understanding of global governance, legal norms and world politics.⁴⁷ In the descriptive camp, I have included the three sets of scholars that brought together experts from various fields to describe and challenge the manner in which global constitutionalism is conceptualised and described.⁴⁸ In the pluralist camp, I focus on the writings of Neil Walker, one of the central figures in the global constitutionalism literature. All of these scholars come to global constitutionalism from their respective fields and their scholarship examines specific institutions, such as the European Union and the World Trade Organisation.⁴⁹ Understandably, their perspective on global constitutionalism is greatly influenced by the dynamics of their respective fields.

In the following section, the writings of these scholars will be presented using the prism of the three camps. In the remaining parts of this chapter, it will be argued that global constitutionalism and global constitutionalisation do not present a wholesome understanding of how international law and international institutions operate. Prompted by globalisation and fragmentation of international law, global constitutionalism and global constitutionalisation are new forms of global

⁴⁷ David Held, *Cosmopolitanism: Ideals and Realities* (Cambridge: Polity Press, 2010); Jürgen Habermas, *Between Facts and Norms Contributions to a Discourse Theory of Law and Democracy* (Boston: MIT Press, 1998) [Translated by William Rehg].

⁴⁸ Macdonald & Johnston, *World Constitutionalism supra* note 3; Dunoff & Trachtman, *Ruling the World supra* note 43; Klabbers *et al*, *Constitutionalization of IL supra* note 37.

⁴⁹ For example, Neil Walker writes about the European Union while Jefferey L. Dunoff's writes about the World Trade Organisation; Neil Walker 'Not the European Constitution' (2008) 15:1 *Maastricht J European & Comparative L* 135; Dunoff, "Constitutional Conceits" *supra* note 39.

governance theory that are premised on a narrow and particular reading of international law and its institutions. Such a critique of global constitutionalism and global constitutionalisation is part of a recent trend in scholarship that challenges the existing orthodoxies of international law.⁵⁰ This trend is part of a larger critical tradition that challenges law's formalism.⁵¹ Scholars working on global constitutionalism and global constitutionalisation do not acknowledge the origins of international law and its institutions, the context of its evolution, or its predilection to present the western particular as universal ideal.

3.3 Normative Global Constitutionalisation and Global Constitutionalism

In what follows, I will examine the discourse that overtly calls for the development of a normative agenda to shape and mould the existing international legal order through attempts to secure peace and promote human rights "as part of the good governance discourse".⁵² This particular agenda's cosmopolitanism seeks to structure international law and its institutions, broadly,

⁵⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of the Legal* (Cambridge: Cambridge University Press, 2006) at 70; Mario Prost, "Born Again Lawyer" (2006) 7:12 German LJ 1037 at 1042; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

⁵¹ Elizabeth Mensch, "The History of Mainstream Legal Thought" in David Kairys, ed, *The Politics of Law: A Progressive Critique* (Pantheon, 1998) at 21; Jack M. Balkin, "Deconstructive Practice and Legal Theory" (1986) 96 Yale LJ 743 at 746; Roscoe Pound, "A Call For a Realist Jurisprudence" (1931) 44 Harv L Rev 697; Felix Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 *Columbia Law Review* 809.

⁵² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 24 [Anghie, *Imperialism*].

for the betterment of mankind.⁵³ This type of analysis is tied to the progress narrative presented earlier that position international law as the search for universal law applicable to all.⁵⁴ The idea of progress in international law is intricately connected to the work of international lawyers to plough their respective fields of law.⁵⁵ They do this work as a means to usher in regulatory frameworks in various areas at the global level.

The implementation of this type of cosmopolitan ideals in the global context is challenging. There is an absence of an executive or legitimate sovereign. There is a lack of democratic legitimacy as generally seen in the domestic jurisdictions. There is no ability to enforce international norms and practices similar to the intermediary nation state. There is an absence of an executive or even a legitimate sovereign in the global order. Finally, there is a lack of democratic legitimacy as generally seen at the local national context.⁵⁶ Notwithstanding these significant hurdles, there are numerous scholars that are pursuing a normative research agenda under the moniker of global constitutionalism that seek to reform the existing international institutional structures. Those working

⁵³ This understanding of cosmopolitanism is based on what Neil Walker deems as "... at least four sets of questions, and sets of candidate answers, which a comprehensive cosmopolitan vision must embrace"; Neil Walker, "Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law" online: (2005) European University Institute Working Paper Law 17 at 4 < <http://ssrn.com/abstract=891036> > [Walker, "Making a World of Difference"]; Printed as Neil Walker, "Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law" in O. Payrow Shabani, ed, *Multiculturalism and Law: A Critical Debate* (Cardiff: University of Wales Press, 2007) 219.

⁵⁴ See Chapter 1, section 1.4.

⁵⁵ Lassa Oppenheim, "The Science of International Law: Its Task, Its Method" (1908) 2 AJIL313.

⁵⁶ Habermas, *Divided West supra* note 41 at 171.

within this normative research agenda want to mould the existing international legal order to secure peace, promote economic development, and human rights.

In order to understand the normative camp, I will examine the prolific scholarship of David Held and Jürgen Habermas. These scholars have captured the imagination of our contemporary international community through their respective innovative research and knowledge production.⁵⁷ More importantly, these two scholars have significantly influenced the development of an international legal order through their research by explicitly calling for greater reforms of the United Nations. It is for this reason that I engage with their scholarship in this section under the heading of the normative claims of global constitutionalism and global constitutionalisation.

3.3.1 David Held and Collective Security

David Held's scholarship on global constitutionalism has concentrated on the building and strengthening of existing infrastructures to tackle current global concerns. In an article titled "Reframing Global Governance: Apocalypse Soon or Reform!" he identifies three sets of global problems with which the international community must grapple. They are: "concerns with sharing our planet (global warming, biodiversity and ecosystem losses, water deficits), sustaining our humanity (poverty, conflict prevention, global infectious diseases) and our

⁵⁷ Wiener, "Global Constitutionalism" *supra* note 28 at 7.

concern over our rulebook (nuclear proliferation, toxic waste disposal, intellectual property rights, genetic research rules, trade rules, finance and tax rules)".⁵⁸

In order to tackle these issues, Held suggests that we move away from the Washington Consensus⁵⁹ based economic policy model to a "wider vision of institutions and policy approaches".⁶⁰ This approach is premised on social democracy. Held argues that we should strengthen existing institutions and foster infrastructure that will deepen our abilities to solve issues of global concern. In this regard, he argues for future of collective security through regional and international organisations.

In *Global Covenant*, Held promotes the project of global social democracy as the basis for guaranteeing "international law, greater transparency, accountability

⁵⁸ David Held, "Reframing Global Governance: Apocalypse Soon or Reform!" (2006) 11:2 New Political Economy 157 at 158 [Held, "Reframing Global Governance"]; David Held, "The Changing Face of Global Governance", (2010) Social Europe Journal online: <http://www.social-europe.eu/2010/01/the-changing-face-of-global-governance-between-past-strategic-failure-and-future-economic-constraints/> [Held, "Face of Global Governance"].

⁵⁹ David Held defines the Washington Consensus as: "For the last two to three decades, the agenda of economic liberalisation and global market integration – or the Washington Consensus as it is sometimes called – has been the mantra of many leading economic powers and international financial institutions. The thrust of the Washington Consensus was to promote this view and to adapt the public domain – local, national and global – to market-leading institutions and processes. It thus bears a heavy burden of responsibility for the type of common political resistance or unwillingness to address significant areas of market failure, including: The problem of externalities, such as the environmental degradation exacerbated by current forms of economic growth; The inadequate development of non-market social factors, which alone can provide an effective balance between 'competition' and 'cooperation' and thus ensure an adequate supply of essential public goods, such as education, effective transportation and sound health; The under-employment or unemployment of productive resources in the context of the demonstrable existence of urgent and unmet need; and Global macro-economic imbalances and a poor regulatory framework – policies that led to the financial crisis"; Held, "Face of Global Governance" *supra* note 58.

⁶⁰ Held, "Reframing Global Governance" *supra* note 58 at 158.

and democracy in global governance [...]”.⁶¹ Ultimately the long-term goal is to bring the various players to the table, even though they may have different interests at stake. In the short-term, Held suggests reforming the existing international institutions and the creation of specific international non-governmental organisations. One of Held’s central goals is to ensure that there is a new convention that reconnects security and human rights elements through unification of the various spheres of international humanitarian law.

This goal in mind, Held calls for the creation of a new global international constitutional convention “to explore the rules and mandates of new democratic global bodies” along with the creation of other mechanism to regulate tax, water and other relevant global issues.⁶² Moreover, he suggests that there should be an expansion of the jurisdictions of the International Court of Justice and the International Criminal Court, and calls for the creation of yet another human rights court.⁶³ The position Held advocates for is quite straightforward - greater development of international law and the creation of additional international institutions. Doing so, Held argues, will secure world peace and bring about equitable redistribution of wealth and alleviation of poverty.

⁶¹ Held, *Global Covenant supra* note 41 at 162.

⁶² *Ibid* at 164-165.

⁶³ *Ibid* at 164-165.

We have already encountered this collective security argument in the context of international criminal institutions.⁶⁴ This argument is analogous to earlier claims in favour of further developing international law, especially as it relates to the use of the United Nations Security Council's Chapter VII *Charter* powers to create the ICTY and ICTR. At the end of the Cold War, the United Nations Security Council was able to move beyond its limitations created by the power struggle between the West and the Communist Block. Subsequently, the Security Council was able to use its *Charter* power to maintain peace and security. This was a shift from earlier policies of the Security Council because of the potential threat of the veto by Union of Soviet Socialist Republics and its allies on the Council.

The suggestion to create international institutions as part of the normative agenda of global constitutionalism, simply ignores the history of international law and its institutions. Within international criminal institutions, we are able to see the institutionalisation of Anghie's dynamic of difference as it relates to the rights of the accused and the role of experts in engendering a pro-conviction bias with the two ad hoc tribunals. The dynamic of difference captures the means by which European colonisers sought to dominate the indigenous population through the sovereignty doctrine during the development of international law in the 16th century. In particular, the argument is that natural law was extended to the indigenous inhabitants as a means to apply western conceptions of law during colonial contact. A universal idea of law was composed and made applicable to

⁶⁴ See Chapter 1 section 1.4.

indigenous inhabitants.⁶⁵ Scholars have traced the evolution of the dynamic of difference in various fields of international law.⁶⁶

The ICTY and ICTR are illustrative of this point. In creating the tribunals, the UN Security Council granted judges the power to amend the rules of evidence and procedure. These powers, with reference to the ICTY may be seen through a constitutional lens. The legislative powers of the judges can be conceptualised as a moment in delegation of Security Council's law-making capacity. But simultaneously, power to amend the rules of evidence and procedure has led to severe restriction on, and violation of, the rights of the accused.

The ICTY's mandate is to render justice to the victims and bring the perpetrators to justice. Its procedures however are problematic; the judges have opted to make changes that would effectively repeal judicial decisions of the appeals chamber⁶⁷, significantly delay the trials⁶⁸ and admit new evidence on appeal⁶⁹.

The rights of the accused, even though enshrined in the ICTY *Statute*, becomes a mere formality that can be overlooked given the barbarous nature of the acts that the accused have allegedly committed. This unhappy result, to use Justice Pal's words, takes us back to the way in which international law has

⁶⁵ Aimée Craft, "Living Treaties, Breathing Research" (2014) 26 Can. J. Women & L. 1.

⁶⁶ Anghie, *Imperialism supra* note 52 1-18.

⁶⁷ See Chapter 1, section 1.4.1.1.

⁶⁸ See Chapter 1, section 1.4.1.2.

⁶⁹ See Chapter 1, section 1.4.1.3.

evolved.⁷⁰ A particular version of justice is extended as the universal and is meted out against those that have committed heinous acts of violence. The irony is that, in doing so, the universal extension is incomplete. Rather, these perpetrators are prosecuted using western understandings of law (for example ICTR), but they are not afforded full trial fairness and due process guarantees as promised by the respective *Statute* and the International Bill of Rights. This raises the idea of victor's justice that has haunted international criminal law from its inception.⁷¹

Ultimately, Held's calls to strengthen existing institutional frameworks may be legitimate. His arguments however ignore the on-the-ground realities of international institutions and how they function. Held's position elides the power dynamics within international institutions, whether it is United Nations Security Council as discussed earlier vis-à-vis ICTY or the ICC.

Drawing from earlier discussions about the politics of prosecution within the International Criminal Court, one can see the powerful role of politics in prosecuting international war criminals. Take for example the emphasis on prosecuting war criminals from the African continent and the resulting criticism.⁷²

Two Security Council referrals have thus far been made to the ICC. Yet on the

⁷⁰ International Military Tribunal for the Far East, *United States et al. v. Araki Sadao et al.*, Dissenting Judgment of Justice Pal (Tokyo: Kokusho-Kankokai, 1999) at 923.

⁷¹ Antony Anghie and B.S. Chimni "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2:1 Chinese JIL 71at 91.

⁷² Makau Mutua, "Africa and the International Criminal Court: Closing the impunity gap", *The Broker Magazine* (December 07, 2010).

surface, it seems like the Security Council is unwilling, or unable, to act regarding Palestine or Sri Lanka for political reasons. It is clear that once international institutions are created, they develop a particular dynamic. We see this unfolding within the International Criminal Court, particularly as it relates to regulatory capture of prosecutorial policy by special interests groups.⁷³ These dynamics are part of the perpetuation of a singular western narrative that is deployed as the universal, which can be exemplified through the politics decisions of the ICC. These dynamics then significantly affect the manner in which these institutions function. Moreover, it affects the ability of these institutions to deliver on their proposed mandates.⁷⁴

There are a number of criticisms emerging from the inner workings of the international criminal justice regime as laid out above and by extension international institutions broadly. Why then are scholars like Held arguing for greater reforms to the United Nations and normative global constitutionalism?

3.3.2 Jürgen Habermas and Renewed Cosmopolitanism?

Jürgen Habermas is one the most acclaimed contemporary public intellectuals of our time. In *The Divided West*, Habermas examines the relevance of Kantian cosmopolitanism in our modern world with a singular superpower, the United

⁷³ Galit Sarfaty, "Measuring Justice: Internal Conflict over the World Bank's Empirical Approach to Human Rights" in Kamari Clarke & Mark Goodale eds, *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge: Cambridge Univ. Press, 2009) [Sarfaty, "Measuring Justice"]; Annelise Riles, "Models and Documents: Notes on Some Artifacts of International Legal Knowledge" (1989) 48: 2 *International and Comparative Law Quarterly* 809 [Riles, "Models and Documents"].

⁷⁴ Sujith Xavier, "Theorising Global Governance Inside Out: A Response to Professor Ladeur" (2013) 3 *Transnational Leg Theory* 268.

States. His argument is premised on the idea that national sovereignty has eroded in the current era of globalisation.⁷⁵ The fast-paced creation of norms and their deployment outside the four corners of the nation state precipitates this erosion. Habermas accepts the traditional understanding of globalisation discussed earlier in the second chapter. Such a state of current affairs as Habermas notes has ushered in “horizontal networks of a global society”.⁷⁶ Habermas argues that the cosmopolitan project needs to confront the objections raised by those who prefer brute power instead of law.

The role of law animates the theatre between these two diverse perspectives: “whether law remains appropriate medium for realising the declared goals of achieving peace and international security and promoting democracy and human rights throughout the world”.⁷⁷ This formulation therefore raises the following question: Can we achieve a solution to the world’s problems through an all-powerful hegemon⁷⁸ or through legally established procedures of an inclusive, but often weak and selective world organisation?⁷⁹

In 2005, two years after the invasion of Iraq, Habermas reflected on our global order. Citing the failure of the imperial approach, especially the invasion of Iraq, Habermas rhetorically asked: “... should we not rather hold steadfastly to the

⁷⁵ Habermas, *Divided West supra* note 41 at 115.

⁷⁶ *Ibid* at 116.

⁷⁷ *Ibid* at 116.

⁷⁸ Habermas, “Interpreting the Fall of a Monument” (2003) 4:7 German LJ701.

⁷⁹ *Ibid* at 116.

alternative project of a constitutionalisation of international law [...]”?⁸⁰ In this process, he acknowledges the successes and pitfalls of the United Nations system in securing peace, protecting and promoting human rights. In acknowledging the failures of the UN system, he suggests that globalisation, the “dissolution of the national constellation and the transition to a post-national constellation” are not challenges to the Kantian project.⁸¹ Rather, these factors provide a “supportive context for the aspiration of a cosmopolitan condition”.⁸²

Once Habermas has outlined the dangers of an all-powerful hegemon and depicted the United States as the contemporary example, he wonders: “[d]oes the inefficiency of the United Nations, its selective perception and temporary inability to act, provide sufficient reasons to break with the premises of the Kantian project?”⁸³ In trying to argue for his modest reforms, Habermas contends that the international community can only overcome the ills of our contemporary society, such as terrorism, the scourge of war, or military occupation, through effective coordination of the different available services and procedures. Additionally, this can be achieved through “the combination of social modernization with self-critical dialogue between cultures”.⁸⁴

⁸⁰ *Ibid* at 116.

⁸¹ *Ibid* at 175.

⁸² *Ibid* at 173.

⁸³ *Ibid* at 183.

⁸⁴ *Ibid* at 184.

Habermas' contribution to cosmopolitanism and the normative shaping of an international legal order is the preservation of a multilevel system in which "the main site of transnational norm generation and application is the continent regime".⁸⁵ Similar to Held, the primary tenet for Habermas' arguments are that nation states, given the nature of globalisation and their lack of power, must use existing institutions such as the ICC to resolve potential conflicts. If this is not possible, then states must create new mechanisms through the existing institutional frameworks to resolve these issues, such as the two ad hoc tribunals. In doing so, Habermas offers an agenda for reform of the United Nations that is rooted in modern needs that occupy our international concerns. The overarching theme is that state action must be governed by, and through, international law. Some scholars have re-characterised this claim as the "specification of a modest role for global regulation and the emphasis that this should take place within the universal register of law".⁸⁶ In making this claim, there is recognition of a loose constitutional framework that informs the operation of law at the global level.

In their inaugural editorial *Global Constitutionalism*, the editors identify some of the different camps in global constitutionalism that are interested in shaping how the global order is constructed by extending the norms and principles of constitutionalism beyond the nation state's borders. Similar to the ideas of Held,

⁸⁵ Walker, "Making a World of Difference" *supra* note 53 at 7.

⁸⁶ *Ibid* at 7.

Habermas, and more recently Jean Cohen⁸⁷, the editors of *Global Constitutionalism* recognise that some scholars want to expand the alleged benefits of the domestic constitutional order. These writers do this as a way to grapple with global concerns such as poverty and human rights violations. There are numerous examples within the current legal discourse on global constitutionalism that adopt this normative approach. For certain scholars, a constitution is a structure-system that is shared by all societies.⁸⁸ They argue that the transfer of the constitutional idea to the international area is uncontroversial.⁸⁹ The constitutional language is often used to describe, promote, and capture the fundamental changes occurring within international law that everyone can sense but cannot articulate. The European Union and other international institutions (World Trade Organisation for example) have complicated this process.

Yet there is a long-standing critical tradition operating under Third World Approaches to International Law that has sought to challenge the universalism of international law. It is now incontestable that the 17th and 18th century development of international law is rooted to colonialism and imperialism.⁹⁰ The

⁸⁷ Jean Cohen, *Globalization and Sovereignty: Rethinking Legality and Legitimacy and Constitutionalism* (Cambridge: Cambridge University Press 2012); Martti Koskenniemi, "Book Review of Jean Cohen's Globalization and Sovereignty: Rethinking Legality and Legitimacy and Constitutionalism (2013) 11:3 Intl J Constitutional L 818.

⁸⁸ Fassbender, "The Meaning of International Constitutional Law" *supra* note 23 at 309.

⁸⁹ *Ibid* at 309.

⁹⁰ Makau Mutua, "What is TWAIL?" (2000) 94 American Society Intl L Proceedings 31; Antony Anghie, "What is TWAIL: Comment" (2000) 94 Am Soc Int'l Proc 39.

traditional public international law literature has sought to omit this connection.⁹¹ A number of international lawyers and international law scholars have argued that international law is monolithic in its very nature.⁹² As demonstrated in the first chapter, Anghie has historicised the evolution of sovereignty as part of the colonial encounter.⁹³ Anghie illustrates that the sovereignty doctrine was developed as a means to subjugate the savages, the original inhabitants of the Americas and the new world. This intervention is an important contribution to the current understanding of international law.⁹⁴ The effects of colonialism and its relationship to international law can be deployed directly to challenge the orthodox understandings of international law to which Habermas is wedded.

Starting the history of international law with the creation of the current international regime beginning in 1648 with the *Treaty of Westphalia* is a narrative that seeks to universalise the western understanding of international law. It seeks to morph the particular into the universal. This characterisation of international law ignores indigenous peoples that lived in the colonised spaces prior to first contact.⁹⁵ I raise this critique to illuminate the somewhat simple assertions that normative global constitutionalism, and Habermas in particular,

⁹¹James Crawford, *Brownlie's Principles of International Law* (Oxford: Oxford University Press 2012) at 16; Malcolm Shaw, *International Law, 4th edition* (Cambridge: Cambridge University Press, 1997).

⁹²Obiora C. Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2010) 10 Intl Community L Rev37; James Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" (2011) 3(1) *Trade, L & Development* 26.

⁹³Anghie, *Imperialism supra* note 52.

⁹⁴*Ibid* at 37.

⁹⁵*Ibid* at 13-31.

rely upon. While the scholars working in the normative camp are pursuing an interesting project, the innocent assumptions that they rely upon remain problematic. In both Held and Habermas' assertions, the existing international infrastructure of international institutions can be called on to deal with international problems. Drawing from the empirical evidence that I presented earlier, this is a difficult task to complete.

The three case studies of the ICTY, the ICTR and the International Criminal Court reveal that the dynamic of difference is buried deep within their respective structures. The dynamic of difference creates a gap between two cultures by deeming one as uncivilised and barbaric, the other as civilised, and developing techniques to transcend the difference. With the ICTY and the ICTR, the amendments by the judges to the rules of evidence procedure caused significant effects on the rights of the accused. The denial of fair trial rights to the accused illustrates the manner in which the dynamic of difference operates within the tribunals. The accused are deemed barbaric and guilty of the alleged crimes, indicating that they are not worthy of having their guaranteed rights protected. Moreover, this type of practice is indicative of a pro-conviction bias where the judges and other officials are convinced that the allegations against the accused are true. There is therefore no need to have the respective fair trial rights protected. Even though the international community sought to prosecute the perpetrators of mass violence in these respective regions, what has transpired, especially through the actions of those in charge of these institutions is to

perpetuate a form of victor's justice that Justice Pal was concerned about within the Tokyo Tribunal in 1946.

A critical look at the ICC reveals the dynamic of difference as evidence by the court's selective prosecution of certain individuals over others as well. The Court has decided to prosecute Saif al-Arab Gaddafi but it has not decided to prosecute alleged war criminals from the global North or allies of the West. When the prosecutorial policy of the ICC is examined, it becomes apparent that politics determines the selectivity of cases to be placed on the Court's docket.

In this context, the ideals encapsulated within the worthwhile claims of both Held and Habermas to reform the international system are illusory because of the manner in which the dynamic of difference operates. Global governance reforms simply do not take into account the history of international law. More importantly, the calls for more law (and institutions) through reform at the international level simply ignore the legacies of colonialism and imperialism on international law. The dynamic of difference, as it operates within the international criminal justice regime and more broadly within the international institutions, is an illustration of the challenges of normative global constitutionalism. If constitutionalism is to be a worthwhile project on a global scale, then it must confront the continuing historical effects of imperialism and colonialism on international law and its institutions.

3.4 Context Based Descriptive Global Constitutionalism and Global Constitutionalisation

In this section, I will canvas the different arguments put forward by scholars relying on a contextual understanding of international law and its institutions as an illustration of global constitutionalism and global constitutionalisation.⁹⁶ This strand of the literature describes itself as the functional camp. The authors gathered under the umbrella of functional camp study the “processes of constitutionalisation, which are revealed through bargaining and negotiations in the environment of international organisations such as the WTO and the EU”.⁹⁷ I have reformulated this characterisation as context-based and descriptive global constitutionalism to include authors writing about global constitutionalism from diverse institutional perspectives that align with this type of analysis. A contextual understanding is descriptive of the manner in which international institutions originated, how they function, and what they accomplish. Scholarship relied upon in this section is concerned with the descriptive, rather than prescriptive, accounts of reforming the international system or creating new institutions (as discussed in the previous section). The descriptive accounts thus seek to identify existing structures exemplifying global constitutionalism. Scholars writing in this genre of global constitutionalism do this as a way to demonstrate the existence of the international order. There is an increase in this particular genre of global

⁹⁶ Wiener, “Global Constitutionalism” *supra* note 28 at 7.

⁹⁷ *Ibid* at 7; For a critique of this tendency to focus on the WTO and EU, see Ruth Buchanan, “Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches” (2006) 57:4 N Ir Leg Q 654 at 662 [Buchanan, “Legitimizing Global Trade”].

constitutionalism scholarship.⁹⁸ Scholars operating under this framework are “interested in examining the extent to which law-making authority is granted (or denied) to a centralized authority as the distinguishing feature of international constitutionalization”.⁹⁹

In this section, I will examine three different perspectives through the scholarship of the following authors in three groups: Ronald St. John Macdonald and Douglas M. Johnston; Jeffrey Dunoff and Joel Trachtman; and Jan Klabbers, Anne Peters, and Geir Ulfstein. I will first explore their various perspectives and then I will use the evidence that I have gathered in the first chapter to challenge these perspectives. The diverse perspectives offered in this camp are representative of this line of argumentation in global constitutionalism, making these authors an ideal selection for this dissertation.

3.4.1 Macdonald and Johnston & Towards World Constitutionalism

The first pair of scholars that fit into the descriptive camp is Ronald St. John Macdonald and Douglas M. Johnston. While these two scholars were prolific in their own right, together they pushed for a greater cosmopolitan agenda of

⁹⁸ For a recent description of the three camps, see Christine Bell, “What We Talk About When We talk About International Constitutional Law” (2014) 5:2 *Transnational Leg Theory* 241 at 244; Erika De Wet, “The Constitutionalization of Public International Law” in Michel Rosenfeld & Andras Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012).

⁹⁹ Wiener, “Global Constitutionalism” *supra* note 28 at 8.

international law.¹⁰⁰ Macdonald and Johnston identified diverse but often overlapping models of international law that seek to address plural values in their collection of essays *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community*.¹⁰¹ Their central aim in this edited volume with over thirty contributors is to challenge the assertions by American officials that international law is not binding, especially as it relates to the ICC and international environmental initiatives.¹⁰²

What they coin as world constitutionalism emerges out of various western cultural modes of civic idealisation.¹⁰³ For these scholars gathered in this volume, the rule of law ideology, the concept of the *Rechtsstaat*, American and Dutch experiments with federalism and western Bill of Rights traditions, have all contributed to the imagination of the international order through a constitutional lens. Constitutionalism therefore is derived from the domestic theories of a nation state as a means to unscramble the legitimacy problem illustrated in the global order.

¹⁰⁰ Craig Scott, "Ronald St. John Macdonald and International Legal Education" (2002) 4:4 Intl Law Forum Du Droit Intl 215 at 215 footnote 3.

¹⁰¹ Ronald St. John Macdonald & D. M. Johnston, "Foreword" in Ronald St. John Macdonald & D. M. Johnston, eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005) at xvi: They suggest the following possible models: state autonomy; world constitutionalism; civic benevolence; fairness; order; regulation; war prevention and management; peaceful conflict resolution; national development; environmental protection; cooperation and convergence of legal systems.

¹⁰² Christian Tomuschat, "Multilateralism in the Age of US Hegemony" in Ronald St. John Macdonald & D. M. Johnston eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff, 2005) at 53-57; Carla M. Zoethout, "Book Review Towards World Constitutionalism: Issues in the Legal Ordering of the World Community. Compiled and edited by Ronald St. John Macdonald and Douglas M. Johnston" online: (2007) Global Law Books <
<http://www.globallawbooks.org/reviews/archive.asp?order=author&index=M>>

¹⁰³ Johnston, "World Constitutionalism in Theory" *supra* note 22 at 16.

Macdonald and Johnston subsequently argue that constitutionalism has numerous essential components. To them, these components can be transplanted to the international sphere to reconcile the lack of legitimacy and legality in the international space.¹⁰⁴ They identify various examples that evidence the presence of a constitutional order. These include the *United Nations Charter*, the difficulty in amending the *United Nations Charter*, and the fundamental human rights guarantees found in the International Bill of Rights.¹⁰⁵ Moreover, they cite to clearly visible trends towards the move to constitutionalism in contemporary international law. They illustrate their point through the following empirical examples: the codification of international human rights law, the recent crystallisation of international criminal law and its respective institutions, the recent trends within the World Trade Organisation, and international trade law.¹⁰⁶ In this instance, Macdonald and Johnston are scanning the existing international institutional infrastructure produced through international law to argue that constitutionalism is a possibility within the global order. Johnston, in his essay in the same volume suggests that “such a project, to be useful, must be shared across all regions, so that allegations of cultural bias in the field of international

¹⁰⁴ These can be summarized through the following: fundamental law; a difficult amendment procedure; the ‘constitution must include living law’; it must be rooted in the sovereignty of the people; originates from a primordial social contract; bill of rights that guarantee fundamental rights; separation of powers; judicial invalidation of ordinary law; HR through common law; and allocation of power to different organs; Johnston, “World Constitutionalism in Theory” *supra* note 22 at 17.

¹⁰⁵ *Universal Declaration of Human Rights*, GA Res. 217 (III), UNGAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948); *International Convention of Civil and Political Rights*, 19 December 1966, 999 U.N.T.S 171 (entered into force 23 March 1976); *International Convention Economic, Social and Cultural Rights*, 3 January 1976, 999 U.N.T.S 3.

¹⁰⁶ Johnston, “World Constitutionalism in Theory” *supra* note 22 at 19.

law can be confronted. The goals of legal uniformity and universality may have to be reconciled with the value of cultural diversity”.¹⁰⁷

In this descriptive account of global constitutionalism, Macdonald and Johnston are much more concerned with the ways in which international institutions are created. Rather than focusing on the internal dynamics of these institutions or the politics involved in their creation, they focus on the overall presence of these institutions. These scholars agree with the assertion that the creation of the two ad hoc tribunals by the United Nations Security Council is a constitutional moment.¹⁰⁸ The manner in which the Security Council deployed its Chapter VII powers to maintain peace and security is a good example of the *United Nations Charter* being deployed for constitutional reasons.

Even the Appeals Chamber of the ICTY has waded into this debate. In *Tadić*, the Appeals Chamber suggests the following:

“It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be “established by law” finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems”.¹⁰⁹

¹⁰⁷ *Ibid* at 27.

¹⁰⁸ Marschik, “Legislative powers of SC” *supra* note 4 at 461-472.

¹⁰⁹ *Prosecutor v. Dusko Tadić (Judgment in Sentencing Appeals)*, IT-94-1-A and IT-94-1-A.

The decision of the ICTY Appeals Chamber may give some jurisprudential weight to the claim that constitutionalisation at the global level need not mimic a particular domestic model of constitutionalisation. Rather, *Tadić*, one of the first decisions of the ICTY supports the idea that there is plurality in how constitutionalisation may occur.

But based on the empirical evidence that I examined from the ICTY, ICTR and ICC, this is simply not the case. Empirical scholarship suggests that international institutions have particular internal dynamics.¹¹⁰ These dynamics have a significant effect on the manner in which international criminal institutions function and whether they are able to deliver upon their promises.¹¹¹ The empirical data from both the ICTY and the ICTR suggests that the changes to the rules of evidence and procedure have significantly curtailed the rights of the accused.

Focusing on witness testimony, the ICTR has struggled with cultural competence within the adjudicatory process. The questions that scholars like Nancy Combs raise is how to grapple with the local witness that has a different culture than the experts and officials of the tribunals.¹¹² The ICTR witnesses rely on cultural

¹¹⁰ Sarfaty, "Measuring Justice" *supra* note 73; Riles, "Models and Documents" *supra* note 73.

¹¹¹ *Ibid*; Sujith Xavier, "Theorising Global Governance Inside Out: A Response to Professor Ladeur" (2013) 3 *Transnational Leg Theory* 268.

¹¹² Nancy A. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010) at 222 [Combs, *Fact-Finding without Facts*].

practices to identify events. They recount their narratives of who did what to whom based on their understandings of the seasons (which helps them identify the time of the year). Combs' account thus suggests that the ICTR based its findings on highly suspect witness testimony. These faulty witness testimonies however have a direct effect on the rights of the accused, which is protected in the ICTR *Statute*.

To make the claim that there is constitutionalisation of international criminal law by pointing to the manner in which these ad hoc tribunals were created is simply insufficient. This type of claim only signals to legal texts rather than how these laws-on-the-books are deployed within international institutions. Surely theorising global constitutionalism must go beyond just describing the existing legislative frameworks and must take into account how international institutions function. In doing so, one has to take stock of the various practices of these institutions to actually ascertain whether constitutionalisation is possible and is present.

3.4.2 Dunoff and Trachtman & Ruling the World through Constitutionalism?

Jeffrey Dunoff and Joel Trachtman's *Ruling the World; Constitutionalism, International Law, and Global Governance* is a collection of essays that can be grouped within the descriptive global constitutionalism camp.¹¹³ Dunoff and

¹¹³ Wiener, "Global Constitutionalism" *supra* note 28 at 7; Christine Bell, "What We Talk About When We talk About International Constitutional Law" (2014) 5:2 *Transnational Leg Theory* 241

Trachtman portray international law as developing in regional and functional pockets within a highly “decentralized and non-hierarchical system”.¹¹⁴ Constitutional coordination therefore is “both necessary and problematic”.¹¹⁵ They argue that global constitutionalism can harmonise and coordinate the various components of the international legal system. For Dunoff and Trachtman, constitutionalised systems authorise the exercise of power. Furthermore, such a system ensures that the exercise of power does not go institutionally unchecked and unbalanced.¹¹⁶ Legal orders may “exhibit various constitutional mechanisms in various degrees”, and constitutionalisation therefore “is a process”.¹¹⁷ From their perspective, global constitutionalism is the natural extension of constitutional thinking from the domestic to the world order. They are using their own experience in the field of international trade law to facilitate such a claim. Their assertion is premised upon ideas, convictions, and commitments, as much as on politics and legal doctrines.

Dunoff and Trachtman, and some of the contributors to their volume adopt a functional (or as I suggest context based descriptive) approach to international constitutionalism. They argue that such an approach sidesteps issues of definition. The issue of definition is what drives most of the writing on

at 244; David Kennedy for example challenges some of the assertions of Dunoff and Trachtman; David Kennedy, “Mystery of Global Governance” in Jeffrey L. Dunoff & Joel P. Trachtman eds, *Ruling the World; Constitutionalism, international law, and Global Governance* (Cambridge University Press, 2009) 37 at 40-41 [Kennedy, “Mystery of Global Governance”].

¹¹⁴ Dunoff & Trachtman, “Functional Approach” *supra* note 1 at 30.

¹¹⁵ *Ibid* at 30.

¹¹⁶ *Ibid* at 18.

¹¹⁷ *Ibid*.

international constitutionalism. Their's is a checklist approach, similar to that of Macdonald and Johnston, which prevents engagement with the substantive aspects of contemporary developments in the international sphere, materially spurred on by the process of globalisation and the specialisation of international law. Their claim is predicated on the "type" based classification, "rather than a quantum of rules".¹¹⁸

The distinguishing feature of global constitutionalism for Dunoff and Trachtman is "the extent to which law-making authority is granted (or denied) to a centralized authority".¹¹⁹ They suggest that constitutionalism has three important functional roles: enabling the formation of international law; constraining the formation of international law, and filling in the gaps in domestic law.¹²⁰ These three functions are implemented through seven mechanisms that are commonly associated with constitutionalisation.¹²¹ These mechanisms are utilised to enable, constrain, or supplement constitutionalisation. Simultaneously, Dunoff and Trachtman are cognisant of multiple institutional structures. They take account of these institutional structures by being consistent with notions of constitutional pluralism. I will examine global constitutional pluralism in the following section.¹²²

¹¹⁸ *Ibid* at 9.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at 11.

¹²¹ These are: horizontal allocation of authority; vertical allocation of authority; supremacy; stability; fundamental rights; review; and accountability or democracy; *Ibid* at 13.

¹²² See below for a broader discussion of constitutional pluralism; Walker, "Constitutionalism and Pluralism" *supra* note 17 at 17-38.

By focusing on the law-making power of international institutions, analogous to Macdonald and Johnston, Dunoff and Trachtman do not take account of the manner in which these institutions function or the history of international law and its institutions. The focus on the law-making capacity of an institution does not increase the legitimacy of the regime; rather this type of focus seeks to impose constitutionalism through the act of law-making. The law-making capacity of an institution is representative of a partial story of constitutionalism. To use the examples from the three case studies presented in the first chapter, the reliance on the law-making authority of an international criminal institutions (for example the powers of the judges or the discretionary power of the ICC prosecutor) would demonstrate the success story of international criminal justice in curbing impunity as a form of constitutionalism. In adopting such a perspective, global constitutionalisation would be a possibility because the United Nations Security Council, prompted by the mass human rights violations, had the power to create the two *ad hoc* tribunals or make referrals to the ICC.

But the reality is that these institutions have significant problems in how they operate. Focusing on the ICTR and its pro-conviction biases substantiates David Kennedy's argument in Dunoff and Trachtman's volume that global constitutionalism, as a theory of global governance is a mystery.¹²³ Even though the Security Council guaranteed the rights of the accused in the enabling *Statute* of the ICTR (and the ICTY), the changes to the rules does not adhere to this

¹²³ Kennedy, "Mystery of Global Governance" *supra* note 113.

concretisation. Focusing on the witness testimony, the judges, and the ICTR as a whole have adopted western legal traditions as their *modus operandi*. Thus, by using the western adjudicatory form, “international criminal proceedings cloak themselves in the form’s garb of fact-finding competence, but it is only a cloak, for many of the key assumptions that underlie the western trial form do not exist in the international context”.¹²⁴ Imagining a constitutional order based on formal structures of international institutions simply ignores the realities on-the-ground. Moreover this type of scholarship reifies a rudimentary understanding of international law that perpetuates the dynamic of difference by continuing the embedded universalism symptomatic in this area of law.

3.4.3 Jan Klabbbers, Anne Peters, and Geir Ulfstein: Eurocentric Constitutionalism?

The third set of writers, Jan Klabbbers, Anne Peters, and Geir Ulfstein, offers another descriptive account. These scholars are motivated by the European Court of Justice’s jurisprudence and the possibility of judicially reviewing United Nations Security Council resolutions.¹²⁵ They suggest that the process of constitutionalisation is a reality and thus provide an account of the “invisible constitution of the international community” by taking the idea of “constitutionalism and running with it”.¹²⁶ More precisely, they unveil how one

¹²⁴ Combs, *Fact-Finding without Facts* supra note 112 at 179.

¹²⁵ Jan Klabbbers, “Setting the Scene” in Jan Klabbbers, Anne Peters & Geir Ulfstein eds, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) 1 at 2 [Klabbbers, “Setting the Scene”].

¹²⁶ *Ibid* at 4.

could reasonably think about the various elements of a global constitutional order and articulate “our constitutional instincts”.¹²⁷

For Klabbers, Peters and Ulfstein, constitutionalism is a “philosophy of striving towards some form of political legitimacy”.¹²⁸ This legitimacy is representative of a constitution. However, they are unclear about what they mean by political legitimacy.¹²⁹

Klabbers, Peters, and Ulfstein are certain that a top-down constitutional process is not a possibility at the international level. Moreover, existing international treaties cannot be nominated as constitutional documents.¹³⁰ Their discussions have focused on specific regimes, such as the European Union and the resulting possible constitutionalisation. Unlike the above-mentioned scholars in descriptive global constitutionalism camp, they argue that these attempts to focus on these regimes cannot be transferred to the global context.

Klabbers, Peters and Ulfstein point to the existence of “a bric-a-brac of decisions” taken by actors in a position of authority, responding to the exigencies of the moment, almost by default.¹³¹ This type of decision-making is more likely to occur at the global level. They contend that, given the unlikely success of all

¹²⁷ *Ibid* at 5.

¹²⁸ *Ibid* at 10.

¹²⁹ *Ibid* at 37-43.

¹³⁰ *Ibid* at 24.

¹³¹ *Ibid* at 23.

other possibilities, global constitutionalism has to make use of other more limited techniques. These techniques are: subsidiarity, margin of appreciation, and proportionality.¹³² These techniques are essential components of the European Court of Human Rights and the European Court of Justice jurisprudence. The European Court of Human Rights monitors the implementation of the European Convention of Human Rights. It was created through the Council of Europe. European Court of Justice on the other hand monitors the implementation of the European Union Treaty.

Ultimately, their suggestion is to rely on the existing European principles and norms within the current global order as illustrations and mechanisms of global constitutionalism. Nonetheless, their descriptive account, while the most compelling of the three groups of writers in this section for its specificity, ignores the significant history of international law and its institutions. For example, the three techniques they employ are part of the doctrines developed and employed by the European Union's Court of Justice and the European Court of Human Rights. Even though some of the doctrines have migrated to other juridical milieus,¹³³ their arguments are Eurocentric. As illustrated in the arguments made by Macdonald and Johnston and Dunoff and Trachtman examined earlier, there is a denial of the specificity of these doctrines to Europe. What is even more troubling is that there is an attempt to transplant the experience from Europe to

¹³² *Ibid* at 31.

¹³³ Amaya Alvez Marin, "Proportionality Analysis as an 'Analytical Matrix' Adopted by the Supreme Court of Mexico" online: (2009) CLPE Research Paper No. 46/2009 <<http://digitalcommons.osgoode.yorku.ca/clpe/154/>>.

the global through these principles. They simply rely on the European regulatory framework and the ensuing principles as demonstrating the required evidence to buttress their claims of global constitutionalism. The focus on the European experience thus reifies a specific understanding of the constitutional order and its possibilities. These authors do not at all understand the politics of international institutions and they are seemingly intent on pushing for universalism of constitutionalism based on western ideals. They could have explored for example the Inter-American Court for Human Rights and its use of proportionality. They could have also focused on the emerging body of literature that hones in constitutionalism's promises and pitfalls in the global South as potential lessons about constitutional theory.¹³⁴

In this section, each of these different descriptive global constitutional perspectives have sought to similarly describe the contemporary global governance institutions as mimicking constitutional type behaviour in order to harness the potential power of constitutionalism. It must be noted that describing the current international order is, in itself, a normative project. Each of these scholars, by selecting their respective examples are making choices about what to include and exclude in their analysis. They are trying to demonstrate how our current international institutions are functioning, either explicitly or implicitly, by using the constitutional features. In doing so, they are attempting to embed notions of legitimacy that are ushered in by constitutional frameworks and the

¹³⁴ Daniel Bonilla Maldonado, "Introduction" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013) [Bonilla, "Introduction"].

language of constitutionalism, whether it is through the formalism of a constitution or checks and balances found in systems with unwritten constitutions. In doing so, there is “some kind of magic” involved in making appear what is not really there.¹³⁵

3.5 Global Constitutional Pluralism

Some of the most contested claims and arguments of global constitutionalism are housed within the constitutional pluralist camp.¹³⁶ The literature is concerned with both descriptive and normative elements found in the above-discussed camps of global constitutionalism.¹³⁷ Its origins can be traced back to the European context. Some of its proponents use the European Union and the World Trade Organisation as their unique paradigm.¹³⁸

The term constitutional pluralism originates from the writings of Neil MacCormick. In his reaction to the European Court of Justice’s jurisprudence, MacCormick suggests that the “most appropriate analysis of the relations of the legal systems is pluralistic rather than monistic, and interactive rather than hierarchical”.¹³⁹

¹³⁵ Susan Marks, “Naming Global Administrative Law” (2005) 37 NYUJ Intl L & Pol 995 at 995.

¹³⁶ Wiener, “Global Constitutionalism” *supra* note 28 at 7-8.

¹³⁷ *Ibid* at 7.

¹³⁸ Neil Walker “Post-Constituent Constitutionalism? The Case of the European Union” in Martin Loughlin and Neil Walker, eds, *The Paradox of Constitutionalism Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008) 247; Miguel Maduro, “Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism” in Jeffrey L. Dunoff & Joel P. Trachtman eds, *Ruling the World; Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University 2009) 356.

¹³⁹ Neil MacCormick, “The Maastricht-Urteil: Sovereignty Now” (1995) 1 European Law Journal 259 at 265; Martin Loughlin, “Constitutional Pluralism: An oxymoron?” (2014) 3:1 Global Constitutionalism 9 at 14 [Loughlin, “Oxymoron”]. The term constitutional pluralism was first used by MacCormick in: Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) at 102-04.

MacCormick's analysis is precipitated by the mutual recognition necessitated between the European Union and its member states. The interaction between these frontiers is based on an old problem that was presented through legal pluralism¹⁴⁰ and constitutional conflicts.¹⁴¹

Constitutional pluralism is closely connected to legal pluralism, which can be traced back to the early 19th and 20th century.¹⁴² In the late 20th century, legal anthropologists set out to document how multiple legal spaces co-existed and how 'semi-autonomous' fields of norms (whether formal or informal) influenced one another other. Sally Falk More traced the manner in which external law and internal norms structure, and influence group behaviour.¹⁴³ The central contention is that there are multiple norm producers and normative orders that regulate human conduct in multiple registers. Formal law is thus subject to, and contingent upon, the informal norms of particular communities. These informal norms, therefore, have a greater organising effect on the formal structure of law.

¹⁴⁰ Sally Falk Moore, "Law and Social Change: the semi-autonomous field as an appropriate subject of study" (1973) 7 Law & Soc'y Rev 719 [Falk More, "Semi-autonomous field"]; David Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) Wis L Rev 1062; Marc Galanter "Farther Along" (1999) 33 (4) Law & Soc'y Rev 1113 at 1116; Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1981) 19 J Leg Pluralism 1; John Griffiths, "What is Legal Pluralism" (1986) 24 J Leg Pluralism 55.

¹⁴¹ There is a large body of literature that engages with MacCormick's scholarship. This is beyond the scope this discussion; For more details see Neil Walker, "Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason" (2011) 24 Ratio Juris 369–85.

¹⁴² Henry Sumner Maine, *International Law; A series of Lectures delivered Before the University of Cambridge 1887* (NYC: Henry Holt and Company, 1888); Eugen Ehrlich *The Fundamental Principles of Sociology of Law* (Cambridge: Harvard University Press, 1936) at 486-507.

¹⁴³ Falk More, "Semi-autonomous field" *supra* note 140.

Constitutional pluralism however is distinct from legal pluralism. Constitutional pluralism explores current normative orders with constitutional characteristics. Constitutional pluralism “recognises that the European order inaugurated by the *Treaty of Rome* has developed beyond the traditional confines of international law and now makes its own independent constitutional claims, and that these claims exist alongside the continuing claims of states”.¹⁴⁴ The relationship between these normative orders is “now horizontal rather than vertical - heterarchical rather than hierarchical”.¹⁴⁵ Constitutional pluralism’s focus on Europe has continued over the recent years.¹⁴⁶ The recent Greek debt crisis, and other global events, will provide an impetus for discussions of constitutional pluralism as part of global constitutionalism.¹⁴⁷ Other world events will also continue to foster discussions about the manner in which constitutional pluralism may be deployed as part of the discussions of global constitutionalism.¹⁴⁸ Ruth Buchanan has suggested that even though constitutionalisation debates about the WTO may be large, there is a sense of naivety to such claims.¹⁴⁹ In what

¹⁴⁴ Neil Walker, “The Idea of Constitutional Pluralism” (2002) 65 (3) *Mod L Rev* 317 at 337 [Walker, “Idea of Constitutional Pluralism”].

¹⁴⁵ *Ibid* at 337.

¹⁴⁶ Neil Walker, “Reframing EU Constitutionalism” in Jeffrey L. Dunoff & Joel P. Trachtman eds, *Ruling the World; Constitutionalism, International Law and Global Governance* (Cambridge: Cambridge University 2009); Alec Stone Sweet, “A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe” (2012) 1:1 *Journal of Global Constitutionalism* 53.

¹⁴⁷ Claus Offe, *Europe Entrapped* (Cambridge: Polity Press, 2015); Claus Offe, “Europe entrapped”(2013-02-06) *Eurozine Review* < <http://www.eurozine.com/pdf/2013-02-06-offe-en.pdf>>.

¹⁴⁸ Jeffrey Dunoff, Mattias Kumm, Anthony F. Lang Jr, Antje Wiener & James Tully, “Hard times: Progress narratives, historical contingency and the fate of global constitutionalism” (2015) 4:1 *Global Constitutionalism* 1 [Dunhoff, “Hard Times”].

¹⁴⁹ Ruth Buchanan, “The Constitutive Paradox of Modern Law: A Comment Tully” (2008) 46:3 *Osgoode Hall LJ* 495 at 506 [Buchanan, “Constitutive Paradox”]; Buchanan states: “Finally, in light of the above, how should we assess the voluminous debates over the “constitutionalization” of the transnational? I would suggest that at least in relation to the WTO, these debates now seem naive, even dangerously out of touch. It is true that the WTO’s “liberal legalist” account of

follows, I will set out the various claims housed under the banner of constitutional pluralism. I will focus primarily on the writings of Neil Walker, one of the main proponents of constitutional pluralism.¹⁵⁰

3.5.1 Neil Walker and Constitutionalism as Doctrine, Constitutionalism as Imagination

The central features of constitutional pluralism can be divided into two parts: the normative and the empirical. The latter is concerned with describing the “competing claims of ultimate political and legal authority raised in the names of different political communities”.¹⁵¹ Zoran Oklopcic suggests that these empirical claims can exist at multiple jurisdictional registers, ranging from marginalised demands for political authority by particular minority communities in a ‘fragile state’¹⁵² to cooperative constitutional arrangements, such as the North American Free Trade Agreement and the European Union.¹⁵³ From this perspective, constitutional pluralism is both legal and political. It “exists in different gradients”, which only in extreme cases conform to everybody’s entrenched juridical understanding of a constitutional reality.¹⁵⁴ On the other hand, the normative

itself as a collection of equal sovereigns is no longer able to hold in place the hegemonic narrative of the divide between law and politics in the transnational, and, hence, justify the broad scope of its operation as an exclusively “legal” institution. Debates over the “constitutionalization” of the WTO stem from these concerns about the “crisis of legitimacy” and, ironically, as such debates have gained momentum, the imagined potential reach of the institution has broadened correspondingly”.

¹⁵⁰ Wiener, “Global Constitutionalism” *supra* note 28 at 8.

¹⁵¹ Oklopcic, “Provincializing” *supra* note 45.

¹⁵² Mark Massoud, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (Cambridge: Cambridge University Press, 2014).

¹⁵³ Oklopcic, “Provincializing” *supra* note 45. at 203.

¹⁵⁴ *Ibid* at 203.

perspective affirms and demands commitments to political pluralism.¹⁵⁵

Oklopcic's description harkens back to the earlier definitions of constitutional pluralism.¹⁵⁶

Neil Walker, one of the pioneers of constitutional pluralism writes:

Conceptually, it is argued that in order to capture the full range of the 'constitutional experience' and imagine the full range of constitutional possibilities within the new plural order, constitutionalism and constitutionalisation should be conceived of not in black-and-white, all-or-nothing terms but as questions of nuance and gradation. There is no unitary template in terms of which constitutional status is either achieved or not achieved, but rather a set of loosely and variously coupled factors which serve both as criteria in terms of which forms of constitutionalism can be distinguished and as indices in terms of which modes and degrees of constitutionalisation can be identified and measured.

In structural terms, it is argued that in order to appreciate the practical significance of the various constitutional phenomena identified through the application of these abstract criteria, we must assess the variable position of the different types of polity or political process with which these phenomena are linked within the global configuration of authority, and also examine the relationship between these polities or political processes. That is to say, as already intimated, constitutionalism in a plural order is necessarily conceived of not only as a property of polities and political processes but as a medium through which they interconnect - as a structural characteristic of the relationship between certain types of political authority or claims to authority situated at different sites or in different processes as well as an internal characteristic of these authoritative claims.¹⁵⁷

¹⁵⁵ *Ibid* at 203.

¹⁵⁶ Walker, "Idea of Constitutional Pluralism" *supra* note 144.

¹⁵⁷ *Ibid* at 340.

Martin Loughlin is critical of constitutional pluralism. He notes that the constitutional pluralist faction can be viewed as a sect and their claims can be summarised in three iterations.¹⁵⁸ First, for the constitutional pluralists, the foundation of political authority is rooted in a constitution; second within a supranational space, the political authority is autonomously constituted as highlighted by Walker's claims above; and therefore "the issue of ultimate authority is either left open (radical pluralism) or is re-integrated in a universal order of constitutional principles (pluralism under international law)".¹⁵⁹

In light of the push back from public lawyers,¹⁶⁰ legal pluralists,¹⁶¹ and international lawyers,¹⁶² constitutional pluralists have retreated to the confines of some basic elements in the descriptive and normative camps identified earlier. Walker proposes to re-imagine constitutional pluralism in light of the heavy criticisms. He argues that constitutional pluralists are beholden to two central but different ideas: constitutionalism and pluralism.¹⁶³

Constitutionalism is premised on the notion that a legal code provides the necessary legitimation, while pluralism respects political diversity. The constitutional pluralists account is a reaction to the "post-Westphalian age where globalising economic, cultural communicative, political and legal influences have

¹⁵⁸ Loughlin, "Oxymoron" *supra* note 139 at 22.

¹⁵⁹ *Ibid* at 22.

¹⁶⁰ *Ibid*.

¹⁶¹ Nico Kirsch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) at 69-103; Buchanan, "Legitimizing Global Trade" *supra* note 97.

¹⁶² Kennedy, "Mystery of Global Governance" *supra* note 113.

¹⁶³ Walker, "Constitutionalism and Pluralism" *supra* note 17 at 18.

both spread and diluted public power”.¹⁶⁴ Constitutional pluralists recognise the fast-paced expansion in human interactions on a global scale through the process of globalisation. They take stock of the developments by appreciating constitutional and political pluralism. This type of argumentation builds on from James Tully’s important suggestion that constitutionalism must be located in a historical context.¹⁶⁵ Tully suggests that there are important interconnections between imperialism, colonialism and constitutionalism.¹⁶⁶ For Tully, modern constitutionalism is about the strange multiplicity of our postmodern world and the possibilities of democratising our constitutional imaginations.¹⁶⁷ Moreover, Tully argues that constitutionalism is deeply imbricated in colonialism and imperialism. He suggests that modern arrangements of constituent powers and constitutional forms (constitutional democracies) cannot be understood through the histories of western states. Rather, modern constitutionalism should be “set in the broader imperial context of state formation”.¹⁶⁸

For constitutional pluralist, and developing Tully’s cortical insights to some extent, it is impossible to be satisfied with the unitary conception of

¹⁶⁴ *Ibid* at 18.

¹⁶⁵ James Tully, “Modern Constitutional Democracy and Imperialism” (2008) 46:3 Osgoode Hall LJ461 at 465- 479 [Tully, “Modern Constitutional Democracy”]; James Tully, “Modern Constitutional Democracy and Imperialism” in Martin Loughlin and Neil Walker, eds, *The Pradox of Constitutionalism: Constitutional Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 315; Günter Frankenberg, Book Review: The Paradox of Constitutionalism. Constituent Power and Constitutional Form – Edited by Martin Loughlin and Neil Walker” (2009) 15:4 European Law Journal 564 at 566.

¹⁶⁶ Tully, “Modern Constitutional Democracy” *supra* note 165 at 480; Buchanan, “Constitutive Paradox” *supra* note 149.

¹⁶⁷ James Tully, *Strange Multiplicities: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 28-29 [Tully, *Strange Multiplicity*].

¹⁶⁸ Tully, “Modern Constitutional Democracy” *supra* note 165 at 480.

constitutionalism. They want to harness the opportunity presented by the post-Westphalian moment. Walker suggests: “constitutional pluralist, in short, seeks to make a virtue out of necessity”.¹⁶⁹

The constitutional pluralist claims are not without criticisms, especially with reference to global order beyond the European context. Walker identifies three criticisms in his attempt to reimagine constitutional pluralism. The first criticism has focused on the monist “singularity” that is produced through the language of constitutions, constitutionalism, and constitutionalisation. The second focuses on the idea that constitutional pluralism, given its allegiance to various forms of political authority, is “nothing more than constitutional plurality”.¹⁷⁰ The third focuses on the fallout from the first two. If we want to avoid the unified constitutional order, or the fragmented self-contained regimes produced by globalisation, then we should avoid the language of constitutions and its anachronistic usage.¹⁷¹

From these critical insights, Walker argues the following: “there remain today good arguments for pursuing the project of adapting the language and mind-set of constitutionalism to meet the pluralist imperatives of broader global conditions”.¹⁷² For Walker, if constitutionalism is to offer us anything under the

¹⁶⁹ Walker, “Constitutionalism and Pluralism” *supra* note 17 at 18.

¹⁷⁰ *Ibid* at 19.

¹⁷¹ Nico Kirsch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) at 69; Walker, “Constitutionalism and Pluralism” *supra* note 17 at 19.

¹⁷² *Ibid* at 21.

current conditions of globalisation, then we must adjust our lens and approach the constitutional predicament through a different perspective.¹⁷³ The impetus to adjust our lenses is born out of the experience in unifying Europe through the European Union.¹⁷⁴ Therefore he suggests that we consider constitutionalism as a doctrine, and constitutionalism as imagination.

Constitutionalism, as doctrine, is conceptualised as a toolbox of mobile resources. It is a “thin and footloose structure and stylisation of norms used to qualify and dignify the emergent site of new global regulatory structure of authority without being constitutive of these sites in the thick manner redolent of the nation state”.¹⁷⁵ Constitutionalism becomes a “matter of detail” forming a body of principles and norms that can help guide new governance mechanisms. Principles such as fundamental rights, separation of powers, due process and natural justice are emblematic of the tools within the constitutional toolbox that are at the disposal of new governance mechanisms.

Constitutionalism as imagination follows on from constitutionalism as doctrine. Here it is meant to provide a point of departure. It is about the potential to imagine a future world based on liberal conceptions of rights, equality and freedom. Constitutionalism as doctrine attempts to use the existing tools of

¹⁷³ *Ibid.*

¹⁷⁴ Neil Walker “Post-Constituent Constitutionalism? The Case of the European Union” in Martin Loughlin and Neil Walker, ed, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008) 247.

¹⁷⁵ Walker, “Constitutionalism and Pluralism” *supra* note 17 at 32.

constitutionalism in a post-Westphalian world while constitutionalism as imagination should serve as a reminder of what “should underscore and inform our puzzles of governance in state or state-like holistic settings and non-holistic settings alike”.¹⁷⁶ In Walker’s assessment, constitutional pluralism as doctrine and imagination houses both the normative and the descriptive elements of global constitutionalism, which then circles back to the scholars that I examined in the earlier sections.

International criminal institutions serve to illustrate both normative and descriptive account of constitutionalism. First, international criminal institutions may demonstrate the existence of a global order that seeks to punish those that have committed international crimes as defined by the international community. International criminal law and its respective institutions pierce the veil of impunity by prosecuting public officials. Simultaneously, the history of international criminal institutions is such that it demonstrates how arguments to shape the world order and create a better world have significant purchase. For example, the International Criminal Court was a dream of international lawyers and international human rights activists prior to 1989; an era in which the Cold War between the two superpowers determined when and how international institutions would function.

¹⁷⁶ *Ibid* at 32.

While the attempts to map the existing international structure as moments in constitutionalism are commendable, grafting international law's realities onto ideas of constitutionalism (whether as doctrine or imagination) simply ignore a central and pressing concern: the internal dynamic of each international institution and very history of international law.¹⁷⁷ While scholars like Tully recognise the dangers of relying on western histories of constitutional formation and state formation, there is no recognition of international law and its institutions' role in colonialism and imperialism and its continued effects within the expositions of constitutional pluralism. What global constitutionalists, in particular constitutional pluralists, ignore can be characterised as a central contradiction embedded in domestic liberal constitutions, constitutionalism, and constitutionalisation. This was the subject of great debate as it relates to liberal legalism.¹⁷⁸

On the one hand, those pointing to constitutional pluralism refer to the manner in which international criminal institutions serve to prosecute grave injustices and in the context of genocide, often referred to as the scourge of humanity. The international community's decisions to prosecute the commission of evil acts serve as an illustration of limiting government's power and protecting the

¹⁷⁷ Walter Mattli and Ngaire Woods, "In Whose Benefit? Explaining Regulatory Change in Global Politics" in Walter Mattli and Ngaire Woods, eds, *The Politics of Global Regulation* (Princeton University Press, 2009) 5; David Charney, "Illusions of a Spontaneous Order: "Norms" in Contractual Relationships" (1996) 144 U Pa L Rev 1841; Patricia J. Williams, *Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991).

¹⁷⁸ Duncan Kennedy, "A Semiotics of Critique", (2001) 22 Cardozo L Rev 1147; Duncan Kennedy, "The Critique of Rights in Critical Legal Studies" in Wendy Brown and Janet Halley eds, "Left Legalism/Left Critique" (Durham: Duke University Press, 2002) 178.

fundamental rights of the victims, survivors and the international community. On the other hand, arguments for constitutional pluralism, both normative/imagination and descriptive/doctrine, simply gloss over the biased selectivity of cases by the ICC for example. Moreover constitutional pluralists ignore violations of fundamental rights of the accused and the legislative powers bestowed upon international judges, reticent of the way in which constitutionalism in its original form in the national experience obscured law's role in maintaining societal conflicts.

David Kairys has suggested that a realistic approach to the law (and constitutionalism) is needed.¹⁷⁹ Such an approach is one where the operation of the law and its "social role must acknowledge the fundamental conflicts in society; the class, race and sex basis of these conflicts; and the dominance of an ideology that is not natural, scientifically determined or objective".¹⁸⁰ Returning to the manner in which international law has evolved and paying close attention to the dynamic of difference theorised by Anghie and other TWAIL scholars, constitutional pluralism and constitutional pluralists like Walker simply rely on constitutional doctrines as a means to see through the cloudy international space.

¹⁷⁹ David Kairys, "Introduction" in David Kairys ed, *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982) at 4.

¹⁸⁰ *Ibid* at 4.

But this international space, as demonstrated in the earlier discussions is plagued by inequities that have become imbedded in the very structure of international law and its institutions. My argument is that international law, from its inception, was created as a means to regulate the encounter between the Europeans and the local inhabitants of the new colonies. Vitoria's articulation of sovereignty is a good illustration of this point. As it has evolved over the years, international law's foundational nature has not been severed from its colonial past. Rather, scholars working under the moniker of TWAIL have chronicled the continuation of this by-product of colonialism and imperialism. One illustration of this point can be seen through the manner in which international criminal institutions function. The selectivity of cases by the ICC or the role of the witness before the ICTR are good examples in which the colonial past is front and centre. Turning to the ICC, the overrepresentation of African cases is a significant problem that threatens the very existence of the international court.¹⁸¹

By choosing to view constitutionalism as a thin structure that is "used to qualify and dignify the emergent site of new global regulatory structure of authority", constitutional pluralists gloss over the underbelly of international institutions as they deliver on their mandates.¹⁸² Whether one takes the ICTR, the ICTY or the International Criminal Court as examples of new global governance structures,

¹⁸¹ Makau Mutua, "The International Criminal Court in Africa: challenges and opportunities", Online: 27 September 2010 Norwegian Peacebuilding Resource Centre/Norsk Ressurscenter for Fredsbygging (NOREF) Policy Paper < <http://www.peacebuilding.no/Themes/Peace-processes-and-mediation/publications/The-International-Criminal-Court-in-Africa-challenges-and-opportunities>>.

¹⁸² Walker, "Constitutionalism and Pluralism" *supra* note 17 at 32.

what is clear is that these entities are deeply political and they continue the tradition of universalising a particular western narrative. Similar to my criticism of Klabbers, Peters, and Ulfstein and their use of principles from European jurisprudence, constitutional pluralism's points of departure are susceptible to similar attacks.

3.6 Conclusion: Mapping a path forward?

I understand global constitutionalism and global constitutionalisation as a taxonomy of contemporary global governance institutions and a normative account about global governance. It is a taxonomy since the writers included in this camp describe the existing world institutions and their respective infrastructure through the lens of constitutionalism. It is a normative exercise because it seeks to structure the existing international order using a cosmopolitan universalist vision of western liberal constitutionalism. Fundamentally, the rationale for the project of global constitutionalism can be rooted in the search for, and the need to have, legitimacy and ultimately legality within the international order as result of fragmentation of international law. It is also a reaction to our globalised social reality.

The various perspectives presented earlier in this chapter locate formal legal frameworks, norms and principles that permeate the international legal order to suggest we have constitutional legal values that inform our global system. These laws, norms and principles exemplify models through which distribution of power,

wealth and resources can arguably be mediated and contested. This does not break from or challenge the idea that international law and its institutions are closely connected to imperialism and colonialism or international law and its institutions are currently dominated by western interests, either in the form of capital or power.¹⁸³ These accounts of global constitutionalism simply do not take stock of the realities of how international institutions function within their respective fields.

By taking the international criminal justice regime as an example, I argued that the different variants of global constitutionalism are parochial in their analysis. The parochialism stems from a clear desire to use the western understandings of constitutionalism as garb to cloak the particular western values as universal.¹⁸⁴ Whether it is part of the normative camps' desire to curb social inequities or constitutionalism as imagination, there is a tendency to rely on the experience of the West as the most important signpost. Ultimately, the desire to understand, inform and make changes to the existing global governance structures however must take account of the global South. In the following few pages, I will briefly explore how global constitutionalism can transcend these limitations.

¹⁸³ Makau Mutua, "What is TWAIL?" (2000) 94 *American Society Intl L Proceedings* 31; Antony Anghie, "What is TWAIL: Comment" (2000) 94 *Am Soc Int'l Proc* 39; James Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" (2011) 3(1) *Trade, L & Development* 26.

¹⁸⁴ Combs, *Fact-Finding without Facts supra* note 112 at 179.

By shifting reference points from global constitutionalism to comparative constitutionalism, two particular bodies of interdisciplinary literature offer significant insights. These insights open up new vistas on how to potentially transcend the limitations I have identified in this chapter. This is a cursory account of these fields. It is meant as a signpost to demonstrate that there are scholars working on constitutionalism from various perspectives that differs from the accounts presented above. I will take up the theoretical questions about the turn to the global South in the final chapter.

With reference to the comparative constitutionalism, there are two bodies of literature that may be useful in transcending the limitations identified above. First there is a burgeoning body of literature that seeks to examine constitutionalism of the global South that may open new avenue of analysis.¹⁸⁵ The second, primarily written by indigenous scholars from North America, has sought to challenge liberal constitutionalism's ability to recognise indigeneity and indigenous claims. In the next few pages, I will explore these two types of scholarly engagement as a means to signal future directions for global constitutionalism.

¹⁸⁵ Bonilla, "Introduction" *supra* note 134; Vidya Kumar, "Global Constitutionalism: Towards a Constitutionalism of the Wretched" in Vasuki Nesiah, Michael Fakhri, Luis Eslava, eds, *60th Anniversary of the Bandung Conference* (Cambridge: Cambridge University Press, Forthcoming 2015).

Under the auspice of constitutionalism of the global South¹⁸⁶, some scholars are interested in challenging the received wisdom of constitutionalism from the global North. Daniel Bonilla, a Colombian comparative constitutional scholar writes the following in terms of the received wisdom from the global North:

Only a few institutions - such as the Supreme Court of the United States, the European Court of Human Rights, and the German Constitutional Court - are considered paradigmatic operators and enforcers of modern constitutionalism's basic rules and principles. These legal institutions are the ones that determine the paradigmatic use of modern constitutionalism's basic norms. They are the ones responsible for defining and solving key contemporary political and legal problems by giving specific content to modern constitutionalism's rules and principles. The answers that these institutions give to questions like "What are the limits of judicial review?" "What is the meaning of the principle of separation of powers?" [...] are considered by most legal communities to fundamentally enable the connection of modern constitutionalism to the realities of contemporary polities.¹⁸⁷

Writers working on comparative constitutionalism of the global South invert the order of things.¹⁸⁸ They examine the jurisprudence of the highest courts in the global South, in particular Colombia, India and South Africa. In doing, the authors gathered under Bonilla's *Constitutionalism of the Global South* examine the jurisprudence of these courts.¹⁸⁹ These scholars have "sought to open the discussion about the jurisprudence" of three courts on social and economic rights, cultural diversity and access to justice and "bridge the gap that exists

¹⁸⁶ For a much more detailed account of the emerging literature of the global South, see Chapter 5, section 5.1, in this analysis starting at p. 248.

¹⁸⁷ Bonilla, "Introduction" *supra* note 134 at 3.

¹⁸⁸ Jean Comaroff & John Comaroff, *Theory from the South: Or, How Euro-America is Evolving Toward Africa (The Radical Imagination)* (London: Paradigm Publisher, 2012); Michel Foucault, *The Order of Things: An Archaeology of Human Sciences* (New York: Vintage, 1994).

¹⁸⁹ I engage much more fully with Bonilla's *Constitutionalism of the Global South* in chapter 5, p. 248.

between Global South and Global North on constitutional matters”.¹⁹⁰The various analyses encapsulated in Bonilla’s collection expose the manner in which constitutionalism, once transported to the colonies and the peripheries, can be deployed in various ways to foster greater benefits for the constituents.¹⁹¹

In tracking the manner in which the various constitutions are being deployed and understood in these three countries, an important point stands out: when confronted by questions of systemic change in Colombia, India and South Africa, the three Courts interpreting the respective constitutions are not arriving at similar results. There is an internal dialogue taking place within these polities about the very nature of constitutionalism, which is divergent from the ways in which global constitutionalism has been conceptualised in the global North. This type of argumentation can be illustrated with the scholarship of Jackie Dugard on the Constitutional Court of South Africa and Libardo José Ariza on the Constitutional Court of Colombia.

Even though South Africa’s Constitutional Court may have been vested with the transformative powers through the post-apartheid constitution, it has been unable, or unwilling to use these tools to transform the economic, social, and cultural conditions of the most marginalised South Africans. In the context of South Africa’s highest court, Dugard asks: “to what extent has the Constitutional Court, as one of the primary interpreters of the Constitution, fulfilled its

¹⁹⁰ Bonilla, “Introduction” *supra* note 134 at 29-30.

¹⁹¹ Tully, “Modern Constitutional Democracy” *supra* note 165.

constitutional promise?”¹⁹² The Court is unable provide the sought after remedy of the various stakeholders. Dugard offers the following insights:

Thus, despite being racially representative and having expressly committed itself to overseeing socio-economic justice in the interests of South Africa’s overwhelmingly poor black majority, the Constitutional Court has balked at allowing poor people who might otherwise be denied justice to gain direct access and has failed to operationalise a meaningful recognition of poverty in its socio-economic judgments. As a consequence, and in stark contrast to the popularity of Constitutional Courts in many developing countries such as Colombia, in South Africa the Constitutional Court is a remote institution that is increasingly sandwiched between growing animosity from the polity over its political judgments on the one hand and, on the other hand, disinterest and distrust by the majority poor citizenry.¹⁹³

The South African example demonstrates the difficulty of protecting economic, social and cultural rights during moments of transitional justice. It demonstrates the limitations of constitutionalism and constitutionalisation in potentially changing the lives of the most marginalised.

In the Colombian context, the Constitutional Court has taken a completely different approach in decisions on prison overcrowding, forced displacement and social issues of importance to Colombians. The unconstitutional state of affairs (USoA) doctrine allows the Colombian Constitutional Court to intervene in instances of massive and systemic violation of rights by government actors.¹⁹⁴

¹⁹² Jackie Dugard, “Courts and Structural Poverty in South Africa: To What Extent Has the Constitutional Court Expanded Access and Remedies to the Poor” in “”, in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013) at 293.

¹⁹³ *Ibid* at 296.

¹⁹⁴ Libardo Jose Ariza, “The Economic and Social Rights of Prisoners and Constitutional Court Intervention in the Penitentiary System in Colombia” in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013) at 129.

By making this type of a declaration and imposing a remedy, the Court takes on the role of public policy maker. Ariza writes:

The doctrine of USoA has certainly had a significant impact. On the one hand, for legal clinics and legal activists in human rights, a USoA declaration implies that the state acknowledges responsibility and can be held accountable for its poor performance in enforcing and guaranteeing rights for a significant population. In this sense, uttering a USoA declaration means claiming victory in the judicial field. On the other hand, the doctrine aims to address structural problems and hardships that swamp efficient institutional performance, creating institutional and dialogical spaces for policy decision making that unblocks an obsolete institutional arrangement".¹⁹⁵

In this instance, the Constitutional Court is rearranging the existing understandings of the constitutional separation of power doctrine as a means to protect the fundamental rights of some of the most marginalised. Further investigation of these similarities and divergence is possible and is part of my future research agenda to understand global constitutionalism from the perspective of the global South.

What is important about the South African and Colombian approaches to economic, social and cultural rights is the availability of diverse global South perspectives on constitutionalism. In particular, as the sharp edges of globalisation, neoliberalism and capitalism calibrates the state of affairs in the global South¹⁹⁶, the responses of the respective nation states through constitutionalism either conforms what we already know about legal formalism or

¹⁹⁵ *Ibid* at 143-144.

¹⁹⁶ Jean Comaroff & John Comaroff, *Theory from the South: Or, How Euro-America is Evolving Toward Africa (The Radical Imagination)* (London: Paradigm Publisher, 2012).

opens up new opportunities to rethink our attitudes about global constitutionalism and constitutional ordering. This type of engagement is completely lacking in the various global constitutionalism camps discussed above.

The second set of scholars that I want to signal to critique constitutional recognition and constitutionalism in North America. I offer this example as part of the continuation of the struggle of indigenous people against settler colonial states. I do not mean to romanticise these interventions or the current lived realities of the indigenous people, rather I point to this example as part of a future project to learn from these initiatives of resistance.

The notion of recognition is imbedded in constitutional democracies as a means to allocate rights to minority communities. Recognition has had a significant effect on the manner in which indigenous communities, such as those located in Canada, have sought to regain their sovereignty through the Canadian judiciary and the *Canadian Charter of Rights and Freedoms*.¹⁹⁷ In *Strange Multiplicity*, James Tully proposes the following insight as means to support the efforts to reorganise constitutionalism through greater protection of minority rights:

“Perhaps the great constitutional struggles and failures around the world today are grouping towards a third way of constitutional change, symbolized in the ability of the members in the canoe [i.e. a multicultural and diverse societies] to discuss and reform their

¹⁹⁷ *R. v. Sparrow* [1990] 1 S.C.R. 1075; *R. v. Van der Peet* [1996] 2 S.C.R. 507; *R. v. Sappier, R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686; *R. v. Powley*, 2003 SCC 43; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74.

constitutional arrangements in response to the demands of recognition as they paddle”.¹⁹⁸

Tully has subsequently explored how “deeply entrenched roles of constitutional democracies [can] be de-imperialized?”¹⁹⁹ Tully’s analysis forms the backdrop of much of Walker’s discussions on constitutional pluralism.²⁰⁰ Tully suggests that there ought be greater participatory democracy by which laws are open to criticisms, negotiation and modification, akin to writers in constitutional pluralism (for example constitutionalism as imagination).²⁰¹ This suggestion and the ensuing development chronicled through the Canadian jurisprudence has been the subject of a deep critique. There are various strands to the critique that focuses on the emphasis on liberal legalism,²⁰² notions of sovereignty,²⁰³ the politics of recognition²⁰⁴ and the politics of refusal²⁰⁵.

The politics of recognition can be characterised as a set of “recognition-based models of legal pluralism” that seek to reconcile the demands for sovereignty by indigenous groups from settler states like the United States and Canada.²⁰⁶ These models of recognition tend to be diverse but most often encompass some form of delegation of land, capital and political power from modern settler nation

¹⁹⁸ Tully, *Strange Multiplicity* *supra* note 167 at 29.

¹⁹⁹ Tully, “Modern Constitutional Democracy” *supra* note 165 at 488.

²⁰⁰ Walker, “Idea of Constitutional Pluralism” *supra* note 144 at 329-331.

²⁰¹ Tully, “Modern Constitutional Democracy” *supra* note 165 at 488.

²⁰² Buchanan, “Constitutive Paradox” *supra* note 149.

²⁰³ Taiaiake Alfred *Peace, Power, and Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 2009).

²⁰⁴ Glen Sean Coulthard, *Red Skin White Masks: Rejecting The Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) [Coulthard, *Red Skin*].

²⁰⁵ Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Setter States* (Durham: Duke University Press, 2014) [Simpson, *Mohawk Interruptus*]

²⁰⁶ Coulthard, *Red Skin* *supra* note 204 at 3.

states to indigenous communities. Yellowknives Dene First Nation scholar Glen Coulthard argues that these efforts reproduce colonial and racist state power over indigenous communities. Coulthard suggests:

[I]nstead of ushering in an era of peaceful coexistence grounded on the idea of reciprocity or mutual recognition, the politics of recognition in its contemporary form liberal promises to reproduce the very configurations of colonialist, racist, patriarchal state power that indigenous peoples' demands of recognition have historically sought to transcend.²⁰⁷

In a similar vein, in investigating the politics of refusal, Mohawk scholar Audra Simpson writes that there is a political alternative to the idea of recognition embedded in constitutionalism vis-à-vis minority communities. The alternative is the politics of refusal. She suggests that:

This alternative is refusal and it is exercised by people within this book. They deploy it as apolitical and ethical stance that stands in stark contrast to the desire to have one's own distinctiveness as a culture, as a people, recognized. Refusal comes with the requirement of having one's political sovereignty acknowledged and upheld, and raises the question of legitimacy for those who are usually in the position of recognizing: What is their authority to do so? Where does it come from? Who are they to do so? Those of us writing about these issues can also refuse; this is a distinct form of ethnographic refusal [...].²⁰⁸

There are number of different ways to transcend the limitations that I outlined in this chapter on global constitutionalism. The above discussion only highlights two contemporary bodies of comparative constitutional literature that offer new insights about constitutionalism and constitutionalisation. These fields must be

²⁰⁷ *Ibid* at 3.

²⁰⁸ Simpson, *Mohawk Interruptus supra* note 205_at 11.

exploited if we are to overcome the context-based problems I detailed in this chapter. Unfortunately, I cannot engage with this literature in this dissertation. Rather I point to it to briefly signal its existence. What is important is to note that global constitutionalism must engage with these scholarly formations if it is to truly theorise *global* governance.

Chapter 4: False Universalism of Global Administrative Law?

4.1 Introduction

The expansion of governance regimes beyond the nation state has prompted scholars to theorise global governance.¹ By moving beyond the simple intercourse between sovereign states, this new global order reflects the dense web of inchoate regulatory actors, norms, and processes.² The first steps of mapping, describing, and then theorising various regimes are difficult, complicated, and often politically contested. As already suggested, there is a surge in academic writing that conceptualises the global order through the lens of constitutional law,³ transnational law,⁴ legal pluralism⁵ and, more recently, administrative law. These scholarly interventions seek to legitimise international law and its institutions in light of the democratic deficit.⁶ The democratic deficit is precipitated by the rapid expansion of international law and international institutions (chronicled in the first chapter).

¹ Kevin Davis, Benedict Kingsbury, and Sally Engle Merry, "Introduction: Global Governance by Indicators" in Kevin Davis *et al*, eds, *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford: Oxford University Press, 2015) at 10-21 [Davis, "Introduction Global Governance"].

² Peer Zumbansen, "Transnational Law, Evolving" in Jan M Smits, ed, *Elgar Encyclopedia of Comparative Law* (Northampton: Edward Elgar, 2012) at 738.

³ Jan Klabbbers, "Setting the Scene" in Jan Klabbbers, Anne Peters & Geir Ulfstein, eds, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); Ronald St John Macdonald and Douglas M Johnston, eds, *Towards World Constitutionalism: Issues on the Legal Ordering of the World Community* (Leiden: Martinus Nihjoff, 2005); Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes" (2009) 16:2 *Ind J Global Leg Stud* 621. But see Jose E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences" (2003) 38 *Texas Intl LJ* 405.

⁴ Peer Zumbansen, "Transnational Legal Pluralism" (2010) 1:2 *Transnational Leg Theory* 141.

⁵ Paul Schiff Berman, *Global Legal Pluralism* (Cambridge: Cambridge University Press, 2012).

⁶ Nico Krisch & Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 *EJIL* 1 [Krisch & Kingsbury, "Introduction"]; Benedict Kingsbury, "The Administrative Law Frontier in Global governance" (2005) *American Society of International Proceedings* 143.

Previously I recounted how scholars are turning to a constitutional vernacular in response to the democratic deficit in global governance. Inspired by domestic experiences, these scholars attempt to discover constitutionalism in the global order. Similarly, in this chapter, I will focus on global administrative law as a means to bridge the accountability gap found within international institutions.

Globalisation continues to have significant effects on how we regulate order at the global level, spurring on the need for greater regulatory oversight. In fact, global regulatory regimes govern almost all aspects of our modern existence, including dentistry, regulation of food, arms control and even prosecution of international war criminals. The current international institutional landscape therefore consists of “international, transnational, hybrid, a mixture of public and private actors, regimes or networks, or even harder to categorise assemblies of evolving governance structures [...]”.⁷ These institutions are created through various international law-making mechanisms that compose our modern fragmented international legal order. Fragmentation of international law continues to occur because international law and its various institutions are not part of a unified legal system akin to those found in national jurisdictions with specific rules of precedent.

⁷ Peer Zumbansen, "Administrative law's global dream: Navigating regulatory spaces between national and "international", Book Review of *Global Administrative Law: The Casebook* by Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald (2013) 11:2 Intl J Constitutional L 506 at 507.

Most national regulatory institutions have a variety of different branches of government consisting of elected executive, legislative and judicial chambers. Based on the accepted legal system in place in these national spaces, the judiciary can make use of legislative enactments and jurisprudential doctrines in adjudication.⁸ International law scholars have identified close to 2,000 self-contained regulatory regimes⁹, each with their own diverse mechanisms for law-making and adjudication. As a result of globalisation and fragmentation, there are instances in which institutional decisions are contradictory. Scholars have characterised this phenomenon as “regime collision”.¹⁰ The fear of “regime collision” has justified modern anxieties about our very fragmented global order.¹¹

In particular, as a result of fragmentation of international law, these multiple and diverse regimes establish “links with other regimes” resulting in the multiplication and cross-pollination of global principles and rules.¹² The emergence of these principles and rules is the basis for global administrative law. In what follows, I will provide a description of the various scholars working within global

⁸ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald, “Foreword” in Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald eds, *Global Administrative Law: The Casebook* (Rome Edinburgh New York: ILRP, 2013) at XXIII [S. Cassese et al, “Foreword”].

⁹ *Ibid* at XXIII- XXV.

¹⁰ Gunther Teubner & Andreas Fischer-Lescano, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” (2004) 24:4 *Mich J Intl L* 999 at 999-998.

¹¹ Martti Koskenniemi & Paivi Leino “Fragmentation of International Law? Postmodern Anxieties”, (2002) 15 *Leiden J Intl L* 553 [Koskenniemi & Leino, “Fragmentation”].

¹² S. Cassese et al, “Foreword” *supra* note 8 at XXIII.

administrative law. In particular, I will present two variations or camps in the global administrative law literature.

In our complicated global governance milieu, some academics suggest that international regulatory regimes develop administrative law principles by directly analogising from domestic administrative law.¹³ The scholars working within this first camp argue that there are now clear principles in these regimes that concern due process, procedural fairness, transparency, duty to give reasons, and other administrative law doctrines.¹⁴ Drawing inspiration from these principles that emanate from domestic administrative law, it is argued that the entire “arsenal of domestic administrative law [...] can be found in the global space”.¹⁵ I primarily focus on Benedict Kingsbury and Richard B. Stewart, as these two scholars are instrumental in the creation of the field of global administrative law. Much more importantly they both continue to theorise various aspects of global administrative law.¹⁶

Some scholars challenge Kingsbury and Stewart’s assertions.¹⁷ Karl-Heinz Ladeur in particular asserts that analogising directly from the domestic

¹³ *Ibid*; Benedict Kingsbury, Nico Krisch & Richard B Stewart, “The Emergence of Global Administrative Law” (2005) 68 *Law and Contemporary Problems* 15 [Kingsbury et al, “Emergence of GAL”].

¹⁴ S. Cassese et al, “Foreword” *supra* note 8 at XXIII.

¹⁵ *Ibid* at XXIV.

¹⁶ Davis, “Introduction Global Governance *supra* note 1.

¹⁷ Carol Harlow, “Global Administrative Law: The Quest for Principles and Values” (2006) 17:1 *EJIL* 187 at 190; Susan Marks, “Naming Global Administrative Law”, (2005) 37 *New York University Journal of International Law and Politics* 995 at 995; Peer Zumbansen, “Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance” in

conceptions of administrative law does not yield the expected results. He suggests that there is a need to reimagine how accountability is generated at the global level.¹⁸ Such an exercise is similar to global constitutionalism's normative and pluralist accounts by scholars like Habermas and Walker and their attempts to portray our constitutional order. In this regard, I will examine the writing of Ladeur and his accounts of postmodern¹⁹ global administrative law. Similar to the previous chapter, I have characterised these two camps according to my interpretation of their respective materials.

The first set of scholars of global administrative law provide a detailed description of how international institutions deploy administrative law in their everyday interactions. The second, Ladeur, acknowledges the difficulties encountered by analogising in this manner, and he proposes to read in accountability in how these institutions function.

This chapter then critiques the turn to administrative law principles deployed in international law and its institutions as global governance. Fundamentally, I argue that global administrative law ignores, obscures, and effaces the underlying context of international law and its institutions. Global administrative

Maurice Adams & Jacco Bomhoff, eds, *Practice and Theory in Comparative Law Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012); Karl-Heinz Ladeur "The Emergence of Global Administrative Law and Transnational Regulation" (2013) 3:3 *Transnational Leg Theory* 243 [Ladeur, "Emergence of GAL"].

¹⁸ Ladeur, "Emergence of GAL" *supra* note 17 at 245-249.

¹⁹ There are various understandings of postmodernism. For a description of these ideas and their application in law, see Jennifer Wicke, "Postmodern Identity and Legal Subjects", (1991) 62 *U Col L Rev* 455; David Kennedy, "On Comments on Law and Postmodernism: A Symposium Response to Professor Jennifer Wicke" (1991) *U Col L Rev* 475.

law suggests a particular western understanding of administrative law as universal and thus, it re-enacts Anghie's dynamic of difference. In order to demonstrate this facet of global administrative law, I rely on the international criminal law case studies canvassed in the first chapter.

4.2 Global Administrative Law: Global Governance as Administration?

As both a student of global administrative law, and as a teacher of national administrative law, the obvious question in my mind is: What is the significance of labelling global governance as administration? Moreover, what are the benefits of identifying the existence or the emergence of administrative law principles within the global regulatory regimes? Does it benefit anyone?

In our respective domestic experiences, the development of administrative law is closely tied to the delegation of the state's power to administrative agencies and the creation of the welfare state.²⁰ Administrative agencies decide on the various content of our news, provide services, deliver healthcare, administer schools and prisons, and regulate our borders.²¹ In Commonwealth jurisdictions, administrative law has evolved from the prerogative *writs of certiorari*, prohibition and *mandamus* that were imposed upon the colonies by their colonial master.²²

²⁰ Gus Van Harten *et al*, *Administrative Law: Cases, Texts, and Materials 6th edition* (Toronto: Emond Montgomery Publications, 2010) at 3-35.

²¹ Colleen Flood and Jennifer Dolling, "An Introduction to Administrative Law: Some History and Few Signposts for a Twisted Path" in Colleen Flood and Lorne Sossin, eds, *Administrative Law in Context, 2nd ed.* (Toronto: Toronto: Emond Montgomery Publications, 2013) at 2-3.

²² Laskshman Keerthisinghe, *The Application of the Writ of Mandamus in the Exercise of the Writ of Jurisdiction of the Superior Courts of Sri Lanka* (Colombo: Sarasavi, 2012); Audrey Macklin, "Standard of Review: Back to the Future?" in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context, 2nd ed.* (Toronto: Toronto: Emond Montgomery Publications, 2013).

Administrative law now regulates the conduct of administrative agencies with delegated executive authority and government agencies that administer special programs and services. The emerging principles that global administrative law scholars identify within the international regulatory regimes are an essential ingredient in national jurisdictions. These national principles generate accountability (through the doctrines of reasonableness and correctness for example) of domestic decision-makers.

Benedict Kingsbury and Richard Stewart are the pioneers of global administrative law. They have argued that global administrative law contains the mechanisms, principles, practices, and supporting social understanding that affect accountability of international regulatory agencies. In particular, they suggest that international agencies have developed standards such as transparency, participation, reasoned decision-making, legality and effective review of the decisions.²³ Ultimately, the project of global administrative law, which started in 2005, has gained traction and continues to grow. An excellent recent example of its expansion is to regulate governance indicators operationalised globally international institutions.²⁴ It is now a recognisable field

²³ Kingsbury et al, "Emergence of GAL" *supra* note 13 at 17.

²⁴ Davis, "Introduction Global Governance *supra* note 1 at 20-21; Sabino Cassese and Lorenzo Casini, "Accountability in the Generation of Governance Indicators" in in Kevin Davis *et al*, eds, *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford: Oxford University Press, 2015) 464 at 471-474.

of global governance theory. The evidence of this growth can be seen through the recent publication of a global administrative law casebook.²⁵

One of the central goals of global administrative law is to redeploy global governance as administration.²⁶ Proponents suggest that this shift allows the recasting of “many standard concerns about the legitimacy of international institutions in a more specific and focused way”.²⁷ In the global legal order, and unlike its domestic counterpart, there is no potential for direct democratic participation by the various constituents. Much more importantly, there is no sovereign at the global level and the respective branches of government are hard to discern.

Like any scholarly field, the current literature of global administrative law includes both proponents and detractors. Ladeur is a proponent. He demonstrates the utility of global administrative law while simultaneously providing incisive adjustments to its central tenets.²⁸ Ladeur argues that administrative law’s (and, by extension, global administrative law’s) postmodernism necessitates that we move beyond relying on ideas of delegation, accountability, and legitimacy. Global administrative law is trying to theorise global governance by adapting to, and experimenting with, the changing nature of postmodern legality. Global

²⁵ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald eds, *Global Administrative Law: The Casebook* (Rome Edinburgh New York: ILRP, 2013).

²⁶ Kingsbury *et al*, “Emergence of GAL” *supra* note 13.

²⁷ *Ibid* at 27.

²⁸ Ladeur, “Emergence of GAL” *supra* note 18 at 245-249.

administrative law is trying to do this while supporting the creation of norms that will adjust to the complexities of globalisation. The writings of Ladeur represent the second camp that I will review below.

The detractors have rightly challenged the tentative assessments of global administrative law. Carol Harlow suggests that it is extremely difficult to identify a universal set of administrative law principles. For Harlow, administrative law is “largely a western construct, taking its shape during the late 19th century as an instrument for the control of public power”.²⁹ Dominated by a philosophy of control, “administrative law has played an important part in the struggle for limited government, its core value being conformity to the rule of law”.³⁰ Susan Marks’ writings suggest that global administrative law “seems to bring an object into being, with a solidity and even a monumentality, that risks putting in the shade disputes over process, agency, and orientation”.³¹ Global administrative law’s turn away from democracy is what motivates Marks’ arguments. The use of delegation, a basic organising principle of global administrative law, therefore may not be the best way to usher in legitimacy in international law.

There are other areas of scholarship that point to a need for a much more robust examination of the different understandings of modern administrative law. This

²⁹ Carol Harlow, "Global Administrative Law: The Quest for Principles and Values" (2006) 17:1 EJIL 187 at 190.

³⁰ *Ibid.*

³¹ Susan Marks, "Naming Global Administrative Law", (2005) 37 New York University Journal of International Law and Politics 995 at 995.

claim focuses on comparative administrative law's potential to offer diverse set of insights globally.³² Global administrative lawyers could explore how different jurisdictions conceptualise administrative law, as opposed to providing a definition based on western understandings of administrative law.³³ While all of these areas can be explored further, in this analysis, I focus on universal nature of global administrative law. This is closely aligned to the criticisms that Carol Harlow has articulated.

Claims made by global administrative lawyers are far-fetched in that their vision of global governance ignores the true markings of the international regulatory regimes, as I have demonstrated in the earlier chapters. Moreover, such claims to legitimacy, accountability, and other similar principles only obscure the realities of international institutions, while simultaneously propagating an outlook premised on particular accounts of domestic conceptions of law, regulation and governance. In the next section, I will explore two sets of scholarship that are part of the current literature on global administrative law.

³² Peer Zumbansen, "Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance" in Maurice Adams & Jacco Bomhoff eds, *Practice and Theory in Comparative Law Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012).

4.2.1 Descriptive Accounts of Global Administrative Law as Administration: Kingsbury & et al

Global administrative law's central goal is to position global governance as administration. This type of positioning allows those working under this descriptive camp to "recast many standard concerns about the legitimacy of international institutions in a more specific and focused way".³⁴ Supporters of global administrative law argue that this approach disturbs orthodox understandings of the concept of law within global governance.³⁵ For example, in national jurisdictions, law is created through elected representatives by way of constitutional arrangements. This is, of course, contested by legal pluralism (and more recently global legal pluralism). In this regard, legal pluralists posit that the state does not have a monopoly in norm creation. Rather there are multiple places in which norm generation occurs.³⁶

Our traditional understanding of legal norm production through the various forms of government is not possible within the global governance context. The law-making capacity of the judges of the two ad hoc tribunals is a good illustration. Global administrative law allows to us imagine the international regulatory space as containing the mechanisms, principles, practices and supporting social

³⁴ Benedict Kingsbury, "The Concept of "Law" in Global Administrative Law" (2009) 20:1 EJIL 23 at 27.

³⁵ Sabino Cassese, "Global administrative law: The state of the art" (2015) 13:2 Int'l J Constit L 465 at 467; Benedict Kingsbury, "The Concept of "Law" in Global Administrative Law" (2009) 20:1 EJIL 23 [Kingsbury, "The Concept of Law"].

³⁶ Paul Schiff Berman, *Global Legal Pluralism* (Cambridge: Cambridge University Press, 2012); Sujith Xavier, "Global Legal Pluralism: A Jurisprudence of Law Beyond Borders, Review of Paul Schiff Berman: *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*" (2013) 24 EJIL 981-98.

understandings that “promote or otherwise affect the accountability of global administrative bodies”.³⁷ In particular, global administrative law ensures these international institutions meet adequate standards of transparency, participation, reasoned decision, legality, and providing effective review of the decisions they make”.³⁸

For global administrative law scholars like Kingsbury and Stewart, there is an accountability deficit within international regulatory regimes. Democratic participation, analogous to that found in the national jurisdictions is not available in international institutions. International institutions are often created by diverse sets of actors and they are not accountable to a constituent population (for example the ICTY and ICTR). The United Nations Security Council created these two international criminal institutions and granted them specific powers to make amendments to their respective rules. This rule making power has effectively given the judges the power to legislate. Judges are solely accountable to the UN Security Council in making these decisions. As I illustrated earlier, the Security Council is very keen to deliver justice cheaply and thus instituted the completion strategy.³⁹ But these international adjudicatory agencies with these types of powers generate decisions that affect portions of the population in Rwanda or in the former Balkans for example. This engenders a democracy deficit.

³⁷Kingsbury *et al*, “Emergence of GAL” *supra* note 13 at 17; For a new articulation of this definition, Richard B. Stewart, “The normative dimensions and performance of global administrative law” (2015) 13 (2) *Intl J Constitutional L* 499 at 499-500.

³⁸Kingsbury *et al*, “Emergence of GAL” *supra* note 13 at 17.

³⁹ See Chapter 1, section 1.4.

Kingsbury and Stewart suggest that the results from such a democracy deficit have produced two possible responses: extension of domestic administrative law to intergovernmental regulatory decisions or the development of administrative law type mechanisms at the global level to address decisions and rules made within the intergovernmental regimes. Kingsbury and Stewart claim that the proliferation of international, transnational regulation and administration designed to address the “globalized interdependence in such fields as security, the conditions of development [...]” underlies the emergence of global administrative law.⁴⁰ “Increasingly, these consequences cannot be addressed effectively by isolated national regulatory and administrative measures”.⁴¹

No particular international regime can take precedence over another. In fact, another distinguishing feature of global administrative law is its acknowledgment of the interaction between the domestic and the international.⁴² There are other additional features of global administrative law according to its proponents. To those gathered in this camp, global administrative law differs from traditional international law that regulates the intercourse between sovereign equals. It is sectorial and it relates to the aim of global regulation, which must ultimately transcend the single nation state. Yet there are no enforcement mechanisms

⁴⁰ Kingsbury *et al*, “Emergence of GAL” *supra* note 13 at 17.

⁴¹ *Ibid*.

⁴² *Ibid*; Krisch & Kingsbury, “Introduction” *supra* note 6.

available to global administrative law because there is no actual constitutional document *per se* in the international space.

The following example from the ICTR demonstrates how scholars writing in this genre of global administrative law can arrive at these respective conclusions. In July 2001, the International Criminal Tribunal for Rwanda's Registrar suspended the employment contract of Thadée Kwitonda, a defence investigator. Kwitonda was employed as part of Arsène Shalom Ntahobali's defence team.⁴³ ICTR's Office of the Prosecutor investigated Kwitonda as a potential perpetrator of genocide. The prosecutor's finding led to Kwitonda's suspension from his role as a defence investigator.

In challenging the suspension, Ntahobali argued that his investigator, Kwitonda, was the only person with knowledge and confidence of the potential witnesses. Kwitonda was an essential member of the defence team and he was instrumental in aiding the newly appointed Defence Counsel.⁴⁴ The prosecutor argued that the Registrar's decision was not subject to judicial oversight,

⁴³ Arsene Shalom Ntahobali was born in 1970 in Tel Aviv, Israel and is a Rwandan national. He is the son of two incumbent Rwandan government ministers during the genocide (Pauline Nyiramasuhuko, Minister for the Family and Women's Affairs and of Maurice Ntahobali, former President of the Rwandan National Assembly, Minister for Higher Education and Rector of the National University of Butare). The Trial Chamber convicted Ntahobali committing, ordering, and aiding and abetting genocide, extermination and persecution as crimes against humanity, and violence to life, health and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; *The Prosecutor v. Arsene Shalom Ntahobali*, Case No. ICTR-97-21-T

⁴⁴ *The Prosecutor v. Arsene Shalom Ntahobali*, Case No. ICTR-97-21-T; The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator, ICTR-97-21-T.

available through legal provisions within the enabling *Statute*, secondary legislation such as the rules of evidence and procedure or Tribunal policy.

The Tribunal's Trial Chamber agreed with the ICTR Prosecutor. The Trial Chamber relied on the delegated administrative powers and responsibilities of the registrar in organising and appointing defence investigators as set out in the *Statute*. The Chamber found that "the issue of re-instatement of a suspended [i]nvestigator is an administrative matter resting with the Registry".⁴⁵ The Trial Chamber, using the language of administrative law, showed deference to the policy decision of the registrar. Those working in the descriptive camp of global administrative law can use this decision as evidence to support their arguments.

In response to the decision and relying on Tribunal policy directives⁴⁶, Ntahobali requested that the International Criminal Tribunal for Rwanda's President at the time, Justice Navi Pillay to review the decision of the registrar and the Trial Chamber. Justice Pillay dismissed Ntahobali's motion. She deferred to the administrative decision of the registrar. In her decision, she stated:

[...] In all systems of administrative law, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review. There are various formulations of this threshold condition in national jurisdictions, but a common theme is that the decision sought to be challenged, must involve a substantive right

⁴⁵ *The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator*, ICTR-97-21-T

⁴⁶ Directive on Assignment of Defence Counsel and the Rules of Procedure and Evidence.

that should be protected as a matter of **human rights jurisprudence** or public policy.

[...] Bearing in mind also, the limited scope of my **judicial review jurisdiction** as opposed to an appeal on merits, I do not find the exercise of discretion by the Registrar in the present case to be unreasonable or *malafide* or based on irrelevant or extraneous factors. [**emphasis added**]⁴⁷

The reference to her capacity to review the administrative decision of the registrar may allow global administrative law scholars to propose that international institutions have developed administrative law standards. In this instance, they would argue that there is the development of a process of effective review of the decisions that these tribunals make.⁴⁸ For global administrative law scholars, this is a good illustration of global governance as administration.⁴⁹ In a similar vein, Sabino Cassese *et al* suggest that International Criminal Court's role in deciding Palestinian statehood demonstrates the Court's role as a global administrator.⁵⁰

If global administrative law is to describe law in the international setting, as Kingsbury and Stewart suggest, then it is a description that "diverges from, and can be sharply in tension with the classical models of consent-based inter-state

⁴⁷ *The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator*, ICTR-97-21-T.

⁴⁸ Kingsbury *et al*, "Emergence of GAL" *supra* note 13 at 17.

⁴⁹ Kingsbury *et al*, "Emergence of GAL" *supra* note 13; Krusch & Kingsbury, "Introduction" *supra* note 6; Benedict Kingsbury, "The Administrative Law Frontier in Global governance" (2005) American Society Intl L Proceedings 143; Kingsbury, "The Concept of Law" *supra* note 35.

⁵⁰ Yoav Meer, "The Notion of State: The Palestinian's National Authority's Attempt to Bring a Claim in Front of the International Criminal Court Against Israel" in Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald eds, *Global Administrative Law: The Casebook* (Rome Edinburgh New York: ILRP, 2013) at 47-51

international law and most models of national law”.⁵¹ In this process, global administrative law’s law takes on a different character. It is not similar to what exists in national jurisdictions. Global administrative law is something that is entirely different from the administrative law found within national jurisdictions. This is problematic for two reasons.

First, national administrative law is a product of political compromises between political actors that were directly selected by their constituents, while international law emanates from a dizzying array of actors and norm producers. The example from the ICTR demonstrates that the rules of evidence and procedure used by the judges are not a product of political compromise. Rather, the Security Council granted the judges the power to draft the rules of evidence and procedure similar to the Nuremberg Charter so that the Tribunal could function. It did so for an arsenal of reasons that I discussed in the first chapter.⁵² As we saw from the empirical evidence that I presented in the first chapter, the judges and their experts have a pro-conviction bias that surfaces in the manner in which the rules of evidence and procedure are amended.

Second, this suggestion circles back to the central claim: a dynamic of difference organises the manner in which international law and international institutions

⁵¹ Kingsbury *et al*, “Emergence of GAL” *supra* note 13 at 17.

⁵² See Chapter 1, section 1.4.

function.⁵³ To simply assert the existence of administrative law principles found in the domestic legal order is discernable in international law and its institutions, as indicia of solving the accountability problems, misses the mark. It does not take into account the manner in which these tribunals are created, the rationale and the politics involved in their creation and how they function.⁵⁴ Rather, deploying such arguments obscures and reifies the malignant effects of international law and its institutions on various parties that are implicated in the respective decisions. What is crucial to this argument is the effect that these policies (and changes to the rules of evidence and procedure) have on the perpetrators and their rights, and more importantly on victims, in whose interests the international community supposedly created the ICTR.

The aforementioned Kwitonda decision can be used as a potential reference to judicial review by global administrative lawyers from the descriptive camp. Their reasoning would be based on how the judges have crafted the respective rules of evidence and procedure. As demonstrated in the first chapter, the general manner in which the judges and this particular Tribunal have utilised these rules has led to a pro-conviction bias that perpetuates western universalism in the ICTR. The problem started with the manner in which the ICTR was created. Even though the Rwandan government supported the move to create the tribunal at the outset, there was a fear that their sovereignty will be eroded and that the

⁵³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) [Anghie, *Imperialism*].

⁵⁴ See Chapter 1, section 1.4.

very structure of the tribunal would generate decisions that would appease the conscience of the international community rather than people of Rwanda and the victims of the genocide.⁵⁵ Ultimately the UN Security Council created the ICTR to bridge the gap between two cultures, one western and the other, barbaric. It followed the same process used to create the ICTY and granted the judges the power to create and amend the rules. The rules were then amended regularly as a means to comply with the completion strategy and deliver justice quickly at the expense of the fair trial guaranteed afforded to the accused. Universalism is embodied through the very dynamics of the tribunal. Only in name are the accused afforded procedural and due process rights. Constant changes to the rules have led to problematic witness testimony, trial delay and a myriad of other related problems, all of which highlight the fact that the rights of the accused are not seriously applied.⁵⁶

Even though Justice Pillay was probably right in dismissing the accused's motion using the vernacular of administrative law, this does not mean that we can co-opt this example from a specific international institution as demonstrating the existence of global administrative law. We must first take a look at the context in which these institutions operate as well as how they function. The context of Rwanda is such that almost all of the citizens were affected by the conflict and the ensuing genocide. Historians such as Mahmood Mamdani have illustrated

⁵⁵ Payam Akhavan "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment" (1996) 90:3 AJIL501 at 506.

⁵⁶ See Chapter 1, section 1.4.2.

the difficulty in ascribing individual criminal responsibility, either by commission or omission, because nearly all Hutus in Rwanda were implicated in the genocide.⁵⁷ This revelation leads us to ask why did the registrar allow the investigator to be employed by the accused in the first place? Do all of the accused have investigators with similar histories of allegations? If the investigators were alleged perpetrators, then are they intimidating the witnesses? These questions force us to contend with the very nature of the Rwandan Tribunal, its universalist conduct, and its failures in delivering justice. To use the ICTR and its jurisprudence to as an illustration of administrative law principles in global governance simply ignores the larger systemic problems endemic in international law and international institutions.

The presence of these administrative law principles, as illustrated by Justice Pillay's limited scope of judicial review jurisdiction, says nothing about broader accountability or legitimacy of these types of institutions. Simply pointing to the use of administrative law does not render international institutions more or less legitimate. Rather, it seeks to mask a larger universalist project embedded in politics and interests.

Another example is the global administrative law casebook and the Palestinian bid for statehood. One of the authors included in the casebook suggest that the Palestinian bid for statehood before the ICC is an indicia of global administrative

⁵⁷ Mahmood Mamdani, *When Victims Become Killers* (New Jersey: Princeton University Press, 2002) pages 3-18 & 41-102 & 185- 233.

law. Such a suggestion is naïve, to say the least.⁵⁸ It ignores the context of the Palestinian bid for statehood. Palestinian claims to statehood can be traced back to the Mandate of the League of Nations, and Arab Israeli conflict starting in 1848.⁵⁹ The current state of affairs in Palestine and Israel can be traced back to the peace negotiation between the Palestinian Liberation Organization and the Israeli Government, led by the late Chairman Yasser Arafat and the late Prime Minister Yitzhak Rabin. The peace negotiations resulted in the creation of the Palestinian Authority. Initially the parties agreed to the Declaration of Principles in September 1993⁶⁰ and subsequently signed the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (September 1995). The agreement delineated the current existing legal governance of the West Bank and Gaza Strip.⁶¹ These two agreements are interim in nature and remain subject to the final Permanent Status negotiations, which have not yet materialise. These agreements envisioned a gradual delegation of powers from the Occupying Forces and the Israeli administration to the Palestinian Authority. The most substantive agreement, *Oslo 2*, stipulates the manner of such delegations of

⁵⁸ Yoav Meer, "The Notion of State: The Palestinian's National Authority's Attempt to Bring a Claim in Front of the International Criminal Court Against Israel" in Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald eds, *Global Administrative Law: The Casebook* (Rome Edinburgh New York: ILRP, 2013) at 47-51.

⁵⁹ Victor Kattan, *From Coexistence To Conquest: International Law And The Origins Of The ArabIsraeli Conflict 1891-1949* (London: Pluto Press, 2009); Sujith Xavier, "Book Review - Victor Kattan's From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949 (2009)", 11 *German LJ*1038-1045.

⁶⁰ *Declaration of Principles on Interim Self-Government Arrangements signed at Washington, D.C. on September 13, 1993.*

⁶¹ *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip on September 28, 1995.*

power and eventual redeployment of Israeli Forces from the West Bank and the Gaza Strip by Israel (article 10 of the Interim Agreement).⁶²

In the 2006 Palestinian general elections, Hamas took control over the Gaza Strip and reignited the conflict. With the termination of hostilities in the Gaza Strip in 2009,⁶³ the Palestinian Authority's Minister of Justice, Dr. Khashan, lodged a declaration pursuant to article 12 (3)⁶⁴ of the International Criminal Court's *Rome Statute*.⁶⁵ The Palestinian Authority's Declaration was controversial, particularly in light of the Goldstone report.⁶⁶ In April 2012, the International Criminal Court's Office of the Prosecutor released a statement suggesting that the determination of Palestinian statehood rested in the hands of "relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a state for the purpose of acceding to the *Rome Statute* and thereby enabling the exercise of jurisdiction by the Court under article 12(1)".⁶⁷

⁶² *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* on September 28, 1995.

⁶³ Al-Haq, "Operation Cast Lead: A Statistical Analysis" (August 2009), available online: Al-Haq <<http://www.alhaq.org/pdfs/gaza-operation-cast-Lead-statistical-analysis%20.pdf>>.

⁶⁴ *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 3; Pursuant to rule 44, sub-rule 2 of the *Rules of Procedure and Evidence*, ICC-ASP/1/3.

⁶⁵ International Criminal Court Office of the Prosecutor, "Declarations Art. 12(3)" online: ICC OTP <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Declarations.htm>>.

⁶⁶ United Nations Fact-Finding Mission on the Gaza Conflict, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UNHRC 12th session 2009, A/HRC/12/48 (25 September 2009).

⁶⁷ The Office of the Prosecutor, International Criminal Court, "Situation in Palestine", online <<http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>>

Discussions continue about whether the Palestinian Authority can avail itself of the *Rome Statute* of the International Criminal Court in light of the recent attacks on the Gaza Strip in 2014. The ICC prosecutor has agreed to conduct a preliminary investigation in January 2015. By simply looking at the institutional framework of the ICC and its capacity to determine statehood ignores the background of the conflict and the politics.

The history of international law demonstrates that there are disparities between established, and supposedly neutral, legal concepts and their contemporary application. As demonstrated in the first chapter, early European attempts to curtail the raw power of the sovereign by creating new rules in the form of international law resulted in universal applications of western notions of law on the newly discovered territories and its inhabitants.⁶⁸ Scholars have demonstrated that international law, and sovereignty doctrine in particular, was used largely to regulate encounters between local inhabitants of the new world and the European colonisers.⁶⁹ This development of international law in the 17th and 18th centuries is closely tied to the continuation of colonialism and imperialism.⁷⁰ By the late 19th and 20th centuries, the accelerated drive of international law had resulted in an abundance of international institutions that were created to deal with the world's problems, such as delivering aid to those in need and dealing with health related issues. This proliferation of international

⁶⁸ James Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" (2011) 3(1) Trade, L & Development 26 [Gathii, "TWAIL, Brief History"].

⁶⁹ Anghie, *Imperialism supra* note 53.

⁷⁰ Gathii, "TWAIL, Brief History" *supra* note 68.

institutions by the late 20th century created a new international space that needed to be described and theorised, given the push of globalisation and the changing nature of the nation state. Global administrative law is one incarnation of these attempts to describe the existing international landscape inspired by domestic understanding of administration as potentially embodying administrative law that includes principles such as transparency and accountability.

The above analysis demonstrates that actual global administrative law cannot be found. Rather, the context and how the respective tribunal or institution functions matters because of the very nature of international law. By not engaging in this manner, global administrative law claims described earlier succumb to a peripheral reading of international institutions. These characterisations inadequately reflect the inherent realities of these institutions.

4.2.2 Ladeur and Postmodern Administrative Law

In the previous section, the dominant and descriptive narrative of global administrative law was presented. In this section, I will focus on the scholarship of Karl-Heinz Ladeur. Ladeur agrees with other global administrative law scholars about its utility and he is committed to the idea of global administrative law generally. He nonetheless challenges certain foundational assertions of global administrative law. This commitment has precipitated a revision of global

administrative law's central tenets and its commitment to domestic administrative law. This is the reason why I have elected to engage with his scholarship.

Ladeur's contribution seeks to confront the recent attempts in global governance to map the existing international legal order based on our understanding of the nation state.⁷¹ The fragmentation of private and public spheres and the transformation of the legal system undoubtedly affects our conceptions of democratic governance. Ladeur suggests that global administrative law may provide a much more meaningful means to manage and stabilise the complexities of various international regimes.

Ladeur tests his hypothesis by turning to the "evolution of modern administrative law" to examine how progress in this field can help us to understand domestic, transnational, and global law. One of his central contentions is that administration and subsequently administrators, rather than the legislators and courts, produces domestic administrative law. With such an understanding of administrative law, Ladeur suggests that the paradigms of administrative law have undergone serious changes over the last decade from "the construction and decision of individual cases to industry related regulation".⁷² There is a new postmodern model of administrative action that is motivated by experimentation and learning, while reflecting the transformation of culture. The technological progress has transformed our existing modes of communication. This

⁷¹ Ladeur, "Emergence of GAL" *supra* note 17 at 256.

transformation in communication, as part of globalisation, has facilitated specialised epistemic communities and highly sophisticated networks. These epistemic communities and specialised networks are a 'society of networks'.⁷³ Ladeur suggests that these developments are generated by globalisation and in turn have altered the very nature of administration. The creation of networks must then be encapsulated within what Ladeur suggests as postmodern administrative law. The role of the state has dramatically changed within this postmodern reality but it has not lost its relevance. The state does not retreat or does it vanish. Rather it has assumed the "role of a player with the responsibility for the rules of the game" to regulate the "polycentric practices of experimentation in the private realm [that] produce lock-ins as well as perverse effects".⁷⁴

Based on such a societal transformation, Ladeur theorises the possibility of a new perspective for global administrative law. The network-like structure of global administrative law is not new, it is a continuation of "fragmentation and, as a consequence, the increasingly loose coupling of the different layers of the normative system of postmodernity which can be observed at the domestic level".⁷⁵ Once we understand that the domestic system is not structured by a unified normative order, it is much easier to imagine its expansion to the

⁷³ Karl-Heinz Ladeur, "Constitutionalism and the State of the "Society of Networks": The Design of a New "Control Project" for a Fragmented Legal System" (2011) 2:4 *Transnational Leg Theory* 463.

⁷⁴ Ladeur, "Emergence of GAL" *supra* note 17 at 249.

⁷⁵ Ladeur, "Emergence of GAL" *supra* note 17 at 245.

international space. Ladeur is challenging Kingsbury and Stewart's assumptions about the very nature of domestic administrative law. He is challenging their desire to analogise from a domestic administrative law perspective in search of accountability and legitimacy.

From this analysis, Ladeur argues that the evolutionary process shapes domestic notions of law. There are overlapping and interconnected dimensions in the production of the legal order. Ladeur, unlike other supporters of global administrative law, asserts that the democratic nature of law should not be overstated. Law's accountability to its democratic constituents and its goals in national jurisdictions must be interrogated. In the domestic context, the question then is whether the decision-makers are ultimately accountable to the constituents that selected them as their policy-makers. For example, are policy-makers and elected officials actually accountable? Moreover, Ladeur notes that within the context of domestic administrative governance, accountability cannot be reduced "to the control of compliance rules".⁷⁶

The postmodern nature of society had a fundamental effect on the relationship between law and its "cognitive infrastructure", precipitating the evolution of the legal system with the creation of new accountability regimes called "entangled hierarchies".⁷⁷ These entangled hierarchies are characterised by erosions in which rules are designed and applied. Spontaneous accountability generated by

⁷⁶ *Ibid* at 256.

⁷⁷ *Ibid* at 256.

networks emerge in this postmodern space. These regimes are not defined in advance. They are constituted through a process of network activity. Ladeur's entangled hierarchies point to the possibility of generating accountability beyond our conceptions of legitimacy production. Ultimately, in standard understandings of global administrative law, there is an overemphasis on democratic participation in any regime. For Ladeur, the postmodern nature of our world has transformed these means of participation where accountability can now be generated through various networks. The control mechanisms conceptualised at the state level cannot help in this instance.

Postmodern insights on administrative law's legitimacy seriously challenge the notion that administrative law must have an element of public law. The postmodern nature of law, given the rise of the society of organisations and networks,⁷⁸ necessitated administrative law to adapt and give way to new explicit re-formulation and re-modifications of the "whole architecture of the normative system".⁷⁹ This point can be illustrated through the recent shifts in the manner in which decision-making power is delegated to traditional private institutions. In a similar vein, questions about the legality of global administrative law must take stock of the changing nature of national domestic law within the postmodern moment.

⁷⁸ *Ibid* at 256.

⁷⁹ *Ibid* at 256.

Global administrative law's animating concern is the democratic deficit in international organisations. Ladeur however contends that a focus on the democratic deficit is overstated. By taking a critical look at the democratic function of law, Ladeur argues that at times, the role of the state requires interference with individual rights. Simultaneously, the state is involved in norm production which "transform[s] the conditions for the use of rights but do[es] not infringe upon subjective rights in the traditional sense".⁸⁰ In this instance, Ladeur is alluding to the power of the state to transform the conditions of individuals through agreements between international institutions. These agreements have a drastic effect on individual rights without actually requiring the state to enact specific legislation (for example the *Treaty of Rome* in the European context and *ICC Rome Statute* in the international context). Consequently administrative action is now being directed at complex networks rather than individuals. The rise of global administrative structures and the fast-emerging norms that regulate these networks strengthen the autonomy of administrative function. This is in contrast with Kingsbury and Stewart's version of global administrative law. Their version seeks to analogise global administrative law with the domestic preconceived notions of administrative law.

For Ladeur, global law must be thought of in procedural terms, "as a law which produces its own preconditions for validity and recognition, beyond the sphere of

⁸⁰ *Ibid* at 252.

the state”⁸¹ that is part of a fragmented context. Such a context is “characterised by a random coming together of national, conventional international and self-organised global law, on the one hand, and similarly heterogeneous cognitive rules [...]”.⁸² The discourse of legitimacy in international law over-analyses the domestic reality.

Ladeur’s contestation may be correct but there is also a danger in assuming the possibilities of global law in procedural terms with its own preconditions for validity and recognition. The rules of evidence and procedure of the two ad hoc tribunals illustrate this point. Even though the statutes of the respective tribunals have created the preconditions for validity and recognition of the rules, the effect of the application of these rules on the accused is problematic for various reasons outlined in the first chapter. Take for instance the example of the judges of the tribunals repealing judicial decisions using the rules of evidence and procedure.⁸³ The judges are using the power granted to them through the respective statute to legislate and ultimately overrule a judicial decision.

Ladeur’s global administrative law can draw upon “components of both the more hybrid loosely coupled type of the law of networks, which emerges at the domestic level, and on components of the new public international law which

⁸¹ *Ibid* at 253.

⁸² *Ibid* at 253.

⁸³ See Chapter 1, section 1.4.1.1.

shatters the hitherto established clear separation from the state-based law”.⁸⁴ Fundamentally, the source of law can no longer be viewed as stemming from canonical texts.⁸⁵ Instead, Ladeur suggests that legal meaning must be generated from several overlapping texts and practices that encompass an experimental approach. He uses various examples from investment protection and environmental governance to suggest that, in these fields, global administrative law may allow “for the development of rules below the rather rigid structure of public international law”.⁸⁶

Ladeur’s account however, does not demonstrate the role of special interests in the evolutionary process in our society.⁸⁷ Even though Ladeur notes the dynamic shifts within the domestic and national accounts of administration, he does not outline whose interests will be taken into account in this process that describes the move from cases to regulation. Ladeur’s version of the evolutionary process within the national fields of law, as a move away from the legislators and the judges to one that is governed by networks, simply omits to mention the embedded power structures within and across these networks.⁸⁸

⁸⁴Ladeur, “Emergence of GAL” *supra* note 17 at 247.

⁸⁵ *Ibid* at 249.

⁸⁶ *Ibid* at 263.

⁸⁷ Walter Mattli and Ngaire Woods, “In Whose Benefit? Explaining Regulatory Change in Global Politics” in Walter Mattli and Ngaire Woods, eds, *The Politics of Global Regulation* (New Jersey: Princeton University Press, 2009) at 5; David Charney, “Illusions of a Spontaneous Order: “Norms” in Contractual Relationships” (1996) 144 U Pa L Rev 1841; Patricia J Williams, *Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991) at 148.

⁸⁸ David Charney, “Illusions of a Spontaneous Order: “Norms” in Contractual Relationships” (1996) 144 U Pa L Rev 1841.

A wholesome understanding global governance includes the rise of networks. This does not necessarily imply that these networks are impregnable to capture by special interest groups. Regulatory capture denotes the control of the “regulatory process by those whom it is supposed to regulate”. Regulatory capture is the process by which a small group, possibly those affected by regulation, takes control “with the consequence that regulatory outcomes favour the narrow “few” at the expense of society as a whole.⁸⁹ The rise of networks does not take in to account the critical interventions from social scientists about the very nature of international law and its institutions.

In pushing the boundaries of global administrative law, scholars like Ladeur identify the global administrative space and its ability to generate self-regulation as a form of spontaneous accountability. Accountability, however, is tied to specific biases endemic to interest groups that have captured the spontaneous legitimacy producing processes within the international institutions. For example, the United Nations Security Council’s created the two ad hoc international criminal tribunals to deliver justice and end impunity in the Balkans and Rwanda. There were a number of political factors that precipitated their decisions. For example, in creating the ICTY, UNSC was concerned with whether the newly formed Balkan states would ratify a treaty based international criminal institution. Similarly, with Rwanda, the Security Council worried about the criticisms about

⁸⁹ Walter Mattli and Ngaire Woods, “In Whose Benefit? Explaining Regulatory Change in Global Politics” in Walter Mattli and Ngaire Woods, eds, *The Politics of Global Regulation* (Princeton University Press, 2009) at 5.

the disproportionate attention to European problems. In addition to these political aspects, the Security Council was preoccupied with a particular set of political concerns: the desire to end impunity in the aftermath of the Cold War. In this light, it can be argued that a special interest group has captured the tribunals⁹⁰ and the interest group is committed to prosecuting those most responsible for the heinous crimes, even in cases where there is a clear lack of evidentiary basis to proceed.⁹¹ The role of experts outlined earlier is important in fostering this pro-conviction bias.

The employees of these tribunals are intricately connected to a pro-conviction bias endemic within their respective international criminal institution. The starting point of this pro-conviction bias is the manner in which these tribunals were created. The judges and their supporting staff (for example their Associate Legal Officers) believe that the accused before the ICTR committed these crimes. Their belief is predicated on the fact that the Hutu population of Rwanda committed the genocide and other acts prohibited by international law. This fact is intrinsically linked to the acceptance of the faulty witness statements.

The arguments in favour of demonstrating a pro-conviction bias are based on experts that travel from tribunal to tribunal. As noted earlier, there is now a class of international experts that work on post-conflict justice issues who populate the

⁹⁰ Elena A. Baylis, "Tribunal-Hopping with the Post-Conflict Justice Junkies" (2008) 10 Or Rev Int'l L 361 [Baylis, "Tribunal Hopping"].

⁹¹ Nancy A. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

tribunals.⁹² These international criminal law experts maintain an almost nomadic lifestyle based on their professional affiliation to the respective tribunal. As part of this lifestyle, they move from one conflict hotspot to another.⁹³ Scholars have chronicled the manner in which these international experts have gathered their expertise. Their expertise is based on a “lack of local knowledge of post-conflict settings, whether that is knowledge of the local legal system, local facts, local culture or any other relevant information”.⁹⁴ To illustrate, 2014 ICTR Appeals Chamber Interns in The Hague may become Associate Legal Officers in Arusha, Tanzania six months after they have completed their internships.⁹⁵ These experts, once they have completed at least two years at a Tribunal may want to move to Cambodia or back to The Hague to join another tribunal adjudicating similar crimes. The content of the law that they work with may be the same but the nature of the conflict and the associated history of the regions are vastly different.

The international criminal law experts are not neutral. Their professional careers are based on the advancement of universalism by ending impunity and prosecuting the responsible war criminals. David Kennedy’s argument that the background norms of international institutions are much more relevant than we

⁹² Bhupinder Chimni, "International Institutions Today: An Imperial Global State in the Making" (2004) 15:1 EJIL 1.

⁹³ Baylis, "Tribunal Hopping" *supra* note 90 at 364; Thomas Skouteris, "The New Tribunalism: Strategies of (De)Legitimization in the Era of Adjudication" (2006) XVII Finnish YB of Intl L 307 at 312.

⁹⁴ Baylis, "Tribunal Hopping" *supra* note 90 at 383; Sujith Xavier, "Theorising Global Governance Inside Out: A Response to Professor Lateur" (2013) 3 Transnational Leg Theory 268.

⁹⁵ There is a mandatory grace period that is enforced by the UN for interns wanting to return to the Tribunal.

had originally thought is important in understanding this process.⁹⁶ The experts' politics shape the results of the adjudicatory process. The adjudicatory process is meant to be objective where the accused is given a fair trial. However, our international criminal law experts manage background norms, and this managerial function results in the determination of how the tribunals operate.⁹⁷ As Kennedy has noted, what really matters at the global institutional level is not what is in the foreground (the tribunals) or the context (Rwanda and the former Yugoslavia). Rather the experts have "colonized the foreground and the context".⁹⁸

The judges and their expert's pro-conviction bias is significant to both the accused and the international community. The pro-conviction bias is rooted inherently in the way international law is constructed, as part of the dynamic of difference.⁹⁹ As noted earlier, notwithstanding the western guilt, the ICTR was created as a means to bridge the gap between two cultures: the civilised and the uncivilised. The ICTR was created to bridge the gap between the civilized international community and the uncivilized Rwandans and to render justice. The tribunal was modelled on an adjudicatory system where the judges were given

⁹⁶ David Kennedy, "Challenging Expert Rule: The Politics of Global governance" (2005) 27 Sydney J Intl L 8.

⁹⁷ Galit Sarfaty, "Measuring Justice: Internal Conflict over the World Bank's Empirical Approach to Human Rights" in Kamari Clarke & Mark Goodale eds, *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge: Cambridge Univ. Press, 2009); Annelise Riles, "Collateral Expertise Legal Knowledge in the Global Financial Markets" (2010) 51:6 Current Anthropology 795 at 796.

⁹⁸ David Kennedy, "Challenging Expert Rule: The Politics of Global governance" (2005) 27 Sydney J Intl L 8 at 12.

⁹⁹ Anghie, *Imperialism supra* note 52 at 4 & 13-31.

the power to legislate through the rules of evidence and procedure. Moreover, and building on the political nature of spontaneous accountability creation, insights from a historical perspective of international law can be used to illustrate that international law is not neutral in how it operates, and demonstrate how it is used to generalise a specific set of western values and traditions.¹⁰⁰

The very structure of international law includes embedded politics and a particular universalistic narrative that is difficult to overcome.¹⁰¹ More importantly, the origins of international law foster a specific “set of structures that continually repeat themselves at various stages in the history of the discipline”.¹⁰² This dynamic of international law therefore encourages regulatory capture by emphasising specific western set of values and traditions. These values and traditions are predominantly western, given the role of the experts and where they come from.

The International Criminal Tribunal for Rwanda’s history with witness testimony is an illustrative example of western universalism. There is regulatory capture by special interests that want to facilitate and expedite the prosecutions of alleged perpetrators of international crimes. This process starts with the experts that populate these institutions and continues up to the judges and the Security Council. Such actions may be analogous to the use of international law to further

¹⁰⁰ *Ibid* at 13-31.

¹⁰¹ *Ibid* at 13-31.

¹⁰² *Ibid* at 7.

colonial expansion as witnessed through the civilising mission discussed earlier. In this example, the narrative of ending impunity and delivering justice to the victims of mass human rights violations is used as means to spread western universalism. This is particularly obvious when the assumed objectivity of adjudicators, litigators and witnesses are examined. In these instances, there is an absence of contextual understanding of Rwanda. More importantly there are difficulties in interpreting the witness testimony that support the decisions rendered. Arguably, Nancy Combs' empirical research highlights the explicit decisions within these tribunals, which then serve to push against and most often contradict, the claims deployed by global administrative law scholars.

4.3 Conclusion

Globalisation and the fragmentation of international law have led scholars to theorise global governance in multiple ways. In the previous chapter, I chronicled the efforts of writers to think about this problem through the lens of global constitutionalism and global constitutionalisation. In this chapter, I engaged scholars writing about global governance through the lens of global administrative law. I reviewed two distinct attempts to understand administration as global governance. The first was a purely descriptive account of international institutions and their use of administrative law principles. In this example, scholars argue that the deployment of administrative principles in international

institutions can fill the democracy deficit and usher in notions of accountability.¹⁰³

As I have illustrated, these claims are not possible. As the evidence from the ICTR reveals, even though it is possible to describe the tribunal's operation in terms of administrative law principles, this does not mean that the use of these principles lead to more accountability. In fact, arguing for the existence of such principles obscures international law's deeply unbalanced history of universalising a specific set of western norms and how international institutions, including the ICTR, are imbricated in this history.

The second, as encapsulated within the writings of Karl-Heinz Ladeur, suggests that global administrative law must acknowledge administrative law's postmodernism. Previously existing articulations of global administrative law must transcend notions of delegation and accountability as a means to secure legitimacy within the global space. These concepts, Ladeur notes, are wedded to out-dated understandings of the modern nation and ignore societal transformations. These transformations, as part of the evolutionary process, have generated the capacity to produce spontaneous accountability by networks. Global administrative law's focus, therefore, should not be on generating control of compliance rules. Rather for Ladeur, by focusing on entangled hierarchies and processes of generating spontaneous accountability through the rise of networks, global administrative law should take on a postmodern understanding

¹⁰³ Richard B. Stewart, The normative dimensions and performance of global administrative law" (2015) 13 (2) Intl J Constitutional L 499 at 500.

of administration. Ladeur's does not take into account the role of special interest in these networks that he relies.

Ultimately, these characterisations of international institutions and the various international regulatory bodies are missing the mark by focusing solely on the general legal frameworks, rather than embracing the internal dynamics emblematic within these institutions. Depicting a very singular narrative that focuses on the law on the books, as witnessed by scholars based in Berlin, Hamburg, London, New York, and Toronto is not useful. Much more importantly, theorising from this superficial perspective may not help us understand the different political compromises involved in how international law and its institutions are created and how they operate. The description of the international legal order cannot be a single story.

There is a need to move beyond this type of a single, universalising, linear, and decontextualized narrative. In this vein, the following chapter is my attempt to think about how we can theorise global governance from the bottom-up, beginning with the global South.

Chapter 5: Theorising from Below? Global South & Third World Approaches to International Law and Global Governance

5.1 Introduction

In the preceding chapters, I examined two contemporary theoretical frameworks currently used by international legal scholars to theorise global governance. These scholars argue that the conditions brought about by globalisation and fragmentation spur on the need to usher in accountability and legitimacy into international law and its institutions. These scholars suggest that it is possible to usher in accountability and legitimacy through global constitutionalism and global administrative law. In this chapter, I focus on how to transcend the problems that I identified in the previous discussions about global constitutionalism and global administrative law.

In my previous analysis, I showed that the first global governance theory uses both constitutionalism and constitutionalisation to identify existing legitimacy-producing mechanisms in international law and its institutions. Scholars working in this area suggest that international law and its institutions exhibit characteristics akin to constitutionalism and constitutionalisation.¹ Under the banner of global constitutionalism, some scholars argue that international law should be used to create a better world by imagining a better constitutional

¹ David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (London: Polity Press, 2004/2013); Jürgen Habermas, *Divided West* (Cambridge: Polity Press, 2006); David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (London: Polity Press, 2004).

future.² For example, the *United Nations Charter* is imagined as a world constitution.³

The second global governance theory focuses on recent attempts to imagine global governance as administration.⁴ For those working in global administrative law, contemporary international institutions are making use of administrative law principles.⁵ Those analogising from Anglo-Saxon jurisdictions identify administrative law norms within international regimes.⁶ By taking inspiration from domestic administrative law,⁷ global administrative lawyers argue that the entire collection of norms, principles and doctrines that weave together domestic administrative law can be found globally.⁸ By demonstrating the presence, or possibilities, of these norms, they suggest that the current international regulatory framework explicitly demonstrates or has the potential to produce accountability. Richard Stewart recently suggests the following: “Despite vast differences in institutional and political circumstances, experience confirms that

² Neil Walker, “Constitutionalism and Pluralism in Global Context” in Matej Avbelj and Jan Komarek, eds, *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012) 17; A similar argument was recently made by global administrative law scholars, see Richard B. Stewart, “The normative dimensions and performance of global administrative law” (2015) 13 (2) *Intl J Constitutional L* 499 at 500.

³ Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Hague: Kluwer Law International, 1998).

⁴ Benedict Kingsbury, Nico Krisch & Richard B Stewart, “The Emergence of Global Administrative Law” (2005) 68 *Law and Contemporary Problems* 15 [Kingsbury *et al*, “Emergence of GAL”].

⁵ *Ibid*; Karl-Heinz Ladeur “The Emergence of Global Administrative Law and Transnational Regulation” (2013) 3:3 *Transnational Leg Theory* 243.

⁶ Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald, “Foreword” in Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald eds, *Global Administrative Law: The Casebook* (Rome Edinburgh New York: ILRP, 2013) at XXIII [S. Cassese *et al*, “Foreword”].

⁷ See chapter 4, Section 4.2.2 for a much a robust discussion of postmodern administrative law.

⁸ S. Cassese *et al*, “Foreword” *supra* note 6 at XXIV.

use of administrative law mechanisms in global administration can help protect the rights of individuals threatened with sanctions and [...] secure greater regard for the politically weak and vulnerable".⁹

In describing the various positions within these theoretical discussions on how to usher legitimacy and accountability into international law and its institutions, I identified a number of problems. The central shortcoming of these two accounts of global governance theory is that they ignore and obscure the true nature of international law and its institutions. As I have demonstrated in the earlier chapters, this is part of a larger trend in international law and its where they deploy the western particular are the universal. This particular facet of international law can be rooted in its history and the manner in which it was forged. As illustrated by Antony Anghie, the early beginnings of international law are imbricated in a universal narrative, starting with the manner in which the sovereignty doctrine was created.¹⁰ This particular aspect of international law continues to this day, even in the manner in which we theorise international law and its institutions.¹¹

I have relied on a body of literature that seeks to position the global South in contradistinction to the global North. By drawing on this body of scholarship, this

⁹ Richard B. Stewart, "The normative dimensions and performance of global administrative law" (2015) 13 (2) Intl J Constitutional L 499 at 500.

¹⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) [Anghie, *Imperialism*].

¹¹ For a recent attempt to demonstrate the universalism of international law and international institutions, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

chapter explores the various means by which we can overcome the universalism imbedded in international law and international institutions. In the global constitutionalism chapter, I identified two potential ways in which we can transcend the limitations of global constitutionalism. In this chapter, I want to return to recent scholarly interventions that engage with the lived realities of the people of the global South. This chapter asks: how can international lawyers and international law scholars learn from the global South? This question prompts another related question: should we learn from the global South?¹² The second question will be explored first.

This chapter builds on contemporary literature on the global South so that we may learn from these diverse perspectives in theorising global governance. Some scholars, such as Boaventura De Sousa Santos, have expressly called for such a reorientation:¹³

The antinomies, difficulties, and hard cases analysed [...] demand that at the beginning of the new millennium we distance ourselves from Eurocentric critical thinking. To create such a distance is the precondition for the fulfilment of the most crucial theoretical task of our time: that the unthinkable be thought, that the unexpected be assumed as an integral part of the theoretical work. [...] I submit that, in the current context of social political transformation, rather than vanguard theories we need rearguard theories. I have in mind theoretical work that follows and shares the practices of the social

¹² This second question is prompted by Sundhya Pahuja's astute reflection during an informal conversation during the TWAAIL 2015 Cairo conference: should we theorise global governance from the perspectives of the global South.

¹³ Jean Comaroff & John Comaroff, *Theory from the South: Or, How Euro-America is Evolving Toward Africa (The Radical Imagination)* (London: Paradigm Publisher, 2012) [Comaroff & Comaroff, *Theory*]; Daniel Bonilla Maldonado, "Introduction", in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013).

movements very closely, raising questions, establishing synchronic and diachronic comparisons, symbolically enlarging such practices by means of articulations, translations, and possible alliances with other movements, providing contexts, clarifying or dismantling normative injunctions, facilitating interactions with those that walk more slowly, and bringing complexity when actions seem rushed and unreflective and simplicity when action seems self-paralyzed by reflection.¹⁴

Others have posited examples from the global South as an interruption to the Eurocentric focus on constitutional theory.¹⁵ The scholars who have expressly called for this reorientation arrive from various disciplinary destinations, including law. They challenge the manner in which we imagine the global South. They argue that the global South is not a carbon copy of the North; rather, it is particular in its development. This development therefore should be celebrated. From this vantage point, turning to the global South provides an opportunity to glean new insights about international law and its institutions.

In what follows, I will set out the basis for this reorientation towards the global South. Then I will pursue the global South literature in international law, by focusing on the broad theoretical foundations of the Third World Approaches to

¹⁴ Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (London: Paradigm Publisher, 2014) at 44.

¹⁵ Daniel Bonilla Maldonado, "Introduction", in Daniel Bonilla Maldonado ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013) [Bonilla, "Introduction"]; Jackie Dugard, "Courts and structural poverty in South Africa: To what extent has the Constitutional Court expanded access and remedies to the poor?" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013); Manuel Iturralde, "Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change" in Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013); Menaka Guruswamy & Bipin Aspatwar, "Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court" in Daniel Bonilla Maldonado, ed., *Constitutionalism of the Global South* (Cambridge: Cambridge University Press, 2013).

International Law (TWAIL) movement. TWAIL scholarship is a reaction against the colonial and imperial projects of international law. I set out its main claims and then examine its proposals. This arrives at an answer to the second question: should we learn from the global South?

Then, I explore the question of how can we learn from the global South. In answering this question, I offer two insights. The first is based on the premise of international law as a field of practice. Often, international lawyers and international law scholars tend to examine the legal mechanisms and the ensuing doctrines of international law without reference to geo-political, economic, social, and cultural contexts. Chapter three on global constitutionalism conveyed that scholars were preoccupied with mapping the existing international structures to suggest the existence of a constitutional order. Thinking about international law as a field of practice can illuminate its unlit corners that are constituted by diverse set of forces at play in today's society, rather than solely focusing on issues of legality. In order to focus on international law as a field of practice, we must gather more insights about international law and its institutions through ethnographies. The second insight that I offer attempts to problematise the ethics of international legal scholarship. In this regard, I focus on the role of international lawyers and international law scholars and their ethical obligations in light of the material reality of the global South.

5.2 Theorising Global Governance from the Global South?

Scholars from numerous disciplines, such as anthropology, cultural studies, history, political science and others, have examined the relationship of the global North to the global South. They have sought to critically question the pejorative and antiquated understandings the West has of the rest of the world.¹⁶ These writers have focused on how the global South is imagined and produced,¹⁷ and the role of national liberation struggles in combating the enduring effects of colonialism.¹⁸ Early anti-colonial and post-colonial literature has also examined this relationship between the global North and the global South.

With this frame of reference, this chapter examines scholarly interventions that suggest we should turn to the global South as a site of knowledge production. I will focus on the writings of two anthropologists and a comparative constitutional and international lawyer. These scholars argue for a specific reorientation towards the global South. This will lead into an examination of the reconstructive elements embedded in TWAIL. Over the past twenty years, TWAIL scholars have sought to critically evaluate international law and its institutions. Unfortunately, these interventions have not had a significant influence in

¹⁶ There is a large body of literature that follows this line of argumentation with a broader focus on colonialism and imperialism; see for example Achilles Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001); Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000); Kamari Clarke, *Fictions of Justice: International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009).

¹⁷ Edward S. Said, *Orientalism* (New York: Random House, 1979).

¹⁸ Frantz Fanon, *Black Skins, White Masks* (New York: Grove Press, 1952); Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963).

international legal theory,¹⁹ in particular in global administrative law or global constitutionalism.²⁰ Accordingly, I use this chapter to examine the diverse arguments housed under the moniker of TWAIL in order to understand TWAIL's reformist agenda and to embed this reformist agenda within conversations on global governance theories.

5.2.1 Interdisciplinary Reorientation towards the global South

Contemporary scholarship has built upon a tradition of critique by questioning how the empire speaks to, and can speak about, the metropole. In this vein, Jean Comaroff and John Comaroff's 2012 *Theory From The South* is a text rich in ideas. They start their contribution by noting:

Western enlightenment thought has, from the first, posited itself as the wellspring of universal learning, of Science and Philosophy, upper case; concomitantly, it has regarded the non-West—variously known as the Ancient World, the Orient, the Primitive World, the Third World, the Underdeveloped World, the Developing World, and now the Global South—primarily as a place of parochial wisdom, of antiquarian traditions, of exotic ways and means. Above all, of unprocessed data. These other worlds, in short, are treated less as sources of refined knowledge than as reservoirs of raw fact: of the minutiae from which Euromodernity might fashion its testable

¹⁹Bardo Fassbender & Anne Peters, Introduction: Towards A Global History of International Law in Bardo Fassbender et al, eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2014) at 2; A recent exception to the rule is Zoran Oklopčić, "Provincializing Constitutional Pluralism" (2014) 5:2 *Transnational Leg Theory* 200 at 203. A similar question was raised by Critical Race Scholars in the United States in the early 1980s; see for example Richard Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?", (1987) 22 *Harv CR-CLL Rev* 301; Richard Delgado, "Critical Race Theory: An Annotated Bibliography", (1993) 79 *Va L Rev* 461 at 461.

²⁰ Bonilla, "Introduction" supra note 15 at 11; But see Peer Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism" (2012) 21:1 *Transnat'l L & Contemporary Probs* accessed online: <http://ssrn.com/abstract=1934044>; Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order*, (2012) 1:1 *Global Constitutionalism* 16-52; Peer Zumbansen, starting with his *Transnational Legal Pluralism* article, has argued that global governance scholarship must take TWAIL scholarship seriously.

theories and transcendent truths. [...] But what if, and here is the idea in interrogative form, we invert that Order of Things? What if we posit that, in the present moment, it is the so-called 'Global South' that affords privileged insight into the workings of the world at large? That it is from here that our empirical grasp of its lineaments, and our theory-work in accounting for them, ought to be coming, at least in major part?²¹

Their proposal is based on the realisation that contemporary actors, norms, and processes are reconfiguring our understandings of the core-and-periphery. Because of the processes of globalisation, the global South is experiencing "some of the most innovative and energetic modes of producing value" and this is the "driving impulse of contemporary capitalism as both a material and cultural formation".²² Whether it is to mine mineral resources²³ or fabricate clothing, it is an accepted fact that most materials are now produced cheaply and quickly in the global South. Moreover, various modes of governance techniques are being deployed in the global South. In order to grasp the history of the present, both empirically and theoretically, they suggest that we must study the global South.²⁴

Comaroff and Comaroff's argument that the global South can open new vistas into the way in which our world works is built on two interrelated arguments. First, based on insights developed over the last 100 years, they argue that

²¹ Comaroff & Comaroff, *Theory supra* note 13 at 1.

²² *Ibid* at 22.

²³ Charis Kamphuis "Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru" (2011-2012) 37 *Brook J Intl L* 529; Edward Bearnot, "Bangladesh: A Labor Paradox", The World Policy Institute", online: (May 2013) "Join the Conversation", <<http://www.worldpolicy.org/journal/fall2013/Bangladesh - Labor - Paradox>>.

²⁴ Jean Comaroff & John L. Comaroff, "Theory from the South: Or, how Euro-America is Evolving Toward Africa" (2012) 22:2 *Anthropological Forum: J Social Anthropology & Comparative Sociology* 113 at 117 [Comaroff & Comaroff, "Theory from the South"]; Comaroff & Comaroff, *Theory supra* note 13 at 7.

modernity,²⁵ particularly in the African continent (and the global South by extension), cannot be understood as a carbon copy, derivative, a Doppelgänger or a counterfeit of the Western (American and European) original.²⁶

The term “modernity” has captured the imagination of various scholars. It describes the processes of globalisation beginning in the 15th and 16th centuries and this process continues today. It is a treacherous, and often contested, concept.²⁷ It is about the shift from traditional modes of governance and production to the contemporary modes of regulation with which we are now familiar. Modernity is concerned with the transition from the traditional to the new, as understood through teleological notions of progress.²⁸

Dipesh Chakrabarty offers a concrete articulation of political modernity:

[...] The phenomenon of “political modernity” — namely, the rule by modern institutions of the state, bureaucracy, and capitalist

²⁵ For a cursory discussion of the term in the context of international law, see John D. Haskell, “The Traditions of Modernity within International Law and Governance: Christianity, Liberalism and Marxism” Howard University School of Law, Human Rights & Globalization L Rev (Fall 2014, Forthcoming); Comaroff & Comaroff, “Theory from the South” *supra* note 24 at 118-119 .

²⁶ *Ibid* at 117; Comaroff & Comaroff, *Theory supra* note 13 at 7.

²⁷ Anthony Giddens, *Modernity and Self-Identity Self and Society in the Late Modern Age* (Pala Alto: Stanford University Press, 1991); Bruno Latour, *We Have Never Been Modern* (Cambridge: Harvard University Press) at 10; Latour addresses the question of what does it mean to be modern with the following: “Modernity comes in as many versions as there are thinkers or journalists, yet all its definitions point, in one way or another, to the passage of time. The adjective 'modern' designates a new regime, an acceleration, a rupture, a revolution in time. When the word 'modern', 'modernization', or 'modernity' appears, we are defining, by contrast, an archaic and stable past. Furthermore, the word is always being thrown into the middle of a fight, in a quarrel where there are winners and losers, Ancients and Moderns. 'Modern' is thus doubly asymmetrical: it designates a break in the regular passage of time, and it designates a combat in which there are victors and vanquished”.

²⁸ Kwame Anthony Appiah, “Is the Post- in Postmodernism the Post- in Postcolonial?” (1991) 17:2 *Critical Inquiry* 336 at 341-342.

enterprise—is impossible to think of anywhere in the world without invoking certain categories and concepts, the genealogies of which go deep into the intellectual and even theological traditions of Europe. Concepts such as citizenship, the state, civil society, public sphere, human rights, equality before the law, the individual, distinctions between public and private, the idea of the subject, democracy, popular sovereignty, social justice, scientific rationality, and so on all bear the burden of European thought and history. One simply cannot think of political modernity without these and other related concepts that found a climactic form in the course of the European Enlightenment and the nineteenth century.²⁹

Similarly, Comaroff and Comaroff suggest that modernity is an orientation about how to be in the world. It encapsulates ideas of identity, consciousness, and progress, which in itself is closely tied to the idea of modernisation.³⁰

Modernity, in the continent of Africa specifically, and in the global South generally, has its own diverse and multipronged path. Such a trajectory has shaped the “moral and material” everyday life of the global South.³¹ They have produced different means through which to make sense of the surrounding lived reality of every person. Comaroff and Comaroff characterise this activity as fashioning “social relations, commodities, and forms of value appropriate to

²⁹ Dipesh Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (New Jersey: Princeton University Press, 2008) at 4.

³⁰ “Modernity refers to an orientation to being-in-the-world, to a variably construed and variably inhabited Weltanschauung, to a concept of the person as self-conscious subject, to an ideal of humanity as species being, to a vision of history as a progressive, man-made construction, to an ideology of improvement through the accumulation of knowledge and technological skill, to the pursuit of justice by means of rational governance; to a relentless impulse toward innovation whose very iconoclasm breeds a hunger for things eternal (cf. Harvey 1989, 10). Modernization, by contrast, posits a strong, normative teleology, a unilinear trajectory toward a particular vision of the future—capitalist, socialist, fascist, whatever—to which all humanity should aspire, to which all history ought to lead and all peoples should evolve, if at different rates”; Comaroff & Comaroff, “Theory from the South” *supra* note 24 at 118-119.

³¹ Comaroff & Comaroff, *Theory supra* note 13 at 8.

contemporary circumstances”.³² Much more importantly, this lived reality is calibrated by the impact of capitalism, colonial contact, and more recently by internationalism and globalism. Africa’s own modernity has given rise to “iconic cultural forms, like popular Christianity, or mass-mediated musical modes, or cinematic genres”.³³ African modernity is a “discursive construct and an empirical fact” that relates to the traumatic history that was made, and that is continuing to be made.³⁴ Yet the global South is posited as the younger backwards child of the North that is often trying desperately to catch up.

The second argument relates to the manner in which the global South is constructed in our collective imagination. This argument is simple: the processes of capitalism and globalisation,³⁵ as we understand them today, were forged and deployed first in the global South. In their own articulation, Comaroff and Comaroff suggest that the “regions in the South tend first to feel the concrete effects of world-historical processes as they play themselves out, thus to prefigure the future of the former metropole”.³⁶ As the acceleration of the various modes of production by different actors, processes, and norm generators expand, it is the global South that is experiencing these repercussions first. This insight is invaluable for the current purpose of how we theorise global

³² *Ibid* at 8.

³³ Comaroff & Comaroff, “Theory from the South” *supra* note 24 at 118.

³⁴ Comaroff & Comaroff, *Theory supra* note 13 at 8.

³⁴ *Ibid* at 8.

³⁵ Boaventura de Sousa Santos, “Globalizations” (2006) 23 *Theory Culture Society* 393; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (London: Butterworths LexisNexis, 2002).

³⁶ Comaroff & Comaroff, “Theory from the South” *supra* note 24 at 121.

governance. As international lawyers like David Kennedy have suggested, the global South is where the global governance rubber hits the road.³⁷

In the context of law, Daniel Bonilla's arguments are analogous to the above claims. In his collection of essays in *Constitutionalism of the South*, he examines how the Colombian Constitutional Court, the Constitutional Court of South Africa, and the Indian Supreme Court can contribute to modern understandings of constitutionalism.³⁸ His point of departure is to recognise the Eurocentricism in constitutional theory. Constitutionalism is usually reliant upon Western legal thinkers, which results in the exclusion of knowledge production from the global South. Bonilla characterises this as the relegation of legal thinkers from the global South to "particularly low level" priority and importance.³⁹

In asserting this characterisation, Bonilla makes five arguments. First, he argues that legal systems in the global South reproduce the legal systems of the global North. Second, Western contributions to legal theory and the adoption of the Western legal systems by countries in the global South have reified the claim

³⁷David Kennedy, "Mystery of Global Governance" in Jeffrey L. Dunoff & Joel P. Trachtman, eds, *Ruling the World; Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) at 41 [Kennedy, "Mystery of Global Governance"].

³⁸Bonilla thus states: "The book aims to open the discussion about the jurisprudence of the Constitutional Court of Colombia, the Indian Supreme Court, and the South African Constitutional Court. The articles gathered in this book explore the jurisprudence of these courts on three matters: social and economic rights, cultural diversity, and access to justice. These three topics are directly related to poverty and inequality, political violence, cultural minorities and the consolidation of the rule of law – issues that are fundamental in these three countries. The book also aims to bridge the gap that exists between the Global South and Global North on constitutional matters. Finally, it aims to make explicit the need to widen the number of authoritative interpreters of modern constitutionalism"; Bonilla, "Introduction" *supra* note 15 at 29.

³⁹ *Ibid* at 4.

that the legal systems of the global South are similar to the legal systems of the global North. This reification has led to the notion that there is little value in understanding the global South as a site of unique legal knowledge or rich legal traditions.⁴⁰ Third, the indifference demonstrated by scholars of the global North is based on an alleged formalism of the laws in the global South, which ostensibly demonstrates the global South's backwardness and underdevelopment. However there is merit in global North scholars studying the issues of social justice in the global South as a way to ameliorate the conditions of those living there. Ultimately, if one were to pursue this argument, its results would be that the global South can be enlightened through the scholarship from the global North by showing the underdeveloped how to use law for their betterment. The fourth argument is that the academic knowledge production of the global North is deemed to be much more robust than the academic knowledge production of the global South. Finally, Bonilla stipulates that the "closed and parochial character of U.S. legal academy, along with the selective openness of most of Western Europe's legal academy, discourages any dialogue with the legal institutions of the [g]lobal South".⁴¹

Bonilla's arguments generate three rules that "govern the production, circulation, and use of legal knowledge":⁴² the well of production rule⁴³; the protected designation of origin rule⁴⁴; and the effective operator rule.⁴⁵

⁴⁰ *Ibid* at 6.

⁴¹ *Ibid* at 6.

⁴² *Ibid* at 9.

The according to the first rule, the global North is the only place able to produce legal knowledge. This signifies that the global South is incapable of producing original knowledge and that it simply replicates knowledge from other sources. Bonilla is accurate in his description of this normative tendency, which is evident in how we theorise global governance today. When discussing the descriptive accounts of global constitutionalism, there is a propensity to rely on European models, European authors and the European experience. For example, in the discussions about the descriptive accounts of global constitutionalism, Klabbbers, Peters, and Ulfstein rely on principles from the European Union and its adjudicatory frameworks as illustrative of global constitutionalism.⁴⁶

The second rule suggests that all knowledge produced in the North should be respected and recognised. This particular insight is extremely valuable to this discussion. Even though scholars from the Third World (and their allies) have been active in international law and its institutions, their critical insights have not been adopted into the literature of global administrative law⁴⁷ and global

⁴³ "This states that the only context for the production of knowledge is the legal academia in the North"; *Ibid* at 9.

⁴⁴ "This indicates that all knowledge produced in the North is worthy of respect and recognition *per se*, given the context from which it emerges"; *Ibid* at 10.

⁴⁵ "This rule indicates that academics and legal institutions from the North are much better trained to make effective and legitimate use of legal knowledge than academics and legal institutions from the South"; *Ibid* at 11.

⁴⁶ Jan Klabbbers, "Setting the Scene" in Jan Klabbbers, Anne Peters & Geir Ulfstein eds, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

⁴⁷ In the context of global administrative law, the main interlocutors often cite to Bhupinder Chimni's work on global administrative law. This reference simply acknowledges that there are scholars like Chimni that challenge the central assertions of global administrative law from the perspective of the Third World. For a recent example, see Richard B. Stewart, *The normative*

constitutionalism. This critique is similar to the reflections of Richard Delgado in 1992 about civil rights scholarship. Delgado noted that an: “inner circle of twenty-six scholars, all male and white, occupied the central arenas of civil rights scholarship to the exclusion of contributions of minority scholars. When a member of this inner circle wrote about civil rights issues he cited almost exclusively to other members of the circle for support”.⁴⁸ Similarly in our discussions about global administrative law and global constitutionalism, there is a reluctance to even acknowledge the presence of Third World-based scholarship.⁴⁹

The final rule - effective operator - indicates that, when compared to their global South counterparts, the institutions and the academic community of the global North are much better equipped and trained to make use of legal knowledge. The analysis provided in the first chapter on the history of international law and its institutions is relevant in this instance. Experts in the international criminal law context move quickly from one tribunal to another, taking with them their particular sense of expertise.⁵⁰ Their expertise and the institutions are evidence of the Bonilla’s effective operator rule.

dimensions and performance of global administrative law” (2015) 13 (2) Intl J Constitutional L 499 at footnote 2.

⁴⁸ Richard Delgado, “The Imperial Scholar Revisited: How To Marginalize Outsider Writing, Ten Years Later” (1992) 140 U Pa L Rev at 1352.

⁴⁹ For a recent example, see Bardo Fassbender & Anne Peters, Introduction: Towards A Global History of International Law in Bardo Fassbender et al, eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2014) at 2.

⁵⁰ See Chapter, section 1.4.1.2.

In short, Bonilla's work illustrates the current reality in legal theories about global constitutionalism and global administrative law. This is specifically true in terms of the argument that many fields of the global South academy tend to repurpose original thinking from the global North.

Bonilla's assertions are grounded in Comaroff and Comaroff's claim that to understand the history of the present *vis-à-vis* theories about constitutionalism for example, both empirically and theoretically, we must study these phenomena in the global South.⁵¹ This is predicated on two interrelated arguments. The first is that the modernities of the global South are unique and must be understood on their own terms. Second, the daily modalities of capitalism and globalisation are experienced first in the global South. Thus, in order to understand the dynamics of global governance we must turn to the global South as the harbinger of the future.⁵² Bonilla's arguments thus demonstrate the urgency in this endeavour by illustrating the lack of self-awareness in literature from the global North about the global South.

The merits of Bonilla's claims can be examined through the different types of legal norms, and the doctrines used to interpret these norms. Bonilla suggests that these arguments and rules tend to obscure reality by hiding the diversity of

⁵¹ Comaroff & Comaroff, "Theory from the South" *supra* note 24 at 117; Comaroff & Comaroff, *Theory supra* note 13 at 7.

⁵² This argument is not without criticism. For instance, the reliance on the global South as an experiment for the future seems rather odd and ill informed. For example there may be a tendency to romanticise the experience of the global South.

the global South's legal communities, both in terms of knowledge that is produced and the strength of the different academic communities located therein. Fundamentally, the various arguments and their resulting rules categorically ignore the rich and valuable theories and doctrines that are being produced by the global South. Bonilla's collection of essays ultimately seeks to initiate a conversation about what we can learn from the global South.⁵³ I highlighted some of the arguments from South Africa and Colombia in the global constitutionalism chapter.

Bonilla's contributions signify a number of important observations about global administrative law and global constitutionalism, which I briefly raised earlier. The first rule about the well of production is visible in the discussions on legitimacy of international law and its institutions. Even though there are significant overtures to include scholars from the global South (especially in terms of their physical presence in edited collections, journal articles, and conferences⁵⁴), the current field of global governance theory *vis-à-vis* international law and its institutions can be characterised as devoid of contextual analysis from the perspective of the global South.⁵⁵ For example, there is an assumption that Northern scholars' cursory top-down view of how international institutions operate may capture the essence of how these international institutions actually function in their

⁵³ Bonilla, "Introduction" *supra* note 15 at 29-30.

⁵⁴ B.S Chimni, "Cooptation and Resistance: Two Faces of Global Administrative Law" (2006) 37 NYUJ Intl L & Pol 799.

⁵⁵ For example Yoav Meer, "The Notion of State: The Palestinian's National Authority's Attempt to Bring a Claim in Front of the International Criminal Court Against Israel" in Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald, eds, *Global Administrative Law: The Casebook* (Rome Edinburgh New York: ILRP, 2013) at 47-51.

respective contexts, such as the ICTR's operations in Arusha, Tanzania. This analysis reinforces Bonilla's positing that the "only context for the production of knowledge is the legal academia in the North".⁵⁶ By ignoring the relevant discussions about the global South, including the critical insights of the subaltern studies movement⁵⁷ and its progenies,⁵⁸ there is a reliance on the well of production rule in global governance theories.⁵⁹

The second and third rules - "protected designation of origin"⁶⁰ and "effective operator"⁶¹ - are very much present in our conversations about international law and its institutions. We can broadly discern that there is a general emphasis that Northern legal knowledge production is worthy of respect and recognition "*per se*, given the context from which it emerges".⁶² This can be illustrated by the

⁵⁶ Bonilla, "Introduction" *supra* note 15 at 9.

⁵⁷ There are various schools of thought within the subaltern studies movement. Scholars writing under the broad umbrella of subaltern studies movement include: Ranajit Guha, *History at the Limit of World-History* (Italian Academy Lectures) (New York: Columbia University Press 2002); Ranajit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (Oxford: Oxford University Press, Delhi, 1983 & New edition: Durham: Duke University Press, 1999); Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (New Jersey: Princeton University Press, 2000); Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in Cary Nelson and Lawrence Grossberg, eds, *Marxism and the Interpretation of Culture* (Chicago: University of Illinois Press, 1988) 271-313.

⁵⁸ See scholarship on TWAIL: Antony Anghie and B.S. Chimni, "Third World Approaches to International and Individuals Responsibility in Internal Conflicts" (2003) 2:1 *Chinese J Intl L Law* 71 [Anghie & Chimni, "TWAIL and Individual Criminal Responsibility"]; B.S. Chimni, "The World of TWAIL: Introduction To the Special Issue" (2011) 3:1 *Trade, L & Development* 14at 20; James Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" (2011) 3(1) *Trade, L & Development* 26 [Gathii, "TWAIL: A Brief History"]; But see Karin Mickelson, "Taking Stock of TWAIL Histories," (2008) 10 *Intl Community L Rev* 355 [Mickelson, "Taking Stock"].

⁵⁹ See discussions in Chapter 3 and Chapter 4.

⁶⁰ "This indicates that all knowledge produced in the North is worthy of respect and recognition *per se*, given the context from which it emerges"; Bonilla, "Introduction" *supra* note 15 at 10.

⁶¹ "This rule indicates that academics and legal institutions from the North are much better trained to make effective and legitimate use of legal knowledge than academics and legal institutions from the South." *Ibid* at 11.

⁶² *Ibid* at 8-10.

failures of global administrative lawyers and global constitutionalism scholars to incorporate critical insights from and about the global South, as well as the results of liberal legalism on the lived realities of the people of the global South.⁶³

International criminal law scholarship provides further evidence of this omission. With the advent of the ICTY and the ICTR, as well as the creation of different international criminal institutions, English language international criminal law literature has generally focussed on the dynamics of the field. In particular, this literature has focussed on the dispensation of the anti-impunity agenda as constructed in the West and popularised by international non-governmental organisations. Scholars such as Anthony Anghie, Kamari Clarke, and Bhupinder Chimni have sought to question the liberal legalism of international criminal law.⁶⁴

Clarke has recently argued that there is an overemphasis on the prosecution of alleged war criminals.⁶⁵ By reviewing the prosecution of Charles Taylor, the former Liberian leader by Special Court of Sierra Leone, Clarke suggests that the

⁶³ For a similar claim in the American domestic context, see Richard Delgado, "The Imperial Scholar: Reflections on a Review of Civil Rights Literature" (1984) 132 University of Pennsylvania Law Review 561 at footnote 2.

⁶⁴ Vasuki Nesiah, "The Trials Of History: Losing Justice In The Monstrous And The Banal" in Peer Zumbansen and Ruth Buchanan, eds, *Law in Transition: Development, Rights and Transitional Justice* (Oxford, Hart Publishing, 2013) [Nesiah, "Trials of History"]; Makau Mutua, "Africa and the International Criminal Court: Closing the impunity gap", *The Broker Magazine* (December 07, 2010) [Mutua, "Closing the Immunity Gap"]; Kamari M Clarke, *Fictions of Justice: The International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009) [Clarke, *Fictions of Justice*]; Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2009) [Kelsall, *Culture*].

⁶⁵ Kamari Clarke, "The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord" (2011) 18 *Indiana Journal of Legal Studies* 7 at 9.

focus on perpetrator responsibility elides and obfuscates the role of political economy in how the Sierra Leonean conflict started. She is acutely aware of the role of colonialism and the resource extraction industries in fuelling the conflict. Similarly, Anghie and Chimni, as early as 2003, were critical of international criminal justice. They argued that the shift to individual criminal responsibility and the move away from national prosecutions for war crimes and crimes against humanity would not be productive.⁶⁶ But the anti-impunity agenda, as reflected through the International Criminal Court's prosecution policy, continues, ignorant to these critical reflections.⁶⁷

The above analysis suggests that there is a strong emphasis for a reorientation towards the global South as a site of knowledge. In the next section, I focus on TWAIL's attempt to reorient its own field of inquiry.

5.2.2 Third World Approaches to International Law

TWAIL's origins can be attributed to an emergence of both reactive and proactive scholarships against the various colonial and imperial projects of international law. The first ever TWAIL conference was organised at Harvard Law School in 1997.⁶⁸ The movement has grown since then, and now includes scholars from diverse disciplines and locations. Accordingly, there have been a

⁶⁶ Anghie & Chimni, "TWAIL and Individual Criminal Responsibility" *supra* note 58.

⁶⁷ John Reynolds & Sujith Xavier, Taking Stock of Third World Perspectives on International Criminal Law, paper presented at Institute for Global Law and Policy conference on 'New Directions in Global Thought', Harvard University (3 June 2013) [manuscript on file with author].

⁶⁸ A draft of the memo of the conference invitation is on file with the author.

number of conferences, with the most recent taking place in 2015 in Cairo, Egypt.

Given the origins of its first conference, TWAIL's foundations are rooted in critical scholarship, especially US legal realism, critical legal studies, feminism and critical race theory.⁶⁹ TWAIL's origins can also be located in postcolonial theory.⁷⁰ I note the controversy in tracing TWAIL's origins to US-based legal theory, but TWAIL scholars have alluded to this connection themselves. For example, James Gathii, one of the graduate students who organised the first conference, states:

In the spring of 1996, a group of Harvard Law School graduate students initiated a series of meetings to figure out whether it was feasible to have a third world approach to international law and what the main concerns of such an approach might be. On Friday, April 26th, 1997 background papers were presented to the group by Bhupinder Chimni who was a Visiting Fellow at the Graduate Program at Harvard Law School in the 1995-1996 academic year and myself.⁷¹

⁶⁹ Gathii, "TWAIL: A Brief History" *supra* note 58 at 28.

⁷⁰ Frantz Fanon, *Black Skins, White Masks* (New York: Grove Press, 1952); Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963); Edward S. Said, *Orientalism* (New York: Random House, 1979); Achilles Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001).

⁷¹ Gathii, "TWAIL: A Brief History" *supra* note 58 at 28 especially note 3; For a similar account, see Makau Mutua, "Critical Race Theory and International Law: The View of an Insider-Outsider" (2001) 45 *Vill L Rev* 84; Anghie & Chimni, "TWAIL and Individual Criminal Responsibility" *supra* note 58.

5.2.2.1 Contemporary TWAIL

TWAIL can be characterised as an anti-hierarchical counter-hegemonic coalitionary movement that is deeply suspicious of universal creeds and truths.⁷² It is anti-hierarchical because it challenges the Eurocentricity of the history of international law and continued propagation of particular monolithic universal values therein. These include, as demonstrated by this analysis in the previous chapters, specific claims to global administrative law and global constitutionalism as universal creeds. In a subversive turn, TWAIL scholars suggest a dialogic maneuverer across cultures. TWAIL calls for the recognition of existing inequities within the structures of international law. It also calls for the recognition of the subaltern voices and demands that all voices be represented.⁷³

Various scholarly views can be grouped under the TWAIL movement. The movement's unifying *raison d'être* is to:

challenge the hegemony of the dominant narratives of international law, in large part by teasing out encounters of difference along many axes- race, class, gender, sex, ethnicity, economics, trade etc. – and in inter-disciplinary ways – social, theoretical, epistemological, ontological and so on.⁷⁴

⁷² Makau Mutua, "What is TWAIL?" (2000) 94 *American Society Intl L Proceedings* 31 [Mutua, "What is TWAIL"].

⁷³ *Ibid*; Antony Anghie, "What is TWAIL: Comment" (2000) 94 *Am Soc Int'l Proc* 39

⁷⁴ Gathii, "TWAIL: A Brief History" *supra* note 58 at 37.

By challenging these dominant narratives, TWAIL seeks to “reduce the distance of the world of international law from the lives of ordinary peoples”.⁷⁵

TWAIL scholars have identified two generational moments in the development of TWAIL scholarship.⁷⁶ The first moment can be classified as the work of international lawyers from the 1960s to 1980s. This is generally known as TWAIL I scholarship. Even though these lawyers did not classify their scholarship as such, and this type of classification is subject to some contestation,⁷⁷ early TWAIL-minded scholars, such as Ram Prakash Anand, argued that international law legitimised the subjugation of the Third World. Moreover it was argued that the pre-colonial southern societies had a vernacular of international law prior to the colonial encounter.⁷⁸ These scholars also recognised the impossibility of rejecting international law by the newly independent states. More importantly this group of scholars argued that the grammar of international law could be transformed to accommodate the demands of the global South. They argued that international law had the potential to be emancipatory and should be used as a way to de-colonise the global South.⁷⁹

⁷⁵ B.S. Chimni, “The World of TWAIL: Introduction To the Special Issue” (2011) 3:1 Trade, L & Development 14 at 20 [Chimni, “Introduction to Special Issue”].

⁷⁶ Gathii, “TWAIL: A Brief History” *supra* note 58 at 14; Anghie & Chimni, “TWAIL and Individual Criminal Responsibility” *supra* note 58.

⁷⁷ Mickelson, “Taking Stock” *supra* note 58.

⁷⁸ Anghie & Chimni, “TWAIL and Individual Criminal Responsibility” *supra* note 58 at 80.

⁷⁹ *Ibid*; Gathii, “TWAIL: A Brief History” *supra* note 58; But see Mickelson, “Taking Stock” *supra* note 58.

TWAIL II scholars, on the other hand, were much more theoretically attuned to politics, economics, international relations, and other interdisciplinary insights. They focussed on the relationship between law, markets, and society as a way to track the influence of colonialism and imperialism. They articulated the following powerful claim: “colonialism is central to the formation of international law”.⁸⁰ This observation focused their attention on the role of the civilising mission in recent governance projects, such as the modern nation-state⁸¹.

TWAIL II is deeply critical of the contributions of their predecessors as evidenced by the structuring of their arguments in direct opposition to TWAIL I. These scholars are critical of the post-colonial state: “TWAIL II scholars have developed powerful critiques of the Third World nation-state, of the processes of its formation and its resort to violence and authoritarianism”.⁸² TWAIL scholars are therefore interested in the lived realities of the people of the global South, and not simply the formal equality ushered in by decolonisation. By honing in on lived realities, these scholars continue to systematically decentre the grand narratives that are embedded within multiple doctrines of international law and its more recent progenies such as international rule of law, law and development, and human rights.

⁸⁰ Anghie & Chimni, “TWAIL and Individual Criminal Responsibility” *supra* note 58 at 84.

⁸¹ Obiora C. Okafor, “After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa” (2000) 41 Harv Intl LJ 503.

⁸² Anghie & Chimni, “TWAIL and Individual Criminal Responsibility” *supra* note 58 at 83.

Makau W. Mutua formulated TWAIL II's three central tenets in 2000.⁸³ The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialised hierarchy of international norms and institutions that sub-ordinate non-Europeans and Europeans alike.⁸⁴ The recent scholarship under the auspice of TWAIL II can be grouped under these tenets. The previous chapters in this dissertation were conceptualised and written in this tradition. The second component of TWAIL is much more prescriptive in that it seeks to create alternative normative legal edifices for international governance. This is what I hope to achieve in this chapter. Third, through policy scholarship, TWAIL scholars aim to eradicate the conditions of underdevelopment in the global South (through praxis for example).⁸⁵ This reformist agenda presents a natural opportunity for building bridges between conceptions of global governance and critical insights about the global South.

There are a number of scholars using the proscriptive elements of TWAIL. The fundamental task of these scholars is to articulate the emancipatory ideals housed in international law. These overtures are analogous to the arguments deployed by TWAIL I scholars, who called for the emancipation of the former colonies using international law.

⁸³ Mutua, "What is TWAIL" *supra* note 72.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

Nevertheless, these critical claims from these international law scholars have not garnered much influence on substantive reforms or in theoretical debates. For example, in the fields of international criminal law and transitional justice, TWAIL scholars are quite active in describing the problematic nature of prosecutions of international criminal institutions,⁸⁶ polemics of transitional justice,⁸⁷ or sole focus of prosecution by the International Criminal Court in Africa.⁸⁸ Such projects, while worthwhile, reinforce the claim made in 1983 by the first Tanzanian President Julius Nyerere that “[i]n international rule making, we [the Third World] are recipients not participants”.⁸⁹ Given the inequities perpetuated by the on-going proselytisation of universal values, there is a need to interrupt this narrative and reimagine a better future. This is a future that includes the various places and peoples of the global South as both recipients and active participants in international law and its theories.

Critics of TWAIL allude to its potential for nihilism.⁹⁰ The charge of nihilism is predicated on TWAIL scholars’ critical position towards international law. These claims of nihilism ignore TWAIL’s reformist aims. It is precisely these neglected reformist aims that I seek to position in conversations on theorising global

⁸⁶ Mutua, “Closing the Immunity Gap” *supra* note 64; Clarke, *Fictions of Justice supra* note 64; Kelsall, *Culture supra* note 64.

⁸⁷ Nesiah, “Trials of History” *supra* note 64.

⁸⁸ Mutua, “Closing the Immunity Gap” *supra* note 64.

⁸⁹ Mutua, “What is TWAIL” *supra* note 72 at 30.

⁹⁰ Jose Alvarez, “My Summer Vacation Part II: Revisiting TWAIL in Paris”, online: Opinio Juris available at:

<http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/>; David P. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law* (2003) 2:1 *Chinese J Intl L* *Chinese J Intl L* 29 (2003).

governance. In this regard, analogous to the other disciplines and other fields of law that I discussed earlier in this section, TWAIL too does call for a reorientation towards the global South. The proscriptive elements housed within TWAIL are part of this reorientation.

There is another line of criticism that has centred on the Marxist tradition. Robert Knox, who works within the frame of TWAIL, argues that TWAIL scholarship is wedded to liberal legalism.⁹¹ Using the idea of principled opportunism,⁹² Knox suggests that TWAIL, and critical scholarship in general, must now rethink its efforts to achieve systemic change. His fear is that by focusing on immediate concerns, critical scholars lose track of the larger strategy. Scholars committed to a better world end up confusing the current tactic for immediate gains with the overall strategy of broader systemic change.⁹³ Knox is absolutely correct in his observation. This particular chapter is written in this tradition of trying to move beyond the immediate tactics that Knox is critical of to one where we can theorise global governance from the vantage point of the global South.

Having identified a various perspectives that argue in favour of a reorientation towards the global South and setting out TWAIL's foundational pillars, I will now

⁹¹ Robert Knox, "Strategy and Tactics" (2012) 21 Finnish YB of Intl L 193.

⁹² Knox defines institutional aspects of "principled opportunism" as: "[D]emands that the deployment of legal argument be openly subjected to political exigencies, with divergent arguments being deployed whenever necessary. As such, legal argument is being geared towards the strategic aim of building a movement to overthrow capitalism, rather than on its own terms. On the one hand, this will involve defensive struggles, where legal argument is deployed in order to defend political activists when the state seeks to attack them"; *Ibid* at 224.

⁹³ *Ibid*.

elaborate on TWAIL's prescriptive components as it relates to the question: how can we learn from the global South in theorising global governance?

5.3 Resistance and Renewal: How to Learn from the Global South?

While current TWAIL literature can be broadly categorized as a form of resistance, it is also important to note the calls for reform.⁹⁴ As suggested earlier, the first tenet of TWAIL is to deconstruct and unpack the existing hierarchies within international law and its institutions. The current TWAIL II literature seeks to challenge western universalism in particular. In the first chapter, I sought to challenge the ideals encapsulated within international law and its institutions, in particular international criminal justice by pointing to the manner in which particular values are made to seem universal and how this affects the rights of the accused.

A small number of contemporary academics are working on reformative projects in TWAIL II. These projects seek to redeem international law's promise. TWAIL's prescriptive elements are more prevalent in the writings of TWAIL I scholars though. These writers sought to harness the emancipatory power and promise of international law. Not entirely dissimilar to their predecessors, academics working under the more contemporary umbrella of TWAIL II are not keen on

⁹⁴ Luis Eslava and Sundhya Pahuja, "Between Resistance and Reform: TWAIL and the Universality of International Law" (2012) 3: 1 Trade, L & Development 103 at 110 [Eslava & Pahuja, "Between Resistance and Reform"].

eliminating international law either.⁹⁵ Rather, these TWAIL II scholars argue for a reconstruction of international law in a manner that reflects the concerns of the global South.⁹⁶

One such example is the scholarship of Balakrishnan Rajagopal. Even though he recognizes that such attempts may render minimal results,⁹⁷ he suggests that it is “legitimate to use international law as an explicit counter-hegemonic tool of resistance”.⁹⁸ The current TWAIL II scholarship is hopeful that international law can realise its emancipatory potential. An illustration of this hopefulness is apparent in Anghie’s writing:

I continue to hope, together with the many scholars who are working to reconstruct international law precisely because of their awareness of the many ways in which it has operated to exclude and subordinate people on account of their gender, race and poverty, that international law can be transformed into a means by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power. At the very least, I believe that the Third World cannot abandon international law because law now plays such a vital role in the public realm in the interpretation of virtually all international events.⁹⁹

⁹⁵ Ruth Buchanan, “Writing Resistance into International Law” (2008) 10 Intl Community L Rev 445 [Buchanan, “Writing Resistance”]; Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, *International Law and the Third World: Reshaping Justice* (New York: Rutledge-Cavendish, 2010).

⁹⁶ Balakrishnan Rajagopal, “Counterhegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy”, (2006) 27:5 Third World Q 767 [Rajagopal, “Counterhegemonic”]; Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens, *International Law and the Third World: Reshaping Justice* (New York: Rutledge-Cavendish, 2010).

⁹⁷ Buchanan, “Writing Resistance” *supra* note 95 at 453-454.

⁹⁸ Rajagopal, “Counterhegemonic” *supra* note 96 at 772.

⁹⁹ Anghie, *Imperialism* *supra* note 10 at 318.

Even though the hopefulness expressed by Anghie and other TWAIL scholars has been the subject of a recent debate,¹⁰⁰ it is certain that there are at least two prospective prescriptive claims that we can discern in answering the question of how can we learn from the global South in theorising global governance.

The first claim, forged as a response to TWAIL's flirtations with monism, is to take stock of international law as a field of practice and to expand ethnographic research that is committed to a TWAIL-based ideology. Here the argument centres on the potential use of ethnography as a means to study the field of international law from the perspective of the global South and to provide insights into how global governance mechanisms affect the daily lived realities of the people of the global South.¹⁰¹

The second centres on the duty of international lawyers and international law scholars to contend with the material reality of the global South. In this section I argue that as intellectuals, they have an ethical responsibility to articulate

¹⁰⁰ Buchanan, "Writing Resistance" *supra* note 95 at 454; Buchanan focuses on the idea of hopefulness in the scholarship of Rajagopal and Nesiha. She suggests the following: "My suspicion is that there is something in the professional commitment of international lawyers, no matter how critical, that obscures the limits of their own (internal) critiques. While the deeply thoughtful and political arguments of scholars such as Nesiha and Rajagopal lead them right up to the edge of the abyss (the limits of law itself), they are unwilling or unable to envision the next step. Part of this suspension might be premised on an implicitly monist understanding of law that stands in the way of a meaningful engagement with the legal pluralism that many TWAIL scholars nonetheless recognise as necessary. Part of it may also have to do with the necessity of theorising the 'event', that is, the need to address the usually unspoken question about the relationship between law, force and revolution. And finally, much of this productive tension might be seen to derive from the dueling commitments embraced by these Third World international legal scholars whose work is illuminating precisely because it refuses the usual comfortable resting places".

¹⁰¹ Luis Eslava, *Local Space, Global Life The Everyday Operation of International Law and Development* (Cambridge: Cambridge University Press, 2015)

accurate portrayals of global governance initiatives and its effects on the lives of the people of the global South.

5..3.1 International Law as Field of Practice

Some writers believe that while TWAIL scholars engage in thoughtful political arguments that lead them to the edge of the abyss, they are nonetheless unable to go beyond the precipice because they are wedded to monist understandings of law.¹⁰² Monism is the belief that international law, made through international relations, must be brought home through sovereign enactment by way of domestic governments. Luis Eslava and Sundhya Pahuja make the following argument:

TWAIL scholarship gestures toward the idea that what gives international law its emancipatory appeal is its promise of universality as such. Such a promise of universalism is quite different from international law's usually formal claims to universality, which are in themselves, as TWAIL scholars have argued, the carriers of specific particularities. Because of this recognition or in some cases, intuition, most TWAIL scholars eschew attempts to re-establish a putatively genuine universality. Such an attempt would be to engage in a neo-Kantian enterprise of finding a new, genuinely universal ground for law. TWAIL's concern for history has shown us repeatedly that these ostensibly genuine universals invariably end up elevating a particular meaning to the universal, thus enacting a familiar mode of power".¹⁰³

Eslava and Pahuja's intervention signals a warning to TWAIL's reformist agenda. What we can gather from their analysis is rather prescriptive. They hint that TWAIL's political project calls for the recognition of a universality. To them, it is a normative conception of international law's promise of universalism and they see

¹⁰² Buchanan, "Writing Resistance" *supra* note 95 at 454.

¹⁰³ Eslava & Pahuja, "Between Resistance and Reform" *supra* note 94 at 121.

it as being “quasi-transcendent”.¹⁰⁴ There is no material reality at the moment in which to achieve emancipation as a result of TWAIL’s criticisms. Such recognition gives way to the potential of plurality. In effect, they posit a moving away from monist conceptions of international law to one that envisions international law as domain of practice.¹⁰⁵

In this imagining, we are able to rely on international law’s specific procedures, “artefacts and forms of being that operate at the mundane and quotidian level and that tie together a vast raft of heterogeneous phenomena in a specific kind of way”.¹⁰⁶ TWAIL’s body of scholarship has already identified political, cultural and economic biases buried deep within the structure of international law. Eslava and Pahuja’s approach would shine a light on how these embedded vernaculars affect day-to-day lives of those that must confront the effects of international law.¹⁰⁷

Taking our cue from Obiora Okafor’s position that TWAIL is a theory and method, this proposal seriously pushes for a methodological shift, analogous to a

¹⁰⁴ *Ibid* at 122.

¹⁰⁵ *Ibid* at 125; “The turn away from monism of international law is not novel. This approach can be ‘discovered’ in the recent scholarship of transnational legal pluralism that focuses on the actors, norms and processes. The scholars working under transnational legal pluralism build on Jesup’s transnational law and they re-characterize the public/private distinctions. Transnational legal pluralism draws inspirations from the insights of decentering the primacy of public-private distinctions and they build on the observations that law need not be formulated through sovereign power, rather law can emanate from diverse set of actors”. See also Peer Zumbansen, “Transnational Legal Pluralism” (2010) 1: 2 *Transnational Leg Theory* 144.

¹⁰⁶ Luis Eslava and Sundhya Pahuja, “Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law” *Journal of Law and Politics in Africa, Asia and Latin America - Verfassung und Recht in Übersee (VRÜ)*, (2012) 45:2 195 at 213.

¹⁰⁷ Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Forthcoming, Cambridge: Cambridge University Press, 2015).

call to arms.¹⁰⁸ This call demands TWAIL “build explicitly on the legal-ethnographic method currently being applied explicitly in international sites and artefacts such as international criminal courtrooms or international NGOs”.¹⁰⁹ Eslava and Pahuja call for an ethos of ethnography as TWAIL’s new unexplored frontier in which scholarship seeks to identify embedded biases in multiple registers.

Ethnography as a field of study is intricately connected to social sciences like anthropology and sociology. It is a method of study deployed by social scientists, including legal scholars. It is generally understood as the study of people in “naturally occurring settings or ‘fields’ by methods of data collection which capture their social meanings and ordinary activities, involving the researcher participating directly in the setting”.¹¹⁰ The purpose is to collect data in a systematic fashion without externally imposing meaning.¹¹¹

Ethnography has evolved over the years. At its inception, it was the handmaiden of colonialism and imperialism.¹¹² It was used as a means to track and study the indigenous populations of the newly discovered world by the various colonisers. This field of study has evolved, integrating insights from various disciplines and

¹⁰⁸ Obiora C. Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2010) 10 *Intl Community L Rev*37.

¹⁰⁹ Eslava & Pahuja, “Between Resistance and Reform” *supra* note 94 at 126.

¹¹⁰ John Brewer, *Ethnography* (Buckingham: Open University Press, 2000) at 6.

¹¹¹ *Ibid.*

¹¹² *Ibid* at 11.

theoretical positions, including postmodernism and postcolonialism.¹¹³ In particular, there is a burgeoning sub-field of critical ethnography that focuses on power relations and effective systemic changes “toward greater freedom and equity”.¹¹⁴

Most recently, Mohawk scholar Audra Simpson has added another layer to the discussions about ethnography that is premised on the politics of refusal. This is important in thinking about ethnography as potential tool in learning how to theorise global governance from the perspective of the global South. Simpson coins her intervention the “cartography of refusal,” which requires an acknowledgment of the role of ethnography in constructing and defining indigenous groups and their politics.¹¹⁵ In describing this refusal, Simpson notes:

These conditions have led to this book as an ethnography that pivots upon refusal(s). I am interested in the larger picture, the discursive, material and moral territory that was simultaneously historical and contemporary (this “national” space) and the ways in which Kahnawa'kehró:non had refused the authority of the state at almost every turn and in doing so instantiated a different political authority. [...]

There is no place in the existing literature for these articulations; nor is there now a neat placement for them within postcolonial studies or analysis. Kahnawa'kehró:non were not free from occupation, which naturalized as immigration, as multiculturalism, and was and is a legalized, settler occupation of the territory that they claim. Thus there was no doubleness to their political consciousness, a still-

¹¹³ Robin Patric Clair, “The Changing Story of Ethnography” in Robin Patric Clair, ed, *Expressions of Ethnography Novel Approaches to Qualitative Methods* (Buffalo: SUNY University Press, 2003).

¹¹⁴ Soyini Madison, *Critical Ethnography Method, Ethics, and Performance* 2nd ed., (New York: Sage Publication, 2012) at 5.

¹¹⁵ Audra Simpson, *Mohawk Interruptus {Political Life Across Borders of Settler States}* (Durham: Duke University Press, 2014) at 33.

colonial but striving-to-be “postcolonial consciousness,” that denied the modern self, which Frantz Fanon, Homi Bhabha, and Anthony Giddens speak of and from [...]. Here I want to push “turning away” into the ambit of refusal - of simply refusing the gaze of disengagement - and to the possibilities that this structures: subject formation, but also politics and resurgent histories. In my ethnographic work I was deeply mindful of the range of possibilities available for political life, for identification and identity within and against recognition, all instantiated in refusals. There seemed, rather, to be a tripleness, a quadrupleness to consciousness and an endless play, and it something like this: I am me, I am what you think I am, I am who this person to the right of me thinks I am, and you are all full of shit, and them maybe I will tell you to your face and let me tell you who you are”.¹¹⁶

This new layer adds further nuance to the study of ethnography. This layer holds a significant amount of potential for future TWAIL-based ethnographies about the material reality of the people of the global South. Simpson thus posits the idea of using ethnography as both a form of resistance and as a tool of emancipation.

The turn to empiricism in law can be traced back to the early 1900s,¹¹⁷ and in particular to two legal theories: legal pluralism and American legal realism. This empirical turn greatly influenced scholarship of the legal pluralist in the 1960s. Social scientists, especially anthropologists, sociologists and others, have additionally contributed to our understanding of law from varying disciplines utilising different methods. Legal pluralism can be traced back to the early 19th

¹¹⁶ *Ibid* at 106-107.

¹¹⁷ Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harv L Rev 457; Sally Falk Moore, “Law and Social Change: the semi-autonomous field as an appropriate subject of study”, (1973) 7 Law & Soc’y Rev 719; Marc Galanter, “Justice in Many Rooms: Courts, Private Ordering and Indigenous Law”, (1981) 19 J Leg Pluralism 1; John Griffiths, “What is Legal Pluralism” (1986) 24 J Leg Pluralism 1.

and 20th century.¹¹⁸ In the late 20th century, legal anthropologists set out to document how multiple legal spaces co-existed and how ‘semi-autonomous’ fields of norms (whether formal or informal) influenced each other. In documenting various legal spaces, scholars had to deploy various social science tools, in particular ethnography.

In her now classic text, based on fieldwork in Africa and informal discussion with workers in the garment industry in New York, Sally Falk Moore examined how external law and internal norms regulate group behaviour amongst the Chagga and New York City garment workers.¹¹⁹ The formal legal structures coexist along with the internal norms. Furthermore, the internal norms of each community are self-regulating and formal laws are invoked when individuals within the social field decide to gain access to the law such as reporting bribes. This perspective can be seen as a novel approach to formal and informal law in society. Formal law is subject to, and contingent upon, the informal norms of the particular community. These informal norms, therefore, have a greater organizing effect than the formal structure of law. Thus, by studying the way in which groups navigate the terrain of law and non-law, we are able to understand how communities interact with state power.

¹¹⁸ Henry Sumner Maine, *International Law; A series of Lectures delivered Before the University of Cambridge 1887* (NYC: Henry Holt and Company, 1888); Eugen Ehrlich *The Fundamental Principles of Sociology of Law* (Cambridge: Harvard University Press, 1936) at 486-507.

¹¹⁹ Sally Falk Moore, “Law and Social Change: the semi-autonomous field as an appropriate subject of study”, (1973) 7 *Law & Soc’y Rev* 719 at 723.

This turn to empiricism is also part of the American legal realist critique. It was inspired by Oliver Wendell Holmes' canonical *Path of Law*, which sought to question established and traditional understandings of law.¹²⁰ Legal realist scholars, such as Holmes and Wesley Hohfeld, were struck by the formal structures of law and they sought to question its very foundation.¹²¹ More contemporary versions of the realist critique have emerged, the latest incarnation being new legal realism; its aim is to provide a counter narrative to law and economics and new formalism.

New legal realists, similar to the legal realist of the 1900s, have attempted to provide an account of decision-making, conceptions of the state, and individuals, and to a large extent legal scholarship.¹²² New legal realists are concerned with inequality at the broader level, and thus they seek to expose power and distributive conflicts in law through empiricism or as some have characterised as the continual reminder of the need to include the bottom.¹²³

We must return to Eslava and Pahuja's suggestion for further empirical and ethnographic scholarship with an understanding that this field of study is multifaceted with its own boundaries. More importantly, the call for ethnographic

¹²⁰ Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv L Rev 457.

¹²¹ David Kennedy & William Fisher, "Introduction" in David Kennedy & William Fisher, *The Cannon of American Legal Thought* (New Jersey: Princeton University Press, 2006) at 3.

¹²² Victoria Nourse & Gregory Shaffer, "Varieties of New Legal Realism: Can A New World Order Prompt A Legal Theory?" (2009) 95 Cornell L Rev 61 at 65; Thomas J. Miles and Cass R. Sunstein: "The New Legal Realism" (2008) 75 U Chicago L Rev 831 at 832.

¹²³ Howard Erlanger, Bryant Garth, Jane Larson et al, "Is It Time for a New Legal Realism" (2005) Wis L Rev 335 at 340.

research and empirical studies is not new as I have detailed above. Rather it is part of a rich history in interrogations imbedded in critical approaches to law. Earlier chapters in my analysis relied on anthropological, ethnographic and empirical research from the international criminal institutions to provide the narratives of resistance.¹²⁴ The move towards ethnographies from the global South as a means to theorise global governance continues quite simply to be within the confines of the first central tenets of TWAIL. Yet it does offer us the potential to map out the existing material reality relying on data collected based on observations. These observations can capture the social meanings of everyday occurrences in international law and its institutions. There are a handful of examples of scholars who have provided such analysis.¹²⁵ Luis Eslava has undertaken an ethnographic analysis of international development policies in changing the internal dynamics of Bogota, Columbia.¹²⁶ But we need more such scholarship, especially as it relates to lived realities of the people of the global South and how global governance mechanisms affect their daily lives.

Conducting ethnographic work is complicated. In theorising global governance from the perspective of the global South, we must contend with the complications

¹²⁴ Clarke, *Fictions of Justice* supra note 64; Kelsall, *Culture* supra note 64; Galit A. Sarfaty, "Measuring Justice: Internal Conflict over the World Bank's Empirical Approach to Human Rights" in Kamari Clarke & Mark Goodale eds, *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge: Cambridge University Press, 2009).

¹²⁵ Galit A. Sarfaty, "Measuring Justice: Internal Conflict over the World Bank's Empirical Approach to Human Rights" in Kamari Clarke & Mark Goodale eds, *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge: Cambridge University Press, 2009); Annelise Riles, "Models and Documents: Notes on Some Artifacts of International Legal Knowledge" (1999) 48 *International and Comparative Law Quarterly* 809.

¹²⁶ Luis Eslava, *Local Space, Global Life The Everyday Operation of International Law and Development* (Forthcoming, Cambridge: Cambridge University Press, 2015).

that arise out of ethnographic research. We are well served to take account of Audra Simpson's warnings. Taking stock of the work of critical ethnographers and the interventions by Simpson, there is a need to engage in this type of scholarship with a commitment to the politics of the global South. Much more importantly, in undertaking this type of work, scholars must engage with the politics of recognition and the politics of refusal.¹²⁷ The politics of recognition centre on the possibility of engaging the contemporary legal orders as a means to make material changes outside the confines of liberalism.¹²⁸ The politics of refusal is centred on the material reality that current legal structures will not yield any such possibilities. Emancipation is not possible through international law. What is important about this type of scholarship is that it demonstrates it is possible to live and resist in this world without engaging. In this instance, there are various possibilities of that are part and parcel of this research agenda. For example, does the Palestinian Boycott Divestment and Sanctions Movement represent as an aspect of the politics of refusal? Or are there other alternatives that are predicated on much more closer reading of Simpson's politics of refusal in the international law context?

What we can learn from Eslava and Pahuja's articulation of international law as practice is the need to examine the broader context in which international law and international institutions function. Analogous to the discussion about the bias

¹²⁷ Audra Simpson, *Mohawk Interruptus {Political Life Across Borders of Settler States}* (Durham: Duke University Press, 2014) at 33.

¹²⁸ See chapter 3, section 3.6.

of judges in the ICTR in the previous chapters, it is necessary to be attuned to the socio-political, cultural and economic factors that surround the examples that are used to denote the legitimacy of international law and its institutions. The exercise of thinking about international law and its institutions as a field of practice shifts our perspective away from one centred on legal mechanisms. By repositioning our attention to the realm of practice, we are able to take note of divergent factors that shape the operationalisation of international norms on the ground, or where the rubber of global governance hits the road.¹²⁹

5.3.2 International Lawyers, International Law Scholars and Ethics

What Lassa Oppenheim suggested in 1908 – that international lawyers should plough their fields – is still very relevant today.¹³⁰ When writing about global constitutionalism, global administrative law, public international law, and global governance, international lawyers and international law scholars often craft the territorial boundaries of their respective subfields. For example, scholars such as Cherif Bassiouni and others have helped define the field of international criminal law. These practical implications about the very nature of international legal practice are analogous to, and bound up in, concerns that domestic legal professional regulatory bodies and domestic practitioners often grapple with.¹³¹

¹²⁹ Kennedy, “Mystery of Global Governance” *supra* note 37.

¹³⁰ Lassa Oppenheim, “The Science of International Law: Its Task, Its Method” (1908) 2 AJIL313.

¹³¹ These subsequently arise in how lawyers should behave towards their clients; David M. Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 Dalhousie Law Journal 267; David B. Wilkins, “Identities and Roles: Race, Recognition, and Professional Responsibility” (1998) Maryland Law Review 1502.

These implications centre on such questions as: what is the role of the international lawyer and international law scholars in contemporary society? What are the professional responsibilities and obligations of international lawyers to their clients, and much more importantly, who exactly is their client? What is the significance of the international lawyer or international law scholar's understanding of context in delivering opinion (for example do they have competent understanding of Rwandan history or Yugoslavian politics)? I argue that it is important for international lawyers and international law scholars to take stock of the material and lived realities of the global South. It is their duty as intellectuals to portray events in a broader context, depicting and talking about various portions of people that may be differently affected by the manner in which international law and its institutions function.

In national jurisdictions, various legal professions regulate the provision of legal services. In the global South, legal transplants have ushered in professional bodies that are similar to their former colonial masters.¹³² As seen in Sri Lanka, the legal profession is regulated by a law society that functions akin to those found in the United Kingdom, Canada and the rest of the commonwealth. Domestic practitioners must adopt a specific attitude in how they behave with their clients.¹³³ Domestic lawyers, depending on their respective jurisdictions, are

¹³² A.R.B. Amersasinghee, *Professional Ethics and Responsibilities of Lawyers* (Colombo: Stamford Law Publishers, 2003).

¹³³ Allan Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin Law, 2006); David M. Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 *Dalhousie Law Journal* 267.

heavily regulated through the respective rules of conduct by their professional bar. A lawyer's professional license is contingent upon ethical behaviour towards the client, the court, the legal community, and the general public.

In the international context, there is no such governing regulatory framework. James Crawford thus suggests the following: "There is clearly no international law bar comparable to domestic bars – there are no qualifications which someone must attain before appearing before international courts and tribunals, no international code of ethics with which they must comply, and no international association to sanction them for misconduct".¹³⁴ There is only a fragmented set of rules that apply to advocates and counsels before the International Criminal Court, the ad hoc tribunals and other such organisations.¹³⁵ Without reinforcing the liberal legalism imbedded within these professional regulatory regimes¹³⁶, the questions that fuel this discussion are, to what extent should international lawyers take note of the global South and its material reality, and do they even have an obligation to do so? Questions such as these underscore the

¹³⁴ James Crawford, "The International Law Bar: Essence Before Existence?" (2014) University of Cambridge Faculty of Law Research Paper No. 19/2014; ESIL 2013 5th Research Forum: International Law as a Profession Conference Paper No. 11/2013 at 1 [Crawford, "International Bar"].

¹³⁵ Philip Sands, "The ILA Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals", (2011) 10 Law & Prac Intl Cts & Trib 14.

¹³⁶ I recognize that reference to professional rules of conduct is a turn to liberal legalism. See for example, Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" at 2-3 - 2-13 ("Barriers to Entry: Something Less than a Warm Welcome?"), paper presented at the Chief Justice of Ontario's Advisory Committee on Professionalism, First Colloquium on the Legal Profession (October 2003), online: LSUC http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf; David B. Wilkins, "Identities and Roles: Race, Recognition, and Professional Responsibility" (1998) Maryland Law Review 1502.

responsibility of the international lawyers and international scholars in a regulatory space devoid of formal regulation.¹³⁷

Before delving into a potential answer, it is important to note the overlap between international lawyers and international law scholars. Throughout this analysis, I have referred to a number of academics who are both international lawyers and international law scholars. James Crawford is a good example. He is an established academic with a long history of teaching in Australia, the United Kingdom, and other countries. Crawford is also an established international lawyer. He was counsel in a number of leading international law cases before the International Court of Justice.¹³⁸ Crawford was recently appointed to the International Court of Justice. In a similar vein, a number of scholars have demonstrated the connections between the role of specific international lawyers and the development of international law (M. Cherif Bassiouni is a good example).¹³⁹ Thus, given the fragmented nature of the various standards of conduct and the various roles performed by international lawyers and international law scholars, it may be more useful to think of these individuals,

¹³⁷ Crawford, "International Bar" *supra* note 134.

¹³⁸ *Gabcikovo-Nagymaros Barrage System (Hungary v Slovakia)*, ICJ Reports 1997 at 7; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996 at 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 at 136; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, ICJ Reports 2004 at 136.

¹³⁹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001); Antony Anghie, "Vattel and Colonialism: Some Preliminary Observations" in Vincent Chetail and Peter Haggemacher eds., *Vattel's International Law in a XXIst Century Perspective* (The Hague: Martinus Nijhoff 2011).

given their overlapping functions, as intellectuals engaged in praxis of international law.

Various writers have theorised the role of intellectuals in our modern society.¹⁴⁰

Edward Said's contributions are especially significant. Said states: "the principal intellectual duty is the search for relative independence from such [societal] pressures. Hence my characterizations of the intellectual as exile and marginal, as amateur, and as the author of a language that tries to speak the truth to power".¹⁴¹

The latter point is of particular importance in answering the question: to what extent should international lawyers and international law scholars take note of the global South and its material reality? It is important because international lawyers and international law scholars, as intellectuals, are constantly imbricated in the milieus of power and authority that shape the lived realities of the people of the global south. Said suggests that intellectuals should move away from specific specialisation (or as he coins it professionalisation) to the much more accessible attitude of an amateur:

I have already suggested that as a way of maintaining relative intellectual independence, having the attitude of an amateur instead

¹⁴⁰ Antonio Gramsci, *The Prison Notebooks* (three volumes) (New York: Columbia University Press, 2011) [Translated by Joseph A. Buttigieg]; Edward Said, *Representations of the Intellectual: The 1993 Reith lectures* (New York: Vintage Books, 1996).

¹⁴¹ Edward Said, *Representations of the Intellectual: The 1993 Reith lectures* (New York: Vintage Books, 1996) at xvi.

of a professional is a better course. But let me be practical and personal for a moment. In the first place amateurism means choosing the risks and uncertain results of the public sphere - a lecture or a book or an article in wide and unrestricted circulation - over the insider space controlled by experts and professionals. Several times over the past two years I have been asked by the media to be a paid consultant. This I have refused to do, simply because it meant being confined to one television station or journal, and confined also to the going political language and conceptual framework of that outlet. Similarly I have never had any interest in paid consultancies to or for the government, where you would have no idea of what use your ideas might later be put to. Secondly, delivering knowledge directly for a fee is very different if, on the one hand, a university asks you to give a public lecture or if, on the other, you are asked to speak only to a small and closed circle of officials. That seems very obvious to me, so I have always welcomed university lectures and always turned down the others. And, thirdly, to get more political, whenever I have been asked for help by a Palestinian group, or by a South African university to visit and to speak against apartheid and for academic freedom, I have routinely accepted.

[...]

But what are these amateur forays into the public sphere really about? Is the intellectual galvanized into intellectual action by primordial, local, instinctive loyalties one's race, or people, or religion -or is there some more universal and rational set of principles that can and perhaps do govern how one speaks and writes? In effect I am asking the basic question for the intellectual: how does one speak the truth? What truth? For whom and where?

Unfortunately we must begin to respond by saying that there is no system or method that is broad and certain enough to provide the intellectual with direct answers to these questions.¹⁴²

In asking these questions, Said helps us move away from understanding international lawyers and international law scholars as specialised professionals embarking on their duties by ploughing their respective fields. Rather, Said forces us to ponder on the material reality of the work that international lawyers

¹⁴² *Ibid* at 87 to 88.

and international law scholars undertake in shaping and writing their fields. Thus in effect, this forces us to come face to face with those that are directly affected by the laws and policies that is shaped and created by intellectuals working with international law.

Recently, Chimni captured one of the central concerns of TWAIL as part of its reformist agenda: “Is human emancipation and environmental protection possible by altering the material structures or does it require an “evolved ethical and spiritual self”?”¹⁴³ He thus enquires about the role of international lawyers (and international law scholars) in thinking and bringing about equitable relations between and amongst nations states and those that live in these constructed boundaries. The rationale for his newfound search for answers is rooted in the following:

The absence of a self that is rooted in duties to strive for self-knowledge and promote the global common good is based on an excessive faith in the idea of restructuring international laws and institutions for creating a humane world. However, by facilitating accelerated capitalist globalization these laws and institutions continue to marginalize subaltern classes and nations and entrench in multifarious ways a singular conception of good life that is inhospitable to the idea of an ethical and spiritual self. In other words, the present day accent on reconfiguring international law and institutions has not produced an adequate focus either on deep structures of global capitalism or on the ethical and spiritual self, embedded in the notion of duty to humanity [...].¹⁴⁴

¹⁴³ B.S. Chimni, “The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi’s Hind Swaraj or Indian Home Rule” (2012) 23: 4 EJIL 1159 at 1160.

¹⁴⁴ *Ibid* at 1160.

In trying to respond to these important questions, Chimni acknowledges that the Marxist tradition, which he has relied on to deliver his TWAIL-based arguments against international law, is not useful in providing adequate insights for reform. This is especially the case because of the “uneasy experience of actually existing socialism” that we experienced over the years that is rooted in “philosophy of militant materialism as a basis for building a world that expands the realm of human freedom”.¹⁴⁵

Chimni subsequently turns to Gandhi’s 1904 *Hind Swaraj* to find inspiration for some of the central organising problématiques embedded in TWAIL. The rationale for this choice is based on the relationship that Gandhi constructs between the self and social transformation as a critique of modern civilisation. Building on *Hind Swaraj*, Chimni seeks to address Marxism’s failings by clarifying the need to be simultaneously “attentive to material structures and to work on the self”.¹⁴⁶ He proposes a number of critical observations that attempt to fill these gaps. By drawing directly from Gandhi, Chimni maps out a number of significant proposals about the state, the grounds for obedience to laws, the understanding of the legal profession and passive resistance.¹⁴⁷ By reflecting on these important factors, Chimni reveals glimpses into alternative global futures, the

¹⁴⁵ *Ibid* at 1160.

¹⁴⁶ *Ibid* at 1163

¹⁴⁷ *Ibid* at 1167.

means by which we can create a better world, and locate the role of international law and international lawyers in that process.¹⁴⁸

In this regard, I want to hone in on one of the central themes that Chimni identifies in creating a better world - the function and role of international lawyers and by extension international law scholars. Focusing on this proposal about international lawyers and international law scholars opens up new vistas in imaging various futures from the perspectives of the global South.

Gandhi's criticisms about the legal profession were based on the role of the courts and lawyers in maintaining and sustaining the colonial rule and the oppression of the people of the global South. Gandhi's cynicism about the legal profession was precipitated by the disparity between the colonised and colonisers, and the resulting unequal treatment between the European right bearers and Non-Europeans without rights. His cynical views extended further to the belief that the legal profession teaches immorality because lawyers benefit from conflicts that they seek to mediate. Chimni explicates some of these implications for international lawyers and international law scholars with the following:

In my view Gandhi's critique of the legal profession raises crucial issues with respect to the responsibility of international lawyers. I will flag some of them. The first matter relates to the role of the legal adviser to governments. In giving advice should legal advisers

¹⁴⁸ *Ibid* at 1167.

privilege truth, read as the global common good and our common humanity, over perceived national interests? Should a legal adviser do a Gandhi to his client if truth were not spoken with regard to the material facts in issue? Secondly, should international lawyers charge exorbitant fees even when that prevents poor individuals and nations from seeking justice? Thirdly, are international lawyers willing to assume personal responsibility for particular interpretations of international law with troubling outcomes for subaltern groups and peoples in the world? Can the ethical self use the legal form as a shield to deflect criticisms? Finally, does a shadow fall between the ideals that often inform the writings of international lawyers and their practices in their professional lives? An example of the latter is the jostling for power and positions in universities and professional bodies. The shadow between aspiration and practice is not unique to any profession or vocation. In many ways it represents mundane reality. The point is that modern professions are subject to an inner dynamic that occludes reaction on the ethical self. What we can learn from Gandhi is that in a very profound sense (to invert Ludwig Wittgenstein) deeds are words.¹⁴⁹

It is imperative that those making legal decisions about the very nature of particular regimes become aware of the lived reality of the global South and the dynamics that spur on international law and its institutions. The *UN Secretary-General's Panel of Experts on Accountability in Sri Lanka* (March 2011) recommendation for the establishment of an "independent international mechanism" is illustrative.¹⁵⁰ Were the drafters of this recommendation¹⁵¹ aware

¹⁴⁹ *Ibid* at 1170.

¹⁵⁰ UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, Report UN Secretary-General's Panel of Experts on Accountability in Sri Lanka, UNSGOR, September 2011, SG/SM/13791 HR/5072. SG/SM/13791 HR/5072; United Nations Secretary General' Panel's Report, Recommendation 1: Investigation (B): The Secretary General should immediately proceed to establish an independent international mechanism, whose mandate should include the following concurrent functions:

(i) Monitor and assess the extent to which the Government of Sri Lanka is carrying out an effective domestic accountability process, including genuine investigations of the alleged violations, and periodically advise the Secretary-General on its findings;
(ii) Conduct investigations independently into the alleged violations, having regard to genuine and effective domestic investigations; and

of the serious problems with the role of the judiciary in amending the rules or serious concerns over witnesses and the rights of the accused within the current international ad hoc tribunals? Did they pay close attention to the manner in which witness testimony is elicited before the international criminal tribunals? Put differently, why did the UN Panel of Experts recommend the creation of an international mechanism when they should have known about the problems international criminal institutions are facing? Unpacking the rationale for these questions is another project.¹⁵²

International lawyers and scholars have an ethical obligation to relay their claims to actual evidence from the ground (based on ethnographic research), rather than relying on antiquated notions about the very nature of law and our society. Such a reflection takes us back full circle to Jean Comaroff and John Comaroff's *Theory from The South* and their central intervention. Their thesis is that contemporary actors, norms and processes are reconfiguring our understandings of the core-and-periphery.¹⁵³ Thus to grasp the history of the present, both empirically and theoretically, we must study the global South.¹⁵⁴

(iii) Collect and safeguard for appropriate future use information provided to it, which is relevant to accountability for the final stages of the war, including the information gathered by the Panel and other bodies in the United Nations system.

¹⁵¹ In the example of UN Sri Lanka Panel, the drafters of the report were: Marzuki Darusman (Former Attorney General of Indonesia and Politician), Yasmin Sooka (Former judge of the Witwatersrand High Court), Steven R. Ratner (University of Michigan Law School Professor).

¹⁵² Sujith Xavier "Looking for 'Justice' in all the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?" in Amarnath Amarasingam & Daniel Bass, eds, *Post-War Sri Lanka: Problems and Prospects* (Forthcoming New York: Hurst/Oxford University Press, 2015).

¹⁵³ Comaroff & Comaroff, "Theory from the South" *supra* note 24 at 117.

¹⁵⁴ Comaroff & Comaroff, "Theory from the South" *supra* note 24 at 117; Comaroff & Comaroff, *Theory supra* note 13 at 7.

5.4

Conclusion

In preceding chapters, I took two ad hoc international criminal institutions and the International Criminal Court as case studies to demonstrate the deeply ahistorical and contradictory nature of global constitutionalism and global administrative law. Broad and general claims to administration or constitutionalism as forms of global governance are problematic, because of the inherent structural bias built into the international system and the indeterminacy of liberal legalism. In this chapter, I relied on interdisciplinary insights and TWAIL to address current gaps in international law, its institutions, and global governance theories. This chapter was organised around two specific questions: should we learn from the global South in theorising global governance; and how can we learn from the global South in theorising global governance.

In answering the first question, I relied on interdisciplinary scholarship and scholars working under the moniker of TWAIL to suggest that this question has already been answered.

In answering the question how can we learn from the global South, I advanced two arguments. First, I argued that international law and its institutions are mediated, moulded, and mitigated by multiple political and material forces. Theories of global governance thus should take these factors into account by thinking about international law and its institutions as a field of practice. Doing so

invites a realisation that there is a need for further investigation of on-the-ground realities and effects of global governance. This, in turn means that we need much more robust ethnographic research, which can better chronicle the effects of global governance on the people of the global South.

Similarly, my second argument sought to locate the role of the international law scholar and international lawyer in this exercise of contending with the lived realities of the global South. I argued that international lawyers and international law scholars as intellectuals have a duty to transform and improve the material reality of the people of the global South.

Conclusion: Theorising from Below

International law and international institutions are intimately involved in the lives of the people of the global South. Yet theories of global governance, global constitutionalism, and global administrative law in particular, ignore the significant importance of the global South in our global order. In the forgoing analysis, two central arguments were pursued: First, both global constitutionalism and global administrative law, as theories of global governance, ignore colonial history of international law and the on-going significance of this lineage. Second, as a means to transcend these limitations of global governance, I articulated a modest proposal of engagement to link global governance with the global South and its respective literature.

The first four chapters in this analysis focused on the first question and identified the problems with global constitutionalism and global administrative law. The final chapter sought to address ways by which we can build bridges between the existing literature on the global South and global governance. Fundamentally, I have argued that the manner in which we theorise global governance is wrong as it ignores the colonial past of international law and the ensuing repercussions are side-lined. This occurs because of our inability to contend with the lived realities of the global South and the proselytisation of western normativity. Second, and as a result of this omission, international lawyers and international law scholars must engage with the global South by asking how can we learn from this material space.

Richard *Delgado* and Jean *Stefancic* state: “legal storytelling movement urges black and brown writers to recount their experiences with racism and the legal system and to apply their own unique perspectives to assess law’s master narratives”.¹ Scholars use critical race theory’s method of personal stories and narratives to describe, understand, and theorise their subject position vis-à-vis its field of study.² They use this method as a means to transgress law’s formalism and capture their own particular voice as form of resistance. Situated scholarship is an offshoot of storytelling employed by critical race scholars.

In developing their method of analysis, critical race scholars have posited that to analyse and challenge power-laden beliefs, it is possible, if not necessary to “employ counter stories, parables, chronicles, and anecdotes aimed at revealing their contingency, cruelty, and self-serving nature”.³ This type of analysis is novel for international lawyers and international law scholars. In particular, there is a controversy in international legal thinking about objectivity, neutrality and subject position.⁴

In this vein, my arrival to this project has been shaped by my own personal experience with international law and international criminal law. My interest in

¹ Richard *Delgado* and Jean *Stefancic*, *Critical Race Theory: An Introduction* (New York: New York University Press, 2012) at 9.

² *Ibid* at 1-16; Patricia J. *Williams*, *The Alchemy of Race and Rights* (London: Virgo Press, 1993).

³ Milner S. *Ball*, “Stories of Origin and Constitutional Possibilities” (1989) 87 *Michigan Law Review* 2280; Regina *Austin*, “Sapphire Bound!” (1989) *Wis L Rev* 539; Richard *Delgado*, “Critical Race Theory: An Annotated Bibliography”, (1993) 79 *Virginia Law Review* 461 at 461.

⁴ For a discussion about objectivity in legal scholarship, see Sujith *Xavier*, “Book Review - Victor *Kattan’s* *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict 1891-1949* (2009)”, 11 *German LJ* 1038-1045;

international law and international criminal in particular stem from my own personal history and my situatedness in the geo-politics of the global South. Undoubtedly, my experiences as a refugee fleeing war affected Sri Lanka in the 1980s is one of the motivators for my keen interest in, and continued faith in, international law. This experience has incubated a firm belief in the potential to secure some form of accountability for the countless victims. I am related to, friends with, or had the honour of working alongside some of these victims.

In this vein, I draw inspiration from my experience of working with non-governmental organisations in Sri Lanka and Palestine, and the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia and International Criminal Tribunal for Rwanda. By working in institutions located in areas of acute conflict and with an international appeals court tasked with adjudicating human suffering have undoubtedly shaped my understanding, faith and subsequent disenchantment with international law and its institutions.

In early 1999, I was part of a Sri Lankan led initiative to document war crimes and crimes against humanity in the Northern and Eastern Provinces of the country. As part of Australian Government funded project, we embarked on tracking and monitoring human rights violations perpetrated by both parties to the conflict. The fundamental purpose of the project was to determine who did what to whom as a means to ensure some form of accountability was possible for the victims. The evidence collected over a span of 10 years remains unused, stored away in boxes in Colombo Sri Lanka, waiting to tell the stories of the

victims. Some of these materials did eventually make their way to the UN Secretary General's Panel of Experts on Sri Lanka, but that report too is collecting virtual dust in the annals of the internet.

Similarly, while working in Palestine for a Palestinian non-governmental organisation, I helped author affidavits from victims in the West Bank that were submitted to the international inquiry lead by Richard Goldstone in Gaza (2008-2009). It was by working in these spaces that I noticed an undeniable belief in international law and its institutions' potential to change the material reality of the people of the global South. The superhuman amounts of energy and time spent in engaging with international agencies as a strategy to end impunity cannot be measured. All of this to say that there was, and continues to be, a sense of hopefulness in pushing for the recognition of the rights of victims. There is a fundamental belief in the potential of law, especially international law. Patricia Williams has characterised this belief (vis-a-vis rights) as: "Rights" [international law, international criminal law etc] feels new in the mouths of black people. It is still deliciously empowering to say. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power".⁵

While in graduate school at York University, I spent six months working for Judge Agius of the ICTY and ICTR Appeals Chamber. Even though I cannot disclose the intricate details of what I saw and touched, I can speak to a sense of loss

⁵ Patricia J. Williams, *The Alchemy of Race and Rights* (London: Virgo Press, 1993) at 164.

that I felt as I left the institution after six months. Elena Baylis and Janet Halley have theorised elements of this encounter.⁶ There is a sharp distinction between my experiences of working in these two specific places - Sri Lanka and Palestine - in the global South and my experience of working as professional within the Appeals Chamber of the ICTY and ICTR. The latter experience is one of disappointment, not of hope. The drastic regulatory capture by a universalistic ethos of ending impunity without much attention to the procedures and practices of the tribunals is unfortunate. This is a missed opportunity.

These experiences have fundamentally shaped my understanding of international law and its institutions. My legal experience working for Judge Agius in the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia and International Criminal Tribunal for Rwanda⁷, my practical legal experience working with non-governmental organisations and clients in the global South (Sri Lanka and Palestine) and my subject position (as a queer Tamil refugee) have shaped the conceptualisation of this research project. Ultimately I have attempted to weave in my personal encounter with harnessing the potential power of international law while working in the global South with the disappointment of perpetuating universalism through international criminal institutions through the questions I have answered in this project. In particular, by

⁶ Elena A. Baylis, “*Tribunal-Hopping with the Post-Conflict Justice Junkies*” (2008) 10 *Or Rev Int’l L* 361; Janet Halley, “Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law” (2008-2009) 30 *Mich J Intl L* 1.

⁷ I am bound by a confidentiality agreement and I have not included any materials directly drawn from my time at the Appeals Chamber of ICTY/ICTR.

focusing on the theories of global governance, I identified some of the inherent problems with the manner in which our international criminal organisations were formulated. Moreover, I was hopeful that by centring my critique of the theories of global governance, we might be able to learn from the global South in the future as we continue to regulate internationally.

In this context, this analysis has sought to achieve two objectives. First, it sought to challenge the false universalisms in global governance theories. My analysis in the first chapter identified a specific trend in international law and its institutions theorised by Antony Anghie as the dynamic of difference. This dynamic characterises how the western particular has become universalised through international law and its institutions. Moreover, this trend continues unabated. More specifically, the demarcation of one culture as barbaric and another as civilised fosters international law's authority to regulate various diverse forms of relationships. By framing one culture (the different people of the global South) as inferior and the western as superior creates the mechanism by which we can transcend this difference and apply universal western conceptions of law. I chronicled this feature of international law and international institutions and focused on the newly minted international criminal institutions ushered in to end impunity in the Cold War's wake.

By providing the empirical evidence from these institutions, this analysis challenged current theories of constitutionalism, constitutionalisation and administration in global governance. These pages presented the argument that

these theories mischaracterise how international institutions function because they ignore international law's colonial past and this past's enduring legacy of exclusion as witnessed in how these institutions function today. Then I turned to my second question that focused on transcending the limitations of global governance theories. In this respect, I asked how can we learn from the global South?

In coming to these conclusions there are two themes that are poignant. International law's past has a way of catching up to its present and its future. I have chronicled this via the international criminal justice regimes. Second, international law is a construct and a tool, the experts and professionals driving this process of instrumentalisation matter. With the reference to the first theme, as we have seen from the manner in which these international institutions operate and how they are unable to grapple with distinct local witnesses. Their *modus operandi* is premised on western values and culture, which are subsequently unable to understand the local witnesses. Second, the people populating these institutions also matter. International criminal institutions are operationalised by a specific class of experts that seem to ignore the real problems of translation, rights of the accused and other similar issues. Connectedly, the same experts then theorise global governance using models inspired by domestic law that are unable to grapple with the difficulties endemic in international law.

There is much work to be done. Much more robust ethnographies focusing on the various global governance institutions and their relationship to the global South are urgently needed. For example, within the field of international criminal law, there is a need to trace how local officials in countries like Sri Lanka handle transitional justice questions. How judges and advocates before the local courts conceptualise and reason transitional justice in both public and private law matters. By thinking about the local responses to transitional justice, a much more robust international understanding can be developed.

What would global governance from the global South entail? What does constitutionalism of the South look like? What are its possible features? Why is this a viable project? Should scholars and practitioners engage in this type of theorising?

These questions highlight the need for a theoretical foundation and an increasingly nuanced understanding of how international law and its institutions are functioning. By building bridges between theory and practice, between the global South and global governance, we ensure that international law, international institutions and global governance can generate some form of emancipation for the people of the global South.

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