Disciplinary Matchmaking

Critics of International Criminal Law Meet Critics of Liberal Peacebuilding

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Abstract

International Criminal Law is experiencing what has been termed a 'critical turn'. With several states declaring their intentions to withdraw from the International Criminal Court's constituting treaty in 2016, it seems that critique has never been more timely or necessary. The body of work roughly grouped under an approach referred to as Critical Approaches to International Criminal Law (CAICL) has contributed to the debate by foregrounding a structural critique instead of an effectiveness critique (which asks how ICL can be improved). We propose that the structural critique may be further developed through an engagement with liberal peacekeeping critique. This body of work, which is critical of liberal peacebuilding practices, has many overlapping points of departure with ongoing CAICL work, including its focus on questions of political economy, its insistence on a historical sensitivity and its skepticism of a politics of interventionism. The two fields are also criticized in similar terms, including their tendency towards over-generalization and distance from practice-relevant issues. We argue that these disciplines can learn from one another's strengths and weaknesses, thereby enriching discourses and practices of critique.

Key words
Critical approaches to international criminal law, liberal peacebuilding, critique, hegemony, governmentality.

1. Introduction

On 18 March 2018, President Rodrigo Duterte of the Philippines announced his intentions to withdraw from the Rome Statute, 'effective immediately'.[1] The announcement came just over a month after the International Criminal Court's (ICC) Chief Prosecutor Fatou Bensouda issued a statement that her Office was opening a preliminary examination of the situation in

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[1] H. Ellis-Petersen, 'Rodrigo Duterte to Pull Philippines out of International Criminal Court', *The Guardian*, 14 March 2018.

relation to the drug war in the Philippines.[2] It was the second state to respond in this way. Burundi announced its withdrawal in October 2016, six months after a preliminary investigation into possible crimes against humanity was launched by the Prosecutor.[3] In both states, the discourse surrounding withdrawal was permeated by accusations that the ICC served as an agent of Western interests. Whether this was political opportunism or a sustained attempt at resisting neo-colonialism, it is not only despots in the Global South who are raising concerns about international criminal justice. Critiques from the Global South are furthermore complemented by a disillusionment among supporters of international criminal law in the Global North.

Certainly, some of the discontent springs from the inherent problems generally attached to all criminal justice domestically or internationally. From a victim point of view, this might be summarized as – 'we ask for justice, you give us law'.[4] More specifically to international criminal law (ICL), the political constraints, selectivity, costliness and inordinate lengths that inhere in international criminal trials, mean that claims regarding its 'post-romantic' phase are no longer unusual. [5] Despite a continuous reference to the youth of the discipline, after more than a decade of reflection on the lessons of the ad hoc tribunals and fifteen years of an active ICC, some of the voices of discontent about ICL as a project

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[2] Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018, available online at https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat (visited at 19 June 2018).

[3] Human Rights Watch, 'Burundi: ICC Withdrawal Major Loss to Victims: Latest Move Shows Government's Disregard for Victims' (2016) Human Rights Watch, available online at https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims (visited at 19 June 2018)

[4] K.M. Clarke, 'We Ask for Justice, You Give us Law': The Rule of Law, Economic Markets and the Reconfiguration of Victimhood', in C. De Vos, S. Kendall, and C.Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015), 272.

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

have emerged in a sustained challenge to ICL's rationale. What has emerged are a number of scholarly projects that challenge the assumptions on which ICL's institutions are premised and that interrogate in a deeper way how power circulates within the field of ICL. Indeed, some now argue that 'the critical note has come to dominate the discourse.'[6] A sustained, if not necessarily itself coherent, attempt at finding a common critical note, is the body of critique loosely bundled under Critical Approaches to International Criminal Law (CAICL). Although an informal and multifarious network, CAICL provides a platform for a distinct way of thinking about ICL as a field of contestation over meaning, methods and solutions, a means by which concerns about its regulative and symbolic functions is formulated.[7] It both builds on and supplements concurrent feminist[8] and TWAIL[9] critiques that interrogate ICL's embedded political, economic and gender biases.

Overall, the impact of this structural critique on policy or practice has been minor,[10] while the impact of structural critique on more mainstream scholarship is also questionable. It is productive, therefore, to think about how other disciplines have attempted to bridge gaps

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[6] D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', 28 *Leiden Journal of International Law* (2015) 323, at 324. Others disagree. Michelle Burgis-Kasthala, for example, argues that 'the dominant paradigm informing ICL scholarship is a positivist, liberal one which favours doctrinal writing or at most, discourse analysis about the normative underpinnings of the ICL project.' (M. Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology',14 *Journal of International Criminal Justice* (2016) 921, at 927).

[7] C. Schwöbel, 'Introduction' in C Schwöbel (ed), *Critical Approaches to International Criminal Law* (London: Routledge, 2015), 1.

[8] See for example L. Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford: Oxford University Press, 2015) and F. Ní Aoláin, 'Gendered Harms and their Interface with International Criminal Law: Norms, Challenges and Domestication', 16 *International Feminist Journal of Politics* (2014) 622.

[9] See symposium of Journal of International Criminal Justice on TWAIL and the ICC edited by Asad Kiyani, John Reynolds and Sujith Xavier in 14 *Journal of International Criminal Justice* (2016) 915-1009.

[10] It is notable that there are emerging efforts at integrating structural critique in ICL into advocacy work. See, for example, the Global Legal Action Network, which works with innovative legal strategies. Several members of the Legal Action Committee are also engaged in scholarly work around the CAICL project (available online at http://www.glanlaw.org/about-us, date visited 19 June 2018).

between mainstream and critical scholarship and between theory and praxis. One critical field that we suggest offers valuable insights is the critique of liberal peacebuilding, which shares many of the same concerns about peacebuilding as a liberal project as CAICL has about ICL. Notably, the liberal peacebuilding critique has moved beyond a deconstruction phase to what can be described as an emancipatory one: developing a counter-project to liberal peacebuilding, enduring its own difficulties in deciding whether to engage 'the mainstream' and in gaining the attention of that 'mainstream', and facing its own counter-critique. These are challenges that any critical orientation faces, and yet they are of particular interest to the CAICL project in the substantive parallels of critique, namely a sensitivity to questions of political economy, an insistence on historical sensitivity and skepticism of a politics of interventionism.

In the following, we examine the development of critical projects in ICL and peacebuilding. We then discuss the similarities in the critiques between the two disciplines. We follow this with an examination of emergent counter-critiques and their possible crises of relevance. Finally, we draw some tentative conclusions.

2. The Justice Project, the Peace Project, and Their Critics

ICL is a project which has multiple goals, emphasizing the need for justice to be done in the courtroom in order for a society which has experienced mass atrocity to transition to a peaceful society. The growth of ICL, as a body of rules and practices, has spawned *ad hoc* tribunals, hybridized courts and the permanent ICC, as well as a surrounding industry of judges, lawyers and administrators, NGOs and activists, scholars, think-tanks, specialised journals and university programmes. The core principles that unite this disparate coterie of people and institutions are a fidelity to the principles of both individual criminal

responsibility and due process, a desire to bring to justice the 'big fish' over the 'small fry', and the elevation of the needs of 'humanity' over traditional principles of immunity. ICL is grounded in both deontological and consequentialist claims. Deontologically, ICL assumes that rational individuals enjoy volition, act in accordance with what their rationality dictates and fundamentally enjoy autonomy over their actions, and should be punished whenever and wherever this leads them to commit (mass) atrocity. As such, ICL is a classically liberal project that attempts 'to fix individual responsibility for history's violent march.'[11] This is accompanied by consequentialist claims about deterrence of violence,[12] the importance of the rule of law,[13] and alleviation of suffering[14].

Prior to the recent critical turn, scholarship in ICL was characterised by an 'overly protective' literature given the reluctance to criticise a nascent ICC with powerful detractors.[15] And so the historical evolutionary tale was one which emphasized progress: From recognition of individual criminal responsibility for gross human rights abuses to a permanent international court underpinned by a multilateral treaty ratified by the majority of the world's states. It incorporated a whiggish teleology of law against politics, reason against passion, right against might. ICL therefore employs a highly evocative vocabulary redolent of

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[11] A. Marston Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75, at 75.

[12] T. Meron, 'The Case for War Crimes Trials in Yugoslavia' in Meron (ed), *War Crimes Law Comes of Age* (Oxford: OUP 1998), 187, 196. See also the jurisprudence on deterrence, for example, in *Prosecutor v Rutaganda* ICTR-96-3-T, para 456 (6 December 1999).

[13] Fatou Bensouda comments: 'The mission to entrench the rule of law and attain normative global justice is a continuous journey that has seen the emergence and increasing acceptance of international criminal law as pivotal and indispensable in the fight against impunity' in F. Bensouda, 'A Tribute to Adam Dieng' in C. R. Majinge (ed), *Rule of Law Through Human and International Criminal Justice. Essays in Honour of Adam Dieng* (CUP 2015) 48.

[14] J. J. Savelsberg, 'International Criminal Law as One Response to World Suffering: General Observations and the Case of Darfur' in R. E. Anderson, *Alleviating World Suffering: The Challenge of Negative Quality of Life* (Springer 2017) 361-373.

[15] Robinson, *supra* note 6, at 324.

heroism, if not messianism - it combats 'radical evil,' prosecutes 'the worst of the worst,' and sets itself in existential opposition to persecution, mass murder, rape and torture. The *ad hoc* tribunals and Rome Statute were seen as a welcome institutionalised affirmation of absolute moral sentiments that went unrealised for so long.[16] The expectation was that ICL could and would 'exert broad influence on both the development of international humanitarian law and its humanisation.'[17]

A. Critique of ICL

As Frédéric Mégret acknowledges, everyone assessing ICL is in some way critical of it; few, if any, of its defenders engage in full-blooded apologias for it.[18] Admissions that the 'honeymoon' is over are commonplace.[19] However, before the aforementioned critical literatures emerged, and before the voices from the Global South were to be heard in the silos and echo-chambers of The Hague, Geneva and New York, the most common and prominent of critiques were those from a positivist tradition which focused on the effectiveness of existing structures and how they could be strengthened. Far from amounting to a deep engagement with the politics of the field, much of the criticism of ICL was pragmatic and policy-oriented advice aiming to make its institutions better at dealing with the complexities that face it, 'tak[ing] the "big questions as answered" and work[ing] from within

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[16] A. Cassese, 'Reflections on International Criminal Justice', 61 *Modern Law Review* (1998) 1.

[17] T. Meron, 'The Humanization of Humanitarian Law', 94 *American Journal of International Law* (2000) 239, at 243

[18] F. Mégret, 'International Criminal Justice: A Critical Research Agenda' in Schwöbel (ed), *supra* note 7, at 17-18.

[19] D. Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice', 11 *Journal of International Criminal Justice* (2013) 505, 509.

limitations that are more or less taken for granted and not necessarily seen as problematic.'[20] Much mainstream critique effectively constitutes a mild concession of the field's imperfections tempered by renewed statements of unqualified faith in its promise and progress if these blemishes can be effaced.[21] Problems with ICL continue to be posed as issues of implementation, not orientation; of communication, not perpetuation of inequalities. As such, these more mainstream criticisms are best described as an efficiency critique, rooted in liberalism and concerned that ICL has failed to live up to its values (due process, independence, modes of responsibility, complementarity) or to its promise (accountability, expressionism, a more peaceful state).[22] As Michelle Burgis-Kasthala puts it, '[i]f "setbacks" are acknowledged, a range of responses centring on a lack of enforcement and suggestions for improvement ensure that the progress narrative prevails.'[23]

The CAICL critique, by contrast, does not evaluate ICL on the basis of success or failure in these regards, but rather explores the presumptions that ICL is inherently humanising, healing, emancipatory or dignifying.[24] It asks who benefits from the existing parameters of ICL, who loses through them, and why. It is this reorientation from a technical to a structural critique which marks out CAICL as a distinctive form of criticism. Whilst positivist critiques tended to reaffirm the benefits of ICL's inherent liberalism and started from the position of the ICC's powerlessness in the world of politics, for those interested in structural problems, many of ICL's issues lie in its embeddedness within a liberal, colonialist

[20] Mégret, *supra* note 18, at 18.

[21] T. Krever, 'International Criminal Law: An Ideology Critique', 26 *Leiden Journal of International Law* (2013) 701, at 710.

[22] Schwöbel, 'Introduction', *supra* note 7.

[23] Burgis-Kasthala, *supra* note 6, at 927.

[24] S. Kendall, 'Critical Orientations: A Critique of International Criminal Court Practice' in Schwöbel (ed), *supra* note 7, at 59.

or masculinist legal paradigm whose rules enable the power of ICL institutions. For these critics, analysis of power relations between ICL, the international community and subject states is too often excluded within an ICL scholarship convinced of the immunity of international courts and tribunals from politics and overwhelmingly oriented towards positivist assessment of judgments and treaty provisions.[25] Those (knowingly or unknowingly) connected to the CAICL project, in particular, aim to acknowledge the politics of ICL, not necessarily rejecting a political role for the courts but emphasising the need to understand these political dimensions and to question the type of politics enacted in individual cases.[26] Without such acknowledgment, and bearing in mind its simplified moral messaging and ostensible aversion to political contention, ICL became a comforting language with which to address crises and articulate human projects.[27] The CAICL literature has developed a wide-ranging critique of the role of ICL in both the international global liberal architecture and the domestic states in which it intervenes. However, having come this far, the obvious question is what happens next? As Susan Marks argues, enquiry in ideology critique 'is motivated not only by curiosity alone, but also by a sense of injustice, a wish to break down barriers to the enjoyment of social goods.'[28]

For some, the critique must concern itself not only with deconstruction but with empowerment, openly serving a better politics, erring on the side of engagement that is empowering and sensitive, and not impositional or chauvinistic. To the extent that it

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[25] *Ibid*., 56-57.

[26] S. Nouwen and W.G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *European Journal of International Law* (2011) 941.

[27] C. Schwöbel, 'The Comfort of International Criminal Law' (2013) *Law & Critique* 169, at 170.

[28] S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of ideology* (Oxford: Oxford University Press, 2000) 121.

embraces this mission, critique becomes an unabashedly political project, concerned with more than mere rejectionism, testing the assumptions of ICL to redirect its attention to new possibilities.[29] To the extent that one succeeds in engaging positively, can concern and commitment realistically be transmuted into emancipatory projects in the context of the institutional limitations of the international criminal courts and tribunals and international criminal justice at large? If critical scholars are to constructively engage with questions of criminal justice, must critical distance necessarily give way to the compromises and complicities of involvement? In answering these questions, we suggest that there are lessons to be learned from the liberal peacebuilding critique which followed a similar trajectory from disparate critical appraisals of post-conflict peace building activities to a reasonably coherent (though far from uniform) body of study to pondering the question of policy relevance and/or complicity.

B. Critique of Liberal Peacebuilding

In post-conflict states ravaged by war, broken institutions and political instability, peacebuilding is usually labelled 'liberal' because (a) it is generally conducted by Western liberal states, (b) whose interventions are underpinned by liberal motivations, most notably the response to actual or foreseen mass breaches of human rights, and (c) they pursue liberal goals such as democracy, rule of law and market economics.[30] The core tenet of this paradigm is the assumption that the best grounding for peace within conflicted states is a liberal democratic polity and a market-oriented economy. Central sites of peacebuilding practice and discussion have been post-conflict Kosovo, Iraq, Afghanistan, the Democratic

[29] B. Sander, 'International Criminal Justice as Progress: From Faith to Critique' in M. Bergsmo *et al* (eds), *Historical Origins of International Criminal Law: Volume 4* (Oslo: TOAEP 2015) 749, at 824.

[30] D. Zaum, 'Beyond the Liberal Peace', 18 *Global Governance* (2012) 121, at 121-122.

Republic of Congo, Lebanon, and Haiti among others. Key institutions in the conceptualization and implementation of liberal peacebuilding techniques have been the United Nations (and within it the UN Peacebuilding Commission), the International Monetary Fund, and the World Bank. The liberal peacebuilding model has primarily been criticized for its underwhelming empirical record. Civil war recurrence rates of around 67% of post-conflict countries during the 1990s and nearly 90% in the first decade of the 2000s sparked the initial attention of critics to the failure of the international community to end cycles of war and repression.[31] Using various methodologies, scholars estimate that anything from 25% to 50% of intrastate peace settlements break down in the following five to ten years.[32] Liberal peacebuilding has also been seen to fail on its own normative terms. Past peacebuilding missions have featured unwanted legacies of increased ethnic violence, public protest, grossly unequal economies, neopatrimonialism, electoral irregularities and gender disparities. The governments which peacebuilding missions have promoted or assisted consistently confront challenges of legitimacy, capacity and economic underdevelopment. Poverty is rarely reduced even after significant international intervention. Many countries subject to peacebuilding missions remain clustered at the bottom of the United Nations Development Programme's Human Development Report. As Belloni argues, '[i]t has become commonplace to state that liberal peacebuilding in war-torn states has, by and large, failed.'[33]

One of the reasons why the liberal peacebuilding critique is more established is that it has been around longer as a body of critique. While the main impetus for both peacebuilding

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[31] C. Call, *Why Peace Fails: The Causes and Prevention of Civil War Recurrence* (Washington DC: Georgetown University Press, 2012)

[32] Eg. A. Suhrke and I. Samset, 'What's in a Figure? Estimating Recurrence of Civil War', *14 International Peacekeeping* (2007) 195,citing around 23% and P. Martin, 'Coming Together: Power-Sharing and the Durability of Negotiated Settlements', 15 *Civil Wars* (2013) 332, at 334, citing a half.

[33] R. Belloni, 'Hybrid Peace Governance: Its Emergence and Significance', 18 *Global Governance* (2012) 21, at 21.

and ICL dates back to the post-Cold War era of liberal interventionism beginning in the early 1990s, the critique developed at different paces. In part, this is most likely due to the close academic-practitioner link that has characterized ICL; this has arguably tempered critique. Many of the scholars concerned with international criminal law at the time (even if it was not yet a distinct discipline) were indeed instrumental in drafting the Rome Statute, some taking up key positions within the newly established tribunals. While ICL therefore enjoyed a prolonged period of general scholarly support well into the new century as the ad hoc tribunals grew in strength and the ICC came to life, critique of peacebuilding practice in the likes of Cambodia, Bosnia and Kosovo was well in train by the end of the 1990s.[34] The failings of peacebuilding were arguably both more evident and perhaps more catastrophic than ICL's failures and so a much larger critical literature built up over time. While CAICL has thus far generated a small cannon and has impacted only at the margins of mainstream scholarship of ICL, so sustained and successful has the liberal peace building critique become that it is credible to argue it has become the 'new mainstream'.[35]

Both fields of critique share similar starting points. CAICL interrogates the presuppositions that enchant ICL, challenges existing institutions by searching for obscured interests or class domination and is consciously sensitive to exclusions, oppressions and suppression.[36] Similarly the liberal peacebuilding critique is 'self-consciously radical, antithetical to realist analysis and rejects some of the dominant paradigms in peace research to concentrate on relatively neglected matters like underdevelopment and social exclusion at

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[34] E.g. D. Chandler, *Bosnia: Faking Democracy after Dayton* (London: Pluto Press, 2000).

[35] S. Hameiri, 'A Reality Check for the Critique of the Liberal Peace', in S. Campbell, D. Chandler and M. Sabaratnam (eds) *A Liberal Peace? The Problems and Practices of Peacebuilding* (London: Zed Books, 2011) 191, at 192.

[36] I. Tallgren, 'Who Are "We" in International Criminal Law? On Critics and Membership' in Schwöbel (ed), *supra* note 7, 75.

the level of individuals and communities that more orthodox analyses ignore.'[37] Critics of liberal peacebuilding ask how peacebuilders produce and reproduce its authoritative claims, just as ICL critics do. Like the latter, they ask what forms of power course through the object of their enquiry, and how they are obscured within a technical language of policy documents, the principle of the Responsibility to Protect or the Rome Statute. Just as ICL critics unsettle assumptions of international criminal courts and tribunals as inherently dignifying and legitimate, peacebuilding critics unsettle assumptions of democracy, statebuilding and liberalised economies as inherently pacific. Even some of the self-identified weaknesses are similar. While Immi Tallgren admits the intrusions of the ICL critique may of necessity be 'crude'[38] and Mégret accepts the allegations of occasional 'posturing' in the critique,[39] Roger Mac Ginty concedes that at times the peacebuilding critique has gone 'far beyond the boundaries of careful and value-free academic discourse.'[40] Even the future development of both fields engendered similar doubts. Just as CAICL contributions ponder an irrelevance/ absorption dilemma (critique being confined to either irrelevance in practice or absorption in the very liberal project it critiques)[41], critics of peacebuilding wrestle with the question of whether they 'should follow the red herring and present alternative "blueprints" or remain

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[37] R. Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (London: Palgrave Macmillan, 2011), 22-23.

[38] Tallgren, 'Who Are "We"?', *supra* note 36, at 89.

[39] Mégret, *supra* note 18, at 44.

[40] Mac Ginty, *supra* note 37, at 23.

[41] Mégret, *supra* note 18, at 45.

true to its own raison d'être, by pointing out contradictions, engaging with strategic discourses, increasing context sensitivity from within.'[42]

The aptness of the liberal peace building critique as a comparator for CAICL is best illustrated by the similarity of the theoretical approaches. Just as critique of ICL is divided between the effectiveness critique *from* liberalism and a more radical critique *of* liberalism, peacebuilding criticism is divided by two main schools that could be roughly distinguished as the moderate policy-oriented ideas-based critique on one side, and the radical power-based critique on the other.[43] The radical critiques of liberalism are suspicious of Western interventionist rationales, seeing the discursive techniques that emphasise free politics and open markets as a façade behind which Western hegemony is concealed, self-interest is obfuscated and exploitative global structures are legitimated. By contrast (and echoing the positivist, effectiveness-based critics seen in ICL), the more policy-oriented, moderate critiques of peacebuilding accept the legitimacy of liberal values and of intervention, but contend that political and economic reforms need to be modulated or delayed on the basis that post-conflict and developing world states are unsuited to their prescriptive rationalities.[44] Policy-oriented critiques judge peacebuilding interventions for their failure to either live up to their own aspirations and norms or their failure to inculcate them domestically. On the ground, moderate critics are concerned with sequencing interventions and reforms to guarantee liberal outcomes in the long run. They do not question the implicit value of

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[42] S. Tadjbakhsh and O. Richmond, 'Conclusion: Typologies and Modifications Proposed by Critical Approaches' in S. Tadjbakhsh (ed), *Rethinking the Liberal Peace. External Models and Local Alternatives* (London: Routledge 2011) 221, at 233.

[43] These distinctions are drawn in T. Paffenholz, 'Unpacking the Local Turn in Peacebuilding: A Critical Assessment Towards an Agenda for Future Research',36 *Third World Quarterly* (2015) 857, at 861 and D. Chandler, *International Statebuilding: The Rise of Post-Liberal Governance* (London: Routledge, 2010) 24.

[44] See for example R. Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004).

liberalism, and so maintain an inherently conservative status quo. Power-based critics, by contrast, seek a radically different post-liberal peace, and are suspicious of the inequalities inherent in global power relations that revolve around the interests of the Global North and a Eurocentric *Weltanschaung*. The tendency of problem-solvers in both peacebuilding and ICL to 'work with what we've got' represents a missed opportunity 'to interrogate the order itself and, by accepting it as "reality", re-inforces its underlying values and structures.'[45]

3. Parallel Critiques

Given the similarities of critique and obvious political sympathies, it is curious that the CAICL literature has yet to fully engage with the liberal peacebuilding critique in a systematic way, and vice-versa. If, as section 2 goes on to argue, statebuilding represents a policy of global securitisation, democracy a form of global political homogenisation, and marketisation a core element of a globalised economy, it is possible to see ICL as the legal dimension of peacebuilding. Just as peacebuilders attribute conflict to the lack of a state, democracy and/or the market, ICL ascribes instances of mass atrocity to the absence of criminal accountability which leaves military and political power with an essentially untrammeled power to abuse their own or neighbouring populations. Like peacebuilding, ICL views itself as a core element of conflict management.[46] Indeed, the Office of the Prosecutor implicitly acknowledges a type of division of labour in its insistence that its concern with the 'interests of justice' under Article 53 Rome Statute be distinguished from the 'interests of peace' which falls within the mandate of other institutions, most notably the UN Security

[45] M. Pugh, 'The Political Economy of Peacebuilding: A Critical Theory Perspective', in A. Bellamy and P. Williams (eds), *Peace Operations and Global Order* (London: Routledge, 2005) 39, at 41.

[46] ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice* (2007), available online at https://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf (visited at 19 June 2018), at 4.

Council.[47] Like statebuilding, democratisation and economic liberalisation, ICL appears a standard solution to ethnic conflict, virulent nationalism and religious fundamentalism.[48] Although ICL might not *directly* build a state, impose forms of democratic rule or open economies further, it is nevertheless seen by its critics as a form of power which has a bias for securitization, homogenization and marketization.

In the following, we have organised what we see as the most important overlaps of critique and agenda in the two critical projects. Themselves intertwined and interdependent, the points of critique which we are highlighting regard: (a) the politics behind the technocratic language of intervention; (b) the hegemonic impulses behind the projects of peacebuilding and ICL; (c) the enabling of economic liberalism through projects of peacebuilding and ICL; and finally (d) complicity in conservative domestic politics. This ordering, apart from its inherent overlaps, also needs to be further qualified: The critical literature is in both fields far from homogenous; not only is critique different in its emphasis, it is also constantly moving in its subject-matter. Regardless of these differences, we believe that there are nevertheless strong affinities, both within the respective fields as well as across them, which are worth highlighting.

A. Revealing the Politics behind Technocratic Language

Perhaps the area with the greatest similarity between liberal peacebuilding critique and ICL critique is the challenge of naive technicism displayed in the self-presentation of those

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[47] Luis Moreno-Ocampo, *Keynote Address to Council on Foreign Relations, Washington, D.C.* (2010), available online at www.cfr.org/content/publications/.../MorenoOcampo.CFR.2.4.2010.pdf (visited at 19 June 2018), at 6.

[48] A view outlined but not shared in D. Zolo, 'Peace Through Criminal Law?', 2 *Journal of International Criminal Justice* (2004) 711, at 727.

promoting peace and justice. Instead of questioning structural inequalities, those promoting liberal peace and ICL focus on technical issues which improve the process in question. Critics argue that peacebuilders apply a standardized toolbox consisting of elections, civil service, the justice sector, army and police, to widely varying conflict ecologies. These approaches 'are inclined to see state-building as a matter of simple technology, as a set of technical skills or capacities, each of which can be acquired, refined and applied no matter what the context… They imply that each post-conflict problem has a logical state-building solution.'[49] In taking issue with peacebuilding's self-presentation as an apolitical technology, critics argue that problems of rule and control that revolve around state weakness are not the key dilemmas, but rather questions of allocations of resources.[50] Statebuilding and good governance reframe public policy 'not as an inherently political matter pertaining to conflict between competing and often irreconcilable interests, but as a matter of "expertise" and "good" management.'[51]

Indeed, to the extent that peacebuilding is content to leave these inequalities in place, this technical expertise serves as veiled ideological camouflage for the pathologies of peacebuilding.[52] Above all, technical activities like capacity-building serve to operationalise

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[49] B. Bowden, H. Charlesworth and J. Farrall, 'Introduction', in B. Bowden, H. Charlesworth and J. Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (Cambridge: Cambridge University Press 2009), at 5-6.

[50] M. Berdal and D. Zaum, 'Power After Peace', in M. Berdal and D. Zaum (eds), *Political Economy of Statebuilding: Power after Peace* (London: Routledge, 2013)1, at 11.

[51] S. Hameiri, *Regulating Statehood: State Building and the Transformation of the Global Order* (London: Palgrave Macmillan 2010) 6.

[52] O. Richmond and J. Franks, *Liberal Peace Transitions: Between Statebuilding and Peacebuilding* (Edinburgh: Edinburgh University Press, 2009) 182.

the transnationalisation of the state and legitimise external political interference on a grand scale.[53]

ICL rests on the same universalist presumptions as democratisation, state building and the free market. Law in the ICL narrative can and must be considered on the basis of universal principles of justice, regardless of political pressures emanating from sovereignty, state boundaries, amnesty or one's position as head of state. The ICC and ad hoc tribunals self-present as fundamentally legalist enterprises in the 'Shklarian' sense, animated by 'the ethical attitude that holds moral conduct to be a matter of rule, and moral relationships to consist of duties and rights determined by rules.'[54] Law enjoys an inherently superior position as neutral and objective justice, understood in contradistinction to 'the unprincipled desultoriness and unpredictable vacillation of politics'.[55] The Office of the Prosecutor consistently denies that politics has anything to do with justice - the ICC prosecutor Fatou Bensouda argues that the officials of the Court 'have nothing to do with politics' even if she recognises 'we operate in a political atmosphere.'[56] There is of course an element of public relations about this claim, but this underpins how central ICL's self-projection of speaking law to power is to the project overall.[57] Given their stated commitment to explicate the problems attached to ICL interventionism, it comes as no surprise that critics of ICL are

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[53] S. Hameiri, 'Capacity and its Fallacies: International State building as State Transformation', 38 *Millennium-Journal of International Studies* (2009) 72.

[54] J. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard: Harvard University Press, 1964) 1.

[55] M. Drumbl, 'The Future of International Criminal Law and Transitional Justice', in W. Schabas, Y. McDermott and N. Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Farnham: Ashgate, 2013), at 532.

[56] Fatou Bensouda, as quoted in Pascal Airault and Brandice Walker, *Fatou Bensouda: The Victims are African* Africa Report, December 2011, available online at http://www.theafricareport.com/index.php/news-analysis/fatou-bensouda-the-victims-are-african-50178052.html (visited at 17 August 2017).

[57] Luban, *supra* note 19, at 509.

skeptical of this presentation of ICL as merely legal technique, as opposed to power. Building on a tradition of Critical Legal Studies (CLS) scholarship, it is argued that although the Office of the Prosecutor acts as if law were neutral, the discourses of international justice operate ideologically, masking the reproduction of political relations of power and inequality behind the façade of technique and impartiality.[58] The binary of individual guilt and innocence obscures the historical reality that mass inequality and abuse can never be the responsibility of just a few individuals. Just as peacebuilding reduces issues of opportunity and social responsibility to prefabricated institutions, complex political, social, economic, and moral questions over historic culpability and distribution are reduced by ICL to ritualized legal maxims. As such, Tallgren argues, it naturalizes and excludes from the political battle 'certain phenomena which are in fact the pre-conditions for the maintaining of the existing governance.'[59]

B. Agents of Hegemony

The critical peacebuilding school moreover interrogates the relationship between post-conflict intervention and global governance. Peacebuilding is advocated by its supporters on the basis of consensual intervention to first stabilise states and then build harmonious societies after internal conflict. Peacebuilding critics see this form of governance as a tool imposing Western values about security, the state and economy to facilitate hegemonic control and exploitation of developing countries in a globalised world.[60] They believe that

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[58] Krever, *supra* note 21, at 704-705.

[59] I. Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *European Journal of International Law* (2002) 561, at 594-595.

[60] D. Roberts, *Liberal Peacebuilding and Global Governance: Beyond the Metropolis* (London: Taylor & Francis, 2011).

pressures of self-disciplining and a culture of hegemony are at work, curbing the self-determination of intervened-upon societies while disavowing the open exercise of power and abjuring any responsibility for its actions. Mark Duffield, for example, argues that statebuilding constitutes an extension of international power over both the physical and political bodies of a population to secure a Western mass consumerist society from dangerous societies beyond its borders. By saving, developing and securing the 'other,' prolonged external intervention is justified.[61] The West's peacebuilding agenda clouds its exercise of power in humanitarian rhetoric, institutionalising asymmetries of power it benefits from instead of levelling a grossly uneven global playing field.[62]

Many of these criticisms are replicated in ICL. ICL, and in particular the ICC, is both symptomatic of, and productive of, the generation of global peace and security. The Rome Statute's Preamble causally links the fight against impunity with the 'peace, security and well-being of the world.' The crimes punished are those 'most serious crimes of concern to the international community,' an idea best captured in the notion of crimes against humanity which suggests the crimes are committed symbolically, if not actually, against everyone on the planet. The means by which it does this (beyond the physical containment of arrestees) is through deterrence whereby the threat of punishment serves to rein in the actions of would-be malefactors in the situation under investigation, while the absence of punishment inevitably encourages further cycles of violence.[63] However, critics of ICL argue it manifests forms of securitised Western hegemony, legitimising and upholding the existing division of power and privilege in the global order as an agent of global justice. Since the conflicts in the former

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[61] M. Duffield, *Development, Security and Unending War: Governing the World of Peoples* (London: Polity Press, 2007).

[62] D. Chandler, *Empire in Denial: The Politics of State-building* (London: Pluto Press, 2006).

[63] L. Moreno-Ocampo, 'The International Criminal Court - Some Reflections', 12 *Yearbook of International Humanitarian Law* (2009) 3 at 5.

Yugoslavia and Rwanda, the Security Council has spoken the language of criminal accountability, establishing or helping establish the ad hoc tribunals in The Hague and Arusha, as well as hybridised tribunals in East Timor, Kosovo, Lebanon, Cambodia and Sierra Leone, to say nothing of the referrals of the Darfur Situation in 2005 and Libya in 2011.[64] The ability of the Security Council to make referrals to the ICC (Article 13(b) Rome Statute) and ask for deferral of investigations for a renewable period of 12 months (Article 16 Rome Statute) leaves it open to the criticism that 'it is a tool for the exercise of the culture of superiority and to impose cultural superiority'.[65] Though the ICC does not exercise direct control over states subject to investigations, the formal and informal threats and incentives it employs shape domestic policy, arguably replicating a modern form of *justice civilsatrice* oriented more towards global than domestic priorities.[66] Complementarity in particular increasingly resembles a disciplinary exercise that privileges conformity with the Statute over legal pluralism.[67]

The implications of ICL's role in reinforcing global law and order have alarmed many within the CAICL scholarship. The moderate form of worry is that international criminal tribunals could serve as an alibi for inaction in those areas too marginal to international interests, 'instruments of therapeutic governance, providing an acceptable compromise between despicable apathy and authorisation of military interventions that UN members are

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64 UN Security Council Resolution 1593, UN Doc. S/RES/1593 of 31 March 2005 and UN Security Council Resolution 1970, UN Doc. S/RES/1970 of 26 February 2011.

65 Statement of Mr Erwa (Sudan), Security Council, 5158th meeting, 31 March 2005, UN. Doc. S/PV.5158, at 12.

66 C. Stahn, 'Justice Civilsatrice? The ICC, Post-Colonial Theory, and Faces of 'the Local' in De Vos, S. Kendall, and C.Stahn (eds), *supra* note 4, 46 at 56-57.

67 C. De Vos, 'All Roads Lead to Rome: Implementation and Domestic Politics in Kenya and Uganda' in De Vos, S. Kendall, and C.Stahn (eds), *ibid*., 379.

unwilling or unable to carry out: if not peace, then justice.'[68] The greater worry, however, relates to the Court as an active intervener. Commission of war crimes can serve to justify Western intervention in the interests of humankind by delegitimising regimes and individuals, for example in relation to Saddam Hussein in Iraq[69] and Muammar Ghaddafi in Libya.[70] As Sander argues, powerful states 'have been able to instrumentalise the stigmatising power of international criminal courts both as a means to undermine the legitimacy of their enemies and to justify military campaigns against them in the name of supporting the cause of global justice.'[71]

A further strand in both critiques is the notion that intervention is highly selective. Peacebuilding critics assail the 'failed state' thesis employed to justify interventions on the basis of its selectivity, bearing in mind that certain states sharing many of the same characteristics as supposedly 'failed states' escaped any international involvement. Indeed, to some the failed state thesis smacks of a cynical construct employed by the international community as a flag of convenience during intervention.[72] Similarly, critics of ICL identify selectivity as one of the primary symptoms of bias and hegemony in ICL. While the ICC has 123 state parties, it does not bind major powers like the US, China, Russia and India (though their interests are seldom mutually compatible). Mahmood Mamdani argues that under the direction of the UN Security Council, the ICC has become an integral part of the international

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[68] S. Nouwen, 'Justifying Justice', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 327, at 343.

[69] E. Stover, H. Megally, and H. Mufti, '"Bremer's" Gordian Knot": Transitional Justice and the US Occupation of Iraq' (2005) 27 *Human Rights Quarterly* 830.

[70] *Report of the International Commission of Inquiry on Libya*, Human Rights Council 19th session, UN Doc. A/HRC/19/68 of 8 March 2012, paras. 139-147.

[71] Sander, *supra* note 29, at 803.

[72] E. Newman, 'Failed States and International Order: Constructing a Post-Westphalian World', 30 *Contemporary Security Policy* (2009) 421.

Responsibility to Protect regime that permits the legal normalisation of certain types of violence (most notably Western counterinsurgency efforts in the likes of Iraq, Afghanistan and Libya) while criminalizing the violence in other states.[73] The overwhelming focus of the Office of the Prosecutor on Africa in terms of 'Situations Under Investigation' (with the single exception of Georgia) and the fact that it remains the only continent where it has issued arrest warrants against suspected criminals has fostered the perception that the ICC represents a European Court for Africans.[74]

C. Facilitation and Legitimisation of Global Economic Liberalisation

Peacebuilding agencies, most notably those in the UN, collaborate with the International Monetary Fund (IMF) in joint frameworks for supporting statebuilding, engage in mutual consultations over coordination and make the IFIs (international financial institutions, including the IMF and the World Bank) and other institutional donors core partners in all peacebuilding activities.[75] Although the IFIs pay lip-service to the distinctiveness of post-conflict countries and elaborate different policy agendas for them, the end-goal remains fundamentally the same as in any underdeveloped state, namely using governance 'to make the state safe for the market' by ensuring it is amendable to economic discipline, can implement laws necessary for liberalisation and withdraw from determining development

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[73] M. Mamdani, 'Responsibility to Protect or Right to Punish?' (2010) 4 *Journal of Intervention and Statebuilding* 53. A similar argument is made in D. Zolo (MW Weir, trans), *Victor's Justice: From Nuremberg to Baghdad* (London: Verso, 2009) 30.

[74] A good treatment of the issue is found in T. Murithi, 'Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court' in G. Werle, L. Fernandez and M. Vormbaum (eds), *Africa and the International Criminal Court* (The Hague: TMC Asser Press, 2014) 179.

[75] S. Woodward, 'The IFIs and Post-Conflict Political Economy' in Berdal and Zaum (eds), supra note 50, at 141.

goals.[76] At a time when the state most needs to be active in protecting the economy through tariffs or providing for the citizenry through subsidy, 'the most conservative and limiting' of neo-liberal economic models like privatisation of state and parastatal businesses, private-sector led growth, macroeconomic stabilisation (inflation and deficit reduction) and service-cutting budgetary management is imposed.[77] In the critical peacebuilding literature, institutional governance reform and state-building are seen as a core aspect of the globalisation of capital,[78] while a liberal market is seen as inextricably bound with democratization.[79] Peacebuilding is used less to address the root causes of conflict than to impose 'disciplinary' or 'shock-therapy' neo-liberalism akin to traditional structural adjustment policies.[80] The external critique is essentially that peacebuilding is a form of economic imperialism designed to protect the interests of the economic elite at the expense of post-conflict countries whose ability to generate basic legitimacy through meeting the needs of its citizens is eroded to a degree that makes future conflict more likely.[81] As Volker Boege *et al* argue, external actors who 'unscrupulously impose state-building in a very pragmatic fashion [are] not so much concerned about ideals of good governance, but about trade and monetary liberalisation, property privatization and other interventions advantageous to

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[76] R. Abrahamsen, *Disciplining Democracy: Development Discourse and Good Governance in Africa* (London: Zed Books, 2000) 525.

[77] S. Tadjbakhsh, 'Introduction: Liberal Peace in Dispute', in Tadjbakhsh (ed), *supra* note 42, at 29.

[78] D. Roberts, 'Hybrid Polities and Indigenous Pluralities: Advanced Lessons in Statebuilding from Cambodia' (2008) 2 *Journal of Intervention and Statebuilding* 63, 94.

[79] Hameiri, *Regulating Statehood*, *supra* note 51, at 15.

[80] Mac Ginty, *supra* note 37, at 4.

[81] J. Smith, 'Economic Globalization and Strategic Peacebuilding', in D. Philpott and G. Powers (eds), *Strategies of Peace* (Oxford: Oxford University Press, 2010) 247, at 247.

external actors.'[82] Essentially, though liberal peacebuilding is primarily based around non-market activities like elections and state-building, it is critiqued for doing nothing to challenge fundamentally unfair global economic structures, instead normalising and legitimising them.

Similarly, ICL is critiqued as a means of implicitly legitimating unfair economic structures and ignoring the distributive functions of its central precepts. Indeed, insofar as it prioritises crimes that are less likely to occur in industrialised states, it is built on an inherent structural inequality between the Global North and South.[83] Just as peacebuilders monopolise the political solutions to the roots of conflict in an unduly narrow manner, critics argue that ICL has 'arrogated' to itself the term 'justice,' reducing the concept to criminal law when it could include economic and social justice.[84] The 'stranglehold' civil and political interpretations of human rights enjoys on the progressivist imaginations and social movements in the developing world has long been identified as a barrier to more socio-economically emancipatory thinking.[85] Critics of ICL have long argued that individual criminal responsibility not only fails to properly situate crimes within a broader structural context underpinning suffering,[86] but that 'the overexposure of international criminal law blinds the world' to the types of slow, structural violence to which the same direct causality

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[82] V. Boege *et al*, 'Undressing the Emperor: A Reply to Our Discussants" in V. Boege *et al* (eds), *Building Peace in the Absence of States: Challenging the Discourse on State Failure* (Berlin: Berghof, 2009) 87, at 91.

[83] C. Nielsen, 'From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law', 14 *Auckland University Law Review* (2008) 81, at 107; C. Schwöbel-Patel, 'The Core Crimes of International Criminal Law' in K. Heller *et al* (eds), *Oxford Handbook of International Criminal Law* (Oxford: Oxford University Press, forthcoming 2019).

[84] Nouwen, 'Justifying Justice', *supra* note 68, at 332.

[85] B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) 171.

[86] Nielsen, *supra* note 83, at 99.

cannot be attributed as is found in ICL.[87] Indeed, to the extent that ICL brings to justice only those within its remit who commit bodily integrity crimes, it implicitly exonerates those domestic and international actors who fall outside it who may have committed other abuses.[88]

D. Complicity with Conservative Domestic Elites

Peacebuilders practically operate under time and resource constraints, and so in turn are reliant on collaboration with (or lack of obstruction from) domestic leaders if their projects are to be brought about effectively. This gives the latter a diffuse but unambiguous veto power on rulership or state reconstruction, resulting in a dyadic relationship based on a mix of conflictual and co-operative strategies, a reality often described as 'compromised peacebuilding'.[89] Critics of peacebuilding argue that there is a natural tendency in such a system to depend on pre-existing elites, often those with a strong inclination to maintain existing political and economic inequalities, to mediate issues of security to the exclusion of the many.[90] As Darby and MacGinty put it, peacebuilding

> often reinforces power-holders and replicates exclusive patterns of social and political relations ……in many peace processes, participants have been unwilling or unable to challenge prevailing patterns of social and political organisation. Although violence ends, patterns of land ownership, patriarchy, and political participation remain

[87] S. Nouwen, '"*As You Set out for Ithaka*": Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict', 27 *Leiden Journal of International Law* (2014) 227, at 255. See also Clarke, *supra* note 4, at 276-277.

[88] R. DeFalco, 'Conceptualizing Famine as a Subject of International Criminal Justice: Towards a Modality-Based Approach' (2017) 38 *University of Pennsylvania Journal of International Law* 113.

[89] M. Barnett and C. Zürcher, 'The Peacebuilder's Contract: How External Statebuilding Reinforces Weak Statehood', in R. Paris and T. Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (London: Routledge, 2009) 23.

[90] Belloni, *supra* note 33, at 31.

unchanged. As a result, the 'peace' is essentially conservative rather than transformative.[91]

It is further argued that ostensibly liberalising features like constitutionalisation, and the creation of power-knowledge systems like media, law, education and electoral democracy in fact merely make ground for institutional stabilisation.[92] In a shell state willing to settle for such limited aims, there is a natural tendency to fall back on conservative peace-as-order models that seek to make "life made predictable and relatively safe" to regulate conflict through security and coercion.[93]

The possibility that ICL serves to bolster conservative, if not abusive, domestic regimes is also one that animates its critics. ICL shares the need for dyadic, co-operative relationships with domestic regimes to an arguably even greater degree than peacebuilders. Being essentially free-standing institutions without police powers, international courts are in terms of enforcement strikingly weak – 'giants without limbs' in former Court President Antonio Cassese's famous terms, utterly reliant on the artificial limbs of state authorities to walk and work in the states to which they turn their attention.[94] The ICC, for example, is entirely reliant on the assistance of states to arrest suspects, collect evidence, ensure access to witnesses, outreach and preserve the security of its personnel. In securing this co-operation, critics observe the ICC accommodating the governments of states whose assistance it needs,

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91 J. Darby and R. Mac Ginty, 'Introduction: What Peace? What Process?', in J. Darby and R. Mac Ginty (eds) *Contemporary Peacemaking: Conflict, Violence and Peace Processes* (New York: Palgrave Macmillan, 2003), 1, at 6.

92 Outi Korhonen, 'The "State-Building Enterprise": Legal Doctrine, Progress Narratives and Managerial Governance' in Bowden, Charlesworth and Farrall (eds), *supra* note 49, at 16.

93 M. Banks, 'Four Conceptions of Peace', in D. Sandole and I. Sandole-Staroste (eds), *Conflict Management and Problem Solving: Interpersonal to International Applications* (London: F. Pinter, 1987), 259 at 261.

94 A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2, at 13.

notwithstanding their own possible complicity in crimes.[95] It is notable that in Uganda, the Central African Republic, the Democratic Republic of the Congo, Mali and Cote d'Ivoire, ICC proceedings have been directed solely against the 'rebels'; i.e. those acting against the present government or supporting political rivals.[96] Inasmuch as it pursues prosecutions but leaves their governments essentially untouched, the ICC's discourse of ownership mimics the peace-as-order governance regimes of parallel peacebuilding efforts.[97]

4. Future Trajectories: Steering a Path Between Irrelevance and Assimilation?

For projects like CAICL, critique often presents itself as a dialectic between irrelevance and assimilation. As regards irrelevance, critics of ICL may find themselves in the position of 'dangerous heretic,' casually disdained with unreflective dismissals of cynicism and moral relativism, ignored because they proffer intellectual abstractions instead of solutions to the problems identified.[98] Greater interaction with practice, by contrast, raises the diametrically opposed risk of complicity in replicating the terms and structures of the object of critque.[99] Critical engagement is often to ICL's practitioners and advocates not merely something approximating sacrilege but also an active impediment to addressing its problems.[100] Others, by contrast, believe the critique is, or at least should be, as concerned with empowerment as it is with deconstruction - the field cannot adopt a purely rejectionist attitude to ICL but should

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[95] P. Menon, 'Self-Referring to the International Criminal Court: A Continuation of War by Other Means', 109 *AJIL Unbound* (2016) 260.

[96] P. McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism' 13 *Chinese Journal of International Law* (2014) 259, at 281.

[97] V. Nesiah, 'Local Ownership of Global Governance' 14 *Journal of International Criminal Justice* (2016) 985.

[98] Tallgren, 'Who Are "We"?', *supra* note 36, at 76 and 81.

[99] M. Farrell, 'Critique, Complicity and I' in Schwöbel (ed), *supra* note 7, at 96.

[100] Nouwen, 'Justifying Justice', *supra* note 68.

attempt to capture it for emancipatory outcomes or divert attention to new frontiers.[101]

This would fit with Philip Alston's recent counsel to creatively explore the art of the possible within real-world constraints and compromises, on the basis that too much critical scholarship is formulaic and insufficiently focused on means and methods to confront challenges identified.[102] Based on the trajectories of the critical peacebuilding project, one might speculate on the options this seeming double bind presents for critics of ICL. Critical peacebuilding has found itself presented with a similar dilemma of whether to present alternative 'blueprints' to the predominant approaches or remain true to its traditional mission of pointing out the pitfalls and contradictions of peacebuilding to increase context sensitivity from within the field.[103] This reconsideration may have been spurred by the acknowledgment that, at least for some, the most significant failing of the critique 'has been its inability to engage in a fuller way' with the policy mainstream.[104] Although peacebuilding scholarship remains dominated by critical perspectives, an intrinsic divide between 'optimistic practitioners' and 'pessimist or at least sceptical academics and theoreticians' remains in place.[105] It became apparent that if critics were to remedy their lack of policy influence they would need to develop sharper theoretical tools to comprehend the complexities of liberal peacebuilding.[106]

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[101] Sander, *supra* note 29, at 823.

[102] P. Alston, 'The Populist Challenge to Human Rights', 9 *Journal of Human Rights Practice* (2017) 1, at 12-13.

[103] Tadjbakhsh and Richmond, *supra* note 42, at 233.

[104] O. Richmond and R. Mac Ginty, 'Where Now for the Critique of the Liberal Peace?', 50 *Cooperation and Conflict* (2015) 171, at 173.

[105] Tadjbakhsh, 'Introduction', *supra* note 77, at 1. He also speaks of practitioners on the one hand and 'abstract theoreticians' on the other (at 2).

[106] J. Heathershaw, 'Towards Better Theories of Peacebuilding: Beyond the Liberal Peace Debate', 1 *Peacebuilding* (2013) 275, at 275.

A. Irrelevance

In contradistinction to conservative peacebuilding approaches emphasizing coercion and domination, critics of liberal peacebuilding have attempted to outline *emancipatory* models of 'post-liberal' peace. Instead of focusing on top-down security and institutions, it is proposed that peacebuilders enjoy closer relationships with intervened-upon societies and base their operations on local ownership and consent, with a greater concern for social justice and local agency.[107] An ethical reading of peacebuilding is believed to require 'a willingness to recognise local ownership, human rights, culture, social and grass roots resources for self-government' and 'infers an engagement with the everyday, to provide care, to empathise, and to enable emancipation.'[108] It is argued that if local, elite and international visions of peace are connected by careful and sensitive partnership and without automatic deference to the expectations of interveners, then a social-democratic and welfare-oriented state redistributing wealth via taxation and international subvention can and will emerge organically.[109]

However, critical visions of an alternative peace often suffer from a lack of detail and concrete tactical links to post-conflict politics. Visions of 'post-liberal' peace tend to combine an emphasis on a wider and more diverse set of relationships within society with an ambitious wish list of outcomes (e.g public service delivery, job security, employment and poverty alleviation). What is often missing is an agenda of how a wider set of relationships within society will lead to the desired outcomes.[110] One such proposal, for example, is based on the idea of 'unscripted conversations' between the local recipients of peacebuilding

[107] Richmond and Franks, *supra* note 52 at 8.

[108] O. Richmond, 'A Post-Liberal Peace: Eirinism and the Everyday' (2009) 35 *Review of International Studies* 557, 565.

[109] O. Richmond, 'The Impact of Socio-Economic Inequality on Peacebuilding and Statebuilding' *16 Civil Wars* (2014) 449, at 464.

[110] E.g. E. Newman, 'A Human Security Peace-Building Agenda', 32 *Third World Quarterly* (2011) 1737, at 1751.

operations and other actors, elites and local communities around the type of peace they want.[111] The type of democracy proposed is not one that links local consensus on peace to parallel elite efforts, but is instead a 'broader attitude towards governance, political community and life in general.'[112] Questions of democracy and governance certainly need to be rethought. However, an issue which remains unaddressed is if such unscripted conversations lead to radically different conclusions *within* local communities about the type of peace they want, as might reasonably be expected in violently divided states. At which point can the 'ongoing critique' and 'the fluidity of continuous adjustment' be hardened to something more tangible? [113] Interventions by peacebuilders on the ground which deal with issues of power, security or territory in a way that foregrounds (institutional) reform are regularly dismissed by critical theorists as problem-solving meta-narratives which maintain the status quo.[114] Indeed, the temptation to focus exclusively on problematizing the ontological or epistemological claims of liberal interveners in isolation of an analysis of interventions on the lives of individuals, or their environment, has the potential to leave critical theorists isolated from policy discourse on the ground.[115] Peacebuilding critics have themselves acknowledged that a great deal of their work is as much about the field's ability to respond to the internal divisions and contradictions within peacebuilding discourses as it is

[111] Duffield, *supra* note 61, at 234.

[112] A. Mitchell and O. Richmond, 'Introduction: Towards a Post-Liberal peace: Exploring Hybridity via Everyday Forms of Resistance, Agency and Autonomy' in O. Richmond and A. Mitchell (eds), *Hybrid Forms of Peace* (Basingstoke: Palgrave Macmillan, 2011) 1, at 17, quoting M. Chou and R. Bleiker, 'The Symbiosis of Democracy and Tragedy: Lost Lessons from Ancient Greece', 37 *Millennium-Journal of International Studie*s (2009) 659, at 674.

[113] Tadjbakhsh, 'Introduction', *supra* note 77, at 7.

[114] O. Richmond, 'Resistance and the Post-Liberal Peace', *Millennium: Journal of International Studies* (2010) 665, at 671.

[115] S. Campbell, D. Chandler and M. Sabaratnam, 'Introduction: The Politics of Liberal Peace' in S. Campbell, D. Chandler and M. Sabaratnam (eds), *supra* note 35, at 3.

about how those discourses transpire outside itself in the context of post-conflict ecology.[116] Others admits that their critiques provide no functional way forward to an improved practice beyond problematizing and deconstructing liberal peacebuilding.[117]

Similarly, it is unclear whether a CAICL project has any potential remedial role for conflicted societies. This is partly due to the fact that structural critique often lies outside of the ambit of ICL. The observation that ICL is symptomatic of the politics of great powers, corporate power, and domestic elites, opens up the necessity of a deeper post-colonial and post-modern critique. Indeed, one of the key elements of the CLS critique of criminal law is that trial and judgment are inescapably tied to individual cases and not the vast web of economic, social and political structures that underpin an individual's resort to breaking the law. Even if the critique succeeded in fostering a willingness among international criminal courts to discuss the root causes of the crimes they process, it might not be met with a commensurate capacity to accurately capture it or propose responses. The critique is valuable in demonstrating ICL is *not* the remedy to the roots of conflict, but it might also make apparent that international tribunals are unlikely to generate any answers.

The critique of ICL is valuable, then, in showing how international criminal courts and tribunals could partly redress their legitimacy deficit by engaging in an anti-hegemonic prosecutorial policy, altering their 'hero-saviour' self-presentation or their instrumentalisation of victims. (Only) these problems lie within the remit of ICL to ameliorate. Nevertheless, it is no mean feat to spell out how the vehicle of ICL could effectively protect against other forms of violence. Indeed, while feminist critiques of ICL have succeeded in ensuring women's experiences of sexual violence have been addressed by international criminal tribunals, ICL

[116] A.B. Fetherston, 'Peacekeeping, Conflict Resolution and Peacebuilding: A Reconsideration of Theoretical Frameworks' (2000) 7 *International Peacekeeping* 190, at 207 and 208.

[117] Newman, *supra* note 110, at 1747.

has proven a limited and limiting forum for wider feminist-inspired change in relation to the broader economic and patriarchal context within which a trial is rooted. As Sander observes, 'the political limits of [criminal] institutions also reflect potentially insurmountable emancipatory limits on what they will ever be able to achieve in practice.[118] By recognizing these limits, greater time, imagination and energy can be directed towards the creation and development of other emancipatory projects.'[119] In so far as the critical peacebuilding field is interested in law and legal institutions, it can learn from the CAICL literature that law too is entrenched in the systemic processes which create and recreate inequality, perhaps even by its very form.

B. Assimilation

It has been argued that insofar as there are alternative visions of justice or peace within CAICL or critical peacebuilding projects, these are in fact based on liberal principles. For example, the principles emphasized by critical peace scholars like consent, local ownership, use of traditional practices, participation, empathy and 'solidarity of the governed' are unobjectionable as general principles in liberal peacebuilding theory. Ostensibly different visions of peacebuilding premised on deliberative, constitutional republicanism and post-liberalism are rooted in undeniably liberal values like self-government, political participation and limited government.[120] Ultimately, therefore, it is argued that the critical peacebuilding

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[118] D. Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law', 11 *International Criminal Law Review* (2011) 409, at 416.

[119] Sander, *supra* note 29, at 825.

[120] Roland Paris, 'Saving Liberal Peacebuilding' (2010) 36 *Review of International Studies* 337, at 354-356.

literature espouses variations within this tradition, as opposed to alternatives to it.[121] Even the most critical scholars of the liberal peace like Oliver Richmond accept the need as part of any sustainable peace for those staples of liberal policy like (a) the state and its institutions to represent the interests of political subjects,[122] (b) the 'narrow security issues' like disarmament, demobilization and security sector reform, (c) democracy, law and human rights[123] and (d) the rationalized, strategic, securitized top-down orthodoxy of politics.[124] Indeed, some contend that much of the welfarism and poverty alleviation on which critical alternatives to the liberal peace are premised implicitly represents a 'nostalgia' for the liberal social contract – critics are not rejecting intervention, but want to control it via forms of Western social contracting familiar in the post-WWII Global North before the ascendancy of neoliberal economic policy.[125]

This inability to escape the parameters of the object of critique is one that potentially faces CAICL also. Even if the critique succeeds in making ICL more sensitive to its problematic sides or more concerned with everyday lives in the intervened-upon societies than its own institutional self-preservation, ICL will inevitably reproduce some of its own institutional, jurisdictional and philosophical limitations. The extent to which such reproduction then becomes complicity is the treacherous line between reform and revolution, between tactics and strategy.[126] Sara Kendall offers the example of moving to field-driven

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[121] *Ibid*., at 350 and 360.

[122] O. Richmond, 'Resistance and the Post-Liberal Peace', *Millennium: Journal of International Studies* (2010) 665, at 670.

[123] Richmond, 'Eirinism and the Everyday', *supra* note 108, at 563 and 572.

[124] O. Richmond, 'Becoming Liberal, Unbecoming Liberalism: Liberal-Local Hybridity Via the Everyday as a Response to the Paradoxes of Liberal Peacebuilding', 3 *Journal of Intervention and Statebuilding* (2009) 324, at 333.

[125] Meera Sabaratnam, 'Avatars of Eurocentrism in the Critique of the Liberal Peace', 44 *Security Dialogue* (2013) 259, 268.

[126] Robert Knox, 'Strategy and Tactics' (2010) 21 *Finnish Yearbook of International Law* 193-229.

rather than Hague-driven investigations which would undoubtedly be a welcome improvement, but concedes it would merely support the type of efficiency critique the critical field aspires to move beyond.[127] Of course, reflexive critics of ICL must remain wary that if the CAICL critique makes an impact, the ICL project may succeed in incorporating parts of it in ways that merely deflect criticism without any thoroughgoing reconsideration of the field's biases.[128]

5. Concluding Remarks

The disappointment at the empirical records and biases evident in both peacebuilding and ICL have increased the relevance of critique that radically disrupts the previously taken-for-granted principles and institutions. Two similar bodies of sophisticated critique about the hegemonic nature of the mainstream peacebuilding and ICL projects, their naïve technicism, their potential complicity in repressive domestic politics and their marginalization of socio-economic issues have emerged out of this disappointment. We find that CAICL has much to learn from both the substance and the trajectory of the liberal peacebuilding critique. The substance of the critique can deepen and enrich critical theory in relation to ICL, highlighting how parallel interventionist projects can compound the problems. The trajectory of the critique is also instructive – at a certain point, scholars may chafe against the limitations of a critique without or with little impact on policy, and face the questions firstly of whether to engage with the dilemmas of practitioners in the object of study, and secondly what that engagement may look like. From the liberal peacebuilding critique we learn - if we did not know this already - that influence in scholarly discourse is not automatically converted into

practice on the ground. Just as critics of liberal peacebuilding appear to stumble from the dangers of assimilation to the pitfalls of irrelevance, this fate may beset critical projects in ICL also. The critical peacebuilding literature may in turn learn from the CAICL critique about the limitations of law and its institutions whilst recognizing the power it wields for tactical radical purposes.

With the more radical critique entering the mainstream, both the mainstream and the critique may reconfigure into a more meaningful, mutually-constituted discourse. This can lead to a greater reflexivity on the part of CAICL, and with that a change in the dialectical relationship between irrelevance and assimilation. Both critical peacebuilding and CAICL realize their potential most by harassing their respective disciplines when they engage in hubris, by initiating conversations about the revised future practice of their respective apparatuses, by drawing attention to the hidden distributive effects of their practices, and relatedly by revealing the moments in which they benefit the powerful at the expense of the weak. And yet, we do not pretend to provide a conclusion which provides a solution. The irrelevance/assimilation dilemma cannot be resolved; instead the recognition of the dilemma can act as a reminder of the necessity for constant self-reflection and navigation. Nevertheless, inasmuch as critique assumes the role of asking the difficult questions, and particularly the ones concerning structures of inequality, to never be content, to eschew the comfort zone of efficiency critiques, it may point the way to a more reflective and legitimate practice.