
The (Non-)Use of African Law by the International Criminal Court

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Abstract

All defendants before the International Criminal Court (ICC) to date have been African, with their alleged crimes having been committed, at least partly, on African soil. When turning to national laws to resolve issues of interpretation in these cases, should the ICC see whether it can use laws of the African state in which the crime occurred? This article argues that it should, but observes – from a dataset of 16,192 citations containing over 200 citations to national laws – that it rarely does. Instead, it turns much more often to Western European and US laws. This phenomenon, the article suggests, troublingly reflects and perpetuates the marginalization of African and other global South laws from what constitutes international law. The article also argues that the Rome Statute requires the ICC to at least examine for appropriateness the laws of a subset of these neglected systems ('the national laws of States that would normally exercise jurisdiction over the crime') when identifying general principles of law. There are several compelling reasons to extend this examination requirement to African and other global South country laws more broadly, and even when not dealing with general principles of law, and few reasons not to.

1 Introduction

The initial enthusiasm and support of many African countries for the International Criminal Court (ICC) has been largely replaced with antagonism.¹ Grievances

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¹ Dancy *et al.*, 'What Determines Perceptions of Bias toward the International Criminal Court? Evidence from Kenya', 64 *Journal of Conflict Resolution* (2020) 1443, at 1445.

primarily centre around the ICC's overwhelming focus on African situations, its disregard for the immunity of senior government officials, the impact of prosecutions on peace efforts and on the United Nations (UN) Security Council's referrals of African non-state parties (Sudan and Libya) to the Court and the Security Council's refusal to defer prosecutions of African defendants.² The ICC's failure to involve enough local African experts, institutions and judicial mechanisms in its work are additional concerns.³ The complementarity requirement – that the Court defer to national investigations and prosecutions unless the state is unwilling or unable genuinely to carry them out – has been another target of complaint, with claims that the Court has disregarded sovereignty by not respecting national processes,⁴ that complementarity is inherently biased against underdeveloped states⁵ and that the Office of the Prosecutor (OTP) lacks patience in working with African states to build their local court capacity.⁶ One African legal scholar sees international criminal law in Africa 'in such an advanced state of decomposition only bones scattered in the valley are what remains'.⁷ Perhaps most painful and damaging is that these criticisms are often accompanied by claims that the Court has an anti-African bias based on neo-colonial or racist grounds.⁸ In 2016, the Gambia, South Africa and Burundi filed notifications of withdrawal from the Court.⁹ In 2017, the African Union called for the mass withdrawal of member

² Gissel, 'A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003', 29 *European Journal of International Law (EJIL)* (2018) 725, at 727–729.

³ P. Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (2018).

⁴ Deguzman, 'Is the ICC Targeting Africa Inappropriately? A Moral, Legal, and Sociological Assessment', in R. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (2016) 333.

⁵ Rowe, 'The ICC–African Relationship: More Complex Than a Simplistic Dichotomy', 11 *FLUX: International Relations Review* (2021) 51; Tzouvala, 'TWAAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures', 109 *AJIL Unbound* (2015) 266.

⁶ Brown, 'The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit', 31 *Temple International and Comparative Law Journal* (2017) 145; Minow, 'Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court', 60 *Harvard International Law Journal* (2019) 1, at 8; Office of the Prosecutor of the International Criminal Court, *The Principle of Complementarity in Practice* (2003), at 3–4, available at www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf.

⁷ E. Benyera, *The Failure of the International Criminal Court in Africa: Decolonising Global Justice* (2022), at 18.

⁸ Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis', 92 *International Affairs* (2016) 1319, at 1319–1320; López, 'Black Guilt, White Guilt at the International Criminal Court', in M. Sirleaf (ed.), *Race and National Security* (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4237581 (bias is not only anti-African but anti-Black); Reynolds and Xavier, "'The Dark Corners of the World": TWAAIL and International Criminal Justice', 14 *Journal of International Criminal Justice (JICJ)* (2016) 959 (geopolitical biases lead to operational selectivity). For perspectives that defend the International Criminal Court's (ICC) focus on Africa or are at least critical of the critiques, see, e.g., Mude, 'Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric', 7 *Open Journal of Political Science* (2017) 178; Ibiyemi, 'Interrogating the Supposed Bias of International Justice Mechanisms over International Criminals in Africa', 1 *Association of Philosophy Professionals of Nigeria Philosophical Quarterly (APPON)* (2022) 78. For perspectives from both sides, see G. Werle, L. Fernandez and M. Vormbaum (eds), *Africa and the International Court* (2014).

⁹ The Gambia and South Africa later rescinded their notifications.

states.¹⁰ Though these efforts have not led to as many withdrawals as some predicted, the Court's relationship with many African nations remains strained.

This article suggests that a more subtle 'anti-Africa bias', or, more broadly, 'anti-global South bias', is occurring behind the scenes in judicial chambers.¹¹ When ICC judges decide legal issues, they must determine which law to apply and which legal authorities should be used to interpret that law. Sometimes this is an easy task, but often it is not. Laws like the ICC's Rome Statute, even at their most detailed, can be ambiguous, broad or vague.¹² In these more difficult instances, the judges must turn to other laws and principles for interpretive guidance. Eventually, their search may involve national laws. It is at this step that this article asks both an empirical and a normative question. First, how often does the Court consult African and other global South country laws? Drawing from a database of 16,192 ICC citations collected over nine years, this article shows that, at least in the ICC records examined, the Court rarely turns to national laws, but, when it does, it gives almost no attention to the laws of African and other global South countries and, instead, more frequently cites laws from the UK and the USA. How a court cites (or does not cite) illuminates judicial practices because it reflects how the court 'chooses to use jurisprudential materials to interact and communicate with its constituencies and institutional surrounding'.¹³ The second section of the article discusses the method of data collection and the database's limitations, the key empirical findings and select case details. Second (and this is the normative question), should the Court consult the laws of African and other global South countries? This article argues that it should. The lack of adequate consideration of these laws reflects and perpetuates Third World Approaches to International Law (TWAIL) concerns that the well from which the sources of international law are drawn continues to unjustifiably neglect Third World nations.

The third section of the article discusses the sources-of-law doctrine from a TWAIL perspective. The article focuses on Africa because the ICC has focused on Africa, but the discussion applies equally to the rest of the global South. The fourth section of the article argues that Article 21(1)(c) of the Rome Statute provides further support for the normative proposition – namely, that the ICC should examine African and other global South laws, at least with respect to a subset of these laws. To explain, Article 21(1)(c), which requires the ICC to apply general principles of law derived from national laws of legal systems of the world, contains the peculiar phrase 'including, as appropriate, the national laws of States that would normally exercise jurisdiction over

¹⁰ 'African Union Backs Mass Withdrawal from ICC', *BBC News* (1 February 2017), available at www.bbc.com/news/world-africa-38826073.

¹¹ This article uses the terms 'global South', 'Third World' (particularly when discussing Third World Approaches to International Law [TWAIL]) and 'peripheral states' interchangeably. Though they each have their own meaning and conceptual difficulties, all are used to describe 'regions outside Europe and North America, mostly (though not all) low-income and often politically or culturally marginalized'. Dados and Connell, 'The Global South', 11 *Contexts* (2012) 12; see also Grovogu, 'A Revolution Nonetheless: The Global South in International Relations', 5 *The Global South* (2011) 175.

¹² Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

¹³ Alschner and Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network', 29 *EJIL* (2018) 83, at 84.

the crime’ (the words in quotation marks will be referred to as ‘the Phrase’). The states that would normally exercise jurisdiction include the state in which the alleged crime occurred. Through an analysis of the meaning of the Phrase, this part concludes that, when turning to national laws to derive general principles of law, the ICC must examine the laws of these nations (Kenya, Sudan, Uganda and so on) to assess their appropriateness. This section also discusses some of the difficulties judges face – and the obstacles that parties before the ICC have faced – in using national laws to derive general principles of law. The fifth and final section suggests that there are compelling reasons to extend the special status of these laws (that they at least be examined for appropriateness) to the use of national laws outside of the context of general principles of law and to laws from Africa and the global South more broadly. These reasons – to increase equity and legitimacy and to improve judging – arguably outweigh any drawbacks.

2 Does the ICC Use African Law? Results from the Citations Database

A *The Citations Database*

The empirical data for this article draw from a database of 16,192 citations from 392 ICC records. All records were from African cases: 346 from the *Situation in Darfur, Sudan* (related to cases against five defendants and the *Situation* in general), 32 from a case involving Jean-Pierre Bemba Gombo of the Central African Republic (CAR), 13 from the Democratic Republic of the Congo (DRC) case involving Mathieu Ngudjolo Chui and one from the DRC case involving Germain Katanga. The data from the records related to Sudan were initially collected for a different study on citation practices in the Sudan cases; thus, they included all records available at that time (1 October 2015). From these records, data were extracted from 9,423 citations. The records related to the other situations were collected using a randomized, double stratification process in connection with an ongoing study on the interpretation and application of sources of law by the ICC. Stratified sampling involves dividing the population (here, the records) into sub-populations and is used when a researcher wants to ensure proper representation from a diverse population. Stratification was used in this study at the first level to maximize the probability of selecting records with higher numbers of citations (based on the types of records confirmed by prior research results) and, at the second level, to ensure that the numbers of records selected from the identified ICC situations were proportionate to the total numbers of records from the situations. From these records, data were extracted from 6,769 citations. Combining the data from these projects provides a broad sampling from across ICC chambers, years, defendants and issues.

The records, which include not only final judgments but also preliminary and intermediate records such as decisions, warrants, directions, orders and so on, were downloaded from ICC websites (initially, <https://www.icc-cpi.int/> and, later when it became available, <https://www.legal-tools.org/>). The data were then extracted from each record and put into a Filemaker database to allow for easy analysis. The data fit into two

broad categories: data about the record, such as its date, the name of the defendant or situation and the identity of the ICC chamber and presiding judges; and data about each citation in the record’s footnotes. The nature of this second category of data depends largely on the cited authority and might include, for instance, the name of the court cited (for example, International Court of Justice or Supreme Court of Canada), the year of the authority, the author (if an article or book) and the names of judges (if it is a court decision). Coding data also involved understanding the context in which the citation was made (for example, to establish factual evidence or to interpret law) and whether the Court was citing the authority favourably (or not).¹⁴ Figure 1, which is an image of the top half of the database interface, may help readers visualize the categories and better understand the collection of data.

For this article, the data were filtered to identify only citations involving the interpretation of law because they best reflect the Court’s use of authorities in perhaps its most important legal function. The data set has important limitations. Although 16,192 citations are a lot, they come from only 392 records – a minute portion of the total ICC records issued (as of 23 October 2022, 45,216 ICC records across all situations and cases were available to the public).¹⁵ Moreover, only a small portion of these citations – represented in Figure 2 – actually reference national laws. The findings also only reflect the citations and records studied. There could be numerous citations to African laws, for instance, in other ICC records that were not captured by this study; indeed, any sampling cannot preclude this possibility. Non-generalizability

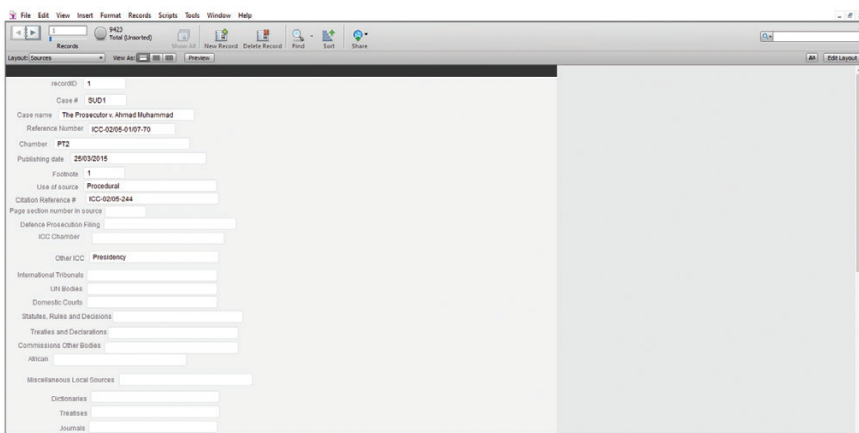


Figure 1: Top half of a sample record from the citations database

¹⁴ Failure to code the distinction between different uses of citations can be a significant limitation to citation studies. Alschner and Charlotin, *supra* note 13, at 86; Zaring, ‘The Use of Foreign Decisions by Federal Courts: An Empirical Analysis’, 3 *Journal of Empirical Legal Studies* (2006) 297; McCormick, ‘Judicial Citation, the Supreme Court of Canada, and the Lower Courts: The Case of Alberta’, 34 *Alberta Law Review* (1995) 870.

¹⁵ ICC Legal Tools Database, available at www.legal-tools.org/. For a comparable data set, see, e.g., McCormick, *supra* note 14 (14,678 Supreme Court of Canada citations).

to the entire citation population is a product of the nature of this study, which is necessarily exploratory because a population of citations has not been compiled by any authority.¹⁶ Non-probability sampling techniques can be useful for preliminary or exploratory research and when there is no population list.¹⁷ Research does not have to be based on representative samples to be valuable.¹⁸ These types of limitations are not unusual in citation studies.¹⁹ The entire sample is still randomized because all extracted citations were examined without eliminating any selectively. In other words, there were no biases in the record selection that would increase or decrease the likelihood of any particular national laws being cited or not cited. Another important caveat is that, because there were no instances in the database of national laws used in conjunction with Article 21(1)(c) of the Rome Statute, these citations do not help in understanding the statutory requirement that the ICC examine the laws of the states that would normally exercise jurisdiction over the crime.

B Citations to National and (African) Regional Legal Authorities

The difference in the number of citations in the database to African and non-African laws is stark. Of the 16,192 citations examined, 246 involving the interpretation of law were made to non-African national laws and 16 to African laws (including both

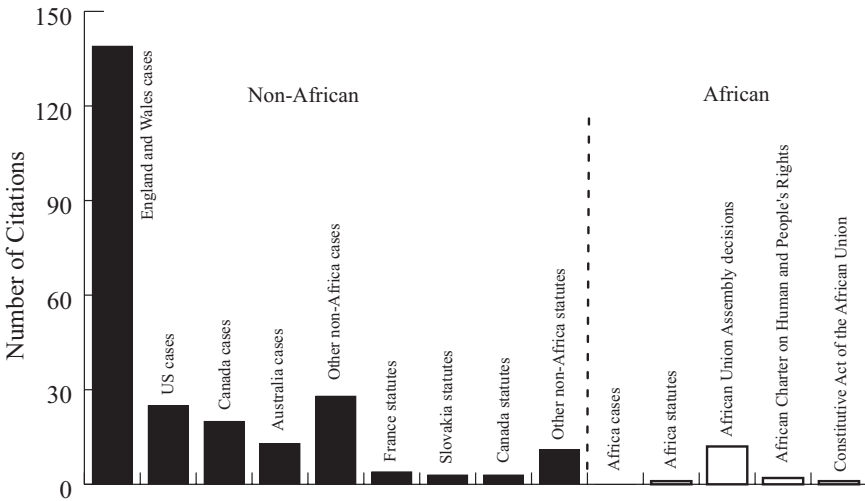


Figure 2: Citations to national (and regional African) legal authorities

¹⁶ A. Kabir, *Development Aid in Stable Democracies and Fragile States* (2019), at 16.
¹⁷ R. Bachman and R. Schutt, *Fundamentals of Research in Criminology and Criminal Justice* (4th edn, 2018), at 259.
¹⁸ L. Ellis, R. Hartley and A. Walsh, *Research Methods in Criminal Justice and Criminology: An Interdisciplinary Approach* (2010), at 147.
¹⁹ See, e.g., Zaring, *supra* note 14 (listing a number of limitations to citation studies and making no claim to have found all federal cases citing foreign decisions).

national and regional laws).²⁰ In total, 225 of the 246 citations to non-African laws were to court judgments, and 21 were to statutes. For court judgments, the leading jurisdictions were England and Wales (139 citations), the USA (25), Canada (20) and Australia (13), and, for statutes, the leading jurisdictions were France (four), Slovakia (three) and Canada (three). Ten countries' statutes and 13 countries' national judgments were cited. Of the 16 citations to African legal authorities, only one was to a national law (the Criminal Code Act of Nigeria), while 15 were to the laws and decisions of regional bodies (12 to African Union Assembly decisions,²¹ two to the African Charter on Human and People's Rights and one to the Constitutive Act of the African Union). **Figure 2** depicts the overall citations to national and (African) regional authorities used in interpreting law.

The most significant feature of **Figure 2** is the remarkable disparity between citations to non-African and African laws. The ICC, at least in the records examined, clearly turns to national laws from outside of Africa much more frequently. Perhaps this incongruity would be unsurprising if the defendants were British or American, but, in this study, all defendants were African, and all alleged crimes took place (at least partially) in Africa. Also striking is that most of the African authorities cited were regional rather than national, indicating that, at least with respect to African sources, the ICC may place more credibility on regional authorities or may consider them more useful in interpreting the Rome Statute or identifying international law principles. The only citation to African case law or African statutes was to the Criminal Code Act of Nigeria in a judgment against several defendants from the CAR (described in greater detail below).

Although this article focuses on Africa because all defendants to date have been African and their alleged crimes were committed at least partially in Africa, the data also can be viewed through the prism of the global North versus the global South.²² Of the 246 citations to non-African national laws, only two were to laws of global South countries: the Brazil Code of Criminal Procedure and the Mexico Federal Penal Code.²³ There were no citations to global South court judgments. There were no citations to Asian or Oceanian laws (other than Australia and New Zealand). **Figure 3** depicts this division, this time omitting African regional authorities.

²⁰ African regional laws were included because their use reflects an important decision by the Court to rely on regional (rather than national) authorities and African (rather than Western) authorities.

²¹ Although African Union Assembly decisions are not technically laws, they are binding upon their members. These 12 decisions were related to the refusal to cooperate with the ICC on arresting then President Omar El Bashir of Sudan.

²² Another distinction that could be made is between citations to common law countries, civil law countries and countries with systems based largely on Islamic law. For court judgments, common law country citations (for example, England, the USA, Canada, Australia) clearly outnumbered those to civil law countries (France, Germany, Italy, the Netherlands and so on), while citations to statutes were more evenly divided between the two systems. There were no citations to legal systems based on Islamic law.

²³ Which countries constitute the global South, or even what global South means, is controversial. This article uses a list developed by the Organization for Women in Science for the Developing World, available at <https://owsd.net/sites/default/files/OWSD%20138%20Countries%20-%20Global%20South.pdf>.

Again, the disparity between citations to national laws of the global North and global South is striking and raises serious concerns about the ICC’s selection of national laws. In the following subsection, some of the ICC cases from which these citations have been extracted are discussed, providing in some instances a partial explanation for why Western laws were used. The third section of the article then addresses the disparity from a TWAIL perspective.

C Discussion of Cases

A closer look at some of the cases in which these citations were identified helps to understand the findings. Notable from Figure 2, for instance, is the high number of citations to legal judgments from England and Wales. These can largely be attributed to an interpretive issue in the Sudanese case of *Banda and Jerbo* over the appropriateness of a stay of proceedings, a concept that originated from common law.²⁴ The Court turned to English case law, for example, that explained that a stay is not appropriate if unfairness can be cured during a trial and for the requirement that a party claiming to be impeded without evidence must provide specific allegations. It also turned to US case law for the proposition that the evidence must be of apparent exculpatory value and cannot be obtained otherwise.²⁵

Importantly, this article does not take a position on the appropriateness of the authorities but instead focuses on their observable use.²⁶ The article does not attempt to

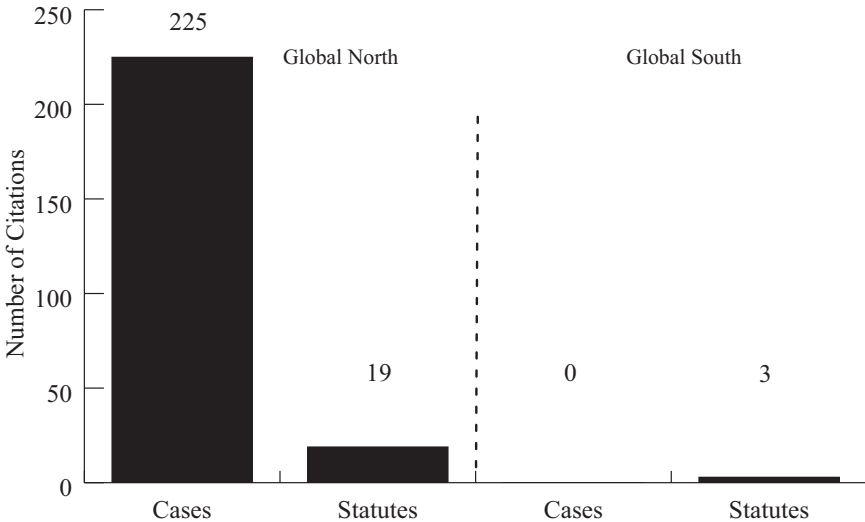


Figure 3: Citations to national legal authorities

²⁴ Decision on the Defence Request for a Temporary Stay of Proceedings, *Banda and Jerbo* (ICC-02/05-03/09-410), Trial Chamber IV, 26 October 2012.

²⁵ *Ibid.*, para. 95.

²⁶ Hall and Wright, ‘Systematic Content Analysis of Judicial Opinions’, 96 *California Law Review* (2008) 63, at 88 (noting how few opinion-coding studies aim to assess the correctness of judicial decisions).

show, as an example, that the Court erred in turning to English or US judgments. This is to say, it is possible that no African laws, especially those from the states that would normally exercise jurisdiction over the crime (among them, Sudan, which coincidentally was a British colony for over 50 years), were relevant to the interpretive matter at issue. Indeed, it is possible (though unlikely) that the Court scrutinized African laws before deciding to turn to the laws of England and Wales but did not document its efforts. The data suggest that, regardless of the appropriateness of these citations, this remarkable discrepancy should be a matter of concern for the Court, and, as is argued, the Court should at least examine African laws and document this examination in its judgments. It did not do so in any of the records examined. Is a stay of proceedings allowed under Sudanese law? Would this not be a relevant jurisdiction to examine? This article suggests that it would be.

Another judgment that used several national laws was *Bemba et al.*,²⁷ in which Trial Chamber VII heard charges of intentionally giving false testimony. To support its finding that false testimony includes not only affirmative false statements but also omissions of truth, the Chamber turned for support to the laws of France, Germany, Italy, Mexico, the Slovak Republic and Switzerland, and to bolster its ruling that jurisdiction is only authorized when the false testimony is about material information, the Chamber looked to the laws of France, Italy, the UK, the Slovak Republic, the USA and, significantly for our study, the Nigerian Criminal Code.²⁸ To its credit, the Chamber's enumeration of national laws that both adopt and do not adopt the materiality requirement signals an effort at transparency and completeness. The judgment, however, did not address whether the laws of the CAR – the country in which at least some of the offences occurred and the country of the defendants' nationality – include this requirement (the CAR was a French colony). Omissions like these cannot but prompt a reader to presume that the Court did not examine the laws of the CAR and wonder why it did not.

In a record related to the *Situation in Darfur, Sudan*, the Office of Public Counsel for the Defence (OPCD) had made several requests for documents related to applications filed by victims to participate in the proceedings.²⁹ In response, Pre-Trial Chamber I ruled that the mere fact that some people may be entitled to the procedural status of a victim is not per se prejudicial to the defence, citing the statutes of five countries – Brazil, Italy, Spain, France and Belgium – that provide procedural status to victims. As with the other cases, there was no evidence that the Court examined the laws of Sudan to determine whether they provide for the procedural status of victims. African regional authorities were also used by the Court to support legal interpretation. The Appeals Chamber in *Ngudjolo Chui*, for instance, cited the African Charter on Human Rights to support the proposition that the right to apply for asylum, the principle of

²⁷ Judgment pursuant to Article 74 of the Statute, *Bemba, Kilolo, Mangenda, Babala and Arido* (ICC-01/05-01/13-1989-Red), Trial Chamber VII, 19 October 2016.

²⁸ *Ibid.*, paras 21–22 (German, Canadian and Swiss laws had no such requirement).

²⁹ Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, *Situation in Darfur, Sudan* (ICC-02/05-110), Pre-Trial Chamber I, 13 December 2007.

non-refoulement and the right to an effective remedy are internationally recognized human rights.³⁰ Pre-Trial Chamber I cited the Constitutive Act of the Union of Africa to support its interpretive finding that the African Union is a regional agency within the meaning of Article 52 of the UN Charter.³¹

Some citations to national cases and statutes were coded in the database as ‘mentioned’, meaning that they were only tangentially related to the actual interpretation of law. For instance, in a record related to the *Situation in Darfur, Sudan*,³² Pre-Trial Chamber I obliquely cited the American Serviceman Protection Act.³³ The context of this citation is difficult to discern because the underlying OPCD filing to which the decision was responding is not publicly available. The citation, which observes that entities in the USA were prohibited from cooperating with the ICC, appears nevertheless to suggest that the OPCD would be unable to obtain information it needed about the potential victims as a result of the American Service-Members’ Protection Act. In another example of ‘mentioned’ citations, the Appeals Chamber in the DRC case of *Ngudjolo Chui* cited ongoing Netherlands cases to support its assertion that it lacked jurisdiction over witness asylum claims.³⁴

If one reads the records in isolation, the citations seem unremarkable. Courts have to identify authorities that address the legal issues before them, and these were the authorities that the ICC found. Looking at the citations in toto as depicted on the graphs, however, reveals certain proclivities. Every citation, after all, is simultaneously a decision to cite one authority and not cite another one. The empirical data point to a significant problem for the ICC because, even if the citations are appropriate, the favouring of Western laws is impossible to ignore. The next section suggests that the problem can be traced at least in part to the marginalization of global South legal systems from international law.

3 TWAIL and the Sources of Law Doctrine

TWAIL scholarship has a rich history of connecting Third World concerns, especially the impact of colonization, to the skewed nature of the sources-of-law doctrine.³⁵ This

³⁰ Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded pursuant to Article 93(7) of the Statute, *Ngudjolo* (ICC-01/04-02/12-158), Appeals Chamber, 20 January 2014; African Charter on Human and Peoples’ Rights 1981, 1520 UNTS 217.

³¹ Decision on the Confirmation of Charges, *Abu Garda* (ICC-02/05-02/09-243-Red), Pre-Trial Chamber I, 8 February 2010.

³² Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur, Sudan* (ICC-02/05-111-Corr), Pre-Trial Chamber I, 14 December 2007.

³³ American Service-Members’ Protection Act, 2 August 2002, 116 Stat. 820.

³⁴ Order on the Implementation of the Cooperation Agreement between the Court and the Democratic Republic of the Congo Concluded pursuant to Article 93(7) of the Statute, *Ngudjolo* (ICC-01/04-02/12-158), Appeals Chamber, 20 January 2014.

³⁵ Berger, ‘The “Global South” as a Relational Category: Global Hierarchies in the Production of Law and Legal Pluralism’, 42 *Third World Quarterly* (TWQ) (2020) 2001 (the idea that colonized societies did not have ‘proper’ law was a key ideological justification for domination).

doctrine, not only embodied in Article 38 of the Statute of the International Court of Justice (ICJ Statute) but also partially reflected in Article 21 of the Rome Statute and Article 31 of the Vienna Convention on the Law of Treaties (VCLT), is of particular interest to TWAIL scholars because of the way in which it renders some communities 'distant and obscure'.³⁶ International law, according to Article 38(1) of the ICJ Statute, is the law to which states consent to be bound.³⁷ This concept is problematic from a TWAIL perspective because colonization rendered colonized peoples stateless or made them mere vassals of their colonizers. Much of Africa and other colonized regions, therefore, were not considered states and, as a result, were seldom involved in the development of international law.³⁸ The other 'meta-source' in Article 38(1), which is also problematic, is the reference to 'the teachings of the most highly qualified publicists of the various nations' as 'subsidiary means for the determination of rules of law'. These teachings came to be, and, to an extent, continue to be, identified with the 'treatises of the "fathers of international law" – men such as Vitoria, Suárez, Gentili, Grotius, Vattel, and Pufendorf'.³⁹ It is no accident that these are all European men. Because it was constructed in this way, the orthodox sources-of-law doctrine leaves 'non-state forms of political collectivity invisible' and makes it exceedingly difficult to locate and recognize relevant and applicable national laws from peripheral states.⁴⁰ TWAIL scholars argue, therefore, that Eurocentricity is an inherent part of the doctrine. In a modern manifestation of this character, international criminal justice can be said likewise to rest on an 'assumption that the relevant legal sources ... are found largely in the American zonal trials after Nuremberg, but not in Islamic or Chinese law'.⁴¹ This article suggests that the lack of citations to the laws of global South states as reflected in the results of the citation study are in part a consequence of this distorted centrality of Western sources of law.

B.S. Chimni's seminal critique of one of these sources of law – customary international law (CIL) – is an instructive example of how TWAIL connects colonialism and capitalism with the sources-of-law doctrine. Chimni describes how, in the 19th century, Europe was considered the theoretical centre of the emergence of international law. The 1856 Treaty of Paris⁴² shifted the makeup of the international community from Europe to civilized nations, thus leaving out the practices of 'uncivilized' non-European states.⁴³ In this way, he traces the origin of CIL to 'the emergence of Europe as a legal community, common European values, the positivist method, and

³⁶ Statute of the International Court of Justice 1945, 33 UNTS 993; Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331; Parfitt, 'The Spectre of Sources', 25 *EJIL* (2014) 297, at 305–306.

³⁷ Parfitt, *supra* note 36, at 298.

³⁸ Anand, 'Role of the "New" Asian-African Countries in the Present International Legal Order', 56 *AJIL* (1962) 383, at 384–385.

³⁹ Parfitt, *supra* note 36, at 298.

⁴⁰ *Ibid.*, at 302.

⁴¹ Kiyani, 'Third World Approaches to International Criminal Law', 109 *AJIL Unbound* (2015) 255, at 257.

⁴² General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, 30 March 1856.

⁴³ Chimni, 'Customary International Law: A Third World Perspective', 112 *AJIL* (2018) 1, at 17.

the needs of nineteenth century imperialism'.⁴⁴ Chimni argues that the lack of available evidence of the state practice of developing countries leaves it dominated by developed countries, and even if these peripheral practices were available, the doctrines of specially affected states and persistent objectors would diminish their significance.⁴⁵ Even the attempt to distinguish between material and formal sources of CIL, devised as a way to cut CIL from its historical roots and distributional consequences, has the result of ignoring the culture and history underpinning material sources that are steeped in racist and parochial European and colonial traditions.

Taking a more empirical approach in *Is International Law International?*, Anthea Roberts explores how international lawyers around the world are influenced and exert influence, concluding that 'the meaning and application of international legal doctrines, principles, concepts, and treaty provisions are dependent on interpretative priorities and presumptions that reflect larger – but specific and often contested – views and assumptions about the nature and objectives of international law'.⁴⁶ Though, ideally, international law would be constructed equally across national and regional traditions, Roberts notes that, in fact, its construction is largely Western. For instance, the national laws cited in international courts and in international law textbooks are dominated by Western laws, particularly British and American.⁴⁷ What these and other studies demonstrate is that deeply entrenched biases are intrinsic to the source-of-law doctrine. It should come as no surprise then that the source-of-law choices made by modern international courts such as the ICC reflect those biases. Given this context, this article suggests that the lack of citations to African legal authorities reflects not only a failure of the ICC judges to give the same weight to the laws of Africa as they do to those of Europe or North America but also how the system is stacked against the global South and the rest of the periphery and that this bias is woven into the very fabric of the historical development of law. The use of English law to discuss the stay of proceedings, or the use of the laws of France, Germany, Italy, Mexico, the Slovak Republic and Switzerland to help determine that false testimony includes omitting the truth, arguably reflects that most of these countries, rather than others, are at the centre rather than the periphery and will remain there (notably, Mexico is a global South country).⁴⁸

The disregard for African national laws is complicated by the fact that almost all African countries (except Liberia and Ethiopia) were colonized and, without exception,

⁴⁴ *Ibid.*, at 20.

⁴⁵ *Ibid.*, at 4, 6.

⁴⁶ A. Roberts, *Is International Law International?* (2017), at xv. Empirical approaches are consistent with TWAIL's support of non-doctrinal methods to unveil the hidden biases and inequities of international law. Sunter, 'TWAAIL as Naturalized Epistemological Inquiry', 20 *Canadian Journal of Law & Jurisprudence* (2007) 475; Parfitt, *supra* note 36, at 306.

⁴⁷ Roberts, *supra* note 46, at 8–9, 167.

⁴⁸ The connection between the national laws selected and the judges' backgrounds, such as their ability to read Spanish (to examine Mexican law) or Slovak, is not evident (the judges in the *Bemba et al.* case on false testimony were from France, the Philippines and Germany). Whether these national laws were cited by the prosecutor was unclear from the ICC records. The backgrounds of the ICC staff that assisted the judges are also unavailable.

adopted the colonizer's civil or common law legal systems upon independence. The continued use of the metropole's laws was a result of a 'lock-in' that favoured following the institutional system that was known at that time. In Nigeria and Kenya, the courts and legal systems counter-intuitively resembled the English common law even more after independence than before.⁴⁹ This retention of colonial legal systems, however, does not mean that the ICC can simply look to the colonizer's laws as a proxy for African laws. African nations have their own laws – both pre- and post-colonial; both formal and informal – apart from those that mirror the metropole's.

The structural bias against laws from the periphery goes deeper yet. There are mundane practical considerations that also place global South countries at a disadvantage. When examining the state practice needed to create CIL, Chimni observes that Third World nations do not always systematically assemble and publish their practices due to, for instance, a lack of human or financial resources or because documentation may not be an important part of their culture.⁵⁰ Also, the views of highly regarded scholars can serve as a subsidiary means of identifying principles of international law, yet Third World scholars with fewer resources produce less, placing the law of these nations at a disadvantage.⁵¹ Cases and statutes from African and other global South countries are often not as easy to find online as those of global North countries. Sometimes, language differences will also create hurdles to accessing these laws. These challenges make it less likely that judges will look for these laws and, when they do, that they will actually find them or be able to understand them. And even when they do look and can find and understand them, the impact of colonialism may nonetheless indicate that the local laws are consistent with those of the imperial powers.

4 Statutory Support for Examining African Laws

This section of the article finds in the Rome Statute additional support for the normative argument that the ICC should examine global South laws when looking to national laws for interpretive guidance. It argues that the ICC not only should, but also, in some circumstances, must, examine the national laws of peripheral states. This argument derives from the peculiar language in Article 21(1)(c) of the Rome Statute.

A *Understanding the Phrase*

In analysing the application of Article 21(1)(c), Fabián Raimondo writes in connection with *Lubanga*:

⁴⁹ Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy', 39 *Journal of Modern African Studies* (2001) 571, at 576–577; Dezalay, 'Lawyers' Empire in the (African) Colonial Margins', 24 *International Journal of the Legal Profession* (2017) 25, at 25.

⁵⁰ Chimni, *supra* note 43.

⁵¹ Gathii, 'TWAII: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography', 3 *Trade, Law and Development* (2011) 26; see also Helmersen, 'Finding "the Most Highly Qualified Publicists": Lessons from the International Court of Justice', 30 *EJIL* (2019) 509.

It should be noted that the Pre-Trial Chamber did not take cognizance of the national laws of the Democratic Republic of the Congo. Even if the inclusion of these laws would have not modified the outcome of the research, at least it would have contributed to give *effet utile* to the words ‘including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime’ of Article 21, paragraph 1(c) of the Statute or, alternatively, it would have contributed to ascertain when it is appropriate to look at such laws in the search for general principles of law.⁵²

Discussing the *Situation in the Democratic Republic of the Congo*, he widens the scope to African laws more generally: ‘[T]he comparative research made by the Appeals Chamber did not include any national legal system from Africa. Even if the outcome of the research remained the same, including national legal systems of Africa would have rendered the research truly international and evidenced the ICC’s commitment to a pluralistic conception of international criminal law.’⁵³ Here, the article builds on Raimondo’s observations by interpreting the Phrase with the tools of the VCLT to more firmly conclude, when deriving general principles of law, that the ICC not only should examine the laws of the state that would normally exercise jurisdiction over the crime but also that it must.

Interpretation by way of Article 31 of the VCLT refers to a ‘holistic approach’ made in good faith in which ordinary meaning, context and object and purpose are to be considered together, at the same time.⁵⁴ For this article, the holistic approach was followed, but only the most relevant and helpful elements of interpretation – ordinary meaning and statutory text (part of context) – are discussed. Interpretation may also resort to *travaux préparatoires* – also included in this article – pursuant to Article 32 to confirm a meaning found by way of Article 31.

1 Ordinary Meaning

‘Ordinary meaning’ refers to the ‘regular, normal or customary’ meaning.⁵⁵ It is the conventional language meaning, not the result of an etymological investigation. International courts and tribunals often use dictionaries to help determine ordinary

⁵² F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (2008) (PhD dissertation on file at University of Amsterdam, at 164, available at <https://dare.uva.nl/document/53312>).

⁵³ *Ibid.*, at 161. For other interpretations of the Phrase, see Hochmayr, ‘Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute’, 12 *JICJ* (2014) 655, at 670–671 (a general principle must be found both in the systems of the world and in the national law of the concerned states, or the Phrase targets only general principles of law that are part of international law); Heikkilä, ‘Article 21: Applicable Law’, in M. Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (2017) 246, at 247, n. 253 (the reference to national laws of the country that would normally have jurisdiction implies that ‘Article 21(1)(c) itself stipulates that at least the national laws of States that would normally exercise jurisdiction over the crime shall be considered as appropriate’).

⁵⁴ Judgment pursuant to Article 74 of the Statute, *Katanga* (ICC-01/04-01/07-3436), Trial Chamber II, 7 March 2014, para. 45. For the use of the VCLT to interpret the Rome Statute, see, e.g., Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo* (ICC-01/04-168), Appeals Chamber, 13 July 2006, para. 39.

⁵⁵ R. Gardiner, *Treaty Interpretation* (2008), at 164.

meaning, with the ICC frequently turning to the *Oxford English Dictionary (OED)*⁵⁶ and *Black's Law Dictionary*.⁵⁷ The ordinary meaning of two words in Article 21 – 'including' and 'appropriate' – are examined here because they are the most helpful words in determining the nature of the ICC's obligation to turn to national laws of states that would normally exercise jurisdiction over the crime:

1. The Court shall apply:

...

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world *including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.* (Emphasis added)

In the *OED*, 'including' as a preposition, which is how it is used in Article 21(1)(c), means: '[u]sed to indicate that the specified person or thing is part of the whole group or category being considered: with the inclusion of'.⁵⁸ *Black's Law Dictionary* does not have an entry for 'including' but, under the entry for 'include', provides: 'The participle including typically indicates a partial list.'⁵⁹ The term, therefore, can be said to signify that the system to which the national laws of the states that would normally exercise jurisdiction belong constitutes one of the various legal systems from which general principles of law can be derived and, if appropriate, applied.

The word 'appropriate' as an adjective means 'specially fitted or suitable, proper' (it does not have an entry in *Black's Law Dictionary*).⁶⁰ This definition seems logically to provide broad discretion to ICC judges in determining when general principles of law derived from the state that would normally exercise jurisdiction are appropriate. The ICC Appeals Chamber has interpreted 'as appropriate' to vest the Court with 'discretion to derive such general principles also from the national laws of States that would normally exercise jurisdiction over the crime, but does not require the Court to do so'.⁶¹ This seems to mean, for example, that if, after examining the national laws of the legal systems of the world, including the national laws of the states that would normally exercise jurisdiction, the Court finds that the principles in the latter laws do not reflect general principles of law, or finds that they do reflect general principles of

⁵⁶ As one example, see, e.g., Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), *Katanga and Ngudjolo* (ICC-01/04-01/07-1007), Trial Chamber II, 30 March 2009, para. 58.

⁵⁷ See, e.g., Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09-19-Corr), Pre-Trial Chamber II, 31 March 2010, para. 45.

⁵⁸ *Oxford English Dictionary Online* (3rd edn, September 2016; most recently modified version published online March 2022), available at www.oed.com/. Though multiple definitions exist for each term, the definition most suitable for the context of Article 21(1)(c) has been selected.

⁵⁹ *Black's Law Dictionary* (11th edn, 2019), available at <https://1.next.westlaw.com>.

⁶⁰ *Oxford English Dictionary Online*, *supra* note 58.

⁶¹ Decision on the 'Request to Make Oral Submissions on Jurisdiction under Rule 156(3)', *Kenyatta and Ali* (ICC-01/09-02/11-421), Appeals Chamber, 1 May 2012, para. 11. Although the Chamber specifies national laws, rather than the legal system(s) to which the national laws belong, the distinction is likely not meaningful because in either case it is a general principle that is derived.

law but there are other systems that reflect contrary general principles that are more compelling, the Court may disregard the national laws of the states that would normally exercise jurisdiction. There are at least two levels in which ‘appropriate’ could come into play: first, in determining whether the principles derived from the national laws are suitable or proper to be considered general principles of law (identification) and, second, in determining whether these principles are suitable or proper to the case at hand (application). Article 21(1)(c) does not address this distinction nor do the dictionary definitions; arguably, ‘appropriate’ could apply at both levels, giving the Court discretion to determine appropriateness throughout the process of identifying, selecting and applying general principles of law. The article’s conclusion that these national laws must be examined in all cases, however, does not depend on the level at which ‘appropriate’ is determined because it applies at a preliminary stage before appropriateness is determined. In other words, the Court must in all instances begin by examining these laws to determine appropriateness; whether it finds them appropriate is at the discretion of the Court.

Putting these ordinary meanings together, an initial understanding of the Phrase can be formulated. The general principles of law that must be applied may include principles derived from the national laws of the states that would normally exercise jurisdiction over the crime if they are appropriate. The Court can only determine whether these national laws are appropriate, however (and this is the key to the argument), if the Court examines those laws. If the Court fails to even examine them, and they would be appropriate, the Court then would fail to satisfy the statutory requirement of applying general principles of law. This means, significantly, that the national laws of the states that would normally exercise jurisdiction must always be examined to see if the general principles that can be derived from them are appropriate.⁶²

2 *Text of the Treaty*

The treaty text is the Rome Statute (including its preamble, annex and amendments). ‘Text’ refers to structure (including punctuation, sentence structure and positioning of words and paragraphs) as much as to textual meaning, and it encompasses the entire treaty.⁶³ Certain interpretive assumptions can be made: a word or phrase used multiple times in the treaty will be assumed to have the same meaning each time; the different parts of the treaty do not contradict each other; every word in the text has

⁶² Another part of the Phrase that is susceptible to multiple meanings but that is not examined in detail in this article is: ‘[s]tates that would normally exercise jurisdiction over the crime’. The ‘widespread position’, based on early drafts of the Rome Statute, is that this phrase refers primarily to territorial jurisdiction and jurisdiction over nationals – that is, where the crime occurred and the State of the defendant’s nationality – and may extend to the state in which the defendant was arrested and surrendered to the ICC. Hochmayr, *supra* note 53, at 671, citing Degan, ‘On the Sources of International Criminal Law’, 4 *Chinese Journal of International Law (CJIL)* (2005) 45, at 81; Raimondo, *supra* note 52, at 158. Jurisdictions that practise universal jurisdiction would presumably be excluded. G. Werle and F. Jeßberger, *The Principles of International Criminal Law* (4th edn, 2020), at 71.

⁶³ Dörr, ‘General Rule of Interpretation’, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012) 522, at 543.

meaning; the use of terms that are similar but not exactly the same have different meanings; and there are no redundancies or surplus words.⁶⁴

Some of these assumptions are helpful in interpreting Article 21(1)(c), especially by comparing it to Article 21(1)(b). Subsection (b) also uses ‘appropriate’ and ‘including’: ‘In the second place, *where appropriate*, applicable treaties and the principles and rules of international law, *including* the established principles of the international law of armed conflict’ (emphasis added). The word ‘including’ in (b) suggests that ‘the established principles of the international law of armed conflict’ are a subset of applicable treaties and the principles and rules of international law that, although not per se appropriate or applicable, nonetheless must be considered. Although terms that are similar but not identical are presumed to have different meanings, the difference between ‘where appropriate’ in (b) and ‘as appropriate’ in (c), if any, is unclear; in the Spanish version of the Rome Statute, these terms in both (b) and (c) are ‘*cuando proceda*’ and in the French version both ‘*selon qu’il convient*’, suggesting that the English difference is probably unintentional.

Another textual comparison that supports the examination of laws from even peripheral states is with Article 38 of the ICJ Statute. Article 38(1)(c) provides for the application of ‘the general principles of law recognized by civilized nations’. The phrase in Article 21(1)(c) – ‘from national laws of legal systems of the world’ (that is, from the entire world) – is geographically broader than ‘civilized nations’. This is to say that, in Article 21(1)(c), there should be no limitation as to which legal systems can be considered, whether ‘major’ or ‘minor’, ‘civilized’ or ‘uncivilized’.⁶⁵ Hence, African laws, even if not considered part of the major families of law, should be eligible to be considered at the ICC, even though they may not be at the ICJ, so long as principles extracted from them are ‘general’. This comparison also points to a need in all instances for the ICC to examine the laws of the states that would normally exercise jurisdiction.

3 Supplementary Means

The *travaux préparatoires* of the Rome Statute contain a helpful record of the debate and considerations that led to the wording of the Phrase and support the proposed interpretation. When using *travaux*, the interpreter looks for the intention of the treaty parties at the time of negotiations and upon what terms concordance was reached.⁶⁶ The *travaux* make clear that subsection (c) – the most controversial part of the drafting of Article 21⁶⁷ – was forged from intense debate and eventual compromise. A 1994

⁶⁴ U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), at 106–110.

⁶⁵ For a critique of the term ‘civilized’ and its implications for Africa, see Nyawo, “African Approaches to International Law” and the International Law-Making Process: The Role of African States and Personalities in the Making of the Rome Statute of the International Criminal Court’, in F. Viljoen, H. Sipalla and F. Adegalu (eds), *Exploring African Approaches to International Law: Essays in Honour of Kéba Mbaye* (2022) 261.

⁶⁶ Linderfalk, *supra* note 64, at 266–267.

⁶⁷ DeGuzman, ‘Article 21: Applicable Law’, in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, 2016) 932, at 942.

draft prepared by the International Law Commission (ILC) provided that the Court was to apply (i) the statute; (ii) applicable treaties and the principles and rules of international law; and (iii), to the extent applicable, any rule of national law. At that stage, there was no hierarchy among them. ‘General principles of law’ were included in subsection (b) and comprised principles found in both international practice and national forums; the reference to the rules of national laws in subsection (c) were separate and independent. These rules of national laws were, according to the ILC, of ‘special importance’ because the crimes under the statute were also national crimes and the legality principle of *nullum crimen sine lege* would require the Court to be able to apply national laws in a manner consistent with the statute, general international law and applicable treaties. The ILC suggested that the Court develop criteria for applying rules of national laws.⁶⁸

One year later, the 1995 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court observed that some conference delegations⁶⁹ had suggested that the statute should make it clear that ‘national law was a subsidiary means for determining general principles of law common to the major legal systems or, alternatively, should clearly indicate the relevant national law, the State whose law would apply and the circumstances in which such law would apply, particularly as national law was far from uniform’.⁷⁰ This tension between preferring a clear identification of national laws that could impact the applicable law of the ICC and a broader and more generalized reference to national laws would grow over time. In 1996, the Preparatory Committee on the Establishment of an International Criminal Court described extensive discussion among the delegations on whether the Court should be able to ‘elaborate/legislate’ on general principles of criminal law that were not in the statute. One delegation proposed that if the Court could not find an appropriate provision of law, it could apply the national law of the states where the crime was committed (or, if in more than one state, where the substantial part of the crime was committed). If no appropriate law of this state could be found, then the national law of the states of the nationality of the accused would apply (if no nationality, the law of the states of permanent residence of the accused). Finally, if still no relevant law could be found, the law of the states that had custody of the accused would apply.⁷¹

At the Rome Conference in 1998, this formulation of identifying applicable national law was one of two competing proposals for Article 21(1)(c), the other one being the current formulation without the clause regarding the national laws of states that would normally exercise jurisdiction over the crime.⁷² The final version combined the

⁶⁸ United Nations, *Yearbook of the International Law Commission: Report of the Commission to the General Assembly on the work of Its Forty-sixth Session International Law Commission* (1994), vol. 2, part 2, at 51–52.

⁶⁹ The *travaux* do not identify the delegations.

⁷⁰ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Supplement no. 22, Doc. A/50/22 (1995), para. 53.

⁷¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Supplement no. 22A, Doc. A/51/22 (1996), vol. 2, at 104, 105.

⁷² DeGuzman, *supra* note 67, at 934.

two proposals, with 'including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime' providing 'examples of the national laws referred to in option 1'. Some delegations argued that the term 'as appropriate' should be replaced with 'especially', indicating a desire to prioritize the general principles derived from the laws of the states that would normally exercise jurisdiction. Other delegations – which eventually prevailed – argued that no reference to particular national laws should be made and that the Court should derive principles from a general survey of legal systems and their respective national laws.⁷³

These competing views capture two conflicting streams of interest. The states pushing for the Court to be able to apply national laws directly – including China, Japan (initially), some Arab states and Israel⁷⁴ – wished to protect their sovereignty and their ability to control the law that would be applied to their nationals.⁷⁵ This stance also aimed to uphold the legality principle of *nullum crimen sine lege*.⁷⁶ Gudrun Hochmayr argues that, when determining which laws should be considered, the sole criterion should be 'that the defendant is familiar with the respective legal system, or that he or she would be aware of this system, should he or she not be brought to trial before the ICC'.⁷⁷ Alain Pellet suggests that the Phrase gives 'priority to the legal systems with which the defendant is familiar' because the Court cannot survey all the countries of the world and because 'the specificity of criminal law and the requirements of the *nullum crimen* principle justify this directive to the Court'.⁷⁸ These arguments align with the idea that proponents of the Phrase may have wanted as much as possible to prevent unfair surprise, a crucial consideration underpinning legality,⁷⁹ to their own nationals who might end up before the Court.

In contrast, other states argued that the ICC should only be able to apply international law and that direct application of national laws would lead to inconsistencies in justice and stunt the development of a coherent body of international law.⁸⁰ Pellet suggests that this second group favoured an 'internationalist' approach⁸¹ that would presumably support the view that the ICC should explore all avenues of international law before turning to national laws, should interpret national law notions embodied in international law in light of the international rules and should not mechanically

⁷³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Working Group on Applicable Law, Doc. A/CONF.183/C.1/WGAL/L.1 (1998), at 1, n. 2; 2, n. 3, 4.

⁷⁴ Saland, 'International Criminal Law Principles', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 189.

⁷⁵ DeGuzman, *supra* note 67, at 935.

⁷⁶ Hochmayr, *supra* note 53, at 670.

⁷⁷ *Ibid.*, at 671.

⁷⁸ Pellet, 'Applicable Law', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), vol. 2, 1051, at 1075.

⁷⁹ Davidson, 'How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court', 91 *St. John's Law Review* (2017) 37, at 44.

⁸⁰ DeGuzman, *supra* note 67, at 935.

⁸¹ Pellet, *supra* note 78, at 1074–1075.

incorporate national law concepts into international law.⁸² If national laws were imported directly, the argument went, similar cases would have to be decided differently depending on their location or the nationality of the defendants.⁸³

A compromise – the current language of Article 21(1)(c) – was proposed by Norway and supported by the USA and Canada.⁸⁴ By rejecting the proposal to replace the term ‘as appropriate’ with the word ‘especially’, the Committee of the Whole that endorsed the Working Group’s paper arguably gave the Court full discretion to select between general principles of law, whether or not derived from the national laws of the states that would normally exercise jurisdiction.⁸⁵ Does this judicial discretion mean, though, that judges can ignore appropriate general principles that could be derived from the laws of the states that would normally exercise jurisdiction? This article argues that they cannot. Because it was the product of what Margaret deGuzman calls ‘an awkward compromise’,⁸⁶ the Phrase presumably serves the interests of one or both of the factions that reached that compromise. Based on the evolution of the Phrase described in the *travaux*, it should serve the interests of the delegations that wanted the direct application of national laws and therefore supports the proposition that the national laws of the states that would normally exercise jurisdiction over the crime should at least be examined; if they do not need to be examined, the eventual language of the Phrase would be no compromise at all but, instead, a total loss for these delegations.

B Challenges in Deriving General Principles of Law from Peripheral Nations’ Laws

In addition to the broad impact of the marginalization of global South laws, distinct and related challenges arise more specifically from the use of these laws to identify general principles of law via Article 21(1)(c). One of the major points of contention in determining general principles of law is which states’ laws should be examined to find these principles. A general principle of law must exist in a number of states, after all, but need not be universally accepted.⁸⁷ While the major legal systems that are usually considered – (i) the Romanist-Civilist-Germanic family; (ii) the common law family; (iii) the Marxist-Socialist family; (iv) the Islamic family; and (v) the Asian family⁸⁸ – appear to cover a great number of jurisdictions, ultimately, the number of national systems that needs to be consulted depends on the issue before the court and the similarity between systems that emerges from the research. The greater the similarity, the fewer the systems that need to be consulted.⁸⁹ Some have noted, unsurprisingly, that

⁸² Shaw, ‘The International Criminal Court: Some Procedural and Evidential Issues’, 3 *Journal of Conflict and Security Law* (1998) 65, at 67–68.

⁸³ Hochmayr, *supra* note 53, at 670.

⁸⁴ Saland, *supra* note 74, at 214–215.

⁸⁵ DeGuzman, *supra* note 67, at 942, n. 87.

⁸⁶ *Ibid.*, at 935.

⁸⁷ Bassiouni, ‘A Functional Approach to “General Principles of International Law”’, 11 *Michigan Journal of International Law* (1990) 768, at 788; DeGuzman, *supra* note 67, at 944, citing A. Heinze, *International Criminal Procedure and Disclosure* (2014), at 48–50.

⁸⁸ Pellet, *supra* note 78, at 1073.

⁸⁹ Bassiouni, *supra* note 87, at 813.

using the major systems of law grants more weight to the laws of some states.⁹⁰ In practice, general principles of law have been dominated by principles from systems based on Roman law and, to a lesser degree, on common law.⁹¹

These tendencies are partially the result of uncertainties that arise from the differences in local statutory language and the lack of consensus on a uniform method for identifying, appraising and applying general principles, making the discernment process a 'somewhat subjective endeavour ... that may vary, depending on who determines what the content of the principle is'.⁹² Judges appear to turn to legal systems with which they are most familiar, sometimes relying on intuition. This commonly means systems based on Roman law and, in particular, European legal systems.⁹³ Applying these inconsistencies to the ICC, Mireille Delmas-Marty notes: 'Article 21(1) (c) raises practical problems in access to sources and methodology when trying to deduce the general principles of law from the legal systems of the world. ICC judges may resort to prioritising their personal knowledge of their own or similar legal systems and may limit their research to means at their disposal and to laws in languages they understand.'⁹⁴ Delmas-Marty's observation should serve as an important warning. The overuse of law from common law jurisdictions, perhaps because of judges' linguistic abilities,⁹⁵ and the overlap between the resort to particular national laws and judges' familiarity with those legal systems⁹⁶ are arguably manifestations of these limitations. Interpretation and translation in international courts carry their own complexities and can sometimes impact crucial decisions.⁹⁷

The identity of court staff also plays an important role in determining the scope of knowledge and materials employed.⁹⁸ Sara Dezalay suggests that the professional pool from which ICC staff are selected is exceedingly shallow, with the Court serving as 'the core of an extremely restricted professional market, with limited, contested channels of access to the wider markets of users of international criminal justice'. ICC judges, in particular, come from an elite group of 'diplomat-lawyers' situated at the

⁹⁰ See, e.g., Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in G. Boas and W. Schabas (eds), *International Criminal Law: Developments in the Case Law of the ICTY* (2003) 277, at 289.

⁹¹ Raimondo, *supra* note 52, at 47.

⁹² Nerlich, 'The Status of ICTY and ICTR Precedent in Proceedings before the ICC', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2008) 305, at 314–315; Bassiouni, *supra* note 87, at 817.

⁹³ Raimondo, *supra* note 52, at 16, 47.

⁹⁴ Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', 1 *JICJ* (2003) 13, at 18; see also Roberts, 'Comparative International Law? The Role of National Courts in Enforcing International Law', 60 *International and Comparative Law Quarterly* (2011) 57, at 89–90.

⁹⁵ Bohlander and Findlay, 'The Use of Domestic Sources as a Basis for International Criminal Law Principles', 2 *Global Community Yearbook of International Law and Jurisprudence* (2002) 2, at 21.

⁹⁶ Raimondo, *supra* note 52, at 186–187.

⁹⁷ D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007), at 76.

⁹⁸ Christensen, 'From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and Its Professional Practices', 43 *International Journal of Law, Crime and Justice* (2015) 609, at 614.

intersection of academia, legal practice, diplomacy, politics and economics. Their ‘disconnection’ from the OTP and other broader contextual aspects of the Court’s work limits their ability to appeal to wider audiences and reinforce the Court’s credibility and authority.⁹⁹

Four ICC cases that have discussed the application of Article 21(1)(c) – identified from book chapters by Mikaela Heikkilä and Gilbert Bitti¹⁰⁰ – provide important initial evidence of the ICC’s general reticence to apply general principles of law and the challenges facing parties that wish to rely on global South laws for this purpose. In all four instances, the Court rejected arguments to identify and apply general principles of law. In the first case, *Katanga*, the defence raised the jurisprudence of the African Court on Human and People’s Rights (among others) as a source of general principles of law, but neither the judgment in this case, nor the second decision, in *Lubanga*, mentioned any national laws from Africa or, more particularly, the country that would normally exercise jurisdiction (the DRC).¹⁰¹ The Court declined in the first case to apply general principles of law because the Rome Statute was clear enough and, in the second case, because the national laws did not show enough of a practice to establish a general principle of law. In the third case, *Muthaura and Kenyatta*, the Court had an opportunity to consider a principle derived from the laws of the nation that would normally exercise jurisdiction over the crime (Kenya), and, in the fourth case, related to the *Situation in the Democratic Republic of the Congo*, an opportunity to consider a principle arguably derived from three major legal systems of the world that included an African nation – Sierra Leone.¹⁰² Yet, in the third case, the Court recognized no deference to Kenyan law and no obligation to derive general principles from it (arguably even if they were appropriate); in the fourth case, by using the phrase ‘universally adopted’, the Court appeared to require total, or at least near total, recognition of the principle – a standard that can rarely be satisfied. Persuading the Court to draw from global South laws, or, for that matter, any national laws, in identifying general principles of law appears from these instances to remain an uphill battle.

⁹⁹ Dezalay, ‘Weakness as Routine in the Operations of the Intentional Criminal Court’, 17 *International Criminal Law Review* (2017) 281.

¹⁰⁰ Heikkilä, *supra* note 53; Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009) 281, at 299–300; Raimondo, *supra* note 52 (who provides a thorough analysis of two of these cases).

¹⁰¹ Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’, *Katanga* (ICC-01/04-01/07-3778), Appeals Chamber, 9 March 2018; Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Lubanga* (ICC-01/04-01/06-1049), Trial Chamber I, 1 December 2007.

¹⁰² Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Lubanga* (ICC-01/04-01/06-1049), Trial Chamber I, 1 December 2007, para. 6; Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, *Situation in the Democratic Republic of the Congo* (ICC-01/04-168), Appeals Chamber, 24 July 2006, paras 27–31.

5 Widening the Scope of the Examination of National Laws

The empirical data indicate, at least in the sample used for this article, that African and other global South national laws are much less frequently cited by the ICC than global North national laws. Drawing from TWAIL, the article suggests that the data should not surprise; these peripheral laws are not, and never have been, central to what constitutes international law or to what is used to understand international law. The interpretation of Article 21(1)(c) indicates that at least a portion of these laws must be examined to determine their appropriateness in deriving general principles of law. Should the ICC widen the search more often by examining African and other global South laws every time it resorts to national laws, even beyond the laws of the states that would normally exercise jurisdiction and outside the scope of Article 21(1)(c)?¹⁰³ This article identifies three interrelated reasons to do so: for equity, for legitimacy and to improve the Court's jurisprudence.

First, widening the examination of national laws will make international law more whole and more representative of human diversity. An increased focus on historically vulnerable groups can uphold 'a more inclusive conception of a global rule of law'¹⁰⁴ and lead to 'a more complete picture of legal systems'.¹⁰⁵ For international justice to serve global (not just powerful) interests, local and international understandings of justice must both be considered.¹⁰⁶ The power imbalances and 'deep structures' that TWAIL has identified strike at the very heart of the international law system because most international lawyers want to believe, if anything, that international law is – or at least is on the path towards becoming – fair and unbiased. Putting the laws of the periphery on equal footing with those of the centre is thus an essential part of TWAIL's quest for 'a more tolerant world in which the states and peoples of the Third World escape structural and substantive marginalization'.¹⁰⁷ Indeed, it is arguably the ICC's disregard for African concerns that brought the relationship to its nadir.¹⁰⁸ Paying greater attention to African concerns and national institutions – including their national laws – would arguably go a long way to alleviating the current conflict. Roberts observes that shifting geopolitical patterns of power indicate that international law will change and that it would thus behove international lawyers to 'expand their

¹⁰³ Though not conventionally invoked in the act of interpreting law, the flexible and versatile legal doctrine of comity, by which courts informally and voluntarily recognize and enforce each other's decisions as a matter of courtesy and based on the need for reciprocity, could be another means by which the ICC, even when not compelled by the Rome Statute or legality, could nevertheless justify turning to national court decisions for interpretive guidance.

¹⁰⁴ Torbisco-Casals, 'The Legitimacy of International Courts: The Challenge of Diversity', 52 *Journal of Social Philosophy* (2021) 491, at 498; Bradley, 'Recent Books on International Law', 112 *AJIL* (2018) 330, at 334.

¹⁰⁵ Badar, 'Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court', 24 *Leiden Journal of International Law (LJIL)* (2011) 411, at 433.

¹⁰⁶ Terris, Romano and Swigart, *supra* note 97, at 71.

¹⁰⁷ Fidler, 'Revolt against or from within the West?: TWAIL, the Developing World, and the Future Direction of International Law', 2 *CJIL* (2003) 29, at 31.

¹⁰⁸ Reinold, 'Constitutionalization? Whose Constitutionalization? Africa's Ambivalent Engagement with the International Criminal Court', 10 *International Journal of Constitutional Law* (2012) 1076, at 1102.

networks and sources to encompass a more diverse range of perspectives and materials'.¹⁰⁹ Even a full implementation of the article's proposal would be only a small step to making the ICC's practices more equitable, and international law and the ICC will likely never be seen as politically neutral to all but the most idealistic observers, but this does not mean that the ICC should abandon efforts to strengthen its judicial practices. Every small step is an important contribution.

Second, the legitimacy of the Court (closely tied to the first reason) will be strengthened.¹¹⁰ Court legitimacy can be viewed on two levels: normatively, meaning that the court has the authority to issue decisions to which constituencies defer, and sociologically, meaning that the court is seen to have the requisite authority.¹¹¹ Diversifying the use of sources of law can help on both fronts; on the former, by improving the acceptance of the ICC's decisions from constituencies on the periphery through the good faith examination of their laws, and on the latter, by impressing upon observers that the Court is making the effort to be more inclusive, even if it ultimately decides not to use a particular legal authority. Paying respect to peripheral legal systems can help gain trust from disenfranchised groups,¹¹² and democratizing processes can increase legitimacy by giving 'voice and influence to groups that are politically, socially, or culturally marginalized'.¹¹³ Recognizing a greater diversity of sources of law could also counter the perception that international courts are alien and inhospitable to non-Western interests.¹¹⁴ The language diversity of international court staff can increase court legitimacy by compelling awareness of the multicultural nature of their project;¹¹⁵ arguably, the same can be achieved by diversifying legal authorities used in the interpretation and application of law. Again, ardent critics will not become sudden supporters, but there are many in the middle who are critical but still cheering, or at least hoping, for the ICC's success and who value efforts at decolonization.

Third, and perhaps most persuasively for courts, widening the spigot from which law is sourced arguably improves the quality of judging.¹¹⁶ There have been many calls to diversify the international judiciary (where global North men continue to dominate), though this diversity usually means diversity of judicial background, especially of sex and national origin, rather than diversity of legal sources in decisions.¹¹⁷ Diversity of both types, however, is beneficial for what it brings to judging: in being able to address

¹⁰⁹ Roberts, *supra* note 46, at 322.

¹¹⁰ Ellis, 'General Principles and Comparative Law', 22 *EJIL* (2011) 949, at 955–956.

¹¹¹ Baetens, 'Identity and Diversity on the International Bench: Implications for the Legitimacy of International Adjudication', in F. Baetens (ed.), *Identity and Diversity on the International Bench: Who Is the Judge?* (2020) 1, at 7.

¹¹² Torbisco-Casals, *supra* note 104, at 502–503.

¹¹³ *Ibid.*, at 498; Galindo and Yip, 'Customary International Law and the Third World: Do Not Step on the Grass', 16 *CJIL* (2017) 251.

¹¹⁴ Kelly, 'The Changing Process of International Law and the Role of the World Court', 11 *Michigan Journal of International Law* (1989) 129, at 158.

¹¹⁵ Roberts, *supra* note 46, at 269.

¹¹⁶ Torbisco-Casals, *supra* note 104, at 502–503.

¹¹⁷ Christensen, 'The Professional Market of International Criminal Justice: Divisions of Labour and Patterns of Elite Reproduction', 19 *JICJ* (2021) 783. Article 36(8)(a)(ii) of the Rome Statute requires the consideration of 'equitable geographic representation' in the selection of ICC judges.

diverse problems,¹¹⁸ in taking into consideration the interests of particular marginalized groups¹¹⁹ and in demonstrating sensitivity to culture, legal systems and the moral values of those subject to justice.¹²⁰ Looking to diverse legal authorities is one way of strengthening a bench's capabilities. African human rights systems can provide a positive example of international adjudication, African jurisprudence can supply lessons for international courts and African law can ultimately offer 'new meanings, standards, rules, and norms of international law'.¹²¹ Theresa Reinold explains that '[a]ctors from the periphery whose norms are excluded from the constitutional edifice represent an important source of normative innovation and self-reflexivity, because they articulate alternatives to existing norms and institutional arrangements and thus challenge the reification of the system's structures'.¹²² The proportion of ICC judges from Africa is encouraging. In 2010, five of the 18 judges were African, and in the most recent list of judges on the ICC's website, four of the 18 were.¹²³ This representation likely strengthens the African perspective on the bench. Yet the marginalization of African law from the sources of international law is a constant, and sometimes apparently insurmountable, hurdle that judges – whether African or otherwise – must overcome if they wish to use African law in the application or interpretation of law at the ICC.

We might consider, in this vein, the jurisprudence of former ICJ judge Christopher Weeramantry who, in the words of Antony Anghie, 'enormously expands the range of international law and the sources from which it may draw'.¹²⁴ In coming to decisions, Judge Weeramantry reached beyond the strict positivism of the sources-of-law doctrine to 'the wisdom of communities which have been disregarded, if not marginalized', customs and beliefs developed by communities within states and others 'which antedated the nation-state by hundreds of years'.¹²⁵ In drawing from 'the wisdom of the world's several civilizations' to determine whether sustainable development is an 'integral part of modern international law', he turned not to Article 38(1) of the ICJ Statute but, rather, to Article 9, which requires in the election of ICJ judges the

¹¹⁸ Park, 'The Third World as an International Legal System', 7 *Boston College Third World Law Journal* (1987) 37.

¹¹⁹ Baetens, *supra* note 111, at 9.

¹²⁰ Nosworthy, 'Diversity, Inclusion, and Legitimacy in International Courts and Tribunals: Insights from within, Perspectives from the Periphery – An Island Girl Speaks', in F. Baetens (ed.), *Identity and Diversity on the International Bench: Who Is the Judge?* (2020) 538, at 544.

¹²¹ Gathii, 'The Promise of International Law: A Third World View', 36 *American University International Law Review* (2021) 377, at 385, 388, 390, 410; see also Fatorous, 'International Law and the Third World', 50 *Virginia Law Review* (1964) 783, at 809.

¹²² Reinold, *supra* note 108, at 1087.

¹²³ M. du Plessis, 'The International Criminal Court That Africa Wants', Monograph 172 (2010), available at www.files.ethz.ch/isn/137504/Mono172.pdf; International Criminal Court, 'The Judges of the Court' Document no. ICC-PIIDS-PS-04-014/21_Eng (undated), available at www.icc-cpi.int/sites/default/files/Publications/JudgesENG.pdf; see also Chandrachud, 'Diversity and the International Criminal Court: Does Geographic Background Impact Decision Making?', 38 *Brooklyn Journal of International Law* (2012) 487, at 512–513 (noting an increase in African judges).

¹²⁴ Anghie, 'C.G. Weeramantry at the International Court of Justice', 14 *LJIL* (2001) 829, at 838.

¹²⁵ *Ibid.*, at 834–835.

consideration of ‘the representation of the main forms of civilization and of the principal legal systems of the world’.¹²⁶

This article’s proposal is more modest: that ICC judges make themselves aware of the legal systems that have been historically neglected to see whether they are relevant and useful. It does not insist that the Court must then use those laws. Examination should be mandatory; use should be discretionary. What are the drawbacks? The Court will need to spend more time finding, reading and analysing a broader range of national laws, additional resources will be needed to undertake this examination and, lamentably, the Court’s already lengthy decisions may run an extra page or two.¹²⁷ Based on the results of this study, however, these burdens would arise infrequently given the uncommon use of national laws in the Court’s jurisprudence. Moreover, courts can ask external institutions or scholars to conduct the necessary research for them.¹²⁸ Weighed against the benefits, these drawbacks seem more than acceptable, especially given what is at stake. The ICC is the world’s first and only permanent international criminal court, meaning its legacy and the precedent that its practices establish, if all goes well, will endure for millennia. An important part of its legacy will be whether it is satisfied to insinuate itself into the hegemonic fabric of international law or, instead, uses its position as a ‘counter-hegemonic tool of resistance’ by accessing and accentuating the ‘pluriverse’ of the sources of law.¹²⁹

¹²⁶ *Ibid.*, at 833.

¹²⁷ Judges are sometimes unaware of their own shortcomings and biases; judicial education may help. Strong, ‘Judicial Education and International Courts: A Proposal Whose Time Has Come?’, in F. Baetens (ed.), *Identity and Diversity on the International Bench: Who Is the Judge?* (2020) 225, at 235.

¹²⁸ Raimondo, *supra* note 52, at 48–49.

¹²⁹ Rajagopal, ‘Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy’, 27 *TWQ* (2006) 767, at 768, 775 (Rajagopal’s arguments are made in the context of human rights and development rather than the sources-of-law doctrine).