Tracing the Historical Cycle of Colonialism as a Crime Against Peace and Security

A Story of Three Reflexive Moments

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03.11.2026 doi: 10.59704/850180b4dd5e6cc6

This post shows how Global South representatives at the United Nations (UN) sought to redefine the concept of international crimes by arguing for the inclusion of colonialism and neo-colonial practices as a crime against peace and security. More specifically, the earlier debates on the criminalisation of colonialism expose the uneven distribution of power and voice in the field and help explain the contemporary reflexive contestation of its vocabulary and punishment mechanisms by Southern actors. Within this framework, reflexive moments form part of a recurring cycle, where Northern legal norms are critically received and re-negotiated by the South, re-injected into the international legal order, and finally re-appropriated by the North in a way that dilutes their transformative potential.

The First Reflexive Moment: After the Second World War

The first major reflexive moment in the post-war development of international criminal law emerged with the drafting of the 1948 Genocide Convention. Global South delegates supported Raphael Lemkin's proposal for the inclusion of "cultural genocide", which they saw as an anti-colonial imperative aimed at protecting minority groups from imperial coercion. However, this initiative met fierce resistance from Western colonial powers. In the UN General Assembly's Sixth (Legal) Committee, they succeeded in deleting the draft article on cultural genocide.[1]

The International Law Commission's (ILC) subsequent work on a "Code of Offences against the Peace and Security of Mankind" offered a better space for contestation. The 1954 Draft Code recognised an additional offence alongside the three Nuremberg-crimes and genocide. It addressed coercive interference in the internal or external affairs of another state through political or economic measures designed to impose the will of the intervening state in order to obtain advantages.[2] The offence was proposed by the Cuban ILC member Francisco García-Amador, following proposals for the criminalisation of "economic aggression" submitted by socialist governments. He argued that such a provision expressed a consolidated legal conviction among twenty-one American states that represented then one third of UN members, given that the 1948 Charter of the Organisation of American States already prohibited such acts.[3]

This innovation generated intense controversy both within the ILC Commission itself and the Sixth Committee. The proponents' arguments shared a common foundation, namely that peace and security, as reflected in the purposes of the UN, could be imperilled not only by armed action but also by coercive economic measures that threatened the political independence or sovereign equality of states. Within the General Assembly, opposition came mainly from the representatives of the United Kingdom and the United States who considered the proposal inconsistent with

[1] William Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2nd ed., 2009), DOI: 10.1017/CBO9780511575556, p. 206-213.

[2] United Nations, *Report of the International Law Commission to the General Assembly*, in: United Nations, *Yearbook of the International Law Commission*, Vol. II (1954), DOI: 10.18356/ab68db6b-en, p. 140-173.

[3] United Nations, *Summary Records of the Sixth Session: 3 June – 28 July 1954*, in: United Nations, *Yearbook of the International Law Commission*, Vol. I (1954), DOI: 10.18356/88c1515d-en, p. 127, para. 47 and 49.

the text of the UN Charter and dangerous for the system of collective security.[4]

Two prominent ILC members, Hersch Lauterpacht, and the Special Rapporteur on Aggression, Jean Spiropoulos, objected that although political and economic pressure were morally questionable, criminalising them would drain the concept of crime of its meaning. In response, the former judge of the Tokyo Military Tribunal, Radhabinod Pal, reminded them that in criminal law extortion was also a punishable offence.[5] Despite the objections, García-Amador's proposal was adopted by majority vote, and enshrined in Article 2, paragraph 9 of the 1954 Draft Code.

The 1954 Draft Code, though ultimately cautious, captured the dynamic of the first reflexive moment. It registered an early attempt to translate experiences of non-military forms of domination into the accepted legal categories of the time. By appropriating the Nuremberg and Tokyo Tribunals' language, states and jurists from Eastern Europe and Latin America sought to reframe externally imposed dependency by means of sustained political and economic pressure as practices analogous to those punished in the landmark post-war prosecutions. In doing so, they exposed the limits of the early post-war vocabulary of international criminal law, while simultaneously demonstrating how that vocabulary could be strategically redeployed to contest hegemonism. The Draft Code thus foreshadowed later debates on neo-colonialism and economic domination that international law would only gradually begin to confront.

Nevertheless, the usual suspects of economic coercion found a way to circumvent the implications of an international criminal system that did not suit their interests. To be sure, García-Amador's amendment to the Nuremberg Principles was just an additional ground for them to pause the international criminal justice project before it got out of hand. Invoking a lack of consensus regarding the content of the crime of aggression, the General Assembly shelved the Draft Code until the successful liberation struggles of the colonised peoples gave rise to a second reflexive moment.

The Second Reflexive Moment: After Decolonisation

The transformation of the international system through decolonisation fundamentally reshaped the institutional landscape. Within a few years, the UN General Assembly expanded dramatically as dozens of newly independent states entered the organisation, bringing with them political experiences and legal priorities markedly different from those of the post-war founding members. A newly formed majority of formerly colonised countries succeeded in passing several anti-colonial resolutions and bringing back to the UN agenda the Code of Offences against the Peace and Security of Mankind. United by their past as much as by their principal geographical location, states from the Global South insisted that any modern codification of international crimes could no longer rest exclusively on the Nuremberg Principles. Instead, it had to confront and dismantle the legacies of colonialism. The Eastern European and other socialist states aligned with the demands of the Global South.[6]

These broader dynamics reverberated directly in the debates of the General Assembly's Sixth Committee in the mid-1970s, where numerous delegations argued that the Draft Code must expressly reflect recent international instruments, such as the General Assembly's Resolution 1514 (XV) of 1960, that condemned colonial rule and affirmed the right of peoples to self-determination.[7] Several States from the Global South emphasised the need to criminalise not only classical, territorial forms of domination but also neo-colonial practices, such as the exploitation of natural resources. A smaller group advocated the recognition of "economic aggression" as a specific offence.[8]

[4] United Nations, *Report of the Special Committee on the Question of Defining Aggression: 24 August – 21 September 1953*, UN Doc. A/2638, 1954.
[5] United Nations, *Summary Records of the Sixth Session: 3 June – 28 July 1954*, in: United Nations, *Yearbook of the International Law Commission*, Vol. I (1954), DOI: 10.18356/88c1515d-en, p. 139-140, para. 58 and 59; p. 151, para. 20.
[6] Taxiarchis Fiskatoris, *The Global South and the Drafting of the Subject-Matter Jurisdiction of the International Criminal Court*, in: Florian Jeßberger, Leonie Steinl, Kalika Mehta (eds.), *International Criminal Law – A Counter-Hegemonic Project?* (TMC Asser Press, 2022), DOI: 10.1007/978-94-6265-551-5_9, p. 177-190.

When the ILC finally returned to the Draft Code in the 1980s, these themes became central to the work of the Senegalese Special Rapporteur, Doudou Thiam. In his second report (1984), Thiam observed that the condemnation of colonialism had long acquired the quality of *ius cogens*. He underscored that the subjection of peoples to alien domination constituted a denial of fundamental rights and an impediment to international peace and security. However, he believed that "economic aggression" belonged more to political discourse than to the "austere language of law", and that its conceptual boundaries remained too indeterminate for codification.[9]

The subsequent discussions in the ILC exposed a profound cleavage on the penal status of colonialism and economic aggression. On one side, a broad coalition of Global South members asserted that colonialism was already *per se* criminal under peremptory norms of international law, the UN Charter, and the core decolonisation instruments. They stressed that it was not a historical artefact but an ongoing structure of domination, persisting through military occupation, denial of self-determination, and neo-colonial economic control. For these members, colonialism was both morally abhorrent and a threat to peace and security, having systematically produced wars of national liberation and international crises. In addition, its criminalisation alongside economic aggression was indispensable for restoring the sovereign equality of states and completing the unfinished project of decolonisation.[10]

By contrast, ILC members from powerful western states such as Ian Sinclair from the United Kingdom and the US-American Stephen McCaffrey argued that the terms "colonialism" and "economic aggression" were political labels and popular slogans that lacked legal precision required for international criminalisation. Critics also considered colonialism an obsolete phenomenon. On the other hand, Christian Tomuschat from Germany commented that, although traditional colonialism would become extinct once Namibia had gained its independence, the persistence of situations of alien domination and exploitation warranted an appropriate provision in the Code.[11]

These opposing positions persisted in the UN debates the following years. Already since his third report (1985), Thiam had evidently realised that he was part of a reflexive process. He felt that "[t]his would seem to be a good time to reflect on the vocabulary of international law".[12] In 1989, the ILC was finally able to adopt a provisional article on "colonial domination and other forms of alien domination", which was reiterated in the text of the draft articles provisionally adopted by the commission on first reading in 1991. Article 18 criminalised the establishment or maintenance by force of "colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations". The Draft Code also contained some other offences of special interest to States that had experienced colonialism, such as "*apartheid*", the "recruitment, use, financing and training of mercenaries", as well as "wilful and severe damage to the environment".[13]

The establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda in the early 1990s, with their narrow jurisdictions, dealt a significant blow to the Draft Code's progressive aspirations. In fact, their creation provided the Global North with the perfect opportunity to re-appropriate the entire international criminal justice project. Soon thereafter, the ILC began capitulating to the political pressures of a newly formed *Ad hoc* Committee on the Establishment of an International Criminal Court (ICC), staffed by state

[7] United Nations General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN Doc. A/RES/1514(XV), 14.12.1960.

[8] Taxiarchis Fiskatoris, *The Exclusion of Transnational Crimes from the Jurisdiction of the International Criminal Court: A Travaux Préparatoires Study* (Middlesex University Research Repository, 2021), p. 133-136.

[9] Doudou Thiam, *Second Report on the Draft Code of Offences against the Peace and Security of Mankind*, in: United Nations, *Yearbook of the International Law Commission*, Vol. II (1984), DOI: 10.18356/2ebdda9e-en, p. 96, para. 47-49; p. 100, para. 80.

[10] United Nations, *Summary Records of the Thirty-sixth Session: 7 May – 27 July 1984*, in: United Nations, *Yearbook of the International Law Commission*, Vol. I (1984), DOI: 10.18356/efa2f1ef-en; United Nations, *Summary Records of the Thirty-seventh Session: 6 May – 26 July 1985*, in: United Nations, *Yearbook of the International Law Commission*, Vol. I (1985).

representatives. Given that the Draft Code's main purpose was to serve as the subject-matter jurisdiction of the future Court, Thiam had to discard colonialism, foreign intervention, apartheid, mercenary activities, and severe environmental destruction. The rapporteur did not hide that this drastic reduction was due to political factors, essentially noting the strong push-back from Northern States, while reprimanding the Third World for its silence.[14]

Very few, like Mexican Alberto Székely, who talked of a "mutilation", raised a serious objection in the ILC or the Sixth Committee. The argument of the symbolic and deterrent value of colonialism's recognition as crime against peace and security was also not enough.[15] In 1996, the Draft Code of Crimes against the Peace and Security of Mankind passed its second reading with a list of offences that essentially replicated the jurisdiction of Nuremberg and the *ad hoc* tribunals for the former Yugoslavia and Rwanda, with the addition of "crimes against UN and associated personnel", at the request of the United States.[16] Two years later, the ICC Statute retained a minimal subject-matter jurisdiction for the Court. It is striking that during the Rome Conference only the observer Organisation of African Unity made a brief generic reference to colonialism.[17]

The Third Reflexive Moment: Today

In this author's opinion, the contemporary contestation of the ICC's legitimacy, especially by African states and scholars of the Third World Approaches to International Law (TWAIL) movement, is intrinsically linked to the fundamental failure of the Rome Statute to address colonial wrongs. The Court's disproportionate prosecutorial bias that has led to its condemnation as a neo-colonial instrument is very probably a symptom of a deeper structural deficit. By codifying international criminality almost exclusively around warlike atrocities, while omitting the systemic violence of colonial and neo-colonial practices, the Rome Statute's substantive architecture practically directs the prosecutorial focus towards Africa. Even in the recent high-profile contexts like Ukraine and Palestine, the ICC does not have the tools to address systemic violence.

This deficit in the Court's subject-matter jurisdiction seems to have been acknowledged by the drafters of the 2014 Malabo Protocol of the African Union, which provides for an African criminal court. Although colonialism *per se* does not appear as a stand-alone crime (an omission that itself warrants further inquiry), the Protocol codifies corporate criminal liability and offences targeting manifestations of neo-colonialism, such as the illicit exploitation of natural resources, the trafficking in hazardous wastes, and mercenarism.[18] As the case study of the three reflexive moments of colonialism as a crime against peace and security reveals, the contemporary friction demonstrates that international criminal justice has arrived once again at the beginning of a recurring historical cycle.

[11] United Nations, *Summary Records of the Thirty-seventh Session: 6 May – 26 July 1985*, in: United Nations, *Yearbook of the International Law Commission*, Vol. I (1985), p. 72, para. 17.

[12] Doudou Thiam, *Third Report on the Draft Code of Offences against the Peace and Security of Mankind*, in: United Nations, *Yearbook of the International Law Commission*, Vol. II, A/CN.4/387, 08.04.1985, DOI: 10.18356/5b8de035-en, p. 76, para. 21.

[13] United Nations International Law Commission Drafting Committee, *Report of the International Law Commission to the General Assembly*, A/CN.4/L.459/Add.1, 05.07.1991, DOI: 10.18356/bdf8c8ed-en, p. 96.

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SUGGESTED CITATION

Fiskatoris, Taxiarchis: Tracing the Historical Cycle of Colonialism as a Crime Against Peace and Security: A Story of Three Reflexive Moments, Verfassungsblog, 03.11.2026, doi: 10.59704/850180b4dd5e6cc6.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20261103-134611-0.

[14] Doudou Thiam, *Thirteenth Report on the Draft Code of Crimes against the Peace and Security of Mankind*, A/CN.4/466, 24.03.1995; Taxiarchis Fiskatoris, *The Global South and the Drafting of the Subject-Matter Jurisdiction of the International Criminal Court*, in: Florian Jeßberger, Leonie Steinl, Kalika Mehta (eds.), *International Criminal Law – A Counter-Hegemonic Project?* (TMC Asser Press, 2022), DOI: 10.1007/978-94-6265-551-5_9, p. 177-190.

[15] Taxiarchis Fiskatoris, *ibid.*

[16] United Nations, *Report of the International Law Commission to the General Assembly*, in: United Nations, *Yearbook of the International Law Commission*, Vol. II (1996), DOI: 10.18356/524b9dc7-en, p. 17.

[17] United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, UN Doc. A/CONF.183/13 (Vol. II), 2002, p. 114, para. 127.

[18] African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (adopted 27.06.2014, not in force); see Gerhard Werle and Moritz Vormbaum (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol* (TMC Asser Press, 2017), DOI: 10.1007/978-94-6265-150-0.