Stealing the Future: Interrogating the Imaginative Boundaries of the International Criminal Court’s Jurisdiction Relating to Lethal Autonomous Robots through Postcolonial Science Fiction Literature

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Lethal autonomous robots are capturing the imagination of legal scholars, governments, and the United Nations. Many have been using science fiction to ask what the law will need to look like in the future to handle these machines yet are relying on the visions of white authors from the Global North. In this thesis, I explore some of the ways in which the coloniality of lethal autonomous robots and the coloniality of the International Criminal Court’s jurisdiction interact. In doing so, I study postcolonial science fiction to engage with alternative epistemologies to those dominant at the International Criminal Court. Jurisdiction is of key importance because it determines who, what and where gets justice. I do not argue for the reformation or the abolition of the International Criminal Court, but rather aim to highlight how masculinism and imperialism have created legal blind spots within which lethal autonomous robots will be able to operate and science fiction is capable of addressing.
1. Introduction

‘Why waste bullets when a cultural bomb will do? Stealing the future is an old story, a universal cliché.’¹

_Andrea Hairston, science fiction writer_

“Pessimism is a tool of white supremacy. They don’t want you to be imaginative about a world free from genocide, wealth hoarding, patriarchy etc. In the moments you think revolution is impossible remember that way of thinking is inherently violent and supremacist.”²

_Noname, poet and musician_

The international community remains at odds over what precisely defines a “lethal autonomous robot” (LAR). The former United Nations (UN) Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns, Human Rights Watch (HRW) and the United States (US) Department of Defense (DoD) have all used variations of the following definition: “robotic weapon systems that, once activated, can select and engage targets without further intervention by a human operator.”³ While all three assert that fully autonomous systems do not yet exist, some real weapons do fit a strict understanding of this definition. The Harop missile developed by Israel, nicknamed ‘fire-and-forget’, can spend nine hours in the air searching for and selecting targets.⁴ If targets hide, it will wait in the air above until they reappear.⁵ The Samsung SGR-A1 – the sentry gun used by

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South Korea to patrol the demilitarised zone that divides North and South Korea – “is capable of interrogating suspects, identifying potential enemy intruders, and autonomous[ly] firing […] its weapon.” Yet the SGR-A1 uses binary algorithms rather than complex artificial intelligence (AI). Binary algorithms use an “if-then-else” reasoning, meaning the system – generally defined as automatic rather than autonomous – should produce the same response each time, given the same input. Autonomous systems may operate more closely to the human “perception-cognition-action” sequence, using probability reasoning to estimate “best possible courses of action” via sensory data inputs. They will not always produce the same response, making them unpredictable.

While some delineation is useful, too firm a distinction may be problematic. As many countries are investing enormous sums in the pursuit of fully autonomous systems, forming a definition for the purpose of regulation under international humanitarian law (IHL) is political, as was raised at the 2016 meeting of the UN Group of Government Experts on Lethal Autonomous Weapons (GGE). Predominantly states in the Global South support either regulation or an outright ban while the US, UK, Russia and Israel strongly oppose that position. The Taranis unmanned aerial vehicle (UAV or drone) being developed by BAE Systems for the British military is reportedly capable of intercontinental travel. It is still unknown precisely how advanced the machine’s AI system will be, but in marketing material the United Kingdom’s (UK) Ministry of Defence (MoD) describes the aircraft as capable of being “fully autonomous”. In policy material, the MoD contradictorily claims

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9 ibid.


to not be developing autonomous weapons, on the basis of a definition of such systems as “self-aware and their response to inputs indistinguishable from, or even superior to” human operators.\textsuperscript{13}

Rather than separating LARs, they require contextualisation. This thesis focuses predominantly on autonomous UAVs, rather than autonomous ground or water-based vehicles. I do so to contextualise aerial LARs within western coloniality based on exerting control from a geographical distance, treating LARs as extensions of colonial technologies, including non-autonomous drones. This builds on the rich body of scholarship that places UAVs and their use in the US-led ‘War on Terror’ within a colonial framework, including within histories of Foucauldian panoptic surveillance and biopolitical control and Mbembian necropolitics.\textsuperscript{14}

Attention to LARs under international criminal law (ICL) has been increasing, partly due to the accountability-gap risk they pose.\textsuperscript{15} Who would be responsible if a machine carries out an action that constitutes a crime under Article 5 of the Rome Statute of the International Criminal Court (RS and ICC, respectively), and what that crime could be if a machine makes the decision are significant jurisdictional issues.\textsuperscript{16} The advent of a situation where the AI in a LAR is equal to the intelligence of a human – predicted to occur by 2040 – or even exceeds it – predicted to occur by 2070 – makes this a pressing concern regarding future impunities.\textsuperscript{17} If a human cannot understand a machine’s reasoning, how could a human be held liable for its actions? The Court, as the current principal and furthest-reaching mechanism of ICL, has not yet had to tackle a situation whereby a machine ‘commits’ a crime, so the race is on to decide whether new law is needed.


I aim to contribute to the legal theory on autonomous weapons and advance multidisciplinary approaches to ICL by exploring the imaginative boundaries of the ICC through science fiction (sf) literature as an analytical tool. Advanced LARs are frequently discussed as a fantasy of sf. The GGE has warned against distraction by “futuristic scenarios” that belong in sf, while Boris Johnson, the British prime minister, has spoken of “pink-eyed terminators sent back from the future to cull the human race”. Legal scholars, too, have summoned sf variously as a prism of interrogation to explore the potential of technological development and inform international law in deciding how to handle a future of LARs. Repeatedly cited are The Terminator, the Star Wars franchise, Isaac Asimov, who invented the ‘Three Laws of Robotics’ in his novel I, Robot, and Philip K Dick’s novella Minority Report, in which crimes are predicted and punished before they occur. Sf is embedded in how we culturally process emerging technology. Its futuristic visions provide space to question our present situation, imagine our futures and suggest alternatives. As a genre, it has boundless imaginative capacity. This is what makes it so valuable to the law, especially in the context of LARs.

Defining sf is no easy task. Darko Suvin described it as “a literary genre whose necessary and sufficient conditions are the presence and interaction of estrangement and cognition, and whose main formal device is an imaginative alternative to the author’s empirical experience.” However, as explained by Jamaican sf writer Nalo Hopkinson, this concept of estrangement can be whitewashing: “one of the most familiar memes of [sf] is that of going to foreign countries and colonizing the natives, […] for many of us, that’s not a thrilling adventure story; it’s non-fiction, and we are on the wrong side of the strange-looking ship that appears out of nowhere.” It is limiting

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21 See further: Isaac Asimov, I, Robot (Harper Voyager 2013, first published 1950) 44.
22 Philip K Dick, Minority Report and Other Stories (Gollancz 2002, first published 1956).
then that, from everything I have read, invariably white and usually male sf authors from the Global North are used to engage in visions of the future of international law regarding LARs. To meaningfully engage in visions of justice, legal scholarship cannot keep excluding the same voices.

I use the broad term ‘postcolonial’ in the title of this thesis because it is broadly imperialism that connects the threat of LARs and erasure in the epistemology. Addressing the temporal boundaries of postcolonialism, I use Geeta Chowdhry and Sheila Nair’s classification, maintaining “that the postcolonial does not signify the end of colonialism, but rather that it accurately reflects both the continuity and persistence of colonizing practices, as well as the critical limits and possibilities it has engendered in the present historical moment.” Oumar Ba and Stuart Hall have been equally influential when considering postcolonialism’s spatiality given, for example, Australia and Canada (settler states) are “not ‘postcolonial’ in the same way” as Nigeria and Jamaica. Thus, while I discuss sf from across the globe, including Laguna Pueblo and Iraqi sf, I aim to be conscious of both their vast differences and the threads that connect them.

The purpose is not to treat the literature as a ‘mine of information’ nor force the voices to speak for or against the ICC. Therefore, engagement with subjectivity is necessary. As Kimberlé Crenshaw explains, there must be a rejection of ‘the prevailing orthodoxy that scholarship should or could be “neutral” and “objective” because it takes the white and male position as standard.’ The idea of objectivity in scholarship is arguably as much of an estrangement from our ‘empirical experience’ as a lot of sf. A central opinion within the thesis is that, alongside rationalism, objectivism forms part of the masculinist narrative advocating for the existence of LARs, which suggests they would not be susceptible to the human/feminine fallibility of emotion. As a white British woman, my only experience of structural racism or colonialism is how I benefit from them. I have no experience of war, have never required or sought the support of international justice for myself or my community,

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25 For examples, see n 20.
26 Geeta Chowdhry and Sheila Nair, ‘Introduction’ in Geeta Chowdhry and Sheila Nair (eds), Power, Postcolonialism and International Relations: Reading Race, Gender and Class (Routledge 2002) 11.
and have never lived under drones. For these reasons, I make no case for the reformation or abolition of the ICC. My goal is to highlight inadequacies in ICL and the limits of its imaginative capacity for addressing epistemological alternatives to those hegemonic in the Global North. It is about drawing attention to the interactions between the coloniality of ICL and the coloniality of UAVs and LARs, and, in the process, decentering whiteness from the production of futurisms in the law.

Learning from the work of scholars of the Third World Approaches to International Law (TWAIL) school of thought, I maintain that ICL is (currently) insufficient precisely because the ICC reproduces an imperialist valuation of knowledge, whereby western systems are given primary relevance and colonial legacies of violence thus become concealed. There must be radical deconstruction of assumptions of the universalism of such law. Focus should move from how the use of LARs may break international law, to how their violence is accepted by the law through jurisdictional inclusions and exclusions. Imperial states aiming to maintain an image as keepers of law and order will inevitably deploy weapons that operate within such shadows.

This thesis is separated into three main chapters– personality, materiality, and territoriality (which I reframe as ‘spatiality’ to break from colonial notions of territory) – that will cover three of the four types of jurisdiction. The opening chapter on personality addresses the potential accountability gap, exploring three possible futures of personhood through Palestinian and Argentinian sf. Under materiality, I engage with the centrality of psychological violence to AI warfare and how this is a grey area for the ICC. My last chapter will explore ‘spatiality’ by engaging with Iraqi and Laguna Pueblo sf to interrogate how occupation is viewed as ‘virtual space’ (meaning space seen as not quite there) within ICL and how this warps recognition of physical space. I argue that LARs may operate within this virtual space to transform aerial space into a possible ‘ventus nullius’ for permanent claim.

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2. Personality

To many proponents of LARs, a future where this technology can act indistinguishably from a human is not only a possibility but an explicit objective. With ICL based on individual criminal responsibility, this is raising concerns of a potential “responsibility gap”. The personal jurisdiction of the ICC is limited to natural persons – human beings – accused of a crime under the subject-matter jurisdiction of the Court when that person is a national of a state party to the RS. Based on territorial jurisdiction, a natural person who is not a national of a state party may also be indicted if they are alleged to have committed a crime on the territory of a state party. LARs could not therefore be held responsible under the jurisdiction of the ICC unless it was extended beyond natural persons and recognised machines with AI as legal persons. Additionally, unlike the Nuremberg International Military Tribunal and the proposed African Criminal Court, the ICC’s jurisdiction also does not cover juridical persons, such as corporations or organisations that may develop or deploy LARs. This chapter analyses locations of responsibility under personal jurisdiction by addressing three possible futures:

(a) the continued conceptual separation of the machine from legal personhood turns accusations of prosecutorial selectivity at the ICC into a jurisdictional problem, analysing direct perpetration and command theory. This is explored through ‘Application 39’ by the Palestinian author Ahmed Masoud, whose family originates from Dayr Sunayd (Gaza);

(b) the machine is given legal personality as an extension of the (gendered) human, allowing a person to be liable via aiding and abetting but consequently perpetuating the acceptance of masculine

31 Arkin 333 (n 30).
33 RS Art 25(1).
34 ibid Art 12(2)(b).
35 ibid Art 12(2)(a).
violence, explored through post-humanist themes within ‘Horacio Kalibang or the Automatons’ by the Argentinian author Eduardo Ladislao Holmberg;

c) individual criminal responsibility is challenged, and the imperial system, being essential to the operation of LARs, is brought under the ICC’s jurisdiction, explored through the abstraction of ‘the enemy’ in Palestinian sf.

2.1 The Individual

It is the 2040s, roughly 15 years since an attempted Israeli invasion led Palestinian cities to each declare themselves independent states.\(^\text{37}\) Israel continues to control each state’s borders and airspace, violently policing from above using aerial LARs.\(^\text{38}\) In ‘Application 39’, a Palestinian tech-genius, Ismael, hacks into one of the LARs and makes himself its operator. At this moment, the LAR is reconceptualised from being an autonomous device for Israeli security to being a controllable tool of terrorism connected to one individual.\(^\text{39}\) It is the only time criminality is explicitly mentioned in the story, when Ismael’s friend Rayyan deliberates what “crime” could now be carried out by the hacker, while Israel’s use of LARs seemingly enjoys impunity.\(^\text{40}\) After the Israeli-owned LARs swarm – when drones communicate and make decisions among each other, making them “inherently unpredictable”\(^\text{41}\) – and carry out a massacre in response to the Gazan president kicking a robot, the ICC declares it will open an investigation, but the Court is presented as largely inconsequential.\(^\text{42}\)

Masoud’s story reflects the ways in which legal debates struggle to conceptualise individuals who could use LARs in the commission of an international crime beyond terrorists and dictators.\(^\text{43}\) Both these terms are undeniably racialised in the international sphere. Reproduction of racialised

\(^\text{38}\) ibid 122 and 132.
\(^\text{39}\) ibid 136.
\(^\text{40}\) ibid 131.
\(^\text{41}\) ‘Report of the 2016 Meeting’ para 40 (n 10).
\(^\text{42}\) Masoud 141 (n 38).
criminality and prosecutorial selectivity has been a common critique of the ICC from TWAIL scholars; the perpetrator appears on the international stage as “a figure of African tragedy and uncivilised violence”. However, Masoud demonstrates that in a conflict between human beings and fighting robots, selectivity could become a matter of personal jurisdiction where only wealthy and technologically ‘advanced’ armies will fall beyond the Court’s reach due to the deployment of weapons that cannot be clearly traced to a responsible individual.

Masoud’s story does not cover the investigation, but the Prosecutor would likely uncover evidence that the massacre was a non-proportional response and an indiscriminate attack on civilians. However, it would have to be proven that an individual – such as the software programmer or military commander – had intent or was aware that “a consequence will occur in the ordinary course of events.” This is an issue for autonomous and unpredictable systems. Even if machines could be constructed with an ‘ethical governor’ structure that would understand the nuances and conflicts of international law and human behaviour and block impermissible actions, as Ronald Arkin optimistically suggests, machine-learning creates the possibility that the AI could ‘override or overwrite its software architecture’, including this structure. The programmer is thus unlikely to be held criminally responsible where the machine “acts outside the observation horizon of its creator.” Where no direct perpetrator is apparent, the Court may use command responsibility. In this scenario, a military commander with “effective command and control” may be liable for their “failure to exercise control properly over […] forces” that commit a crime, providing the commander knew or should have known the acts were being committed or were about to be committed and the commander “failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission” or ensure those responsible were punished.

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45 RS Art 8(2)(b)(iv).
46 ibid Art 8(2)(b)(i).
47 ibid Art 30(3).
51 RS Art 28(a).
defined by possession of the “material ability to prevent or punish”, is indicated by proof of the ability “to issue orders” and “that the orders were actually followed.” This is clearly a problem in the case of LARs, where a commander may not understand a LAR’s decision-making process, AI may override orders, a LAR may act too quickly to allow a human to prevent its actions, and machines cannot be punished due to their incapacity to suffer or feel guilt.

Serious violations carried out by LARs may thus expose a lacuna in the Court’s jurisdiction. Since it is likely to be predominantly states in the Global North with the resources and desire to develop such machines, this jurisdictional gap may be most distinct in the Global North in practice. Masoud’s story and his narrative of criminality therefore present us with a warning of what could occur, including a partly redundant ICC, if the law does not respond to such a challenge.

2.2 The Human-Machine Blur

We may therefore need a more nuanced understanding of the philosophical connection between humans and machines. As Emily Jones argues, we should “not fixate on autonomy but […] instead work to break down the false dichotomies between” the human and machine. One suggestion from Stuart Casey-Maslen has been that “courts might need to interpret a person as extending to encompass a weapons system with a form of [AI]”. While the machine is held as the principal offender, those humans involved may be perceived as aiding and abetting. In the Katanga case, the ICC clarified that aiding and abetting a crime under Article 25(3)(c) of the RS “requires a contribution consisting solely of promoting or encouraging a decision to act” and does not require control over “whether and how the crime will be committed”. As such, any number of actions from programming to arming the machine could theoretically constitute encouragement. However, according to the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Furundžija

52 Prosecutor v Čelebić (Appeal Judgement) IT-96-21-A (20 February 2001) para 256.
55 Gayle (n 11).
56 Jones 115 (n 7).
57 Casey-Maslen 245 (n 15).
58 ibid.
59 Prosecutor v Katanga (Judgement) ICC-01/04-01/07, T Ch II (7 March 2014) para 1396.
case, while the aider or abettor does not need “to share the [mental element] of the principal offender, they do need to be aware of that intent and that their “actions assist the perpetrator in the commission of the crime”.

Consequently, the machine would have to have provable intent before a human could be held liable, which Casey-Maslen notes is not feasible because machines are not capable of intentionality.

I would argue that the issue hangs on how intent is conceptualised, which is limited by the anthropocentric cognition of the law. If courts were to extend legal personhood to a machine, what is to say that it is not indicative of intent under Article 30(2)(b) if AI, supposedly programmed to understand IHL, demonstrates it “is aware of the [substantial] risk” that a crime will occur compared with other actions when applying its perception of probabilities and then “accepts such an outcome” in deciding to conduct that action? It is not a dissimilar cognitive process from that of humans.

In ‘Horacio Kalibang or the Automatons’, published in 1879, Fritz, the narrator, creates humanoid “automatons” that are physically indistinguishable from humans. Brains, it is argued, are easy to recreate as they are little more than “a great machine, whose exquisite springs move by virtue of impulses transformed thousands and thousands of times”. Holmberg challenges the perception that the innate characteristics of humanity are God-given and inimitable. Perhaps it is time to challenge similar (albeit more secular) assumptions within ICL regarding intent. Holmberg even sardonically has Fritz explain: “politicians who lack reason and honor, scientists who base their arguments on the mysteries of faith, doctors who kill, lawyers who lie,” these are clearly robots. In this conceptualisation, machines are the extension of an already fallible humanity, showing both how the machine can be human-like in its tendency to be immoral and the human can be machine-like in our tendency to err in our responsibilities.

Anti-anthropocentrism is a central tradition in posthumanism, which Cary Wolfe defines as an attempt to transcend the ‘humanity/animality dichotomy’ and challenge the perceived superiority

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60 Prosecutor v Furundžija (Judgement) IT-95-17/1-T (10 December 1998) paras 236-239.
61 Casey-Maslen 245 (n 15).
62 Prosecutor v Lubanga (Confirmation of Charges) ICC-01/04-01/06, PT Ch I (29 January 2007) paras 352-353.
63 Cited in Rachel Haywood Ferreira, The Emergence of Latin American Science Fiction (Wesleyan University Press 2011) 178.
64 ibid.
65 ibid 180.
of rationalist disembodied humanity.\textsuperscript{66} Though, Rachel Haywood Ferreira notes that nineteenth-century Latin American male writers tended to present artificial humans as either descendants of their invariably male creators or made in those creators’ own image.\textsuperscript{67} Holmberg’s robots reproduce gender, whereby the only automaton-women are objects of romance and sex and the automaton-men are objects of destruction and domination. Robotics in the present day similarly reproduce gender, with feminised robots involved in humanitarian efforts and masculinised ones involved in fighting, as Heather Roff has demonstrated through an exploration of the naming and physical design choices of warbots.\textsuperscript{68} Accepting the legal personality of LARs could therefore further legitimise the hegemony of masculinity, meaning continuing acceptance of violence and war as a rationalist fact of (masculine) humanity’s fallibility. Reimagining the law within the same Eurocentric masculinist confines does nothing to challenge the heart of such imperialist and masculinist ideology as a \textit{cause} of suffering.

\textbf{2.3 The Imperial System}

In some ways then, the very act of holding an individual accountable obscures the role of violent systems, such as imperialism and patriarchy, that a future of LARs is reliant upon. Immi Tallgren summarises the matter as follows:

\begin{quote}
By focusing on individual responsibility, criminal law reduces the perspective of the phenomenon to make it easier for the eye. Thereby it reduces the complexity and scale of multiple responsibilities to a mere background. [...] We are not really discussing nuclear weapons; we are discussing machete knives used in Rwanda.\textsuperscript{69}
\end{quote}

Similarly, the international community is not really discussing UAVs or LARs as potential profitable tools of colonialism, bringing eternal distress to those they watch\textsuperscript{70} and bombing instability into

\textsuperscript{66} Cary Wolfe, \textit{What is Posthumanism?} (University of Minnesota Press 2010) xv.
\textsuperscript{67} Ferreira 181 (n 64).
\textsuperscript{68} Heather Roff, ‘Gendering a Warbot: Gender, Sex and the Implications for the Future of War’ (2016) 18(1) International Feminist Journal of Politics 1, 2.
resource-rich nations,\textsuperscript{71} it is discussing racialised and uncontextualised terrorists and other anomalous individuals in the global system. When considering LARs as tools within a colonial system, the limitation of the ICC to only address the surface factor of which individuals may be liable for specific crimes and not the colonial system means a failure to treat the conditions that have fostered violence. Certainly, we cannot discuss the War on Terror ideology emerging after the 11 September 2001 terror attack in the US – an ideology that has created spatially and temporally unlimited war, which LARs, without risking a state’s own combatants, could be critical to perpetuating. LARs will ultimately be products of the system in which they are created and yet that system cannot be held accountable by the ICC.

According to Basma Ghalayini, in Palestinian sf “the idea of an ‘enemy’ is largely absent. Israelis hardly ever feature, as individuals, and when they do, they are rarely portrayed as out-and-out villains.”\textsuperscript{72} In ‘Commonplace’ by Rawan Yaghi, who is based in Gaza, individual perpetrators of violence are wholly decentred from the situation in Gaza when drones become Israel’s primary weapon in 2048. There is no mention of an individual Israeli in the story, nor even the word ‘Israel’. The cause of the violence is perpetually in the background: when children hit a swarm of drones with slingshots, they mysteriously disappear despite their mothers having sworn they ‘had been home at the time.’\textsuperscript{73} Yaghi presents a reality of suffering within a system of control that has no single direct perpetrator: the entire situation is violence, from the Nakba in 1948 to 2048 if Israeli occupation continues. The use of drones seems to embody the depersonalisation of violence within a violent system of imperialism.

The story invites legal scholars to take a more introspective approach to UAVs and LARs, as not only a direct cause of suffering but also a symptom of a larger and more invisible suffering. The conditions have become so ingrained that the protagonist admits he often imagines what he looks like from above before the drones point their weapons at him for lying down in the wrong place.\textsuperscript{74} The fact that the ICC cannot address this scenario, where the direct actors are merely cogs, contributes to Tallgren’s concluding point that the exclusion of some responsibilities may be “to naturalize […]

\textsuperscript{71} Grietje Baars, \textit{The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy} (Brill 2019) 343-344.
\textsuperscript{72} Basma Ghalayini, ‘Introduction’ in Ghalayini (ed) x (n 38).
\textsuperscript{73} Rawan Yaghi, ‘Commonplace’ in Ghalayini (ed) 154 (n 38).
\textsuperscript{74} ibid 156.
certain phenomena which are in fact the pre-conditions for the maintenance of the existing governance; by the North, by wealthy states, by wealthy individuals, by strong states, by strong individuals, by men, especially white men, and so forth.\textsuperscript{75} Drones are a way of removing the individual combatant and potential perpetrator from the battlefield, without removing the collective terror of those existing under them. The perpetrator is therefore abstracted by LARs without the ICC being capable of tackling abstract causes of suffering.

3. Materiality

The RS details four types of international crimes that constitute the subject-matter jurisdiction of the ICC: genocide,\textsuperscript{76} crimes against humanity,\textsuperscript{77} war crimes\textsuperscript{78} and the crime of aggression.\textsuperscript{79} When envisioning crimes involving LARs, war crimes and aggression tend to take precedence.\textsuperscript{80} For war crimes, the immediate issue is that relevant acts must take place with a nexus to an international armed conflict (IAC) or non-international armed conflict (NIAC), while the specific justiciable crimes vary depending on which category of conflict their use falls. Although it appears odd to suggest that LARs might be used outside an armed conflict, the very prospect of LARs is adding new dimensions to the existing progression into what has been termed “postmodern warfare” – characterised by “the blurred boundaries between war and peace”.\textsuperscript{81} The appearance of permanent warfare and the doctrine of pre-emptive self-defence brought about by the War on Terror is and has been warping international law.\textsuperscript{82} In the Tadić case before the ICTY, an IAC was defined as existing “whenever there is a resort to armed force between States”.\textsuperscript{83} The International Committee of the Red Cross (ICRC), in relation to IHL, stated that “the reasons for or the intensity” of any “recourse to armed force against another State” have no impact on the categorisation of IAC.\textsuperscript{84} Nonetheless, targeted

\textsuperscript{75} Tallgren 595 (n 70).
\textsuperscript{76} RS Art 6.
\textsuperscript{77} Ibid Art 7.
\textsuperscript{78} Ibid Art 8.
\textsuperscript{79} Ibid Art 8bis.
\textsuperscript{80} For instance: Casey-Maslen (n 15).
\textsuperscript{83} Prosecutor v Tadić (Jurisdiction) IT-94-1-A (2 October 1995) para 70.
\textsuperscript{84} ICRC, Commentary on the First Geneva Convention (Cambridge University Press 2016) para 218.
killing via drones, most notoriously carried out by former US President Barack Obama’s administration within the War on Terror, has re-energised debate over whether an intensity threshold exists for IAC classification. Both IHL and ICL recognise a threshold for NIAC to differentiate between armed conflict and riots, for instance. Thus, sporadic use of LARs may not come under the subject-matter jurisdiction of the ICC in relation to war crimes, despite it seeming its most basic applicability.

However, determining an IAC or NIAC is only the first hurdle. The definition of war crimes within the RS is far more detailed than those in the ICTY or ICTR statutes, leaving less room for judicial interpretation at the ICC. William Schabas explains this was the result of states being “frightened” of such judicial power. It is therefore necessary to question not only the crimes that have been included but also those that have been excluded. I build on Asad Kiyani’s critique of ICL’s failure to “recognize violence beyond particular forms of bodily harm, notably the structural or slow violence that conditions the day-to-day realities of violence and criminality in the postcolonial states”. ICL, and particularly the RS, has embedded constructions of (non)acceptable violence into the subject-matter jurisdiction of courts and tribunals that reproduce colonial impunity.

Those against autonomous weapons have been particularly focused on the capacity of LARs to distinguish between a civilian and a combatant, a combatant and someone who is defenceless due to sickness or wounds, and LARs’ ability to recognise the act of surrender. Such concerns are in some ways limited from the outset because machines are being built in the context of international law. States such as the UK and US have declared an intention to ensure that forms of autonomous weapons comply with IHL, although this could mean pushing up to or even reconstructing the law’s

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85 The legality of targeted killing is beyond the scope of this thesis. See further: Nils Melzer, Targeted Killing in International Law (Oxford University Press 2009) 9-43.
87 ICRC, Commentary, para 387 (n 85); RS Art 8(2)(d) and (f); Tadić para 81 (n 84); Prosecutor v Akayesu (Judgement) ICTR-96-4-T (2 September 1998) para 620.
89 Kiyani 258 (n 31).
90 For example: ‘Report of the 2016 Informal Meeting’ para 45 (n 10); Sharkey 788-789 (n 20); Human Rights Watch, ‘Losing Humanity’ 24 (n 3).
boundaries. To create machines that explicitly break international law and risk being subject to a ban or tight regulation would be bad for business. I wish to draw a comparison with the discourse on LARs that focuses solely on their lethality and potential ‘illegality’, which obscures the forms of domination and control used by states in the Global North, maintaining their pretence of being the force of global order. In doing so, I question how psychological violence has become a grey area for the ICC by examining how violence is constructed in relation to AI within the nonbinary African American author Nisi Shawl’s short story ‘Deep End’.

3.1 Psychological Violence

In ‘Deep End’, Shawl engages with histories of control over the minds and bodies of Black and Brown people to demonstrate the psychological torment that AI created by white imperialists may perpetuate. They reimagine the classic sf trope of planetary colonisation as a penal colony where the minds of Black and Brown convicts are downloaded into the bodies of the white bourgeoisie. The process involves 87 years travelling in a spaceship, being switched in and out of consciousness, meaning no one is certain how long they have been aboard. ‘Dr Ops’, the AI controlling the spaceship, appears “as a lean-faced Caucasian man” and employs a benevolent persona who “sticks to the rules.” Such a narrative is also apparent in pro-LARs discourse – that the machines will be more inclined to stick to the laws of war and will not act out of malice or vengeance. Shawl demonstrates that not only is technology not created in a social or cultural vacuum but that certain forms of violence already constructed as acceptable could become its domain. Psychology is the spaceship’s silent weapon, tormenting the passengers with the sense of their own “oblivion”. It is notable that other stories involving AI I researched, particularly those by Palestinian authors, also place significant emphasis on psychological suffering.

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93 ibid 12 and 16.
94 ibid 13.
95 ibid 13 and 20.
96 Arkin 332 (n 30).
97 Shawl 13 (n 93).
98 For instance: the technological manipulation of collective memories in Saleem Hahhad, ‘Song of the Birds’ in Ghalayini (ed), 1 (n 38); physical violence is strikingly background noise in Yaghi 153 (n 74).
The UK MoD, for instance, has boasted of Taranis’s ability to exert both “kinetic” and “non-kinetic influence”.99 In military targeting, kinetic refers to the application of physical force “with (primarily) lethal effects”, while non-kinetic can refer to influence over “non-physical elements”, including (as agreed by the North Atlantic Treaty Organisation) the “will, understanding, and behaviour” of people100 – “not limited to combatants,” Paul Ducheine explains.101 Far from being a covert manipulation of the law, using non-kinetic influence explicitly makes civilians the targets of military operations.

Metin Basoglu has suggested that the US drone programme constitutes “collective torture” because of the non-kinetic influence it demonstrates, based on the imposed mental state of “prolonged exposure”, unpredictability and inescapability.102 Interviews conducted by the Stanford Law School show widespread anticipatory anxiety in Pakistani civilians living under US drones.103 One interviewee reported that the drones are “always surveying us, they’re always over us, and you never know when they’re going to strike and attack.”104 Another explained the impact of such existence: “[b]efore the drone attacks, it was as if everyone was young. After the drone attacks, it was as if everyone is ill.”105 The constant feeling of being watched by LARs, alongside the perpetual threat of death based on the decisions of a machine, which may not even be understood by its military commander, increases all these things. The effect may be similar to Shawl’s description of an induced sense of oblivion, whereby life and death become such blurred categories that targets cannot be certain which state they are in. Psychological influence becomes the main tool for ensuring control and compliance by an entity (Dr Ops, western states or the ICC) that wishes to maintain an image of benevolence and upholding law and order.

99 UK MoD 21 (n 13).
100 Quoted in Paul Ducheine, ‘Non-Kinetic Capabilities: Complementing the Kinetic Prevalence to Targeting’ in Paul Ducheine, Michel Schmitt and Frans Osinga (eds), Targeting: The Challenges of Modern Warfare (Springer 2014) 205.
101 ibid 206.
104 ibid.
105 ibid 82.
Nonetheless, for the ICC, psychological violence appears to be a legal grey area unless considered with or as an effect of physical violence. The RS makes some references to mental suffering. Torture, “whether physical or mental”, can constitute a crime against humanity “when committed as part of a widespread or systemic attack directed against any civilian population”,\(^\text{106}\) as well as a war crime.\(^\text{107}\) However, it requires that the victims are “in the custody or under the control of the accused”.\(^\text{108}\) It is also a war crime within an IAC to “wilfully [cause] great suffering, or serious injury to body or health”,\(^\text{109}\) which the ICTY defined as “including mental health”\(^\text{110}\). Yet in practice at the ICC, it is rare to see a war crime charge of psychological harm alone unless in relation to sexual and gender-based violence. The crime to which I refer would perhaps fit more within a crime of terror, which is explicitly included in the statutes of the International Criminal Tribunal for Rwanda (ICTR)\(^\text{111}\) and the Special Court for Sierra Leone.\(^\text{112}\) The ICTY established its own jurisdiction over the crime of terror in the Galić case as “spreading terror among the civilian population”\(^\text{113}\) – although it was not explicitly included in the ICTY Statute – which the Appeal Chamber in the Milošević case determined did not require that the threat of physical violence be followed by the actual commission of physical violence.\(^\text{114}\) The loose definition of war crimes at the ICTY was to help avoid “evasion of the letter of the prohibition”.\(^\text{115}\)

The RS leaves no such room for adding new definitions of war crimes to its remit through judicial interpretation. Even if the ICC were able to bring threats of violence within its jurisdiction (outside sexual and gender-based violence), the panoptic surveillance and non-kinetic influence for which LARs may be used and which Shawl brings to life cannot be easily defined as a “threat of violence”, even though civilians are direct targets. This violence, which the UK has boasted it has capacity for and which has been the tool of imperial powers such as the US, is not recognised and, within the

\(^{106}\) RS Art 7(1)(f).

\(^{107}\) ibid Art 8(2)(a)(ii).

\(^{108}\) ibid Art 7(2)(e).

\(^{109}\) ibid Art 8(2)(a)(iii).

\(^{110}\) Čelebići, para 424 (n 53).


\(^{112}\) Statute of the Special Court for Sierra Leone (adopted 14 August 2000, UNSC Res 1315) Art 3(d) and (h).

\(^{113}\) Prosecutor v Galić (Appeal Judgement) IT-98-29-A (30 November 2006) para 69.

\(^{114}\) Prosecutor v Milošević (Appeal Judgement) IT-98-29/1-A (12 November 2009) paras 32-33.

\(^{115}\) Prosecutor v Kupreškić (Judgement) IT-95-16-T (14 January 2000) para 563.
jurisdiction framework of the ICC, may struggle to be recognised in the future, despite its continuing centrality to imperial systems of control.

4. Spatiality

Under Article 12 of the RS, the ICC may exercise its jurisdiction over the territory of a state party, or “a vessel or aircraft” registered to a state party if a crime occurs on board.116 The Court may also exercise jurisdiction over a non-party state that accepts the jurisdiction of the Court on an ad hoc basis117 as well as where the UN Security Council refers a situation to the Prosecutor.118 The jurisdiction of the Court over land therefore has the capacity to be very large. However, Schabas notes that its jurisdiction over “the airspace above the State and to its territorial waters and, possibly, its exclusive economic zone” are “grey areas [yet] to be determined.”119 In comparison, the ICTY and ICTR Statutes explicitly included airspace within their remit.120 This could theoretically pose an issue for the ICC claiming territorial jurisdiction in cases involving aerial LARs used by non-state parties, but it is broadly held that in ICL it is “sufficient that one constituent element of the act or situation has been consummated in the territory of the State”, which could allow the harm to be localised on the ground.121

However, as Edward Said argued, “there is no use in pretending that all we know about time and space, or rather history and geography, is more than anything else imaginative.”122 For this reason the term ‘spatial’ has been chosen over ‘territorial’ to refer to jurisdiction over where a situation or alleged crime took place. ‘Territoriality’ reveals its coloniality: the very concept in the international sphere is based on imaginary lines drawn often with minimal consideration of the terrains and populations being divided. The issue is not into which territory the harm can be localised, but how the space in which drones operate is imagined and thus excluded from the ICC’s jurisdiction. Using ‘spatiality’ is intended to allow room for different interpretations of space.

116 RS Art 12(2)(a).
117 ibid Art 12(3).
118 ibid Art 13(b).
119 Schabas 67 (n 89).
121 Cedric Ryngaert, Jurisdiction in International Law (OUP 2008) 75–76; Prosecutor v Bemba (Warrant of Arrest) ICC-01/05-01/08-15, PT Ch III (10 June 2008) para 10.
I engage with the space of occupation, first examining the theoretical aspect and then relating this to the use of drones and LARs. A story by the Iraqi author Jalal Hasan illustrates that limited legal recognition of occupation itself distorts realities in the recognition of space that has been or is occupied, which I frame as the virtual space of occupation. I then build on arguments that the current use of drones “resembles an aerial occupation” (legally temporary and a potential crime of aggression) to suggest that it is instead a transformation of the vertical space into a *ventus nullius* (indefinite claim). This is an adaption of the principle of *terra nullius*, meaning ‘empty land’, which was used to justify European colonialism on the assumption “that such zones are for the time being free for the use and exploitation of all”. LARs form part of the western-centric concept of technological advancement that determines empty and exploitable space. I engage with Leslie Marmon Silko’s (Laguna Pueblo) construction of liberated space and critique of the masculine egotism integral to western conceptualisations of space to explore alternative futures.

4.1 Virtual Space

It has been argued that LARs may create such a disconnect for the “operators” that war and suffering will be perceived as taking place within a “virtual” space. What should be recognised, however, is how this ‘virtual’ space already exists in other forms within ICL. By this, I diverge from the definition of ‘virtual’ relating to computing and instead to that meaning something that is intangible. How occupation is understood as a virtual space is of relevance to LARs as potential tools of colonialism. ICL does recognise military occupation as a crime of aggression under Article 8bis but this fails to tackle continued occupation that began before this amendment entered into force in 2008. It imagines occupation as a temporary moment rather than an inherently criminal, persistent and multifaceted system, and it is this system that becomes the virtual space. Rather than seeing systems of occupation as beyond reproach, the terms upon which occupation has been determined must be questioned to understand the space in which LARs may carry out accepted forms of violence.

In Hasan’s story ‘The Here and Now Prison’, set a century after the US and British occupation of Iraq beginning in 2003, a lecturer tells his students that “one of the curses of language” is that it obscures

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125 Ben-Naftali 39 (n 20).
126 RS Art 8bis(2)(a).
how a situational change fundamentally alters physical realities.127 “We call it the world whether it is our own world or that which we no longer know,” he explains. A US student realises that in the “artificial world” in which she lives, “everything you touched became obsolete because you touched it, everything you said became a lie because you said it.”128 The virtual space of occupation creates an ‘artificial world’ in which everything becomes fundamentally changed. By accepting the artificial world and treating it as unchanged, everything done within the space becomes superficial.

In the law, this fundamental change between pasts and presents can be viewed in how the virtual space of occupation translates into distorted realities in the recognition of space that has been or is occupied. Occupation may not legally be recognised, however it is arguably still practiced; as with the continued presence of foreign troops in Iraq after the UN Security Council announced that the occupation had ended in 2004, and Israel’s continued control over the borders, airspace and waters of Gaza following the withdrawal of Israeli settlers in 2005.129 Occupation as a legal fiction is therefore in conflict with occupation as a lived reality. The ascension of Palestine to the ICC has epitomised this in the context of ICL. In 2012, the then Prosecutor declared he was unable to open an investigation into the situation in Palestine until the UN General Assembly decided whether or not Palestine was a state.130 This was determined on 29 November 2012, when the General Assembly voted to accept Palestine’s statehood.131 Since then, Palestine has referred the situation again to the ICC, clarifying that “[t]he State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip”.132 Nonetheless, Pre-Trial Chamber I has invited Palestine and “victims in the

128 ibid 147.
Situation in the State of Palestine”133 as well as Israel134 to submit observations on the scope of the Court’s territorial jurisdiction, namely whether it extends to those areas included in the State of Palestine’s referral.135 The deadline for these submissions closed on 30 April 2020 and a decision is pending.136

The realities of Palestine’s borders have thus been warped by a prevailing history of occupation and the ICC is having to determine which reality to accept. The 1949 borders exist in the lived experience of many Palestinians and yet there is a legal gaslighting in the assumption that subsequent occupation and refusal to transfer control back to Palestine could have overwritten this. The inability to address occupation itself, as an artificial world, must be understood as integral to this problem.

### 4.2 Ventus Nullius

The specific role of LARs and UAVs within the virtual space of occupation is that of enforcement and legitimisation. Campbell Munro and Eyal Weizman have both argued that the existing use of drones “resembles an aerial occupation” across Pakistan, Somalia, Yemen and Gaza.137 Munro does this through an exploration of the “vertical battlespace” that challenges international law’s conceptualisation of the “bounded, terrestrial, and horizontal zone of conflict, which privileges territorial sovereignty”.138 The use of drones applies the imperialistic conception of the “divisible sovereignty” of the postcolonial state in the name of security while avoiding being classified as a “physical occupation of terrain, and thus renders ambiguous the legal occupation of territory.”139

I wish to take Munro’s arguments further to suggest it is not only that sovereignty has been displaced but that the aerial space of postcolonial states has been fundamentally changed using aerial occupation into the *ventus nullius*, understood as being (1) ‘empty’ and (2) ‘unused’ or ‘exploitable’, through narratives of the technological supremacy of imperial powers. This is a significant step up

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134 ibid para 16.
135 ibid para 3.
138 Munro 237.
139 ibid 238.
from occupation because, under IHL, occupation implies the situation is temporary, thereby maintaining acceptance of the sovereignty and rights of the occupied power.\textsuperscript{140} Contrastingly, the purpose of \textit{terra/ventus nullius} within the law on territory is to create an indefinite claim of ownership and sovereignty of the imperial power.\textsuperscript{141} This requires that no other state has legitimate claim, which was justified by European colonisers through what Sookyeon Huh terms the “teleology of civilization” to disqualify non-European states from claim “because they could not utilize such territory effectively due to their lack of civilization.”\textsuperscript{142} Designation of effective use therefore tends to be Eurocentric, as it considers only our technologies as being advanced and our systems as civilised.

Within Leslie Marmon Silko’s (Laguna Pueblo) \textit{Almanac of the Dead}, the significance of European masculinities within the rhetoric of territorial claim and technological advancement is stark. The book starts with a map around what would be usually recognised as the US-Mexican border. She declares that “[t]he defiance and resistance to things European continue unabated. […] Native Americans acknowledge no borders.” The entire book deconstructs Eurocentric conceptualisations of space that centre around capitalist ownership, masculine domination, and egotism. All but the last two chapters are named after continents. Within these, Silko demonstrates through brutally violent prose how western individualism, fuelled by the masculine desire for hierarchy and self-gratification, has disconnected Europeans and Euro-Americans from the Earth to give the illusion of ownership of space.\textsuperscript{143} The role of the law in this illusion is explained by an Indigenous lawyer-turned-poet named Wilson Weasel Tail in an indictment in the form of a poem against the US “and all other colonials”, challenging the formation of colonial land titles and breaches of contracts and US Supreme Court judgements.\textsuperscript{144}

The privileging of masculinity and capitalism within imperial law is shown to be essential to the teleology of civilisation. In Pakistan, in the former Federally Administered Tribal Areas (FATA) – now legally and administratively merged with the Khyber Pakhtunkhwa Province – the US

\textsuperscript{140} Jean Pictet, \textit{Commentary on the Fourth Geneva Convention} (International Committee of the Red Cross 1958) 275.
\textsuperscript{141} Stuart Banner, ‘Why \textit{Terra Nullius}?’ (2005) 23(1) Law and History 95, 95.
\textsuperscript{143} Leslie Marmon Silko, \textit{Almanac of the Dead} (Penguin 1992) 258.
\textsuperscript{144} ibid 714-716.
extensively used Predator drones for surveillance and targeted killings\textsuperscript{145} on the basis that the FATA was “ungoverned” and “lawless” territory, which meant the US was not infringing Pakistani sovereignty.\textsuperscript{146} Therefore, airspace over the FATA was presented as a space which does not belong to Pakistan or residents of the FATA. This translates into technological discourse regarding the inability of certain states, on account of their supposed “lack of technological sophistication” – based in the prioritisation of the masculine and profitable technologies of war – to shoot down or deploy their own air force to manage the “threat” posed by the “lawless” territory.\textsuperscript{147} So, once the territorial space below has been depicted as being empty of sovereignty and any non-western states that may have a claim over the aerial space made illegitimate by their supposed weakness in security technologies, imperial powers may subsequently make their claim through the discourse of civilisation. John McGinnis, an advocate of LARs, suggests that AI in warfare “may actually lead to less destruction, becoming a civilizing force in wars as well as an aid to civilization in its fight against terrorism.”\textsuperscript{148} In this thinking, acquisition of the aerial space for the use of LARs is a moral obligation. Given that airspace is at least a grey area for the ICC and that the virtual space of occupation shows the Court’s potential role in interpreting territories that are seen to have been warped by colonial practices, this reimagining could pose serious doctrinal questions in the future. To challenge this, Silko’s novel comes in handy again. Her imagining of a just future comes from subverting the western obsession with ownership and war and breaking down the borders and boundaries that have been arbitrarily created and accepted through the law’s own violence. The book builds to what is framed as the birth of ‘The Fifth World’, in reference to mythology in various Indigenous cultures that states the current world that we live in will be destroyed and replaced by the Fifth World, in which the wrongs of colonialism are resolved.\textsuperscript{149} This leads into the last chapter, named “One World, Many Tribes”, in which people transcend any need for borders, rise up and all ethnic divisions are discarded to unite subjugated peoples in the revolution. Once space is no longer understood through narratives of domination, war and violence are no longer necessary or ‘rational’.


\textsuperscript{149} John Muthyala, ‘\textit{Almanac of the Dead}: the dreams of the Fifth World in the Borderlands’ (14)(4) Literature Interpretation Theory 357, 370.
4.3 Conclusion

So, to whom does the future belong? If we continue to centre white western voices in our visions of justice, then we do nothing to challenge the foundations of injustice. It continues a dispossession of imagination. Throughout this thesis, I have demonstrated some of the ways in which the coloniality of LARs and the coloniality of ICL interact within the gaps in the ICC’s jurisdiction. To focus exclusively on voices from within those same systems of power would therefore produce superficial results at best. Postcolonial writers have authority to speak on the west’s long history of colonial violence and dispossession. These epistemologies are essential to confront law that treats its contents as universal, objective, and rational. Jurisdiction is of particular importance because it indicates what matters: who must face international justice the most (and who is beyond reach), what violence is unacceptable (and what is acceptable), where justice can be imagined (and where there is no necessity for justice). The structural inequalities of the law are highlighted by this constant conflict of inclusion-exclusion.

In reality, LARs are likely to continue the problems already demonstrated by non-autonomous UAVs, from the use of psychological violence to unyielding occupation and spatial acquisition. Nonetheless, this does not negate the need for focus on them. LARs will introduce a particular paradigm of impunity, supported by the masculinist and imperialist blind spots of the law. They are essential to the imagination of the west’s trajectory of progress and technological superiority. Their purpose is to remove the human combatant from conflict but continue to inflict the relentlessness of war on those deemed less worthy of life. This way, western nations can continue to appear to be a force for good by absenting their own people from international injustices and using only the most advanced and the most ‘humanitarian’ methods of inflicting death.

My own subjectivity requires transparency about where my ‘authority’ comes from: the same systems of power that have excluded the voices I discuss. I therefore wish to take inspiration from Gina Heathcote by concluding with a quote from Adrienne Maree Brown – an author, activist, and doula from the US – without my own analysis or voice, in an attempt to make space rather than appropriate:150

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We are living now inside the imagination of people who thought economic disparity and environmental destruction were acceptable costs for their power. It is our right and responsibility to write ourselves into the future. All organizing is science fiction. If you are shaping the future, you are a futurist.\textsuperscript{151}

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