This is a draft version of a chapter, subject to minor amendments, that was published in Andrew Brynes and Gabrielle Simm (eds), *International Law and Peoples' Tribunals* **(Cambridge University Press, 2018).**

Accusing 'Europe': Articulations of Migrant Justice and a Popular International Law

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> *"We accuse Europe of continual violations of human rights and the systematic mistreatment of refugees, migrants and asylum seekers!"*

1. Introduction

This chapter examines a recent civil society initiative, Tribunal 12, as an internationalised articulation of migrant justice.[1] Tribunal 12 was held in Stockholm in May 2012, and sought to put 'Europe' on trial for the systematic violations of the rights and dignity of refugees, asylum seekers and migrants. By adopting a legal and aesthetical framework, the initiative aimed to draw attention to the increased global securitisation of borders, criminalisation of unauthorised migrants and systemic exploitation of undocumented people in Europe. It also intended to generate support for migrant struggles within Europe by highlighting the morally unjust and harmful effects of European border practices. Although the Tribunal differed significantly from earlier international peoples' tribunals in that it did not hear any witness testimonies from migrants themselves, I nonetheless locate Tribunal 12 within a legacy of peoples' tribunals and their entanglement with international law and institutions.

Peoples' tribunals have been generally recognised for their ability to demand or provide a form of accountability for collectively-experienced harms committed by state or non-state actors,

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[1] For further information on Tribunal 12, see the Tribunal 12 website (now available at https://web.archive.org/web/20130318105617/http://tribunal12.org/), which contains information about the Tribunal organisers and participants, video recordings of all Tribunal sessions, and the final Tribunal 12 Report written by the International Jury.

harms that generally fail to receive any adequate institutional redress.[2] In this chapter, I examine how Tribunal 12 extended this politics of accountability to address some of the fundamental norms that structure the international domain. My reading of Tribunal 12 emphasises how it named and interrogated the harms arising from the contemporary institution and policing of European borders, but also the harms from the notion of fixed borders themselves. In doing so, I argue that the Tribunal questioned forms of political community, identity and belonging based upon a security–territory–people nexus which continue to be fundamental organising principles for determining modes of inclusion and exclusion in the international legal order.

This chapter explores how Tribunal 12 appealed to international law as a language of popular justice, but also saw it as inextricably limited through its legitimation of state sovereignty, territorial control and borders. The Tribunal's use of international law exemplified an attempt to hold established institutions to account while also seeking to create a different form of justice and political community to that merely envisioned and authorised through international law and institutions.

This chapter proceeds in three parts. First, I explore the marginalised position of migrants within the international legal order through the use of Hannah Arendt's writings on statelessness. Second, I offer a reading of Tribunal 12 that frames the Tribunal's political and ethical claims as a juridical project that constitutes a different basis for international community, belonging and accountability. In particular, I unpack Judith Butler's thinking around the 'performative contradiction' of universals and an ethics of cohabitation to elaborate the productive claims that peoples' tribunals can make in and of the international (legal) order. Finally, I suggest that the importance of peoples' tribunals within international law is their enactment of a popular form of international law that seeks to unsettle and transform the existing norms and institutions of international law, rather than simply attempting to democratise or widen the sphere of participation within established structures. In doing so, Tribunal 12 advanced a politics of

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[2] I adopt the terminology of 'peoples' tribunals' rather than that of 'citizens' tribunals' because of Tribunal 12's concern to break down the citizen/migrant distinction (discussed in Part 4 of this chapter). I note though that the concept of citizenship can be disaggregated into various components (legal, political, economic, cultural etc) and constituted as a performative and relational practice such that migrants can been seen to engage in 'acts of citizenship' when performing certain everyday activities or staging political protests that make greater demand for recognition, equality and inclusion within a political community: see Engin Isin and Greg Nielsen (eds.), *Acts of Citizenship* (London: Zed Books, 2008). Despite this, Tribunal 12's concern appears to be better encompassed though the notion of constituting a 'people', rather than enacting 'citizenship'.

accountability that challenged the framework and mechanics of international law, rather than merely critiquing its normative content or practical operations.

2.   Migrant Justice and Technologies of Inclusion in the International Domain

Writing in the aftermath of the Second World War, political theorist Hannah Arendt was concerned with the production of citizenship — and its antipathy, statelessness — as both a legal and political condition. To become stateless, Arendt remarked, is to be defined as and placed in the position of the 'outlaw'. As an outlaw, a person is not only outside law's protection and must 'transgress' it in order to survive, but their very presence in a territory is criminalised and subject to police action. This means that the stateless lack any form of legal or political protections. The production of statelessness in the twentieth century — as a predicament of the consolidation and universalisation of nation-states — is also the production of a state of rightlessness. As Arendt wrote, the:

> calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion — formulas which were designed to solve problems within given communities — but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them…[3]

In this passage, Arendt's key claim is that the condition of statelessness entails not simply a loss of particular rights, but rather a more fundamental exclusion, namely the exclusion from the right to belong to and participate in a political community and the 'loss of a community willing and able to guarantee any rights whatsoever'.[4] This exclusion, for Arendt, starkly demonstrates the fallibility of human rights in their contemporary institutional, political and legal forms. Because of their historical consolidation as rights available to citizens of nation-states, human rights are not inalienable and they tend to fail those who need them the most. This meant, for Arendt, that the attainment of human rights is not prior to being included within a political community, which in its modern iteration is expressed as a community of citizens. Rather, it is the right to belong to a political community that is of fundamental importance and is constitutive of, in Arendt's

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[3] Hannah Arendt, *Origins of Totalitarianism* (New York: The World Publishing Company, 1958) 295-6.
[4] *Ibid* 297.

famous pronouncement, 'the right to have rights'.[5] In a world organised around nation-states, the loss of this right, for Arendt, amounts to the 'expulsion from humanity altogether' and well as the loss of a 'place in the world which makes opinions significant and actions effective'.[6]

While Arendt used the language of 'total domination' and absolute political exclusion to describe those people designated as rightless, her analysis can nonetheless help to reveal the difficulties that those deemed excluded from a *polis* — legally, politically, and in the extreme case, physically — experience when making political claims. Importantly, Arendt's intervention does not simply collapse the rights of Man into the right to citizenship. It rather recognises that attaining particular political rights is dependent upon the dynamic 'right to exist first as a political subject', that is, to be recognised as a political subject within an instituted community.[7]

The reinvigoration of international law and institutions in the second half of the twentieth century has not diminished the centrality of Arendt's claims. While Arendt urged the creation of a 'law above nations' to counter the production of the condition of rightlessness, the continuing centrality of nation-states as the central subjects of contemporary international law means that the realisation of human rights remains dependent upon a state willing and able to recognise or enforce them. The contemporary world thus persists, as Arendt had earlier diagnosed, as a 'world organised into nation-states',[8] even if there has been a proliferation of new international norms and regimes and growing recognition afforded to other actors, participants or subjects of international law at the turn of the 21st century. Patrick Hayden, in interpreting Arendt's thought for present forms of exclusion and containment, notes that the power of Arendt's contribution is how she highlighted that:

> statelessness is not an aberrant or accidental phenomenon occurring despite the best efforts of states to prevent it, but a 'normalized' systemic condition produced by an international order predicated upon the power to exclude as the essence of statist politics.[9]

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[5] *Ibid* 296298.

[6] *Ibid* 297, 296.

[7] Kim Rygiel, *Globalising Citizenship* (Vancouver: UBC Press, 2010)96.

[8] Arendt, above n 3, 280.

[9] Patrick Hayden, 'From exclusion to containment: Arendt, sovereign power and statelessness' (2008) 3 *Societies without Borders* 248–269 at 250.

Similarly, Butler suggests that Arendt's work is powerful for its 'prescience in predicting the recurrence of statelessness and the persistence of territorial violence', for its insistence on the inevitability of statelessness in a world of states.[10] Statelessness then reveals the deep 'structural deficiencies of the international system' and must be seen as a problem of *political* rather than *geographical* space.[11] It is this political configuration of space then that produces people as stateless as an 'anomaly' within the international order and is incapable, Arendt despaired, of guaranteeing the stateless a 'place in the world'.[12]

Statelessness, for Arendt, necessarily refers to both de jure statelessness (those deemed without nationality by a given state) as well as de facto statelessness (those individuals inside a territory threatened by denaturalisation and/or deportation).[13] Worldwide, the UNHCR estimates that approximately 10 million people were affected by statelessness in 2012, 700,000 of whom live in Europe.[14] This number is much higher when Arendt's de facto stateless are considered: a European Commission-funded 'Clandestino' project suggested that there were between 1.9 to 3.8 million undocumented migrants in Europe in 2008, although earlier statistics suggested this number is greater, between 5 to 8 million people.[15] The numerous and dispersed struggles of undocumented people in Europe have been well-recorded by non-governmental organisations as well as articulated by migrants themselves.[16] These struggles have at times been over access or entitlement to specific state-funded resources such as health, education and housing or about conditions arising from precarious employment and structural exploitation in labour markets. At

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[10] Judith Butler, '"I merely belong to them"', *London Review of Books* (10 May 2007).

[11] Hayden, 'From exclusion to containment', 254, 257; citing Peter Nyers, *Rethinking Refugees: Beyond States of Emergency* (Abington: Routledge, 2006).

[12] Arendt, above n 3, 286, 293-296.

[13] *Ibid* 279; Hayden, above n 11, 255.

[14] UNHCR, *Global Report 2012 – Addressing Statelessness* (2013).

[15] Clandestino Project, *Final Report* (2009) 109, http://cordis.europa.eu/documents/documentlibrary/126625701EN6.pdf; see also Council of Europe, *Position on the Rights of Migrants in an Irregular Situation* (24 June 2010), https://wcd.coe.int/ViewDoc.jsp?id=1640817. The term 'undocumented' has been adopted by some migrant struggles (particularly in the US) and it is generally accepted within a lot of migration studies literature. However, as Brigid Anderson noted at Tribunal 12, the irony is that often so-called 'undocumented' migrants are in fact 'over-documented', but they have the 'wrong' documents. In this sense, the term 'unauthorised' migrant can more accurate to reflect their relationship to state power.

[16] For NGO reports, see eg Platform for International Cooperation on Undocumented Migrants, *PICUM's Main Concerns about the Fundamental Rights of Undocumented People in Europe* (2010). For migrant statements, see eg statement issued by the International Migrants Alliance and Migrante Europe: www.apmigrants.org/home/item/59-ima-statement-and-critique-of-the-5th-gfmd.

other times, struggles have involved objecting to the dehumanising, harsh and punitive state measures allegedly in place to deter and police unauthorised migrants.

On a more fundamental level, migrant struggles express demands for political inclusion and issue a challenge to what migration scholar Nicholas De Genova has called the 'production of deportability' for non-citizens. For De Genova, the production of deportability involves official practices that create the 'possibility of deportation', rather than referring to the act of deportation per se.[17] This ensures that migrants — regardless of their status as documented or undocumented, temporarily legalised or illegalised[18] — live with the constant threat of future police action and removal. Such measures function as a disciplinary technology of social control and exclusion as well as a means of perpetuating the treatment of migrants as a vulnerable and deportable workforce. Rather than absolute exclusion per se, regulatory regimes require and expect migrants to be present within European physical and legal spaces. However, the production of conditions of deportability ensure that migrants are always subjected to forms of 'differential inclusion', functioning as an apparatus for organising global uneven distribution of labour and wealth.[19]

Within international law, migrant struggles for justice have been made and primarily received within a framework of the individual-*as-citizen* of a particular nation-state or the individual-*as-human* as a subject of humanity bearing particular rights and duties. Migrants are able either to appeal to their home states to offer them certain protections owed to them as citizens while living abroad, or to look to their state of residence for certain protections based upon recognised universal norms or established treaties.[20] In both approaches, migrants remain reliant upon states being willing and able to enforce migrant rights claims in order for such rights to be meaningfully recognised. As such, particular states can be accused of not protecting their citizens

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[17] Nicolas De Genova, 'Migrant "illegality" and deportability in everyday life' (2002) 31 *Annual Review of Anthropology* 419–447 at 439; Nicolas De Genova and Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space and the Freedom of Movement* (London: Duke University Press, 2010).

[18] For an analysis of how law illegalises people, see Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).

[19] Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton: James Swenson trans, Princeton University Press, 2004) 7.

[20] See, eg, Brian Opeskin et al (eds), *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012). While the fragmentation of international law has seen the proliferation of mechanism for the articulation, regulation and enforcement of migrants rights within the different regimes that constitute the international legal order — including, for example, migrants as 'civilians' under international humanitarian law; as 'victims' of human trafficking under international criminal law; as 'workers' subject to international labour standards; as 'service suppliers' under international trade law; or as 'refugees' under international refugee law — these 'status-based' regimes still function largely around an idea of the *individual-as-human*.

abroad or of violating the rights of particular groups of migrants within their territory. However, the conditions of possibility for the international order — the fundamental norms of sovereignty that structure the exclusionary political configurations of citizenship and the horizons of deportability — remain beyond accusation within the dominant framework offered by international law.[21]

3. Reading Tribunal 12

This section reads Tribunal 12 as a project that put this international framework on trial. This section explores four elements of Tribunal 12: first, how the Tribunal located its political intervention; secondly, how the Tribunal addressed and constructed 'Europe'; thirdly, how the Tribunal grounded its claim to represent 'people' the international domain and to generate a different mode of international sociability; and finally, how the Tribunal included the voices and stories of migrants in its sessions. These elements could be broadly thought of as questions of status, authorisation, constitution and procedure, all questions that are linked to a juridical way of thinking.[22] I use this juridical approach to read what was essentially a political act performed through a mediated legal form and language.

a. Locating Tribunal 12

As a civil society initiative, Tribunal 12 aimed to 'awaken the conscience of Europe' and to challenge the dominant trajectory of migration politics and policies of European states and supranational institutions. As a one-day event, Tribunal 12 engaged a variety of audiences, both within and beyond Sweden. The Tribunal sessions were held at the Stockholm Kulturhuset, and attended by a small number of people — approximately 300 — throughout the day. By far the greater level of engagement with the Tribunal was mediated through technology: approximately 7,000 people watched the online live streaming of Tribunal sessions. In addition, over 20 public screenings were simultaneously held in cities across Europe, ranging from public parks attended by over 1000 people to smaller gatherings in local libraries. A recording of the Tribunal sessions were also replayed on Swedish television after the event.

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[21] Gregor Noll, 'Why human rights fail to protect undocumented migrants' (2010) 12 *European Journal of Migration and Law* 241–272.

[22] See generally Shaunnaugh Dorsett and Shaun McVeigh, *Jurisdiction* (Abington: Routledge, 2012).

Consequentially, by far the greater level of audience engagement with Tribunal 12 occurred across physical distances. This distance meant that the audience was dispersed and fragmented, making it difficult to generate a sense of a cohesive community or movement. But it also allowed individuals or groups to determine the form and degree of their engagement, providing a resource for community groups to organise their own programs and focus their discussions on local circumstances and national policies in order to complement the broader European-wide focus of the Tribunal sessions.

The Tribunal was a carefully planned staging, consisting of a team of prosecutors who elaborated on the charges against 'Europe', actors presenting witness testimony, academic experts detailing the practices and policies of European states and their effects, and a seven-member international jury that issued the final verdict. The day was structured around four thematic sessions: Border control, Asylum process, Undocumented migrants, and Detention and Deportation. In each session, the prosecution first introduced the particular practices of European states, institutions and corporations. After this, evidence was presented by academic 'experts', and testimony of migrants was read out in order to demonstrate the subjective experiences and effects of exclusionary border practices.

For example, in the Border Control session, the jury heard about the 16,136 migrant deaths at European borders since 1993.[23] They heard the story of Bahram, a 16-year old Afghani asylum seeker who was smuggled to Bulgaria only to be beaten, starved, interrogated and strip searched in police custody before being forcibly moved to and detained in a migrant border camp for four months. Here, his application for asylum was rejected, resulting in his presence in Europe becoming illegalised and subject to deportation. The question that was repeatedly put at the Tribunal was who was responsible for this violence and these accounts of harm? Was it the product of, or a deviation from, international norms and processes?

The final session consisted of a jury deliberation: here, each jury member provided a personal reflection on the materials they had heard that day. Jury member and Swedish author Henning Mankell, for example, declared that Europe had become 'a monster, a beast'. Fellow jury member Somali writer Nuruddin Farah called on Europeans to 'know their own history' as, in his

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[23] Leanne Weber, 'Death at the Global Frontier', *OpenDemocracy* (13 June 2012).

words, 'the life [that] they have is owed to the fact that their people were able to go elsewhere [during periods of war, famine, persecution or hardship] … sometimes going to countries where [their peace was enabled or secured] through the [dispossession or] massacres of indigenous people'. The jury also formulated a short collective verdict, in which they explicitly 'condemned European governments for violating fundamental norms … [such as] the equal moral worth of all human beings … which go beyond existing laws' as well as 'violating existing laws on how governments should handle asylum seekers, detention and irregular migration'. They called for the 'removal of restrictive immigration practices' both within and beyond European territory, condemned the political economy of borders, and drew attention to contemporary migrant struggles for justice that present alternative horizons or foundation for community.

Through its constitution and articulated purpose, Tribunal 12 explicitly situated itself within a longer legacy of peoples' tribunals, most notably that of the Bertrand Russell Tribunal in 1967 that had also taken place, in part, in Stockholm.[24] Yet it was also keen to find its own form. Most notably, unlike earlier tribunals, Tribunal 12 deliberately adopted a 'dramaturgical' mode for organising its sessions and materials. In this sense, its political emphasis was more on a performative staging, than on facilitating a forensic trial or providing an avenue of redress for particular victims.[25] This distinguishes it sharply from earlier tribunals, and is the product of the particular history and motivation for the Tribunal.

The Tribunal was the culmination of a five-year cultural project, Shahrazad, that brought together non-European exiled and diaspora writers to tell their stories through literary events and collaborations. As an 'offshoot' of the International Cities of Refuge Network, a network that aims to provide safe haven to persecuted writers, the Shahrazad project was organised primarily around the ideas of freedom of expression and diversity.[26] The project's purpose was to foster spaces for inter-cultural dialogue based upon human rights where European and non-European writers could share their writings and stories of common experiences and aspirations. It also aimed to 'provide Europe with new, more open and sustainable narratives about itself', narratives that both challenged and affirmed European traditions and ideals. In this sense, the

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[24] The Tribunal 12 website explicitly states that the project is 'inspired by the International War Crimes Tribunal that was formed by Bertrand Russell and Jean-Paul Sartre in 1967'.

[25] The Tribunal website emphasises that 'artistic expression [is] an integral part of the tribunal'.

[26] 'About Shahrazad', *Shahrazad – Stories for Life*, www.shahrazadeu.org/en/content/about-shahrazad.

project's purpose can partly be seen as redemptive: attempting to 'revitalise some of [Europe's] capital values: freedom, democracy and solidarity' though bringing stories from outside Europe within.[27]

The Tribunal 12 project developed out of and in connection with the Shahrazad project, with these literary concerns providing a core framework for the Tribunal even though it was organised as an independent project. Thus, rather than arising out of migrant struggles themselves, Tribunal 12 saw itself acting in support of and in solidarity with such struggles. Although migrants and migrant organisations played a key role in devising and planning the Tribunal, for example, through the project's Organising and Reference Committees, they were largely absent from the official tribunal proceedings, an element that I will discuss later.

State-centric narratives of the international legal order continue to structure how peoples' or citizens' tribunals have been perceived in relation to international law. While the reception of and publicity around such tribunals has varied according to the time, actors and issue, official, academic or popular representations can generally be divided into two distinct camps. On the one hand, critics have dismissed peoples' tribunals outright as ideological 'fiascos' or 'kangaroo courts'.[28] In this view, peoples' tribunals have no judicial merit or enforcement powers and merely mimic or mock the legal form.[29] On the other hand, advocates of peoples' tribunals have celebrated them for publicly 'putting wrongs on the scaffold',[30] wrongs that are often state perpetrated or sanctioned, and that would otherwise go without recognition or redress. The tribunals are thus narrated as deriving their legitimacy from that fact that they promote a form of 'unofficial accountability',[31] with civil society stepping in to 'fill a gap' in official institutional measures or where state institutions fail to respond. Here, the tribunals are celebrated for their *effects*: in expressing resistance to hegemonic practices, creating an archive or factual

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[27] The Shahrazad project also commenced with a small tribunal event, known as the Stavanger or Hospitality Tribunal, held in May 2008.

[28] NGO Monitor, 'The Russell Tribunal on Palestine: A Legal Farce and Total Failure' (10 November 2011).

[29] For a discussion of such critiques, see Christine Chinkin, 'Peoples' tribunals: Legitimate or rough justice' (2006) 24 *Windsor Yearbook on Access to Justice* 201–220. Attempts have been made though to reclaim such terms, with for example, Arundhati Roy defiantly declaring in her concluding remarks of the World Tribunal on Iraq, that 'this court is a kangaroo court': Arundhati Roy, 'Opening Speech of the Spokesperson of the Jury of Conscience' in Müge Gürsoy Sökmen (ed), *World Tribunal on Iraq: Making the Case against War* (Northampton: Olive Branch Press, 2008) 3.

[30] Christine Chinkin, 'Editorial comments: Women's International Tribunal on Japanese Military Sexual Slavery' (2001) 95 *American Journal of International Law* 335–340.

[31] Fleming Terrell, 'Unofficial accountability' (2006) 15 *Texas Journal of Women and the Law* 107–14.

documentation, or being a public witnessing of moral and legal harms. Christine Chinkin, for example, in her work on the Tokyo Women's Tribunal, puts forward six grounds that legitimate peoples' tribunals, including their use of extensive powerful oral testimony, expert evidence and official reports of recognised civil society bodies to bolster their judgments.[32] As Richard Falk notes in his work on the World Tribunal on Iraq, the motivation for peoples' tribunals 'do[es] not arise from an uncertainty about issues of legality and morality but from a conviction that the official institutions of the state, including the United Nations, have failed to act to protect a vulnerable people'.[33]

Extending this politics of accountability, this chapter highlights how Tribunal 12 put contemporary state and supranational migration governance practices on trial, in order to focus on both breaches of established international norms as well as of more generally-conceived moral principles such as the 'equal worth' of all humans. This meant that there was a productive slippage between, on the one hand, challenging the denial of particular rights to migrants and, on the other hand, more generally critiquing the morality of institutional attempts to exclude migrants from the normative political community of 'Europe'. In terms of accountability, the Tribunal responded to harms arising not only from the inadequacy of existing norms and international institutions, but also articulated a critique of the very structure of the international itself, imagined as a 'community of nations' in which the individual is dominantly incorporated as a 'citizen', even if it is as a citizen of another state. At times, then, the Tribunal recognised the need to unsettle and reconfigure the international domain and its modes of belonging in order to advance the justice-seeking claims of migrants within Europe.

b.   *Addressing 'Europe'*

Although adopting a tribunal format, Tribunal 12 represented itself primarily as a political, rather than legal, project.[34] Politically, its task centred on issuing a vocal and public challenge to Europe's treatment of asylum seekers and migrants. In staging this challenge, 'Europe' was

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[32] Chinkin, 'Editorial comments', 335.
[33] Richard Falk, 'World speaks on Iraq' (2005) *Guild Practitioner* 91–94 at 92.
[34] For example, a key Tribunal 12 organiser described the Tribunal as having 'moral' rather than 'judicial value', suggesting that the Tribunal's main contribution was not legal but rather its elaboration of a 'full picture of the problems, and examples of how the systematic violence and practices are used' so that the Tribunal findings and verdicts could be used by activists in pushing for systemic change. Interview with Tribunal 12 organiser (November 2012, on file with author).

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framed as neither a natural nor self-evident entity. Rather, its framing constituted a political gesture, oscillating between the general and the particular; between a historically-constructed ideal of 'Europe' and its concrete contemporary manifestations; between identifying specific institutional actors and signifying an all-encompassing social collective. This vacillation symbolised a refusal to conclusively define 'Europe', and was the product of and productive for a particular way of thinking about institutional politics, political communities, and ethical responsibility. But, as we shall see, it also risked, at times, repeating or prioritising a construction of 'Europe' articulated by states and supranational institutions.[35]

A primary function of an address is to name and identify the subject of the address, that is, the subject of responsibility and accountability of an accusation. This means that an address also in turn constructs and frames the object of the address.[36] It is a multi-relational act, singling out the accused from a community of other possible addressees as well as in relation to the harmful acts, while simultaneously defining or delimiting the sphere of that responsibility and conduct. In legal proceedings, the subject of responsibility needs to be named with precision, as otherwise its specific conduct cannot be examined or a particular order cannot be enforced. The Tribunal's address to 'Europe' rather negated this demand: while it named 'Europe' as the specific subject of accountability, the precise identity or construction of 'Europe' was left deliberately ambiguous and open. In the accusation, 'Europe' functioned as a sign that at times would refer to the official institutional matrix that regulates legal citizenship, visa enforcement and the asylum process; at other times, 'Europe' designated a community of people, a collective project, both in its material and ideation forms. As one Tribunal organiser put it:

> We wanted 'Europe' not to be defined. It was very deliberate. We are not accusing only the EU, or European governments, or specific officers. But we are accusing everyone, on all levels, because it's a very complex problem, the responsibilities are on different levels and we didn't want that to be explicitly stated [in the accusation], because then we could exclude the others from the responsibilities. In the end, Europe is also talking about

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[35] On Europe as a historically-contested social construct, see Balibar, above n 19 (narrating Europe's 'hyper-real' qualities) and Roberto Dainotto, *Europe (in Theory)* (London: Duke University Press, 2010), on how theoretical understandings of the location of 'Europe' have shifted over time. Dainotto seeks to deconstruct the idea of 'Europe' such that it no longer makes sense to speak its name.
[36] On the power of an 'address', see Louis Althusser, *Essays on Ideology* (London: Verso, 1971) 44–48.

ourselves, everyone, that's watching and not watching. … We're accusing ourselves and all citizens of Europe.[37]

In framing the accused in this way, the Tribunal created a critical malleability to the identity of the accused that left the precise contours of the accused's identity open for elaboration and repeated interrogation in each session. For example, when discussing the particular failures of law to protect migrants or the stark abuses of legal processes in the asylum process session, 'Europe' as a subject of responsibility included the practices of actors that ranged from national governments and their divergent legislative frameworks to the European Union harmonisation mechanisms such as the Schengen system and Dublin Regulation regime.[38] Actors ranged from intergovernmental organisations such as Frontex (the EU border control agency) to private profit-driven corporations such as SERCO that manage immigration detention and deportation within certain European states.[39]

At other times, 'Europe' appeared as a more figural construction, the product of its historical constitution as a political entity in both its material and idealised forms. As one expert witness put it, contemporary 'Europe' and ideas of 'Europeanness' about equality and social welfare could not be cut off from their global histories: the

> foundation of European prestige and prosperity, for hundreds of year was precisely colonial empire … European colonialism as monumental crime against humanity and established a global social and political order of white racial supremacy.[40]

The 'fortification' and expansion of European borders, through practices restricting and policing migration, then becomes a way of creating new global divisions on the basis of race, a twentieth-first century 'redrawing' of W E B Du Bois' 'colour line'.[41]

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[37] Interview with Tribunal 12 organiser (November 2012, on file with author).
[59] *Schengen Acquis Convention* [2000] OJ L 239/19; *Council Regulation (EC) 343/2003 of 18 February 2003* ('Dublin Regulation').
[39] See, eg, Gregory Feldman, *The Migration Apparatus: Security, Labor and Policymaking in the European Union* (Stanford: Stanford University Press, 2012).
[40] Nicholas De Genova's address to Tribunal 12 (Session 4: Detention and Deportation).
[41] See De Genova's address to Tribunal 12 in which he references W E B Du Bois, *The Souls of Black Folk* (Chicago: AC McClurg, 1903).

This politics informed why no defence to the European border regime was invited or presented, as the Tribunal did not want to exhaustively name those responsible by inviting a particular defendant (and not others). Such an invitation would have acted to limit the field of responsibility as well as confine the harms to a particular time and place. Rather, in keeping 'Europe' open and deliberately ambiguous, the Tribunal encouraged the jury and audience to reflect upon the norms, institutions and people that carry responsibility for the maintenance of exclusionary and violent border practices. Thus, participants were asked to take responsibility for how they understood 'Europe' and framed the accusation.

As the above quote from a Tribunal organiser explains, the sign of 'Europe' could and should include what he described as 'ourselves'. Here, the accusation encompassed European citizens who are, in a certain sense, the 'beneficiaries' of state systems reliant upon established borders and the differential privileges stemming from the institution of citizenship, and who are morally culpable for not speaking out about the harm done in the name of a collective Europe. The 'European' part of the audience was called on to take responsibility for the ongoing marginalisation and exclusion of migrants in their proximity and communities. In this way, the 'we' that accused 'Europe' was not entirely absolved of responsibility, its claim to a coherent identity being unsettled and contaminated by traces of both the accuser and the accused. The Tribunal, in this sense, became a project of speaking to and as 'Europe': both critiquing specific institutional practices of exclusion as well as demanding self-reflection by 'Europe's' subjects. Considered in this light, the staging of the Tribunal fed into broader attempts to transform the conversations about 'European' identity, entitlements and belonging.

Yet the Tribunal's construction of 'Europe' risked repeating a certain exclusion of migrants from the recognised political community of Europe. It risked taking established political ideas and legal constructions of Europe and European 'citizenship' as the basis of its construction of Europe, rather than asserting that migrants are already part of the actually existing political and economic communities found within the territorial space of 'Europe'. This is by no means to suggest that migrants should be included within the 'subject of responsibility'. Rather, it attends to how prioritising legal relations as a way of understanding 'Europe' sits ambivalently alongside other attempts to broaden what 'Europe' entails or to think about European belonging beyond the realms of formal citizenship. After all, as several participants emphasised throughout the

proceedings, migrants are 'already Europeans' and participate on a daily basis in the political struggles and forces that make up 'Europe'.

c.   *'We accuse...': Performing Communities of Ethical Cohabitation*

A third element of the Tribunal's constitution was how it sought to authorise itself through articulating a collective 'we'. The Tribunal deployed a technology of judgment to performatively bring a particular 'we' into being.[42] Rather than grounding itself in a sovereign, bounded 'we', the 'we' of the Tribunal was much more decentered, temporary, and fleeting: there was no 'we' prior to its articulation at the Tribunal, and there was necessarily no fixed 'we' behind the utterance nor a permanent institution to give it shape.[43] The Tribunal's 'we' is best understood as split between functioning as a descriptive and a performative (that is, a statement that inaugurates or brings a particular state into being).[44] As a descriptive, it described those present at, engaging with or supportive of the Tribunal 12 sessions and verdict. As a performative, it created a paradigmatic 'we', producing and materially enacting a form of community that both negotiates and disavows national units as the primary markers of belonging or the primary mode authorising access to or action within the international domain.

The 'we' behind the Tribunal's accusation of Europe made a claim to and of the international domain that can be described as a jurisdictional practice, that is, a practice that inaugurates legal relations or makes a claim to speak the (or a) law. In this sense, the assertion of a 'we' was also a claim to rightly occupy and people the international domain, and thus a right to structure and shape the forms of belonging and modes of sociability of the 'international'. But crucially, it was not a right asserted by virtue of legal citizenship, nor was it a simple demand for inclusion within an already-textured space. It was rather an attempt to make and think of the international domain in a way that moves beyond an international based on the nation-state system.

Butler's work on the politics of contesting universals enables an understanding of the performative claim that Tribunal 12 made. Butler suggests that universals can be mobilised in

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[42] On technologies of law, see Dorsett and McVeigh, above n 22, 54–80.

[43] One tribunal organiser expressed disappointment that there were no follow-up events for the Tribunal, no way of further galvanising the networks created through the project as a way for further solidifying, shaping and mobilising this 'we'. Interview with Tribunal 12 organiser (November 2012, on file with author).

[44] J L Austin, *How to Do Things with Words* (Oxford: Clarendon Press, 1962); Judith Butler, *Excitable Speech: A Politics of the Performative* (London: Routledge, 1997).

such a way as to give rise to a 'performative contradiction'. The performative contradiction arises, for example, when a claim is made to belong to or be covered by an established universal when those making the claim 'are without entitlement' to do so.[45] This collective claiming exposes 'the contradictory character of previous conventional formulations of the universal'. It is not a claim based on 'a priori recourse to a truer criterion of universality',[46] but rather seeks to rework and fashion the particular content given to the universal anew. Butler uses the example of undocumented people in Los Angeles singing the United States' anthem in Spanish as an act of protest and a way of making a claim to belong to the particular nation.[47] For Butler, this performative act of singing enacted a radical politics of equality and critically articulated an unauthorised plurality to the nation.

Butler argues that such creative interventions require a reworking of dominant languages, institutional forms or power relations: they challenge the modalities of inclusion and belonging offered by 'conventional and exclusionary norms of universality' (such as ideas of the legal 'citizenship' or the 'international community').[48] The claim then inaugurates a distinct gap between the exercise and realisation of a particular norm, such that the gap can be made visible and mobilised. In Butler's words, such claims prompt a 'set of antagonistic speculations on what the proper venue for the claim of universality ought to be. Who may speak [in the name of the universal, here the 'international']? And how ought it be spoken?'[49] And, further, how might or should such claims be received? Framed in this way, Tribunal 12's 'we' drew on pre-existing ideas of an 'international community' and on norms recognised within international law, but did so in a way so as to reshape them. In positing and enacting a different form of international sociability, in Butler's words, it 'starts to take what [it] asks for'.[50]

The question of who the 'we' represented and who was included in the 'we' was raised at various moments throughout the Tribunal. One expert participant suggests that the 'we' should

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[45] See generally Butler's remarks in Judith Butler and Gavatri Chakravorty Spivak, *Who Sings the Nation-State?* (London: Seagull Books, 2007) 58-68.

[46] Butler, 'Restaging the universal: Hegemony and the limits of formalism', in Judith Butler et al, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London: Verso, 2000) 39.

[47] Butler and Spivak, above n 45, 58-61.

[48] Butler writes: 'It does suggest, however, that conventional and exclusionary norms of universality can, through perverse reiterations, produce unconventional formulations of universality that expose the limited and exclusionary features of the former one at the same time that they mobilize a new set of demands.': Butler, above n 46', 40.

[49] *Ibid* 39.

[50] *Ibid*.

be formulated in a way that unsettled the foundational categories offered by law and challenged the citizen/migrant dichotomy as a legitimate basis for political belonging:

> Migrants are already new Europeans, but the question is what Europe is at stake in engaging migrants … We can imagine ourselves as a clean and good conscience of the powers that be, or we can imagine ourselves as participating in the struggles with those migrants in the remaking of a new kind of world order in which Europe is a crucial site.[51]

In this perspective, the Tribunal project needed to fit into part of a broader 'remaking' or rearticulation of Europe, giving rise to a new form of international sociability. This form of political community could be paralleled to what Butler has called political communities grounded in an 'ethics of co-habitation'. For Butler, such communities entail negotiating political relations of 'unwilled proximity and unchosen cohabitation', committed to building bonds and institutions for making 'all lives livable and equally so'.[52] They necessitate 'an obligation to live with those who already exist' in all their heterogeneity.[53] This does not mean doing away with foundations or universal claims to a 'we', nor does it mean a refusal to oppose the aggression and hostility of those who occupy or colonise lands, but rather it means recognising that 'we remain obliged to struggle to affirm the ultimate value of that unchosen social world' and to 'find political and economic forms that minimize precarity and establish economic and political equality'.[54]

In the Tribunal's sessions, for example, participants emphasised the need for rights arising from the fact of residence or the fact of mobility as a way of countering the stark policing of the legally-constructed categories of 'migrant' and 'citizen'. These rights exceed those rights offered within the framework of international law, and thus assert new political demands and claims to justice and inclusion, based upon migrants' current activities and physical presence within Europe. Such an articulation of rights resonates with Étienne Balibar's call to move towards grounding 'communities of fate' founded upon principles of equality and liberty derived through practices of translation and negotiation, rather than 'communities of destiny' founded upon

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[51] Nicholas De Genova's address to Tribunal 12 (Session 4: Detention and Deportation).
[52] Judith Butler, 'Precarious Life, Vulnerability and an Ethics of Cohabitation' (2012) *Journal of Speculative Philosophy* 134–151 at 145.
[53] *Ibid* 146.
[54] *Ibid* 150.

principles of bounded and unified sovereign communities, constituted through practices of inclusion–exclusion.[55] This thus offers us a mode of sociability around contingency, solidarity, cohabitation and openness, rather than a bounded, determined or fixed community. The Tribunal's 'we' then can be seen as grounding a collective that is 'constantly in the making',[56] a *demos* whose foundations and boundaries are always open to contestation and reorganisation.

d.   Bearing Witness?

A fourth element of the Tribunal's constitution was how it incorporated the testimony of migrants themselves as those affected by European border practices. Tribunal 12 adopted a 'dramaturgical' framework in order to put forward a structural narrative of the European border regime, rather than providing a forum for people to give testimony in person. This was in stark contrast to earlier peoples' tribunals and demonstrates the varying objectives of peoples' tribunals. This artistic approach was taken partly because of practical difficulties around the Tribunal's location but it was also a broader political statement about the power of states to marginalise people subjected to certain forms of state violence, whether through being held in immigration detention, living with precarious legal status or having been deported from a particular territory.

A key reason for adopting an aesthetic mode for presenting migrant testimony was because some of those people affected by the European border regime would have had difficulties acting as witnesses in Sweden and may have faced serious consequences as a result of their testimony. Many migrants were unable to be present at the Tribunal, particularly if they remained in detention centres or had already been deported from Europe. For undocumented migrants within Sweden, the act of giving testimony would have required them to publicly reveal their status, an act that may have subjected them to a heightened risk of deportation.

Because of the difficulties surrounding the transnational criminalisation of unauthorised migration, Tribunal 12 organisers felt that any migrant testimony presented to the Tribunal would have been unduly restricted through the very state and transnational practices that the Tribunal was putting on trial. That is, it may have been only migrants with a particular legal

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[55] Balibar, above n 19, 131–2.
[56] Butler, above n 52, 150.

status, or at a particular stage in the asylum process, who would have been willing and able to provide testimony. In this way, European impositions of sovereignty and border practices might have disproportionately shaped the very voices being heard at the Tribunal as well as dictated those that were excluded. As one tribunal organiser stated, the desire for inclusivity meant that the organisers looked for another medium for including migrant voices:

> we wanted to have testimonies from all over Europe and not only from Sweden. And then we would have had problems because many people can't travel freely. I don't know if that's obvious in the Tribunal. In many ways it's also a statement that these people can't be on stage because they're threatened and they are trying to get away from authorities and so on.[57]

Instead, the Tribunal opted to collate testimony prior to the event, speaking to migrants and recording their stories at a less public time and place across a number of European countries. Migrants could also offer their stories through migrant advocacy and activist networks. This meant that the Tribunal was able to capture and present a range of testimony that might otherwise have been excluded. The range of testimony focused both on the emotional effects of European border practices, and how migrants put forward their claims and survived and created lives under difficult circumstances. However, this medium meant that testimony was presented in neat and predetermined form. The audience did not have to negotiate the intimate relations of listeners to difficult stories and the ethical demands that such relations entail. A central question for the organisers was: to what degree would the reading of testimony be seen as a gesture of erasure or perpetuating a symbolic violence of speaking on behalf of migrant?

Ultimately, this question was mediated through another ethical question for the Tribunal: namely, the power and pitfalls of (in)visibility for many unauthorised migrants in Europe. Given that many of the harms on trial were ongoing, adopting of an artistic mode for presenting testimony meant that migrants, in particular those without legal authorisation to be in Sweden, would not face any consequences as a result of testifying to the Tribunal. Unlike other migrant activist campaigns that generate their strength from a collective and ongoing public solidarity and create more permanent support networks for dealing with state arrests or deportation

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[57] Interview with Tribunal 12 organiser (November 2012, on file with author).

attempts,[58] the Tribunal felt that it was unable to provide such support to coincide with the Tribunal event. It could also not guarantee the absence of state presence at the Tribunal, thus mitigating any attempts to create a safe space within which people could testify.[59]

Another reading of the use of the aesthetic form for conveying migrant testimony could be to frame the Tribunal's conduct as a refusal to engage the particular representational mode deployed within state practice. In the area of migration law, law demands that migrants tell their story in a particular way that meets imposed understandings of credibility and plausibleness. As Jennifer Beard and Gregor Noll write, there is a 'deeper sovereign relationship' between authority, truth and law.[60] In addition to defining criteria to be met to satisfy refugee status, international law 'demands that an applicant for refugee status carry the truth or credibility of that status within her as a subject of legal interpretation'.[61] In reading the testimonies, the experiences of migrants were presented as 'fact', rather than as a narrative that needed to be evaluated by or should evoke sympathy from a community of listeners.[62] Responsibility was placed less on the migrants to tell their stories in a mode amenable to legal adjudication, but rather projected onto the community of listeners to listen and act in solidarity with these struggles. Such acts of listening alone cannot undo the structural inequalities arising from, as Arendt writes, a 'world organised into nation-states'. Nevertheless, they can create a heightened

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[58] See, eg, the recent public campaigns of undocumented people in the US, including the 'No Borders, No Fear' UndocuBus speaking tour, as well as migrant public sit-ins outside of official institutions.

[59] The use of actors made Tribunal 12 different from two earlier peoples' tribunals dealing with aspects of migration. For example, the focus of the International Migrants Tribunal (Manila, December 2012) was on the harms arising from official labour migration to the global North, and the main charge against countries of the global North was that of human 'slavery'. Here, the Tribunal heard testimony from return migrants, who were citizens of the Philippines, or migrant activists (from Mexico, Indonesia, Italy among other places) who had the ability to access legal visas for travelling to the Philippines for the Tribunal hearing. No testimony was heard from unauthorised migrants or undocumented people (www.apmigrants.org/home/item/83-final-verdict-of-the-international-migrants-tribunal). Similarly, the Permanent Peoples' Tribunal Session on the Right of Asylum (Berlin, December 1994) heard testimony from various witness (including nationals from Columbia, Peru and Iran). Interestingly, one of these testimonies was given by a representative instead of in person. A third example is that of the Independent Asylum Commission in the UK, which produced three reports in 2008 and conducted numerous public hearings and semi-public 'focus groups' across the UK as a way of gathering testimony as well as invited written and video submissions from asylum seekers. The Commission also encouraged the use of pseudonyms to protect migrant identities (ewww.independentasylumcommission.org.uk).

[60] Jennifer Beard and Gregor Noll, 'Parrhesia and credibility: The sovereign of refugee status determination' (2009) 18 *Social & Legal Studies* 455–477 at 459.

[61] *Ibid* 460. See also Anthea Vogl, 'Telling stories from start to finish: Exploring the demand for narrative in refugee testimony' (2013) 22 *Griffith Law Review* 63.

[62] On law's demand for a particular coherent and plausible narrative in refugee determination cases, see Trish Luker, 'Decision making conditioned by radical uncertainty: Credibility assessment at the Australian Refugee Review Tribunal' (2013) 25 *International Journal of Refugee Law* 502–534.

sense of awareness of how the institution of citizenship is implicated in the construction of particular political communities, the forms of exclusions it entails, and how citizens must act alongside migrants to undo certain systemic harms.

3.   International Civil Society and a Popular International Law

Struggles for migrant justice take many forms, encompassing a diversity of tactics and articulations. Caroline Moulin and Peter Nyers have expressed their dissatisfaction with the idea of a 'global civil society' for its inability to capture the diversity of approaches as well as political subjects that act in internationalised spaces. For Moulin and Nyers, the normative assumption underpinning the concept of a 'global civil society' is that of being comprised of 'groups of citizens' who are linked to established and respected entities such as international NGOs, and who celebrate liberal values of 'rational dialogue, consensus, persuasion, individual autonomy, personal responsibility, mutual obligation, and tolerance'.[63] Arguing that such a framework fails to account for the political practices and subjectivities of migrants themselves, Moulin and Nyers extend Partha Chatterjee's influential theorising of 'political society' to the international domain 'as a way of thinking about global political life from the perspective of those who are usually denied the status of political beings'.[64] Chatterjee, writing in the context of democratic politics in postcolonial India, offers a conceptual framework for distinguishing between 'civil society' and 'political society', where the former is 'restricted to a small section of culturally equipped citizens' whereas the latter makes up the 'majority of the world'.[65]

For Chatterjee, civil society has the language, resources and sense of entitlement to make their voices heard and express their claims to the state as 'rights-bearing citizens'; members of political society, rather, negotiate their relationships with authority through their very presence and the fact that they are governed in particular ways.[66] This means that civil society initiatives tend to affirm the language of the 'nation-state founded on popular sovereignty and granting equal rights to citizens' while political society acts involve mobilising a practical politics around

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[63] Carolina Moulin and Peter Nyers, '"We live in a country of the UNHCR": Refugee protests and global political society' (2007) 1 *International Political Sociology* 356–372.
[64] *Ibid* 358.
[65] Partha Chatterjee, *Politics of the Governed* (Cambridge: Cambridge University Press, 2004) 41.
[66] *Ibid* 40. Chatterjee notes that those who make up his 'political society' often need to 'transgress the strict lines of legality in struggling to live and work'.

the governmental administration of welfare and services to specific populations.[67] In taking up and extending Chatterjee's concepts to internationalised spaces, Moulin and Nyers do not seek to use these concepts as a 'blueprint' for classifying different acts, but rather as a way of transforming our understanding of the political so as to attend to the multiple transformative acts, demands and effects of what they call 'international political society'.[68]

This schema is useful also in understanding the political claims and possible transformative effects of peoples' tribunals and the social movements within which they are located. Although Tribunal 12's politics of 'respectability' is best understood within a concept of 'international civil society', what is interesting about the initiative is that it attempted to take seriously the need to move beyond an appeal to legal or political citizenship as the basis for articulating its politics of solidarity. The Tribunal illuminated how recourse to the language of formal citizenship or appeals to reform established institutions will be largely inadequate, as the regime of citizenship does not necessary institute a relationship between those doing the acts of governing and those being governed nor guarantee any substantive rights to the governed.

Jury member Saskia Sassen, in her personal verdict, stressed the need to move beyond a migrant/citizen binary, suggesting that the internationalisation of the citizenship regime may be at the heart of the problem generating the uneven relations between the governors and the governed.[69] This aligns with the work of Craig Borowiak, who argues that the material fact of 'being governed' should constitute a moral claim of inclusion within the *demos* in order to hold the institutions and people to account that govern them. For Borowiak, the 'governed should have opportunities to sanction and demand answers for the powers that govern them'.[70]

4. Conclusion

Tribunal 12, through its staging and verdict, suggests a form of law that demands a more just order based on actual presence in political spaces rather than formal legal entitlements. It is a 'popular' form of international law that claims the authority to speak in the name of the 'people', constituting a jurisdiction beyond the international institutional architecture structured around

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[67] *Ibid* 37.
[68] Moulin and Nyers, above n 63, 358.
[69] Saskia Sassen's remarks at Tribunal 12 (Session 5: Verdict).
[70] Craig Borowiak, *Accountability and Democracy: The Pitfalls and Promise of Popular Control* (Oxford: Oxford University Press, 2011) 9.

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states. Such a 'popular' law uses existing legal principles in order to mobilise such norms otherwise than how they are intended or usually applied within dominant institutional arrangements. My point in naming the Tribunal and other peoples' tribunals as a 'popular' form of international law is not to deny or redeem international law from its coercive, technical and institutional registers, or to negate the fact that any claim to act in the name of the 'international' will always be interjected into 'an extant order within which sovereignty is operative', that is 'entering into a meeting place where the conditions of sociality are severely constrained'.[71] Rather, perhaps it will allow us to think through the mechanisms and technologies that regulate entry into the international as well as international law's contested orientations, and thus its political possibilities.[72]

Methodologically, this means taking seriously the possibility of thinking ethically about the narratives that we tell of international law.[73] It entails a political commitment to think about the 'critical instability' or 'restlessness' at the heart of international law alongside its normative force,[74] in order to attend to the spaces — however fleeting, contradictory and insurrectional — that could shape our understanding of the international domain differently.

While there is certainly nothing inherently progressive or democratic about insurrectional politics, there is something critical about denaturalising boundaries of predefined publics in order to make them, in Craig Borowiak's words, the 'perennial objects of democratic accounting'.[75] This insistent accounting aims to render fragile existing institutional structures 'susceptible to

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[71] Sundhya Pahuja and Shaun McVeigh, 'Rival jurisdictions: The promise and loss of sovereignty', in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (Abingdon: Routledge, 2010) 105.

[72] This idea of a 'popular international law' can be contrasted with accounts asserting the 'democratisation of international law' through the inclusion of civil society in international law-making processes. In such narratives, civil society designates a relatively knowable and fixed field of actors that is included within established institutional process as legal and political citizens. They may shape, interpret or inform the content of international law and the spaces for contestation, but not necessarily have a claim to belonging to or being constitutive of international law per se.

[73] Feminist international lawyers, for example, have long articulated this need. For instance, Anne Orford writes that 'reading and writing about international law involves the reproduction of power relations' such that subverting dominant narratives could 'contribute to the communal project of making it possible to imagine and create other ways of being': Anne Orford, 'Positivism and the power of international law' (2000) 24 *Melbourne Journal of International Law* 502–529 at 528.

[74] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) 37.

[75] Borowiak, above n 70, 162.

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reconfiguration'.[76] While this does not necessarily entail the dissolution of citizenship or ideas of the *demos* per se, it radically abandons the idea of the *demos* as a finite, bounded community whose 'authority is final'.[77] For Borowiak, this means recognising that 'citizens alone would [not] have the authority to decide who else should be included and how accountability relations should be comprised'.[78] Instead, the very structures of the international legal order need to be located within the 'field of contestation and answerability'.[79]

Certain elements of the Tribunal project are evidently open to critique. We can question who has access to the sites, language and funding of the initiative. We can problematise its mimicking of the legal institution's split between expert evidence and witness testimony (whereby the Tribunal's structure primarily names the contribution of Western individuals as 'expertise' with the contribution of non-Western migrants relegated to the register of 'experience'). We can question the Tribunal's mode of including migrant voices. Is this an act of speaking for? Is this a denial or capture of individual and grounded experiences in order to make them paradigmatic of a particular 'other'? Does it replicate the reification of state discourses of migrant 'flows'?

While these are all important avenues for critique, in this chapter I suspend this critical register to hold on to, where possible, the politics of the Tribunal's enunciations and its claim to speak in the name of a cosmopolitan 'we' in its address to 'Europe'. This act offers us a form of 'popular' international law that decentres the nation-state as the dominant vehicle for a jurisdictional claim in the international domain.[80] This permits us to envision 'the international domain' as a site of contestation, whereby its subjects, content and limits are never fully determined, but rather figured out through many processes of constituting the international legal order. In its claim to speak the law, Tribunal 12 highlighted and adjudicated both specific violations of international norms as well as harms arising from the very structures and constitution of the international domain itself. Like other peoples' tribunals that came before it, this act can be read as a demand

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[76] *Ibid* 166. Borowiak rightly notes that 'there is nothing inherently democratic or just about the category of insurgency'.

[77] *Ibid* 17.

[78] *Ibid* 16.

[79] *Ibid* 17.

[80] Etymologically, the word 'popular', derived from *popularis*, denotes a sense of something 'belonging to the people': a sense of it being the proper domain, possession and quality of the people.

for social change that uses the existing norms offered by international law while also serving to imagine and enact the international otherwise.