

THIRD WORLD APPROACHES TO INTERNATIONAL CRIMINAL
LAW

Foreword

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The papers presented in this symposium are the result of a series of panels held at the most recent Third World Approaches to International Law (TWAIL) conference, which took place in February 2015, in Cairo, Egypt. TWAIL is an informal network of international legal scholars and practitioners that have gathered together since the 1990s, animated by the aspiration to connect traditions of the oppressed and the particular ways in which international law continues to facilitate the marginalization of Third World peoples — whether in the realms of trade and investment, environment and development, or securitization and military intervention.

Although international criminal law has been subject to important but intermittent analysis and critique from Third World perspectives over recent years, the Cairo conference also saw perhaps the most extensive TWAIL engagement with the field of international criminal justice to date. We are happy to introduce in this symposium several of the papers that originated in and evolved from our discussions in Cairo.

Most introductions to TWAIL are necessarily prefaced with some contextualization of the ‘Third World’ label. Much debate continues as to the most appropriate terminology to incorporate what is variously described as the ‘developing world’, the ‘Third World’ or the ‘global South’.¹ Any such denomination that purports to encompass and unify the heterogeneity of peoples that account for a significant majority of the world’s population is invariably reductive. Within international legal scholarship, the nomenclature of the ‘Third World’ has garnered a particular purchase on account of various

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1 See, for example, A. Pahuja’s ‘A note on the use of “Third World” in S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011), at 261.

interdisciplinary insights that draw on the effects of colonialism, imperialism and the subjugation of vast communities of people under the auspices of progress and civilization. Following the lead of anti-colonial and postcolonial scholars, we understand the Third World not in the sense of a place in time or fixed demographic, but of a project. It is an anti-imperial project grounded in a social and political consciousness that bands together diverse actors through their common marginalization by the particularities of economic and cultural hegemony.² The concept of the Third World connotes a specific and contemporary material condition, a relationship between colonized and colonizer as shaped by the evolving forces of neoliberal globalization.³ It seeks to capture power relations at all levels between communities, inside and outside of established borders. As Vijay Prashad suggests, the imperatives of struggles from below have evolved to encompass both an identity struggle and a global class struggle: a Third World project against traditional colonial governance, and a global South project against neoliberal structures.⁴

Relating such postcolonial interventions that engage North–South relations in the context of international law, the organizing characteristic of TWAIL scholarship is two-fold. First, TWAIL seeks to understand, unpack and deconstruct the role of international law in creating and perpetuating racialized hierarchies and structural material inequalities.⁵ Second, TWAIL constructs and presents alternative normative legal edifices for international governance that unsettle festering colonial power dynamics. Offering a theory of international law as well as important contributions to the science of method in international legal studies,⁶ TWAIL can be most broadly understood as an intellectual agenda with an activist bent that coheres around a broadly unifying set of ideas and politics. In this vein, Antony Anghie and Bhupinder Chimni describe a plurality of Third World approaches, and characterize their own efforts as viewing international law through the lens of the ‘lived history’ of the people of the global South.⁷

This lived history has recently been theorized in an expansive manner to encompass, for example, the experiences of indigenous peoples in North

- 2 See, for example, F. Fanon, *The Wretched of the Earth* (1961) (Constance Farrington trans., Penguin, 1967); V. Prashad, *The Darker Nations: A People's History of the Third World* (New Press, 2007).
- 3 J. Comaroff and J. Comaroff, *Theory from The South or, How Euro-America Is Evolving Toward Africa* (Paradigm Publisher, 2012), at 45 and 47.
- 4 V. Prashad, *The Poorer Nations: A Possible History of the Global South* (Verso, 2012).
- 5 M. Mutua, ‘What is TWAIL?’ 94 *American Society of International Law Proceedings* (2000) 31; J. Gathii, ‘TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography’, 3 *Trade, Law & Development* (2011) 26.
- 6 O. Okafor, ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?’ 10 *International Community Law Review* (2010) 371, at 374.
- 7 A. Anghie and B.S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’, 2 *Chinese Journal of International Law* (2003) 77; A. Anghie, ‘What is TWAIL: Comment’, 94 *American Society of International Law Proceedings* (2000) 39; B.S. Chimni, ‘The Past, Present and Future of International Law: A Critical Third World Approach’, 7 *Melbourne Journal of International Law* (2007) 499.

America.⁸ In light of the Canadian Truth and Reconciliation Commission's finding that the state of Canada engaged in systematic cultural genocide against its indigenous populations,⁹ this expansive understanding of the global South reconnects international criminal law discourses (around the naming and definitions of crimes) to material suffering, in a context where that suffering is located outside of the traditional geographic boundaries associated with the Third World. We remain careful at the same time not to conflate decolonization and resistance to the structure of settler colonialism¹⁰ with broader struggles for social justice in post-colonial societies.¹¹ Nor do we suggest that all colonial experiences are the same; only that they are characterized by common (not uniform) patterns of domination and resistance.

From this understanding of TWAIL, one that begins to disaggregate the state and the conceptual limits that are often closely associated with territorial boundaries, two persistent threads emerge in TWAIL-oriented scholarship. First, 'the experience of colonialism has made peoples of the global South acutely sensitive to power relations among states' and to the ways in which any 'proposed international rule or institution will actually affect the distribution of power between states and peoples'; second, it is the 'actualized experience of these peoples' and 'not merely that of states which represent them in international fora, that is the interpretive prism through which rules of international law are to be evaluated'.¹² TWAIL scholars engaged in linking international law to the realities of colonialism and imperialism, however, do not necessarily advocate for the abandonment of international law. Rather, some suggest a 'reconstruction' of international law in a manner that reflects the concerns of the global South. As Rajagopal says, it is 'legitimate to use international law as an explicit counter-hegemonic tool of resistance' in the context of wider contestation and transformation.¹³

Scholars working under the moniker of TWAIL are well-placed to capture the ambiguities and ambivalences of 'tribunalized' responses to various forms of atrocity. In this symposium, we consider the field of international criminal justice as a particular site of contestation in TWAIL's interaction with international law, and explore it as a surface over which broader debates of concern to TWAIL sensibilities (such as radicalism v. reform, hegemony v. universality, and international law's double movements of emancipation and exclusion) play out. What does it mean to think about international criminal law's norms,

- 8 A. Bhatia 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World', 14 *Oregon Review of International Law* (2012) 131.
- 9 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at 1–6, 133 and 202.
- 10 P. Wolfe, 'Settler Colonialism and the Elimination of the Native', 8 *Journal of Genocide Research* (2006) 387; P. Wolfe, *Settler Colonialism and the Transformation of Anthropology* (Cassell, 1999).
- 11 E. Tuck and K.W. Yang, 'Decolonization is not a Metaphor', 1 *Decolonization: Indigeneity, Education & Society* (2012) 1.
- 12 Anghie and Chimni, *supra* note 7, at 78.
- 13 B. Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy', 27 *Third World Quarterly* (2006) 767, at 772.

rules, institutions and procedures through the frames of the colonial past or imperial present? What biases, blind spots, political moves and rhetorical tropes emerge from the ways in which international criminal justice mechanisms navigate the racial and socio-economic cleavages that persist between North and South? Of particular concern for the authors in this symposium is the issue of whether and how TWAIL can enrich the practice of, and scholarship on, international criminal law. The question here is whether TWAIL can be more than simply reflexively critical, and whether it can identify possibilities and alternatives to that which it problematizes, and new avenues of exploration for scholars working outside of the TWAIL tradition.

This symposium pursues a mutually reinforcing approach. As a number of the papers make clear, a central concern is not only to give voice to TWAIL views on international criminal law but to put TWAIL and international criminal law into a more productive relationship. At the same time, this should not be taken to imply that TWAIL and international criminal law are hitherto alien to one another. The post-Second World War practice of international criminal law has always carried within it strands of TWAIL sensibility. While Nuremberg's many faults have been noted repeatedly, Aimé Césaire's observation that the prosecution of Nazi crimes entailed the first — if incomplete, and perhaps unwitting — prosecution of colonialist crimes holds true.¹⁴ Justice Pal's dissent at the Tokyo Tribunal, moreover, is perhaps the prototypical Third World approach to international criminal law, highlighting the nexus between Allied imperial aggression against Japan — in its kinetic violence, its territorial annexation and its post-war legal and political governance of Japan — and the criminal law problems of *ex post facto* justice.¹⁵ These positions continue to resonate in contemporary analyses of international criminal law. This symposium is not the first contact between TWAIL and international criminal law, but it does seek to intensify that engagement at a time when both are of increasing concern in international legal scholarship.

We open with an article by Michelle Burgis-Kasthala that focuses on the relationship between international criminal law and TWAIL, and in particular the question of method in international criminal law research. Burgis-Kasthala identifies methodological frailties in the study of international criminal law, pointing to the challenges it poses, for example, to feminist scholars. She also explains the methodological possibilities that might be realized through a greater attention to a TWAIL-supported transdisciplinarity. A key underpinning theme of the symposium is also first raised in this essay, that of TWAIL's duality of suspicion and faith in the possibility of transformation through international law. Adopting an optimistic view of law's potential and possibilities, this article argues for new methodological approaches to international criminal law, embodying a resistance to the legal status quo that is reformative at its core. In keeping with some of the other essays' advocacy of

14 A. Césaire, *Discourse on Colonialism* (J. Pinkham trans., Monthly Review Press, 1972) (1950), 36.

15 International Military Tribunal for the Far East, *United States et al. v. Araki Sadao et al.*, Dissenting Judgment of Justice Pal (Kokusko-Kankokai, 1999), 23–24.

parallel resistance and push towards methodological pluralism, this analysis ties international crime into geopolitics and social realities.

As gestured to by Burgis-Kasthala, the apparent preoccupation with the Third World as a geographic entity leads to familiar and historical concerns about selective prosecution. Asad Kiyani's paper revisits the problem of selectivity, challenging its role in the governance of the postcolonial state. Kiyani develops a typology of selectivity practices and their sources, including the geographic selectivity that forms part of John Reynolds and Sujith Xavier's analysis, and the material selectivity that both they and Burgis-Kasthala identify as a prior question that is often overlooked. The article partially rebuts claims of selectivity, arguing that various forms of selectivity are familiar and perhaps even necessary aspects of criminal law. At the same time, one particular type of selectivity practice is problematic because it has distinct repercussions for the liberalist vision and justification of international criminal justice, and because — in keeping with TWAIL problematizations of the postcolonial state itself — it often reifies and supports violent and oppressive governments against Third World peoples. Here, Kiyani turns the lens of TWAIL away from the defects of foreign and international actors and onto local agents instead, demonstrating how TWAIL can further nuance familiar claims.

As with Kiyani, the point of departure for Reynolds and Xavier is the selectivity of the International Criminal Court's prosecutions. The authors approach international criminal justice from a perspective that attempts to reconcile the biases and structural failings of the field — such as its selectivity — with its appeal among popular and grassroots movements in the global South. Reynolds and Xavier explain how the practice of international criminal law mimics colonial regulation in two ways. The mindsets that inform international criminal justice are often reductive and construct ordinary people of the global South as in need of saving (through the civilizing force of international criminal law). In addition, the practice of international criminal law is often directed solely at Third World states and nationals, and often preserves or aligns with pre-existing hegemonic power structures in international relations. As a result, the TWAIL sensibility they adopt demands the reconceptualization of international criminal justice. It also advocates for parallel resistance to the surrounding international legal system that administers structural violence against the very people who turn to international law for support.

Whereas Reynolds and Xavier point to some inherent contradictions in local demands for international criminal justice, and Kiyani warns of normalization of international criminal law in service of local governance, Vasuki Nesiiah examines another aspect of international criminal law's relationship with the local. Nesiiah warns of the normalization of international criminal law in service of global governance through the discourse of 'local ownership'. Approaching the question of legitimacy through the lens of governmentality, Nesiiah notes that the discourses of local ownership and democratic legitimacy mirror good governance techniques in a range of other fields. While local ownership claims to synchronize the regulatory function of international criminal

law with the desires and priorities of local communities, this construct of local governance often smothers dissent and resistance to the production of international law. Here, victims become statistical indicators and lose their subjecthood and agency. This pre-emptively denies the valence of political dialogue, negotiation and contestation in response to an international crime. Just as Burgis-Kasthala is concerned about the lack of comprehensive understanding of violence in international criminal law, Nesiah is concerned about its exclusion of comprehensive responses to violence. Ultimately, the turn to local ownership represents an anti-democratic turn that presupposes universal values and goals in a manner indifferent to comprehensive political accountability and the agency of dissenting and subaltern communities.

We hope that these articles, individually and collectively, can contribute to deepening existing conversations and initiating new ones within (and beyond) international legal scholarship. By hosting this symposium, the *Journal of International Criminal Justice* has provided an important platform for exploring productive interaction between TWAIL perspectives and the field of international criminal law. The *Journal's* commitment to examining international criminal justice from a plurality of angles aligns well with the TWAIL insistence on layered, multidimensional analyses of international law, and reflects the maturation of scholarship in both realms.