Third World Approaches to International Law and Individual Responsibility in Internal Conflicts

Antony Anghie** and B.S. Chimni***

I. Introduction

When the American Journal of International Law published a Symposium on Method in International Law in 1999, Third World Approaches to International Law (TWAIL) was omitted.1 TWAIL is not a “method” if by method we simply refer to a means of determining “what the law is.” But it is certainly as much a “method” as feminism, critical legal studies (CLS), international relations/international law (IR/IL), and even legal process. As the authors presenting each of these perspectives make clear, these are not “methods” in a traditional sense, but they are distinctive ways of thinking about what international law is and should be; they involve the formulation of a particular set of concerns and the analytic tools with which to explore them. In attempting to describe and apply TWAIL2 in the following pages, we are

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1 This article was written at the invitation of Professors Anne-Marie Slaughter and Steven Ratner, the editors for the American Journal of International Law of a Symposium on Method in International Law, 93 AM. J. INT’L L. 291 (1999), after that symposium was published. This article will be included in a forthcoming book containing an expanded version of that symposium, to be published by the American Society of International Law. The editors of the Chinese JIL have decided to publish it here because of the widespread interest in the symposium on method, and because this article was not included in the original symposium published by the American Journal of International Law. The authors have attempted to make this article consistent with the other contributions to the symposium rather than to take into account more recent developments in international law. The authors wish to thank Professors Anne-Marie Slaughter and Steven Ratner and anonymous reviewers of the Chinese JIL for their helpful comments. The US Blue Book style is used herein.


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** Professor of Law, S.J. Quinney School of Law, University of Utah, U.S.A.

*** Professor of International Law, Jawaharlal Nehru University, New Delhi, India.

acutely aware of the fact that we cannot speak for the entire community of Third World international law scholars: we present only one version of this tradition, and other TWAIL scholars may very well disagree with the positions we outline here.\(^3\)

For TWAIL scholars, international law makes sense only in the context of the lived history of the peoples of the Third World. Two important characteristics of TWAIL thinking emerge from this. First, the experience of colonialism and neo-colonialism has made Third World peoples 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. This is because, for reasons detailed below, Third World states often act in ways which are against the interests of their peoples. For us, then, Third World peoples' resistance to, or acceptance of, international rules and practices which affect their lives offers strong evidence of the justice or injustice of those rules and practices.\(^4\) By evaluating

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\(^3\) Further, for the reasons cited by Charlesworth, we too have mixed feelings about participating as Third World voices and not just plain "international lawyers." Hilary Charlesworth, *Feminist Methods in International Law*, 93 Am. J. Int'l L. 379 (1999).

\(^4\) We take the term "resistance" from the extensive work done by post-colonial scholars. See, e.g., *Selected Subaltern Studies* (Ranajit Guha & Gayatri Spivak eds., 1988). See also Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41(2) Harv.
positivist rules through the lens of the lived experience of Third World peoples, TWAIL scholars seek to transform international law from being a language of oppression to a language of emancipation—a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples and which, thereby, promotes truly global justice.

II. What is TWAIL?

Like many of the other perspectives presented in the symposium, TWAIL has undergone evolution and transformation over time, and we might distinguish between what might be called TWAIL I scholarship produced by the first generation of post-colonial international lawyers, and more recent TWAIL II scholarship. TWAIL II scholarship has broadly followed the TWAIL I tradition and elaborated upon it, while, inevitably, departing from it in significant ways. At the risk of simplifying considerably, TWAIL I scholarship\(^5\) formulated a number of positions which had an important impact.
on all subsequent TWAIL scholarship.

First, TWAIL I indicted colonial international law for legitimizing the subjugation and oppression of Third World peoples. Nineteenth century international law, for instance, excluded non-European states from the realm of sovereignty, upheld the legality of unequal treaties between European powers and non-European powers, and ruled that it was completely legal to acquire sovereignty over non-European societies by conquest.6

Second, it emphasized that pre-colonial Third World states were not strangers to the idea of international law. For instance, non-European societies had developed sophisticated rules relating, for example, to the law of treaties and the laws of war. TWAIL I, then, attempted to create a truly international law, both by pointing to the commonalities among ostensibly very different societies, and by identifying a rich body of doctrine and principle which was to

be found in Third World legal systems and cultures, and which could be used for the benefit of the entire international community.\textsuperscript{7}

Third, TWAIL I adopted a non-rejectionist stance towards modern international law. TWAIL I believed that the contents of international law could be transformed to take into account the needs and aspirations of the peoples of the newly independent states. This was to be achieved principally through the United Nations system. TWAIL I scholarship was closely aligned with the diplomatic initiatives undertaken by newly-independent Third World states, and TWAIL I placed immense faith in the UN to bring about the changes necessary to usher in a just world order. In attempting to achieve these ends, the Third World states attempted, in effect, to formulate a new approach to sources doctrine by arguing that General Assembly resolutions passed by vast majorities had some binding legal effect.\textsuperscript{8} These TWAIL attempts to create a system of international law which was democratic and participatory were often defeated by positivist arguments regarding sources and consent.\textsuperscript{9}

Fourth, TWAIL I laid great stress on the principles of sovereign equality of states and non-intervention, fundamentally important issues to societies which had just recovered their independence. Thus the Third World states initiated a number of resolutions in the United Nations which sought to advance these principles of sovereign equality and non-intervention.\textsuperscript{10}

\begin{thebibliography}{9}
\bibitem{Texaco} Texaco Overseas Petroleum et al. v. Libyan Arab Republic, 17 I.L.M. 1 (1978).
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Fifth, it understood that political independence in itself was insufficient to achieve liberation as the economic structures which linked the First and the Third world, the North and South, continued to disadvantage the South and needed to be reformed; thus it sought to inaugurate a New International Economic Order. The South sought in this way to make structural changes to an international economic system which was perceived to disadvantage developing countries, and, more specifically, to regain control over its natural resources, and to exercise effective control over foreign investors.

III. TWAIL II

In the last decade or so, what might be termed TWAIL II scholarship has attempted to reassess both the relationship between international law and the Third World, and the approaches outlined by TWAIL I. TWAIL II has attempted, then, to further develop the analytical tools necessary to deal with Third World realities in a continuously shifting international setting.

Critiquing the Post-Colonial State

First, TWAIL II has adopted a critical attitude towards many of the important tenets of TWAIL I. TWAIL I perceived the newly independent, post-colonial state as a unitary entity that transcended and stood above conflicts and tensions generated by class, race and gender within Third World societies. The task of intellectuals was viewed as supporting this state in its nation building tasks. Consequently, TWAIL I did not closely interrogate the idea of state sovereignty in order to align the language of international law with the destiny of Third World peoples as opposed to Third World states. This view of the transcendent post-colonial state prevented a focus on the violence of the state at home.

11 Of course, the classic work on this subject is MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979).
13 The work of several TWAIL II scholars has been influenced by the writings of post-colonial scholars. See generally, BART MOORE-GILBERT, POSTCOLONIAL THEORY: CONTEXTS, PRACTICES, POLITICS (1997). See, e.g., LAWS OF THE POSTCOLONIAL (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).
By contrast, while recognizing the fundamental importance of the doctrine of sovereignty for advancing Third World interests and for protecting and preserving Third World states against various forms of intervention, TWAIL II scholars have developed powerful critiques of the Third World nation-state, of the processes of its formation and its resort to violence and authoritarianism. Corresponding with this is a concern to identify and give voice to the people within Third World states—women, peasants, workers, minorities—who had been generally excluded from consideration by TWAIL I scholarship. TWAIL II scholars have examined, on one hand, how the great projects of "development" and nation-building promoted by international law and institutions and embraced in some form by Third World worked to the disadvantage of Third World peoples. On the other, they have examined whether and how international human rights norms may be used to protect Third World peoples against the state and other international actors. By simultaneously examining the Third World state critically and recognizing the possibility of using international law to promote the interests of Third World peoples, these TWAIL II positions on international human rights law differ from either mainstream or critical Northern views on human rights as well as from the views of Third World states themselves. One of the major difficulties confronting TWAIL scholars arises precisely because it is sometimes through supporting the Third World state and at others, by critiquing it, that the interests of Third World peoples may be advanced.

Theorizing the Fundamentals

In addition, TWAIL II has sought to further the analysis developed by

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15 See, e.g., the collection of essays in Legitimate Governance in Africa: International and Domestic Perspectives (Edward Kofi Quashigah & Obiora Chinedu Okafor eds., 1999).
16 See, e.g., Celestine Nyamu, How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?, 41(2) Harv. Int’l L.J. 381 (2000). It is not only human rights, but other major discourses such as feminism that are given a different character when viewed from a post-colonial perspective. E.g., Joe Oloka Onyango and Sylvia Tamale, The Personal is Political or Why Women’s Rights Are Indeed Human Rights: An African Perspective on International Feminism, 17 Hum. RTS. Q. 691 (1995).
TWAIL I of the structural factors promoting inequalities between First and Third World states. In this respect, TWAIL II has focused more explicitly on theoretical inquiry than TWAIL I, which adopted a relatively unproblematic view of international law and saw its task as using the established techniques of international law to address Third World concerns. As a consequence of the failure of a number of Third World initiatives, most prominently that of the New International Economic Order, TWAIL II scholars began to examine more closely the extent to which colonial relations had shaped the fundamentals of the discipline. Rather than seeing colonialism as external and incidental to international law, an aberration that could be quickly remedied once recognized, some TWAIL II scholarship has focused on a more alarming proposition: that colonialism is central to the formation of international law.

This inquiry has been conducted through a study of particular doctrines of international law such as human rights, and through a critical examination of the history of international law. For some TWAIL II scholars, the history of the relationship between international law and the non-European world was important not simply to demonstrate that the non-European world had developed a number of important principles which corresponded with well recognized principles of international but also to understand better the extent to which the doctrines of international law had been created through the colonial encounter. It was principally through colonial expansion that international law achieved one of its defining characteristics: universality. Thus the doctrines used for the purpose of assimilating the non-European world into this “universal” system the fundamental concept of sovereignty and even the concept of law itself—were inevitably shaped by the relationships of power and subordination inherent in the colonial relationship.17 It is thus hardly surprising that the Third World’s attempts to use these same fundamental doctrines to advance its goals might encounter unique difficulties and challenges.

*The Structure of Colonialism: the Civilizing Mission*

We have said that international law has historically justified and legitimated the suppression of Third World peoples. How does this

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suppression take place, what are the techniques and technologies by which it is
effected? This inquiry takes different forms depending on the area of
international law involved. At a broader level, such inquiries use an analytic
framework derived from the concept of the “civilizing mission.” The
“civilizing mission” operates by characterizing non-European peoples as the
“other”—the barbaric, the backward, the violent—who must be civilized,
redeemed, developed, pacified. Race has played a crucially important role in
constructing and defining the other.18 This concept of the “civilizing mission”
justified the continuous intervention by the West in the affairs of Third World
societies and provided the moral basis for the economic exploitation of the
Third World that has been an essential part of colonialism.

This task of transforming the other requires the development of new
doctrines, technologies and institutions. A number of issues arise from this
reflex: how is this “other” constructed? How does this construction shape the
legal framework which regulates the interaction between the West and the
other? How does it determine what is legally permissible to each of the
parties?

These ideas of the backward and the primitive, we argue, exercise a
powerful and unstated influence on international law. More particularly, in
the context of the ongoing problem of violence in the international system, it is
significant that since the beginnings of international law, it is frequently the
“other”, the non-European tribes, infidels, barbarians, who are identified as
the source of all violence, and who must therefore be suppressed by an even
more intense violence. However, this violence, when administered by the

18 It is for this reason that TWAIL has much in common with a number of other
important bodies of scholarship including Critical Race Theory and LatCrit
Theory. See, e.g., Henry J. Richardson III, Gulf Crisis and African-American Interests
Under International Law, 87 Am. J. Int’l L. 42 (1993); Ruth Gordon, Saving Failed
States: Sometimes a Neocolonialist Notion, 12 Am. U. Int’l L. & Pol’y 903 (1997);
Isabelle Gunning, Modernizing Customary International Law: the Challenge of Human
Spaces and the Role of Critical Race Theory in the Struggle for Community Control of
Investments: An Institutional Class Analysis, 45 Vill. L. Rev. 1037 (2000); and Adrien
Katherine Wing, A Critical Race Feminist Conceptualization of Violence: South African and
Palestinian Women, 60 Alb. L. Rev. 943 (1997). Again, we cannot do justice to the
literature produced by the numerous scholars working in this tradition. For
important collections of work in these traditions which also provide guidance to the
literatures, see, on Critical Race Theory and International Law, Symposium,
Critical Race Theory and International Law: Convergence and Divergence, 45(5) Vill. L.
Rev. 827 (2000); on Lat-Crit Theory, see, Colloquium, International Law, Human
colonial power, is legitimate because it is inflicted in self-defence, or because it is humanitarian in character and indeed seeks to save the non-European peoples from themselves.\textsuperscript{19}

What is remarkable is the way in which the project of the civilizing mission has endured over time, and how its essential structure is preserved in certain versions of contemporary initiatives, for example, of "development," democratization, human rights and "good governance", which posit a Third World that is lacking and deficient and in need of international intervention for its salvation. To understand the cunning of colonialism, the ways in which the civilizing mission reproduces itself in bewilderingly different forms, all of them presented as benevolent, TWAIL II scholars have focused more explicitly on the methodologies of international law and the ways in which those methodologies addressed Third World issues or else precluded consideration of those issues.\textsuperscript{20}

\textit{TWAIL and the Politics of Knowledge}

Given the importance of theoretical inquiry to our understanding and approach to international law, it is inevitable that TWAIL scholars have turned their attention to the question of how knowledge about international law is produced. How do we identify what counts as acceptable scholarship in the field of international law? Here a powerful international division of intellectual labor prevails: Northern scholars and Northern institutions set these important standards. Further, these scholars and institutions seem to assume that the most significant schools of thought originate in the North—or even more specifically, in the United States. In the words of the editors when introducing the methodologies initially compiled in the \textit{American Journal of

\textsuperscript{19} This basic structure is evident in the works of the earliest jurists to write on "modern international law", Francisco de Vitoria. See Francisco de Vitoria, \textit{On the Indians Lately Discovered} and \textit{On Making War on the Indians}, in \textit{De Indis Et Ivre Belli Relectiones} (Ernest Nys ed., John Pawley Bate trans., 1917).

International Law, "although many of the methods have a distinctly American origin, the community of scholars for nearly all of them is now global."\(^{21}\) We draw—unhappily wearisome—attention to this aspect of the symposium project since it reflects a powerful reality that scholarship cannot be separated from the institutional resources—law schools, journals, publishers—that enable its production.

TWAIL has thus found it difficult to assert itself in an institutional setting which, when it is not generally uncomprehending of TWAIL's history and its aims, seeks to incorporate TWAIL into a familiar geography of alliances and rivalries.\(^{22}\) Some of Northern schools of thought that have generally neglected the subjects of race, colonialism and the Third World have recently developed an interest in TWAIL methodologies and concerns, which we welcome.\(^{23}\) However, to then see TWAIL as a product or subsidiary of these Northern schools would be to further the familiar pattern that all knowledge and theory—including TWAIL—originates in the North. This would disregard the enormous body of work which has been done by TWAIL scholars for more than five decades, work which has often not received proper recognition, and only a part of which we can present in these pages.

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\(^{22}\) This outline might further explain why, when attention was drawn to the omission of any methodology focusing on race by Professor Richardson, the editors' response was that they believed Third World (postcolonial) approaches did not constitute a distinct method, and could be seen as incorporated under critical legal studies approaches. Henry J. Richardson, *Correspondence*, 94 AM. J. INT'L L. 1, 100-01 (2000). Reply of Professors Slaughter and Ramer, *id.*, at 101; to be fair, the Critical Legal Studies (CLS) presenter, Martti Koskenniemi, is not the source of this confusion as he does suggest that CLS does not incorporate post-colonial theory “where were the methods of ‘ethics’, ‘natural law’, ‘post-colonialism’...?” Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 352 (1999). Equally, it must be pointed out that Critical Race Theory, which has concerns in common with TWAIL, has drawn on CLS work in ways which suggest both contestation and coalition.

\(^{23}\) There has been a growing interest on the part of scholars who are usually thought of as CLS scholars, in Third World issues. See footnotes 59-61 infra and discussion therein.
IV. Individual Criminal Responsibility in Internal Conflicts

Overview

The issue presented to us by the editors is whether, under current international law, individuals are criminally responsible for atrocities committed in internal conflicts or, if they are not, whether they should be. The fundamental inconsistencies arising from the regime currently in place has been carefully analyzed by a number of scholars24 and presented by several contributors to the original symposium. In essence, traditionally, atrocities committed by an individual in the context of a conflict between states will give rise to criminal responsibility on the part of that individual, whereas the same crimes committed in an internal conflict may not give rise to any such responsibility—although they may amount to a violation of international human rights law. The reasons for this anomaly may be traced back to the complex, parallel and overlapping developments in international humanitarian law, international human rights law and international criminal law. For TWAIL, it is also noteworthy that the many atrocities committed by colonial powers against colonized peoples were generally not the subject of concern for international law, and it was only when European peoples were subject to the tragedy of the Holocaust that a concern for atrocities committed within a state emerged. Indeed, as Schabas argues, the distinction between atrocities committed in international and internal conflicts was established by the Allies after the war because the prospect of using the rubric of “crimes against humanity” for internal conflicts pure and simple made the Allies “uncomfortable with the ramifications that this might have with respect to treatment of their own minorities, not to mention their colonies.”25 In effect, then, the atrocities regime did not apply to a colonial power despite the intense violence they often used to suppress anti-colonial resistance. Thus, a connection was established between crimes against humanity and international armed conflict, the result of which is the schizophrenia which has since afflicted international humanitarian law and which is the very problem that this symposium attempts to address. The practice of colonialism, then, played an important and yet unexamined role in the formation of the relevant

international law. For TWAIL scholars, this point is not unexceptional; rather, it suggests again the ways in which colonial issues shape in some way an ostensibly neutral, objective and universal law, including IHL.

How then, do the characteristic preoccupations of TWAIL scholars affect our approach to the issue of individual responsibility in internal conflict? We see this issue in the context of the broader issue of the control of violence, the protection of civilians during conflict and the attribution of responsibility. Our analysis may be broadly divided into two parts. First, we approach the problem by questioning the understanding of "internal conflict" that appears to provide the foundation for the whole issue of individual accountability. The other methods presented in the symposium rely on "context" in various ways to address the validity and appropriateness of rules, but for us context means North-South relations and the civilizing mission that often structures these relations. Second, we turn to some of the more specific issues involved in determining whether and how individuals should be held accountable for internal atrocities.

In relation to the first point regarding context, we agree that individual accountability is important to the issue of addressing internal conflicts. We also believe that international human rights law plays a vital role in constraining the type of "ethnic politics" that often accompanies the grand project of "nation building" in Third World states where politicians have often played the race card in order to win popular support. However, these approaches alone are insufficient. We argue that violence has been displaced in part from the first to the Third World by a number of international practices which have resulted in the South's subjection to a range of unsustainable economic and social policies policed by international financial and trade institutions that enrich and favor the North.

The Yugoslavia and Rwanda conflicts have been crucially important in raising the whole question of individual responsibility for internal conflicts, and the international community has devoted a massive amount of its resources to the creation and administration of the two tribunals charged with trying individual perpetrators in both types of conflicts. In both cases, however, it is clear that policies authored by international financial institutions (IFIs), the World Bank and the International Monetary Fund\(^\text{26}\) in which

powerful actors of the international system play a dominant role, were in part responsible for creating the wider environment in which these human rights violations took place. Thus any attempt to identify responsibility for these tragedies and to create systems of accountability should also inquire into the roles that these other international actors played in promoting and exacerbating the situation. Even more pointedly and directly, it is now well acknowledged that significant international actors such as the United Nations itself, failed to address the growing dangers in Rwanda. In addition, we question whether a regime of individual accountability appropriately addresses situations where entire communities inflict massive violence on each other.

Basically, then, any proposal to develop new regimes and institutions to address these tragedies must surely consider, first, the extent to which the negligence and failure of existing international institutions contributed to the problem, and secondly, the very direct ways in which powerful states, which have played the virtuous role of establishing new mechanisms of accountability may have promoted, or in the least, failed to prevent, the very violence which they now seek to redress. If there is any basis for the claim

27 The International Panel of Eminent Personalities asked to investigate the 1994 Genocide in Rwanda and the Surrounding Events by the Organization of African Unity notes in its report of June 2000 that by the late 1980s, all economic progress ended. Rwanda’s economic integration with the international economy had been briefly advantageous; now the inherent risks of excessive dependence were felt. Government revenues declined as coffee and tea prices dropped. International financial institutions imposed programs that exacerbated inflation, unemployment, land scarcity, and unemployment. Young men were hit particularly hard. The mood of the country was raw.


28 See Jose Alvarez, Crimes of States/Crimes of Hate: Lessons from Rwanda, 24 YALE J. INT’L L. 365 (1999). Indeed, Alvarez, in his important article, argues that tribalism and ethnic identities were, in significant ways, created and politicized by colonial powers in pre-independence Rwanda, relying on European theories of racial superiority, in order to further their own authority. These findings further complicate any easy distinctions between “internal” and “external” violence. See id. at 440-441.

29 Thus the historian Gerald Prunier argues that French authorities “played an important part in one of the worst genocides of the twentieth century.” GERALD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 340 (1995). Nevertheless, France has been forceful in calling for the prosecution of the
that IFIs have exacerbated “internal” conflicts, then surely it is ironic that they have been significantly expanding the scope of their activities, often in ways which appear to be in excess of their mandates and that they now indeed are becoming involved in the “reconstruction” of post-conflict societies. Awareness of and accountability for international policies and practices that create the environment in which internal conflicts are ignited must accompany individual accountability for conduct during conflict.

In our view, then, a legal approach that addresses the conditions under which these broad societal conflicts take place may prove more effective in quelling violence against civilians over the long term than a regime of individual accountability alone enforced through national and international courts.

Secondly, turning to the issue of individual accountability, TWAIL insists on a consistent and objective approach to initiatives directed towards establishing individual accountability. Initiatives of this nature always suffer from the danger of becoming, simply, the reproduction of the civilizing mission and victor’s justice. The NATO military operations in 1999 raised disturbing questions about the neutrality and objectivity of this Tribunal. Although the Tribunal was presented with compelling evidence to the effect that NATO had violated international humanitarian law, it chose not to proceed with any further inquiries, stating dismissively that no inquiry was useful and that nothing would emerge. For TWAIL scholars—and indeed, individuals responsible for these atrocities, and has played an important role in the establishment and administration of the Rwanda Tribunal. The indifference and delays of the United Nations, and various Security Council members, further compounded the situation.


31 As Makau Mutua argues, with respect to the Rwanda and Yugoslavia tribunals, “such tribunals would only make sense in the context of an overall solution, a comprehensive and bold settlement addressing the foundational problems that unleashed the genocide in the first place.” Makau Mutua, Never Again: Questioning the Yugoslav and Rwanda Tribunals, 11 TEMP. INT’L & COMP. L.J. 167 (1997).


33 The Final Report to the ICTY prosecutor stated, very broadly, that:
many other scholars who are concerned about the rule of law and impartial justice, decisions of this sort by the ICTY whose mission it is, precisely, to identify and try the parties responsible for the “unlawful killing of civilians”, the ICTY’s decision unhappily tends to confirm the suspicion that justice is selective. To prevent selectivity, we further believe that a regime must be established to hold accountable the individuals and states who support individuals, such as General Pinochet, who have been responsible for massive human rights violations. Finally, given the concern to protect civilian populations, we believe it vital to examine all the current practices, including the imposition of economic sanctions, which are currently deemed “legal” and which have a devastating effect on those populations. It is a tragic paradox that the people of Iraq have suffered more in a time of supposed “peace” than they ever suffered in a time of war. International law has yet to develop principles which address the problems arising from this situation.34

The Development of Contemporary IHL

Having placed the issue of individual accountability within this broader context, we now proceed to focus more closely on some of the issues and doctrines regarding individual accountability—for we do believe that IHL has a vitally important part to play in dealing with the problem of internal conflict. TWAIL continues to aspire towards the creation of an international law which truly reflects the needs and interests of peoples rather than states. However, even within the existing framework of sources doctrine, from a TWAIL perspective, it is vital that the creation of a system of individual accountability for internal atrocities must occur through a process that involves all states and that is open, democratic and participatory. It is for this reason that we are

opposed to the current manner in which these doctrines are being developed. We apply these perspectives and principles both to the creation of international criminal tribunals and the development of international criminal law.

We are opposed to the ostensible creation of new law by the ICTY and ICTR, and are more in favor, whatever its weaknesses, of the process undertaken through the ICC. As the IR/IL approach notes, the problem is that international legal institutions are "intensely political actors."35 This recognition has two implications. The first implication concerns the creation of the institution itself. We are doubtful as to whether the ICTY should have been established by the United Nations Security Council.36 The exigencies of the situation in Yugoslavia may have made such a response attractive, but we are extremely uneasy about the fact that this is part of an intensifying trend whereby the Security Council is arrogating to itself the power to deal with numerous international questions which have been the subject of ongoing negotiations by the larger international community.

In terms of the creation of the law, tribunals such as ICTY have been seeking to rapidly develop the law and indeed, to resolve the contradictions confronting the application of IHL in humanitarian conflict, through interpretive techniques that Simma and Paulus have termed "modern positivism."37 We are opposed to this approach to the development of international criminal law because it undermines both the settled law and the principles of participation in the formulation of the law.

For example, in its 1995 decision on the issue of jurisdiction in the Tadic case, the ICTY Appeals Chamber eroded the distinction between international and internal conflict by enunciating a customary law of war crimes in internal conflicts although it was unclear whether the necessary practice could be established.38 In the course of its decision on the merits, the


36 At the same time, we do acknowledge that the establishment of the ICTY may play a role in deterring further war crimes. See Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, 95 Am. J. Int'l. L. 1 (2001).


Appeals Chamber further departed from what appeared to be a number of established principles of international law. The result may have been that the Chamber, in attempting to fashion a response to the Balkan conflict, created a new set of problems which could unsettle the existing law. While the law certainly needs to be revised, we are uncertain as to whether this is the best method to adopt and whether in fact it furthers justice in a broader sense. The approach of the Chamber raises grave questions as to whether the fundamental principle of nullum crimen sine lege had been properly respected.

The Chamber's approach contravenes, further, the explicit comments made in the Report of the Secretary General in relation to the creation of the Tribunal to the effect that the Tribunal “would have the task of applying existing international humanitarian law.”

Overall, then, because of TWAIL concern for an inclusive and participatory international law, our view is that the law relating to individual responsibility in internal conflicts should evolve in a manner which is fair and acceptable to all parties rather than through formulations which reflect the views of dominant states alone. The Rome Statute of the International Criminal Court (ICC Statute) suffers from several significant shortcomings.
which suggest that participation and democracy often give way to power. Thus the ICC Statute does not outlaw the use of nuclear weapons, in a situation where this issue is surely fundamental to the goal of the ICC, to prevent the acts harming innocent civilians. In addition, the jurisdiction of the Tribunal has been severely curtailed. The powers of the Security Council, provided for in the ICC framework, are a further concern. Nevertheless—perhaps repeating TWAIL I hopes for the gradual reconstruction of international law—we endorse the creation of the ICC. Despite the several shortcomings we identify here, the ICC represents the efforts of the international community as a whole to address these problems and to cover the gaps in international humanitarian law pertaining to the responsibility of the individual in internal wars. The formulation of articles 8(c) and (e) of the ICC Statute deal explicitly with war crimes arising in internal conflicts.42

Simply, it greatly facilitates the creation of a culture of compliance if the rules in question have been established through an open process which has received the broad approval of the international community as a whole. Thus, for example, the recognition of the multicultural basis of the laws of war is particularly relevant to improving compliance with the law of war. The point is relevant even from the point of view of the issue of the enforcement of international humanitarian laws in internal conflicts. As Judge Weeramantry noted in his dissenting opinion in the Nuclear Weapons case, "it greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture."43

Finally, we are of the view that the people of the state which has experienced internal conflict should decide how to deal with individuals who commit atrocities in internal conflicts.44 We recognize that such a position raises a number of problems regarding the relationship between international tribunals and the societies in which these atrocities take place. On the one hand, the internationalization of internal atrocities could play an important role in providing justice in situations where national mechanisms are lacking or else hopelessly compromised. On the other hand, there are many important


42 Id.
44 For a searching inquiry into the choices that societies which have suffered such violence face, see MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998).
national interests which could justify leaving the matter to nationally established institutions to settle—as argued by Kader Asmal. These concerns may be addressed by the ICC through the mechanism of complementarity which would enable national courts to deal with these issues initially.

V. TWAIL II and Others

While seeking to reconstruct international law, TWAIL's approach to the discipline is based on a philosophy of suspicion because it sees international law in terms of its history of complicity with colonialism, a complicity that continues now in various ways with the phenomenon of neocolonialism, the identifiable and systematic pattern whereby the North seeks to assert and maintain its economic, military and political superiority. "Context" is an important concept to many of the other methodologies, and this is the context in which we locate the problem of individual accountability. However, none of the other approaches consider internal conflict in the broader framework we have outlined above. Contemporary ethnic conflict is not simply the latest expression of primordial forces. Its nature, its conduct, its shape are all inextricably linked both with colonialism and with the very modern forces of globalization that inevitably involve North-South economic relations. By approaching the issue in this way we seek to make IHL more effective by attempting to create a comprehensive system in which powerful states and international institutions are prevented from exacerbating the social tensions which often give rise to such conflict. We note, that with the exception of Charlesworth, none of the other contributions to the original symposium question in any significant way the characterization of the concept of "internal" and the analysis that follows from it. Given that the vast majority of "internal" conflicts that have attracted the attention of international law scholars have occurred in the Third World—Latin America, Asia, Africa—the effect of such an approach is implicitly to accept that violence is endogenous to


these societies. While this may be a consequence of the way in which the editors presented the issue, we find such approaches problematic because they hardly correspond with the complex socio-political circumstances in which such conflict arises. For these reasons, we believe it is important to connect the issue of individual accountability to various other areas of international law that clearly have a bearing on the matter in a world that is so intensely interdependent.

This interdependence is something that IR/IL approaches purport to encompass. IR/IL approaches have much to contribute to understanding international legal structures and processes, but TWAIL II places great emphasis on international economic relations even as it does not negate the role of power (realism), subjective factors (constructivists), the role of institutions (institutionalists) and the role of domestic politics (liberal). Indeed, it subscribes to a particular synthesis that emphasizes these individual elements in relation to the structures of global capitalism, and, in our view, has greater explanatory value as far as the North-South divide and the causes of internal conflicts are concerned. While we use many of the elements that are found in IR/IL approaches, we do not subscribe to the vision and broader policy recommendations that are often produced by such approaches. In fact as Holsti points out, Western “International Relations Theory as it has developed over the past 250 years may be of limited relevance in helping explain the crucial issues facing contemporary Third World and post-Socialist States.” Further, we are concerned about the possibility that calls for interdisciplinarity, which undermine or erode the notion of valid law, may have the effect of “smoothening the paths of the hegemon.” At the risk of confirming an orientalist stereotype of the feminine nature of the colonized, we find ourselves in agreement with many aspects of Charlesworth’s feminist analysis, as indicated throughout our presentation.

Our position on sources, which has been the subject of comment by others, may be stated in terms of a number of propositions. First, like Simma...
and Paulus and Law and Economics (L&E),\textsuperscript{52} we believe that it is important to be able to identify clear rules of law. Nevertheless, we agree with many of the critiques of positivism that have been noted by others in the symposium. It is insular and therefore fails to locate international law and institutions in their political context. It freezes the sources of international law, which acquire an almost mystical quality. It posits that an objective interpretation of rules (both textual and customary) is the reality. Furthermore, it fails to place these rules within a larger normative framework, as a consequence of which it does not take cognizance of structures and practices that reproduce oppressive and patriarchic international law rules. By generally disregarding the political dimension of international rule making, interpretation and application, positivism does not take into account the complex ways in which “consent” can be extracted from weak Third World countries; nor can it provide a critique of the ways in which a few powerful states can block international initiatives that benefit the larger international community. Positivism, as pointed out earlier, has continuously defeated Third World attempts to reform international law. At the same time, however we are somewhat skeptical about the approaches of the International Legal Process (ILP) school and the New Haven school,\textsuperscript{52} which both provide for and indeed encourage expansive interpretations of the law. Thus O’Connell asserts that “even where treaties and customary rules do not fully support an outcome, a duly established international law decision maker should reach the outcome that supports society’s values.”\textsuperscript{53} It is of course tempting to subscribe to this view on the basis that this might be one way for values promoting Third World interests to be advanced notwithstanding the obstructions of positivism. However, we are concerned about the ways in which “society’s values” are interpreted, particularly in a situation where “society” is quite often equated with dominant Northern views.

This same concern shapes our response to the New Haven school. We have elsewhere offered a detailed critique of the New Haven method and will confine ourselves to recalling a few points in context.\textsuperscript{54} The New Haven

\begin{itemize}
\item \textsuperscript{54} For a detailed critique, \textit{see} B.S.CHIMNI, \textit{INTERNATIONAL LAW AND WORLD
approach suggests that legal rules are open to various interpretations.\textsuperscript{55} TWAIL believes that both positivism with its emphasis on the transparency of a rule and the Policy approach, which in effect enables considerable hermeneutic freedom, are problematic. Because it does not further examine the connection between the way in which hermeneutic power is exercised and existing power structures, the Policy approach does not appear to explore the ramifications following from the fact that the content of international law rules are written by power. Thus, the notions of “human dignity” and “world public order” that the New Haven school would look to in offering guidance are themselves shaped by these considerations of power. These considerations often possess a North-South dimension, much as they would be shaped by considerations of gender.\textsuperscript{56} There has been marked disparity between the extraordinarily comprehensive methodology proposed by the New Haven school and the somewhat narrow, US oriented proposals that have emerged from such an inquiry.\textsuperscript{57} In this context, we welcome the point, made by Wiessner and Willard, that self-reflection, “clarification of the observer’s standpoint,”\textsuperscript{58} is an important aspect of the Policy approach, as this might lead to a more open version of the New Haven school.


\textsuperscript{55} Wiessner and Willard make the point, with which we agree, that “[o]ne’s perception of “the law” can differ substantially depending on whether one is a member of the system observed, whether one is an outsider, or whether one lives at its margin. It may also vary depending on one’s culture, class, education, gender, age, life experiences, and other factors.” Wiessner & Willard, \textit{supra} note 52, at 322.

\textsuperscript{56} As Charlesworth states, “[t]he New Haven commitment to a world public order of human dignity also fails to consider the gendered dimensions of the notions of order and human dignity.” Charlesworth, \textit{supra} note 3, 392. Basically, where certain voices and interests have been systematically excluded from participating in a system of world order, as has been the case with the Third World and women, it is perhaps only by understanding the specificity of the ways in which they have been excluded and actively seeking to excavate those voices that they may be effectively recovered and taken into consideration. But the New Haven School does not appear to engage in this project, operating more at a problematic general level. As Judge Rosalyn Higgins, a follower of the school noted many years ago, “McDougal is concerned for human dignity in the new nations as in all nations; but he does not see the developing countries require the separate and urgent attention of the legal process.” Rosalyn Higgins, \textit{Policy and Impartiality: The Uneasy Relationship in International Law}, 23 Int’l Org. 914, 924 (1969).

\textsuperscript{57} See Chimni, \textit{supra} note 54, at 143-145 (for a discussion of some of the scholars who argue this point).

\textsuperscript{58} Wiessner & Willard, \textit{supra} note 52, at 322.
So the paradox we face is this: TWAIL shares the positivist and L&E desire for clear rules even while acknowledging the inherent impossibility of ever achieving them. The alternatives suggested by ILP and the New Haven school are equally problematic. This leaves the CLS approach and Martti Koskenniemi’s suggestion that the indeterminacy of international law is such that it is of little assistance in justifying or criticizing international behavior. Many of the insights that CLS developed have been important and useful to TWAIL scholarship. Almost inevitably, given that the Third World has often been subordinated by international law, TWAIL has several elements in common with CLS and feminism, both of which in different ways have attempted to question the power structures embedded in law. Nevertheless, TWAIL differs from CLS in several ways.

Language is never free of ambiguity; law is, inevitably, indeterminate. We agree that justice at times may be promoted by the employment of another discourse, the language of a novel, in the words of Koskenniemi, although of course, there is no discourse free of ambiguities: novels—particularly great novels—may evoke very different responses. There are at

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59 CLS has itself gone through various metamorphoses and has acted as the basis for what might be called the NAIL (New Approaches to International Law) movement. For a detailed account of these transformations, see David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335 (2000).

60 Koskenniemi, supra note 22, at 351.


62 Thus Robert Kaplan has written a very influential essay on Joseph Conrad’s magnificent novel, *Nostromo* which presents it as a novel whose major theme is Third World disorder; Kaplan’s reading overlooks Conrad’s superb exploration of the corrupting effects of colonialism at a both personal and political levels. See Robert D. Kaplan, *Conrad’s Nostromo and the Third World*, National Interest 51 (Spring 1998); for an alternative reading of *Nostromo* which focuses, on the theme of colonialism, see EDWARD SAID, CULTURE AND IMPERIALISM xvii ff. (1993). How should we read the novels and non-fiction of V.S. Naipaul?
least two reasons, however, why TWAIL scholars are unwilling to depart the
arena of international law, notwithstanding the injustices that international
law has inflicted on the Third World, and the disappointments of TWAIL I.
First, TWAIL scholars believe in the transformative potential of international
law and in the ideal of law as a means of constraining power. While the
problem of indeterminacy is real, it is not a problem purely internal to the
argumentative structures of international law and the ambiguities of language.
Linguistic indeterminacies are resolved most often by resort to social context.
This is why indeterminacy very rarely works in favor of Third World interests.
Ambiguities and uncertainties are invariably resolved by resort to broader
legal principles, policy goals or social contexts, all of which are often shaped
by colonial views of the world and the conceptual apparatuses that support it.
This, after all, is precisely why we are troubled by the New Haven approach.
We believe that international law is constraining, that good argument based
on law does prevail; but it often prevails only as argument and in the face of
power, good argument does not necessarily control action.

Second, and equally importantly, there are real dangers in conceding
the entire arena of international law to other methodologies and actors in the
aspiration to find a more powerful discourse which would render injustice with
such clarity and persuasion that it would compel the changes in international
relations which TWAIL seeks. To the extent that CLS suggests this course of
action, it runs the risk of merely supporting, if not furthering the status quo, as
Koskenniemi recognizes.63 TWAIL simply cannot afford this because
international law has now become an extraordinarily powerful language in
which to frame problems, suggest fault and responsibility, propose solutions
and remedies. International law rules matter and must be taken seriously. It is
not simply a distinctive style of argumentation but has serious consequences
for how ordinary people live. To present it as a mere style is to privilege form
over content; as Charlesworth notes, international law has “a symbolic, as well
as a regulative function.”64 International law is a field of contestation over
meanings, approaches, solutions, remedies, and one that TWAIL cannot
surrender. Finally, even Koskenniemi appears to be ambiguous about the
uselessness of law: law does serve some function in preventing the simple
prevalence of politics in its most blatant form.65

63 Koskenniemi, supra note 22, at 360.
64 Charlesworth, supra note 3, at 393.
65 See Koskenniemi, “Whatever one thinks of lawyers, or of a culture within which
the question of ‘validity’ is a matter of professional concern and not of formalistic
VI. Conclusion

The issue presented to us is, as the responses suggest, are far too complex to enable the production of a comprehensive and detailed set of proposals. Rather, the different methodologies outline a set of broad principles, approaches and concerns to the problem in question. TWAIL, while using analytical tools that are also part of the arsenals of various approaches, represents a distinctive approach to international law. Our perspective is profoundly shaped by the experiences of the peoples and States of the Third World. However, this does not mean that our methods are limited and partial, as opposed to other methods that present themselves in more universal terms. First, as we have argued, it is the Third World that is in important respects the object of these initiatives. Any system that purports to be universally valid must surely be assessed in terms of how it deals with the most disadvantaged. Second, methodologies that purport to be “universal” and that rely on concepts posited as having the same valence everywhere—“the individual”, “cost benefit analysis,” etc.—often prove to be narrow and particular, a mechanism for advancing certain unacknowledged but specific interests as being for the universal good.

TWAIL is not so much a fixed methodology that promises to provide clear answers if only the appropriate amount of research was done (into cost benefit analysis or the role of the domestic actors or the contexts in which decisions are made). Many methodologies aspire to a science that may never be achieved. In TWAIL, then, we offer instead an ongoing project that is continuously questioning not only the foundations and operations of international law, but also its own methodological premises. Approaches to international law that fail to take into account its violent origins might preclude an understanding of the continuing complicity between international law and violence and in this way, simply perpetuate a “violence that thinks of itself as kindness.”66 It is precisely by attempting the task of excavating these aspects of international law that TWAIL seeks to formulate an international

law that might hold good to its ideals and serve the cause of global justice. This project may appear both presumptuous and paradoxical: but given that we belong to a profession whose engagement with paradox is inescapable—how is order created among sovereign states—the issue is not that of achieving consistency and resolving paradox but rather, choosing which paradoxes and tensions to engage with in our professional and personal lives.