

## INTRODUCTION TO SYMPOSIUM ON TWAIL PERSPECTIVES ON ICL, IHL, AND INTERVENTION

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This symposium on Third World Approaches to International Law (TWAIL) is the first of two resulting from an open call.<sup>1</sup> While TWAIL scholarship has its antecedents and roots in much earlier periods, TWAIL as a loose network of scholars began using that self-identifying acronym in the late 1990s. The four contributions to this symposium address international criminal law, international humanitarian law, and claims to justification for military intervention. They join a growing self-identified body of scholarship in international law. The essays also reflect important pushback against themes in earlier TWAIL scholarship. They critically engage blind-spots and limits of TWAIL scholarship with proposals on how these could be addressed.

In the first essay, “Third World Approaches to International Criminal Law,” Asad Kiyani argues that to overcome the problem of selectivity in international criminal law, Third World Approaches to International Criminal Law must focus on the “growing role of domestic power and repressive local authorities in the practice of international criminal justice.”<sup>2</sup> According to Kiyani, it is insufficient for TWAIL scholarship to focus merely on how international criminal law overrides the sovereignty of weak states, or how it is unequally enforced or even how it shields powerful ones. Kiyani maintains that critical scholarship must also focus on the gaps that international criminal law misses: how it is repurposed by local elites for consolidation of domestic power; and its silence on the criminality of state and corporate actors as well as foreign and transnational arms dealers and military forces involved in African conflicts. Unless TWAIL scholarship addresses these gaps, Kiyani argues, it falls short of its promise to be connected to “the concrete experiences and claims found in local spaces” that are central to its mission.

Parvathi Menon’s contribution, titled “Self-Referring to the International Criminal Court: A Continuation of War By Other Means,” continues a theme in Kiyani’s paper: how African states use international law and institutions to legitimate their actions and delegitimize internal political opposition and rebel groups.<sup>3</sup> She uses the examples of Uganda, the Democratic Republic of Congo, the Central African Republic, Cote d’Ivoire, and Mali. In Menon’s view, African states with little or no effective control over their territories recharacterize the conduct of armed opposition groups as armed conflict, to provide a basis for opening such groups to investigation and/or prosecution by the Office of the Prosecutor of the International Criminal Court. This, Menon argues, contrasts with the impunity shown with regard to African leaders who, with the exception of President

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<sup>2</sup> Asad G. Kiyani, *Third World Approaches to International Criminal Law*, 109 AJIL UNBOUND 255 (2016).

<sup>3</sup> Parvathi Menon, *Self-Referring to the International Criminal Court: A Continuation of War by Other Means*, 109 AJIL UNBOUND 260 (2016).

Bashir of Sudan (and the distinctive situation of Kenya) have not faced similar investigations or prosecution for international crimes. It is this asymmetry between civilians and political leaders of African states, on the one hand, and opposition groups who lack combatant privilege or civilian immunity, on the other, that lies at the center of Menon's contribution.

For both Kiyani and Menon, African states have, like Western states, been complicit in exploiting international law at the expense of Africa's political "others"—political opposition groups in particular. For Menon this "internal othering," goes beyond traditional TWAAIL critiques of international criminal law—that of selectivity of African cases and that of contravention of the principle of complementarity under the ICC Statute.

Ntina Tzouvala's contribution, "TWAAIL and the 'Unwilling or Unable' Doctrine: Continuities and Ruptures," probes another TWAAIL dilemma—the concern in its scholarship both to resist imperialism and to address the material and ethical concerns of third-world peoples—in the context of one contemporary justification for the use of force.<sup>4</sup> Tzouvala argues that the "unable or unwilling" doctrine replicates the nineteenth century "standard of civilization," which differentiated between the so-called civilized, barbarous and savage spheres of humanity and thereby enabled Western states to arrogate for themselves the authority to intervene in non-Western states. Tzouvala observes the "unable and unwilling doctrine" has in the recent past found support among extremely few states and therefore has little if any *opinio juris* to support it. She therefore concludes that scholarship in support of this doctrine effectively underwrites "the naked practice of a handful of Western states to define manifestations of international law." For Tzouvala, the tension created by the "unwilling or unable" doctrine as against the prohibition of the use of force in the Charter of the United Nations reflects a persistent puzzle for TWAAIL scholarship—that international law is simultaneously "a locus of oppression" and a "constant promise for liberation." She argues TWAAIL scholarship has yet to fully grasp this tension.

In the final essay, titled "Islamic Contributions to International Humanitarian Law: Recalibrating TWAAIL Approaches for Existing Contributions and Legacies," Corri Zoli argues that TWAAIL scholarship should be more attentive to history, traditions of governance and the participation of Islamic States in the making of international law.<sup>5</sup> In her view, such an approach is superior to presuming "static notions of identity," narratives of resistance, and "shared ideologies," which she attributes to TWAAIL scholarship. To address these shortcomings, Zoli argues that TWAAIL scholarship should pay attention to the history of "third-world participation and leadership in developing international law norms." Zoli delves into historical sources to demonstrate the consistency of Islamic norms with those of international humanitarian law, as well as the role of Muslim states in the early Geneva and Hague diplomatic conferences. Zoli emphasizes that contrary to TWAAIL critiques of empire and imperialism, "humanitarian priorities" emerged from these diplomatic conferences. Her essay therefore emphasizes the "multicultural pedigree" of international law.

The four essays in this symposium thus make useful contributions to TWAAIL scholarship. I want to end this introduction by noting the sure forward momentum of TWAAIL scholarship in the twenty or so years since scholars began to self-identify as such. Using databases such as Westlaw, Lexis/Nexis and Bloomberg law, all admittedly Western-based, the chart below indicates the first TWAAIL articles were published in 1998 and that the trend has mostly been upward since then. These essays join that growing and vibrant scholarly agenda, with important internal debates, that has now found its way to the AJIL.

<sup>4</sup> Ntina Tzouvala, *TWAAIL and the "Unwilling or Unable" Doctrine, Continuities, and Ruptures*, 109 AJIL UNBOUND 266 (2016).

<sup>5</sup> Corri Zoli, *Islamic Contributions to International Humanitarian Law: Recalibrating TWAAIL Approaches for Existing Contributions and Legacies*, 109 AJIL UNBOUND 271 (2016).

