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NON-WESTERN APPROACHES TO INTERNATIONAL LAW

This panel was convened at 2:30 p.m. on Friday, March 31, 2023 by Alejandro Chehtman and Ntina Tzouvala, and chaired by George Galindo, of the University of Brasilia and the Ministry of Foreign Affairs of Brazil, who introduced the panelists: Francisco-José Quintana, of the University of Cambridge; Lauri Mälksoo, of the University of Tartu; Kangle Zhang, of Peking University; Ntina Tzouvala, of the Australian National University; and Amaka Vanni, of the University of Leeds.

Approaching "Latin American Approaches to International Law"

*By Francisco-José Quintana**

In preparing for this panel, my thoughts returned to a passage from *Formas de olver a casa*, a novel by Chilean writer Alejandro Zambra. The protagonist, musing over conversations of his university days, recalls how his classmates would tell stories of death, family, and politics in Chile under Pinochet's rule. Lacking a personal experience to contribute, the protagonist held back from sharing the pertinent yet intimate story of his neighbor. The protagonist reflects: "I knew little, but at least I knew that: no one could speak for someone else. That although we might want to tell other people's stories, we always end up telling our own."

This passage resonates with the essence of my remarks. Our understanding of what is often proposed—including at ASIL meetings throughout the decades—as the Latin American approach to international law too frequently resembles a generalization of very particular perspectives. Perhaps, one could say, our ideas have been shaped by people telling other people's stories. Today, I want to problematize three commonplace assumptions—or, as I would like to call them, myths—about Latin American approaches to international law.

First, let us first consider what can be called the "myth of anachronistic formalism." This is the prevalent and enduring belief in a Latin American inclination toward impractical legal arguments, born from an overzealous defense of state sovereignty. In the 1959 ASIL Annual Meeting, U.S. Professor Aaron Thomas provided an illustrated expression of this view. He argued that the Latin American states championed an "absolute doctrine of non-intervention" that rendered "the complete protection of the 'basic goal values' of the [inter-American] community" impossible.[1]

In advancing his argument, Thomas deployed a few conventional moves. He cast Latin Americans as unwavering formalists. Moreover, he framed this formalism as anachronistic, tying it back to the old days of nineteenth-century interventionism. Finally, by contrasting non-intervention with human dignity, he subtly blamed Latin American legalism for the stagnation in regional social and economic progress. Today, we see similar strategies underpinning

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[1] A. J. Thomas, Jr., *Non–intervention and Public Order in the Americas*, 53 ASIL Proc. 72, 73 (1959).

contemporary narratives, as evidenced in NGO reports on Latin America that brand non-intervention as an "archaic" principle.

The past and present of international legal argument in Latin America, however, is far more nuanced. The portrayal of an unyielding formalist obsession among Latin Americans does not hold. In fact, Latin American states were instrumental in creating the Inter-American System, arguably the world's first regional legal-political system, demonstrating a commitment to advance the common interests of the inter-American community. Admittedly, Latin American jurists and diplomats have performed a balancing act between their aspirations for cooperation with a certain defensive legal formalism. Yet this has rarely been an anachronism. Throughout the twentieth century, many Latin Americans employed principled legal arguments to counter the abuses of collective action or to resist the imposition of international standards that ran contrary to their interests. Nevertheless, the myth of anachronistic formalism persists.

The second generalization that I want to scrutinize is the "myth of no real difference." In the 1986 ASIL Annual Meeting, Argentine international lawyer Hugo Caminos contended that "the Latin American approach to law is fundamentally a restatement of Western legal theories and ideas, particularly of European origin."[2] He then extolled a set of universal international legal rules, tracing their origins to Latin America. This is an archetypical example of "contributionism," a prevalent approach among Latin American international lawyers.[3] Contributionism does not interrogate international law's claim to universality. Rather, it legitimizes it, by depicting the discipline as an assemblage of global contributions.

This approach, however, obscures the reality of Latin American actors who have critically engaged with, and sought to transform, fundamental aspects of international law. Consider, for instance, the project to codify an "American international law" in the early twentieth century, most influentially promoted by Chilean jurist Alejandro Álvarez. Or take the efforts to change international economic law associated with the structuralist economics of the UN Economic Commission for Latin America. Between the 1950s and the 1970s, various Latin American diplomats and jurists advanced international legal change in the United Nations. Among them was Mexican Jorge Castañeda, who argued that "[i]n the vast body of law having to do with the responsibility of states, the rules now in force . . . were not only created independently of the interested small states, but even against their desires and interests."[4] These examples, among many others, show that the emphasis on contributions and the understatement of differences does not accurately reflect the diversity of Latin American perspectives.

Third, let us examine the more recent "myth of the historical centrality of human rights." This narrative posits that human rights, as we understand them today, have long defined Latin American approaches to international law. This myth echoes some of the points I have discussed. It follows the contributionist model, as it celebrates Latin America's role in the construction of a purported universal project. It does not reclaim the history of human rights in Latin America to challenge certain aspects of the contemporary dominant approaches to international human rights law. Some of the early articulations of international human rights in Latin America exhibited distinctive concerns for state autonomy, independence, and economic cooperation that contrast sharply with today's emphasis on adjudication and individual rights.

[2] Hugo Caminos, *The Latin American Contribution to International Law*, 80 ASIL Proc. 157, 157 (1986).

[3] On contributionism, see James Thuo Gathii, *Africa*, *in* The Oxford Handbook of the History of International Law (Bardo Fassbender & Anne Peters eds., 2012).

[4] Jorge Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 Int'l Org. 38, 39 (1961).

Furthermore, this perspective is historically simplistic. Borrowing from historian Eric Hobsbawm, it might be said to reify an "invented tradition." The regional codification and institutionalization of human rights were part of broader struggles over the legal ordering of regional geopolitical and economic relations. These now-forgotten struggles involved contested visions of sovereignty, collective security, and development, articulated in the language of international law.

This myth often sets up a static tension between sovereignty and non-intervention, on one side, and human rights and democracy, on the other, with the latter progressively gaining ground in international law. It thus creates a straw-man of formalism, where sovereignty, state consent, and rules are all seen as hurdles to progress in a narrative that demands action and policy as ethical imperatives.

To be sure, human rights could be said to define Latin American approaches today, bringing with them virtuous consequences. The myth of historical centrality solidifies their contemporary importance. But it does so at the cost of obscuring other concerns—both past and present—as well as the need of developing alternative languages and institutional mechanisms to address them.

International law was once employed to debate the very concept of Latin America, to understand how Latin American states were impacted by international structures, and to explore possibilities for regional cooperation to effect change.[5] Yes, this was largely the work of regional elites and the projects they advanced were often riddled with contradictions. However, there is less space for regional political contestation through law today. This contraction is indeed a loss.

Let me conclude by stressing that a central dimension here is the political economy of knowledge production. Funding decisions made and collaborative projects designed in the North Atlantic determine which Latin American stories get to be told. In this way, voices are constrained and myths are reinscribed. This panel today stands in contrast, providing a welcome platform for an open, horizontal conversation. Thank you.

Remarks by Lauri Mälksoo*

Europeans—and later the West—have dominated international law for a long time. This has created a myriad of problems of justice and representation in the interpretation and application of international law. It is necessary to be (or become) aware of these problems and, where possible, try to solve them. However, it does not follow from this situation that all non-Western approaches to international law deserve to be romanticized. Powers which strongly criticize the West are not always Robin Hoods, trying to correct injustices; a non-Western approach to international law can also be imperialist and abusive toward its neighbors. We can currently see it in the context of the war of aggression which the Russian Federation launched against Ukraine on February 24, 2022, and in the way that this war has been conducted, often in systematic violation of norms of international humanitarian law. At the level of ideas, Russia's current war against Ukraine is also a war against the West. It is not merely non-Western; it is anti-Western—and the thinking behind it also reveals an alternative concept of international law.

Russia is historically probably the first country where a non-Western concept of international law emerged. Sure, in Latin America, jurists such as Alejandro Álvarez promoted the concept of American international law as something which was supposed to be distinct from the way the dominant European powers saw international law. But the initiative of American international law was not a real break with classical international law; it mainly introduced and legitimized

[5] *See* Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 Harv. Int'l L.J. 283 (2006).

* University of Tartu.

certain regional elements in international law in the Western hemisphere. However, in the 1920s and 1930s, when the Soviet Union had emerged and consolidated itself, Soviet Russian jurists such as Evgeny Korovin and (in a different way) Evgeny Pashukanis introduced the Soviet concept of international which was in several ways fundamentally different from the understanding of international law elsewhere in Europe. For example, Pashukanis insisted that the principle of *pacta sunt servanda* would not fully apply to the Soviet state and its (inherited) international legal obligations. Writing in the early 1920s, Korovin made it very clear that for him, the unity of international law had been broken; from now on, there were different competing spheres of international law. And perhaps this is one of the central questions about international law in our time too: in the reality of international law, how much can we assume its universality?

Several intellectuals in the West—perhaps at that time not so much in the context of law but in culture and politics more generally felt a certain sympathy with the Soviet approach because the Soviets were actually good at pointing out hypocrisies in the capitalist world as well as in how classical international law often served existing power relations. At the same time, not everyone noticed that while criticizing the abuses of the capitalist world and the mainstream international law in Western Europe, the Soviets actually managed to preserve most of the territory of the old Russian Empire and even reconquer some of it in 1940. They criticized the West for its colonialism and imperialism but managed to maintain the Russian imperialism in the actual practices the Soviet Union. The Soviet Union was the first and most vocal criticizer of Western approaches to international law but within the Soviet Union, repressive and imperialist practices were carried out. In the rhetoric and thinking of Soviet jurists, what was aggression when done by a Western power somehow naturally transformed into liberation and something progressive when done by the Soviet Union. Moreover, pluralism within the Soviet Russian society did not develop in the sense that never was it allowed to scholars to say anything publicly critical about one's own state's practice or discourse in the context of international law.

Contemporary Russian practices of international law—an example of a non-Western approach—is a direct legacy of these earlier, particularly Soviet practices in Russia. As within Russia, the country has almost always been portrayed as a force for good, also in the context of international law and relations, there is currently still too little awareness of colonialist and imperialist practices in the history of Russian engagement with international law.[1] Russia's struggle with the West is portrayed as Messianic, eschatological, and thus full of historical meaning. For example, there is, on the one hand, pride for the Soviet role at the Nuremberg trials in 1945–1946 but, on the other hand, almost complete rejection of the idea that international criminal law as applied by international institutions might also apply to Russian citizens. In the context of international humanitarian law, Michael Riepl has recently convincingly demonstrated how Russia has failed to implement its rules and principles in domestic law and how since the Soviet period, Russia has applied international humanitarian law at best selectively.[2]

My point is not that leading Western countries, including the United States, have not violated international law. My point is that due to the specific historical trajectory of Russia as a non-Western great power, it is usually difficult if not impossible to criticize or even mention such violations in the public discourse within the country. On a personal note, I remember well how in 2003—the year of the Iraq war—I attended the annual meeting of ASIL in Washington and a number of international lawyers from the United States and elsewhere in the West criticized the war in Iraq as illegal under international law. In Russia, after President Putin launched the full-scale war against

[1] *See also* Lauri Mälksoo, *The Legacy of F.F. Martens and the Shadow of Colonialism*, 21 Chinese J. Int'l L. 55 (2022).

[2] Michael Riepl, Russian Contributions to International Humanitarian Law: A Contrastive Analysis of Russia's Historical Role and Its Current Practice (2022).

Ukraine in February 2022, based on my previous experiences in the country, I do not think that a public criticism of Russia's war as illegal or as violating international humanitarian law would be possible in the discourse of international lawyers.

On July 1, 2020, Russia formally changed its constitutional approach to international law and consolidated the principle that the Russian constitution itself prevails over international law and its interpretations by international courts and institutions. This enables Russia to argue that international law can be put aside when Russia's national interest, as interpreted by the Kremlin and as translated legally by the Russian Constitutional Court at St Petersburg, demands it.

At the time when ASIL's 2023 annual meeting took place in Washington, D.C., Russia's President Putin approved the new version of the country's foreign policy concept.[3] Reading this document, we can get much information here on how the Russian government itself sees the dynamics of international law globally and in Russia's neighborhood. The main line in this policy document is that Russia is currently fighting against U.S. hegemony and for more multipolarity in the future world order. The document says that Russia "consistently advocates strengthening the legal fundamentals of international relations, and faithfully complies with its international legal obligations."[4] At the same time, in a dialectical move, the same passage in the document adds that "decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation which collide with the Constitution may not be executed in the Russian Federation," exactly as the constitutional amendments of 2022 foresaw it. In sum, Russia declares that it is among its national interests "to strengthen the legal foundations of international relations"[5] but the drafters of the policy document have apparently not considered the possibility that Russia's full-scale war against Ukraine since 2022 is, in the opinion of the overwhelming majority of the UN General Assembly, in most direct conflict with this aim. It is certainly not sure that the international law that Russia wants to be strengthened is the same one as taught and understood in most Western foreign ministries and even law schools.

Russia declares that it is fighting the United States and Western hegemony in world politics but it is Russia's own pursuit of regional hegemony and great power status that makes it very difficult for Russia's smaller neighbors, currently most acutely Ukraine, to rely on the effectiveness of international law and its institutions in their actual relations with Moscow.

No Way Out

*By Kangle Zhang**

It is a challenging exercise sketching alternative approaches to international law, not the least because the *legal* world we live in, its basic contours, and fundamental parameters—be it sovereign states, borders, property claims, and contractual relations—are already constructed by a specific approach to international law. The turn to history in international legal scholarship has carefully and powerfully revealed the Euro-centric nature of that specific approach, and demonstrated its imperial dimension. Indeed, the perpetuation of the orthodox European approach, with states being the units of analysis, leads to an inclination of imagining alternative approaches by linking specific states with their international legal practices and entitle it an alternative approach—a

[3] The Concept of the Foreign Policy of the Russian Federation (Mar. 31, 2023), *at* https://mid.ru/en/foreign_policy/fundamental_documents/1860586.

[4] *Id.* at 21.

[5] *Id.* at 15, para. 3.

* Peking University.

Chinese approach to international law and similar variants serve as good examples. That inclination overlooks the penetrative effects of the orthodox European approach, with its argumentative conundrum accompanied by and confined in a homogenous process of global expansion and reproduction of capitalist relations of production.[1]

This presentation argues that what is termed the Chinese approach to international law is the orthodox European international law. Moreover, this orthodox international law portrays a world of power competition at the interstate level, thus purposely shielding the legal mechanisms that are serving the interests of a small group of transnational elites at the expense of the masses from the scrutiny of international lawyers.

By orthodox European international law, I refer to a specific conception of communities as well as distributions of rights and duties between countries that were universalized starting from the end of the nineteenth century. Mestizo international law as Arnulf Becker Lorca terms it, as a result of interactions between the center and the peripheries, usefully captures this process of universalization.[2] It was in this process that the orthodox European approach was embraced by Chinese international lawyers, though notably with divergent motivations, ranging from domestic political struggles to a sincere pursuit of equal seating in the global arena. The Chinese approach in essence rooted in the orthodox European international law, is a result of the appropriation of the international legal discourse by the Chinese through faithful learning of the law.

The profound insistence on an absolute notion of sovereign autonomy and equality, the embracement of positivism and legal formalism, which are at the core of Chinese international legal practices today, roots deeply in European international law and its geographical expansion in the nineteenth and early twentieth centuries. The faithful appropriation of the international legal discourse by Chinese international lawyers is most profoundly witnessed in a deeply rooted belief in and acceptance of the European origin of international law. The late Professor Wang Tieya, a mentor of the leading international lawyers of the People's Republic of China, wrote in his monograph: "Modern international law has its origin in western civilization. It has, however, been expanding to the whole world."[3]

The argument of the Chinese approach rooted in the orthodox European approach warrants detailed and careful analyses. The time limit of the panel certainly will not allow it. That said, it is necessary to respond to the two most common streams of counterargument. The first counterargument values the academic influence of the Soviet Union, arguing that a generation of Chinese international lawyers was trained in Moscow and later played a role in shaping Chinese international legal practices. The second builds on the constitution of the People's Republic, noting that it is a socialist state guided by, among others, Marxism-Leninism, hence Chinese international legal practices being influenced by a Marxist outlook. Both arguments suggest a distinctive Chinese approach to international law. As academically valuable as these arguments are, each falls short in its way. The first argument is fixated on a specific historical period and overlooks the changes brought to Chinese international legal education since the end of the 1970s. The second argument overlooks the Chinese characteristics of the socialist state. Indeed, Marxism in China has taken its own—for lack of a better word—variable form. A better and full appreciation of the Chinese approach to international law requires a practical eye on Chinese international legal practices, for example, the legal underpinnings of infrastructure projects along the Belt and Road Initiative, as opposed to ideological wordings and metaphysical conceptions.

[1] Ntina Tzouvala, Capitalism as Civilisation: A History of International Law (2020).

[2] Arnulf Becker Lorca, Mestizo International Law: A Global Intellectual History 1842–1933 (2014).

[3] Tieya Wang, *International Law in China: Historical and Contemporary Perspectives*, 221 Recueil des Cours 195, 204 (1990-II).

To reiterate, the Chinese approach to international law is built on an embracement of orthodox European international law. The orthodox European approach is so pervasive that the very idea of a distinctly Chinese approach is already the making of that European approach. More importantly, the European approach has largely preconditioned the disciplinary imagination of the world, that it is one of competition, filled with state-centered and interest-driven projects through the means of contracts and property claims. As a result, much attention has been paid to the display of rivalries in the international arena, for example, the China-U.S. dynamic in international relations, in trade war, and earlier on the legal debate around absolute sovereignty and non-intervention versus responsibility to protect. In a way, the orthodox European approach sets the agenda of legal interventions, and in doing so it shields the actual and effectual distributive outcomes of international legal mechanisms from critical interrogation.

One (of many) alternative approaches to international law ought to reflect on the orthodox approach and unravel its hidden secrets. For example, how does a particular mode of engaging with international law settle as the orthodox approach, and which groups are benefiting from this process? This line of work has been usefully and successfully carried out by heterodox groups, including but not limited to TWAIL scholars, scholars in the critical genre, and Marxist scholars. In the context of discussing a Chinese approach to international law, this leads to the following observation. Rivalries in the international arena, for example, the U.S.-China dynamic, appear on the surface as disagreements on values and as a result of which legal arrangements protect those values. Yet these debates shield the transnational legal mechanisms that facilitate small groups of people benefiting across borders, for example through a well-built international financial infrastructure that enables the "haves" to benefit disproportionately. Indeed, small groups of people and industries benefiting through international legal arrangements have easily escaped the attention of international lawyers. For example, the coercion, and distributive effects as a result of that coercion, which are built into the legal infrastructure of international finance, has not attracted enough attention from international lawyers. The seemingly technical and complex legal mechanisms, involving sovereign debt, the payment system, banks and rating agencies, and more, are the ones effectively serving the interests of the transnational elite group. Even more importantly, a combination of orthodox European international law and the transnational elites continuously benefiting from these legal arrangements seems to have captured international legal thinking. The orthodox European international law creates a space for the continuous capital accumulation of elites by shielding the legal underpinnings of such accumulation from the scrutiny of international lawyers and by directing the attention of the polities to rivalries and power struggles. In doing so, the non-Western approaches to international law, for example, the ones my fellow panelists have nicely articulated, are facing challenges when it comes to practical terms, of materializing these approaches in the existing orthodox Western international law.

Where to go from here? I suggest that the non-Western approaches could well thrive in the institutions and more broadly the discourses of the orthodox Western approach. In the nineteenth and early twentieth centuries, the Western and non-Western individual international lawyers and approaches to international law interacted, and together, expanded the geographical location of European international law. This suggests that today, the efforts of international lawyers promoting non-Western approaches and thus adding bricks to the plurality of international law, might well through our interactions with the singular orthodox Western international law, result in an international law toward the direction of justice and equality. The space for non-Western approaches is perhaps exactly at the same institutions and classes and intellectual harbors of the orthodox European international law.

Remarks by Ntina Tzouvala*

On its seventy-third session, the International Law Commission debated an unusually urgent issue, namely the question of sea-level rise and its implications for international law, including in regard to statehood. Far from being a theoretical debate, this discussion responds to the concerns of many low-lying states, notably—but not exclusively—island-states, that anthropogenic climate change will render them uninhabitable and/or will result in the total submersion of their land territory. In other words, it is a terrible, but realistic, scenario that existing states will lose their population and/or territory in the course of the twenty-first century, especially in the absence of urgent and ambitious mitigation measures. Given the centrality of both in the Montevideo Convention, commonly taken to reflect customary international law, many have raised the question if the statehood and/or legal personality of these states will survive this calamity. Pacific states have given a strong affirmative answer to this question, invoking a strong presumption in favor of state continuity. Drawing from examples where statehood survived the (temporary) absence of state government, Pacific leaders and lawyers argue that the criteria set out in the Montevideo Convention concern the initial emergence of statehood and not its ongoing existence.

This is a persuasive argument that deserves to be taken seriously. Nevertheless, I want to propose another way of dealing with the problem, one that seeks to rethink the constitutive elements of statehood in ways that reflect the diverse ways that people arrange their relationship with space and independent political authority. One clarification is due: here, I suggest that the criteria of statehood enumerated in the Convention can and should be interpreted in ways that are more accommodative of non-Western understandings and practices of statehood. In fact, my argument relies on the idea that many of the conventional interpretations are backed by little more than an unthinking adoption of Eurocentric understandings of the constitutive elements of statehood. However, I do not intend to question the concept of statehood as such or to suggest a wholesale reconceptualization of its constitutive elements. This is despite the fact that many critical legal academics and practitioners, with Indigenous peoples leading the way, have argued that the very concept of statehood is Eurocentric and inimical to their interests and worldviews.[1] However, it remains the case that loss of statehood because of climate change will not challenge the concept itself. Rather, it will only deprive certain peoples from the rights and privileges that states enjoy under international law. Given that these are the peoples who have contributed to climate change the least, this would be a particularly unjust legal outcome.

The essence of my argument is that interpretations of "territory" in the law of statehood rely on four assumptions: (1) "territory" is distinct from "government" and "population"; (2) "territory" means nothing more than "space"; 3) territory needs to be "natural"; and 4) territory is primarily land-territory with sea-territory depending on the existence of land. Here, I posit that all four assumptions are generally implicit and underdeveloped theoretically because they are backed by precious little authority and, rather, reflect Western conceptions of how law and political authority exist in and transform space. Take, for example, the assumption that territory needs to be "natural," which is usually backed by reference to the UN Convention on the Law of the Sea (UNCLOS) and to a single domestic court ruling, that by the Administrative Court of Cologne. In the case of UNCLOS, Imogen Saunders has shown that a careful reading of the Convention's *travaux préparatoires* reveals that the debates about "artificial islands" and whether they create maritime entitlement was so contested and protracted, precisely because it was not self-evident amongst the

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[1] J. Kehaulani Kauanui, Paradoxes of Hawaiian Sovereignty: Land, Sex and the Colonial Foundations of State Nationalism (2018).

negotiating parties that "artificial territory" is not territory at all.[2] Indeed, even after UNCLOS answered the question in the negative, it only did so for the purposes of the law of the sea, and not for the law of statehood. Rather, the only consistently quoted authority that deals with the specific question of statehood is that of *Re Duchy of Sealand* of the *Administrative Court of Cologne.* One need not be too meticulous in their search for state practice and *opinio juris* in order to acknowledge that one case by a regional Western court does not suffice for settling such a fundamental issue. Rather, this decision needs to be read in conjunction with the developing practice of low-lying states, such as the Maldives, of creating artificial islands as an explicit strategy toward preserving their statehood. Therefore, as Cait Storr has argued, scholarly pronouncements about the self-evident necessity of natural territory as a prerequisite for statehood need to be read as expressions of a Western ontology that assumes a clear separation between humans, nature and technology rather than as syntheses of an exhaustive examination of state practice and *opinio juris*.[3]

The equation of territory with land may have better foundations within international legal doctrine, but it is not beyond contestation either. The issue was raised by one member of the International Law Commission who remarked that "sovereignty referred to the whole territory under a State's control and no solely to the land territory. Thus, a territory that became fully submerged because of sea-level rise should not be considered a non-existent territory."[4] This pronouncement also questions the oft-repeated, included within the ILC, International Court of Justice pronouncement that in international law "land dominates the sea." Often invoked against the possibility of non-land territorial configurations, this pronouncement needs to be weighted against the proliferating practice of stabilizing baselines in light of rising sea-levels, especially by Pacific states, and the (moderate) shift of position amongst Western, maritime states, such as the United States, that has now "acknowledged" this practice.

It is precisely the law-making practice and ambition of Pacific states and peoples that opens a window for my proposed creative engagement with the criteria of statehood. Indeed, engaging with Pacific history, practice and theory would readily reveal that the subsumption of sea to land and the strict separation between "territory" and humanity are alien to the region. In 1994, Tongan and Fijian writer Epeli Hau'ofa published a path-breaking piece in the field of Pacific Studies, entitled "Our Sea of Islands.[5] "Hau'ofa's ambition was not jurisprudential, even though the piece contains a brief reference to the concept of the exclusive economic zone (EEZ). Rather, he wanted to push against the idea of "smallness" the pervaded, and still does, the developmental discourse around Oceanic states. He did so by putting forward an alternative conceptualization of space in which land does not dominate the sea nor does the sea separate one piece of land from another. Rather, land and sea exist in a continuum and they bring seafaring peoples together instead of separating them. Hau'ofa emphasized that the contemporary idea of small, isolated islands is partly false and partly the outcome of colonial laws and practices that restricted mobility across the seas in the name of protection. This was not a deterritorialized idea of political community, as some have suggested in light of climate change. Rather, peoples had profound relationships with space and legal claims and duties over the resources found in them without adopting the four assumptions outlined below. As both Hau'ofa and, more recently, Katerina Teaiwa have shown, these

[2] Imogen Saunders, *Artificial Islands and Territory in International Law*, 52 VAND. J. TRANSNAT'L L. 643 (2019).

[3] Cait Storr, *Denaturalising the Concept of Territory in International Law*, *in* LOCATING NATURE: MAKING AND UNMAKING INTERNATIONAL LAW (Usha Natarajan & Julia Dehm eds., 2022).

[4] ILC Report, Ch. IX, paras. 150–237, para. 196, UN Doc. A/77/10 (2022).

[5] Epeli Hau'ofa, *Our Sea of Islands*, 6 CONTEMP. PACIFIC 148 (1994).

relationships were profoundly harmed but were not extinguished by colonialism.[6] They are part of state practice and *opinio juris* in the region as well as general principles of law that can and should be taken into account by international courts and tribunals and other international legal bodies. I am not sure that the international legal order that will emerge from such a dialogue will be "decolonized," but it might just be a slightly fairer one.

Remarks by Amaka Vanni*

This presentation is based on the premise that the injustices perpetuated during the COVID-19 pandemic—from vaccine imperialism,[1] unequal access and distribution, and the use of intellectual property (IP) laws to maximize corporate profitability that sacrificed the life and health of the poor and the racialized—are crimes that should not be shrugged away as part and parcel of neoliberal economic activities. Building on the work of Third World Approaches to International Law[2] (TWAIL), I argue that TWAIL provides the language to not only theorize and confront what happened during the pandemic but also the tools for remedying the unfortunate COVID-19 response in preparation for the next pandemic by creating a more equitable path going forward.

At a basic level, intellectual property rights exist to motivate people to invent by offering them a time-limited monopoly. It was originally designed to promote ingenuity and ground-breaking inventions by granting creators a limited monopoly period. At the global level, the World Trade Organization (WTO) Agreement on Trade-Related Aspect of Intellectual Property Rights[3] (TRIPS Agreement) provides a minimum standard for the protection of IP and has significantly contributed to the globalization of IP rules and norms. While it is beyond the ambit of this presentation to run us through its negotiating history, suffice to say that many countries were, even at that time, dissatisfied with, and critical of this system because it fails to take into consideration their needs, interests, and local conditions as the strong protection mandated by the Agreement threatens their much-needed access to information, knowledge, tech transfer, and essential medicines. This, of course, became even more apparent during the height of the COVID-19 pandemic when breakthrough vaccines became available in the fight against the virus. During the pandemic, these monopolies restricted rather than ensured equitable access. Companies instead used IP to hoard knowledge, block competition, and maximize revenue. As a result, to get vaccines into the hands of people, many non-Western countries were stuck relying on the benevolence of transnational pharmaceutical corporations and philanthropic actors. For many TWAIL scholars, this is not new.

TWAIL is both an intellectual and political movement that seeks to understand the history, structure, and processes of international law from the perspective of countries in the Global South. It also seeks to promote and include the interest of the previously colonized in international law discourse. Furthermore, TWAIL argues that the current international legal framework is a colonial project created to legitimize and sustain unequal structures of growing North-South divide. Thus,

[6] Katerina Teaiwa, *Our Rising Sea of Islands: Pan-Pacific Regionalism in the Age of Climate Change*, 41 Pac. Stud. 26 (2018).

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[1] Amaka Vanni, *On Intellectual Property Rights, Access to Medicines and Vaccine Imperialism*, TWAIL Rev. (2021), *at* https://twailr.com/on-intellectual-property-rights-access-to-medicines-and-vaccine-imperialism/#:~:text=2021%20TWAILR%3A%20Reflections-,On%20Intellectual%20Property%20Rights%2C%20Access%20to%20Medicines%20and%20Vaccine%20Imperialism,the%20altar%20of%20corporate%20profitability.

[2] *TWAIL-Related Commentary on the Coronavirus Pandemic*, TWAIL Rev. (May 13, 2020), *at* https://twailr.com/twail-related-commentary-on-the-coronavirus-pandemic.

[3] Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.

for this school of thought, the global IP regime and the attendant inequities are a continuation of asymmetrical power relations rooted in historically racialized processes such as slavery, colonialism, and its post-colonial legacies, which continues the perseverance of racialized differentiated exploitation of humanity, particularly the Global South, for capitalist accumulation/extraction. Ultimately, TWAIL foregrounds what the West is unwilling to theorize or confront, which is a correction of the sanitized and whitewashed picture of the modern global order that challenges the delusions of Eurocentric international law.[4] Seen this way, we begin to understand the COVID-19 pandemic response, particularly vaccine distribution and access, for what it truly was—a charade legitimized by international law for the profit and interest of transnational corporations backed by their national governments.

This brings me to the essence of this presentation, which is how do we **remedy this unfortunate situation in preparation for the next pandemic**? One of the important attributes of TWAIL is that the movement has given us the language to adequately theorize not only historical and transnational sources of injustice but has also persistently highlighted spaces of transitional justice projects championed by coalitions of the racialized and minority groups, as well as Indigenous communities located in the Global South. These includes works by third work activists, international lawyers,[5] political actors, and intellectuals in areas such as international criminal law,[6] environment,[7] informal economy,[8] migration,[9] and broader international economic regime.[10] Using a TWAIL lens to study the historical foundations of global IP regime helps to open the analytical frame of restorative justice approach, which seeks to restore relationships to "rightness"—that is, the notion of creating healthy relationships where they were absent before. Restorative justice seeks to repair what is broken, compensate victims for harms done, and reconcile relationships between individual people so that they can live together peacefully in the future.[11] In other words, it aims at restoration, compensation, and/or reparation whereby all the parties with a stake in a serious dispute come together to resolve collectively how to deal with the aftermath of the offense and to locate areas of contingency and change.

To be sure, the restorative justice thought system is not new—it was previously practiced in many grassroot and Indigenous communities located in the Global South and provided the basis for handling disputes and conflicts before the colonization of these territories by Western European powers. In contemporary practice, restorative justice involves getting to the truth, including understanding the root causes of an issue, acknowledging responsibility for actions, or failure to act that caused harm/injury, and instituting frameworks to avoid similar harms in the future.[12] Employing a restorative justice approach at a global level would involve pinpointing where we failed as a global

[4] Charles W. Mills & Srdjan Vucetic, *Race, Liberalism, and Global Justice: Interview with Charles W. Mills*, 9 INT'L POL. REV. 155, 158 (2021).

[5] O.C. Okafor, Report of Independent Expert on Human Rights and International Solidarity, UN Doc. A/76/150 (July 19, 2021).

[6] John Reynolds & Sujith Xavier, *The Dark Corners of the World*, 14 J. INT'L CRIM. JUST. 959 (2016).

[7] Usha Natarajan & Kishan Khoday, *Locating Nature*, 27 LEIDEN J. INT'L L. 21 (2022).

[8] *Ruptures 21: Towards New Economies, Societies and Legalities*, *at* https://warwick.ac.uk/fac/soc/law/research/centres/globe/ielcollective/our-work/projects/ruptures21.

[9] Tendayi Achiume & Tamara Last, *Decolonial Regionalism: Reorienting Southern African Migration Policy*, 2 TWAIL REV. 1 (2021).

[10] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2021).

[11] Dial Dayana Ndima, *Reconceiving African Jurisprudence in a Post-imperial Society: The Role of Ubuntu in Constitutional Adjudication*, 48 COMP. & INT'L L.J. S. AFRICA 359 (2015).

[12] *A Comparative Analysis of Restorative Justice Practices in Africa*, GLOBALEX, *at* https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa1.html#:~:text=Restorative%20justice%2C%20as%20practiced%20in,a%20crime%20or%20a%20dispute.

society by articulating that the deaths caused by hoarding and artificially created scarcity due to deployment of IP in health emergencies is a criminal offense. Doing so provides us with a language to name the neglect, harm, and death caused by the systemically inequitable rollout of vaccines, tests, and treatments for what is truly was—a crime against humanity.[13] For instance, while the pandemic has been devastating for all countries, the world's poorest countries have been hardest hit, with women and children bearing a disproportionate burden. Further, under the guise of IP gamesmanship, pharmaceutical companies in cahoots with their national governments derailed the global vaccine rollout with nationalism, greed, and self-interest, and if changes are not made now, this same handful of companies will determine for the rest of the globe what they can and cannot do in an event of another pandemic.

A serious call for a TWAILian restorative justice approach demands that we liberate ourselves from the fiction that the current international IP law with its flexibilities and muted waivers can tackle the issue of unequal access to essential medical equipment, tests, medicines, and know-how.

It demands a new thinking and an understanding that this world and this system as we know it is historically contingent and constructed, and that a new way of doing is possible. This new world would decenter the interests and whims of transnational corporations, and would put in its place a world informed by a more participatory politics and law making. This would look like creating a system that is not only humanly, economically, environmentally, and racially just, but one that upholds people over property. In upholding people over property, a restorative justice paradigm would embody the principle of inclusivity, balance of interests, and a problem-solving orientation. This would involve democratizing manufacturing capacity to sites outside the Global North that would allow many low- or middle-income countries in the Global South to manufacture vaccines and other essential medicines, the sharing of know-how to do so, and the freedom to pursue these goals. Already, the failed global response to COVID-19 has seen the World Health Organization lead the creation of an mRNA technology transfer hub in Africa to enable the continent build capacity to produce mRNA vaccines.[14]

However, many scholars, such as Professor Sharifa Sekalala, note "that this model remains embedded in a broader charity discourse with colonial roots that necessitates Global South dependency on the Global North."[15] A restorative justice framework, one in which important questions such as "what do we owe a distant other"[16] demands we create new forward looking world system —one which aims to prevent future offending via a drastic overhaul of IP regimes and legal codes that propagate racial hierarchies and the legacies of colonialism and imperialism, whilst inputting a sustainable financial systems that provides for appropriate publicly funded research for viruses and neglected diseases, and the support for pharmaceutical manufacturing in the Global South. This would, in the short term, include a systematic and supervised transfer of technology from the Global North to ensure equitable access to pharmaceutical technology per Article 7 of the TRIPS Agreement. But in the long-term would involve a development of new systems that

[13] I would like to point out that according to Article 7(1) of the Rome Statute, crimes against humanity do not need to be linked to an armed conflict and can also occur in peacetime, and it also provides a definition of the crime that contains the following main elements including "Other inhumane acts." This is position is expanded further in a forthcoming article.

[14] WTO Press Release, MRNA Technology Transfer Programme Moves to the Next Phase of Its Development World Health Organization, *at* https://www.who.int/news/item/20-04-2023-mrna-technology-transfer-programme-moves-to-the-next-phase-of-its-development.

[15] *Manufacturing Inequality: Examining the Racial-Capitalist Logics Behind Global Pandemic Vaccine Production*, AFRONOMICSLAW, *at* https://www.afronomicslaw.org/category/analysis/manufacturing-inequality-examining-racial-capitalist-logics-behind-global.

[16] *Panashe Chigumadzi's Nixolisa Ngani? – With What Are You Apologising for?: Full Text of Panashe Chigumadzi's Zam Nelson Lecture 2023*, DIPSAUS PODCAST, *at* https://www.dipsaus.org/exclusives-posts/2023/1/25/v17l4tqd9950lvsn2hvpazy9r3le4m-fha6j-jl5mm-3hk6d.

decenters the interests not only the interests and dictates of transnational corporations but one that upholds people over property.

Remarks by George Galindo

It is a real privilege to moderate a panel with outstanding scholars committed to challenge a number of views that often are inadvertently assumed as common understandings in international law.

The presentations above clearly show that non-Western approaches to international law are not only essential but also necessary for anyone aware that the current state of international legal rules and institutions is far from being fair to different peoples around the world. This panel is an excellent example of how non-Western approaches to international law may enrich legal scholarship by revisiting classical issues through different perspectives and advancing meta-critical arguments.

First, they show that international lawyers should be creatively engaged in revisiting issues that are reputed as traditional for the discipline. This is demonstrated by Ntina Tzouvala's challenging of the concept of statehood and Amaka Vanni's scrutiny of intellectual property rights. If territory as a conceptual category is not decoupled from the idea of space, several paradoxes may arise, such as those that have been at the table in the debates about the international legal response to sea-level rise. On its part, restorative justice is instrumental in tackling the deleterious effects of a conception that historically used intellectual property rights to legitimize particular economic interests of few to the detriment of peoples from the Global South, as the COVID-19 pandemic shows.

Second, the interventions in this panel highlight that critique itself must become aware of the bias and contradictions it produces. Powerful meta-critical arguments are present in the contributions of Francisco-José Quintana, Lauri Mälksoo, and Kangle Zhang. "Latin American approaches to international law" is an epistemological category of grand complexity; trying to grasp it without due care may lead to its essentialization and misinterpretation. Although traditionally labeled as a champion of non-Western perspectives on international legal issues, "Russian approaches to international law" may be as imperialist as classical (European) international law, as the war in Ukraine makes crystal clear. Finally, although the rise of China as a global superpower has made some hope that an alternative and more emancipatory international legal perspective would emerge, its reliance on sovereignty, equality between states, formalism, and positivism shows that, in many senses, it replicates classical (European) international law.

This panel's final and most important message is that making non-Western approaches more visible is not enough; they should be an integral part of international legal discourse without losing sight of the problems and potentialities that come from this integration.