

## Voicing and Addressing Colonial Grievances under International Law

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### 1. The Status of Colonial Grievances in International Law

In his letters to Bishop Creighton, Lord John Dalberg-Acton famously wrote: “Power tends to corrupt and absolute power corrupts absolutely”. Less cited, however, is the aphorism immediately preceding this phrase: “Historic responsibility has to make up for the want of legal responsibility”.<sup>1</sup>

Yet, not even historical records are cognizant of the complete extent of the want of legal responsibility. Post-war negotiations have traditionally been characterized by dichotomies of a reparations-debtor and a reparations-creditor. What of, for instance, citizens of neutral, non-warring states who were forced into battle by virtue of their identity as colonial arsenal? Born out of an etymology of war and conquest, the Westphalian model of modern international law has failed to conceive justice for the collateral as a subject of enquiry. When the narrative of colonial crimes shifted from a call for agitation in the face of colonization, to a demand for accountability and financial and positional restitution, the response of the international community was not satisfactory. There was a dearth of acknowledgement of colonial policies as ‘wrongs’ and of promises of non-repetition through codification of political treaties. From colonial victims’ perspective, such treaties reek of masquerades where talk of change is cheap and membership is based on resigning one’s ability to unmask other members.

An inherent double standard manifested itself in the meting out of international justice. Through the lenses of the so-called ‘Third World’, it appeared as though the ‘powers-to-be’ were effectively immune to waging ‘aggressive’ wars by portraying them as ‘just’. They were also immune from accountability given their capacity to refuse to co-operate with investigations and the corresponding low success-rates in securing convictions against them. In the case of the North Atlantic Treaty Organization’s (‘NATO’) bombings over Kosovo and Serbia, former Chief Prosecutor of the International Tribunal for the former Yugoslavia Carla Del Ponte admitted that action against NATO states was deterred because of their unwillingness to be prosecuted.<sup>2</sup> She sensed investigative lethargy clouding the judgment of her legal team which concluded, based on NATO’s own press releases, that sufficient evidence did not exist to open investigation. While considerations of resource allocation in sanctioning investigations are not entirely unfounded, it is doubtful whether full effect is given to the mandate of such institutions in so far as these ‘powers-to-be’ are concerned.

In this policy brief, I take a closer look at the anthology *Colonial Wrongs and Access to International Law* (‘*Colonial Wrongs*’), its focus on foundations of international responsibility for colonial wrongs, and

some of its implications.<sup>3</sup> *Colonial Wrongs* represents a further work-product of the Centre for International Law Research and Policy’s (‘CIL-RAP’) efforts to broaden collective ownership in international law, as a precondition for it to become more global. ‘Historic responsibility’ for colonial grievances is not the property of historians and scholars of contemporary approaches to international law. Rather, *Colonial Wrongs* invites international (criminal) lawyers (including those in government service) to reflect on the continued relevancy of colonial grievances to international law and to atrocities in contemporary conflicts in former colonies. Patience and compassion are required in the meeting with colonial grievances. Efforts should be made to find new and effective ways to initiate conversations in communities affected by strong colonial grievances, by that seeking to design innovative routes, both legal and social, to enable catharsis and healing, and to reduce alienation from the international legal order in former colonies.

*Colonial Wrongs* also serves as a rich body of case studies involving fact-work on colonial wrongs, previous redress attempts and their inadequacies, and implementable proposals to bridge the ‘accountability gap’ so identified.<sup>4</sup>

### 2. Reflections on *Colonial Wrongs* and Access to International Law

The starting point of the discourse on colonial wrongs and their treatment in international law is succinctly captured in the critiques presented by Ryan Mitchell,<sup>5</sup> whose chapter offers three perspectives: (i) *ontological*, to describe how recognition and governance of colonies created hierarchical subtexts between colonizers and locals; (ii) *epistemic*, to highlight invisibility of the distrust created by colonial policies that underscore current ethno-religious confrontations; and (iii) *genealogical*, to address incongruity in creatively overcoming temporal and spatial jurisdictional barriers against former colonies, but not colonizers. A problem of asymmetrical exercise of discretion is thus identified as the cause for selectivity in international accountability. From my perspective, there seems to be some wilful blindness in the discharge of international justice within

<sup>3</sup> Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin Hlaing (eds.), *Colonial Wrongs and Access to International Law*, Torkel Opsahl Academic EPublisher (‘TOAEP’), Brussels, 2020 (<https://www.toaep.org/ps-pdf/40-bergsmo-kaleck-kyaw>).

<sup>4</sup> See, for example, on Colonial Burma, Derek Tonkin, “Migration from Bengal to Arakan During British Rule 1826–1948”, in Bergsmo, Kaleck and Hlaing, 2020, pp. 253 ff., see above note 3 (<https://www.legal-tools.org/doc/e4tulh/>); on Canada, Asad G. Kiyani, “Avoidance Techniques: Accounting for Canada’s Colonial Crimes”, in *ibid.*, pp. 501 ff. (<https://www.legal-tools.org/doc/aym3x1/>); and on Norway, Gunnar Ekeløve-Slydal, “Past Wrongdoing Against Romani and Sámi in Norway and the Prism of Modern International Criminal Law and Human Rights”, in *ibid.*, pp. 525 ff. (<https://www.legal-tools.org/doc/kt6470/>).

<sup>5</sup> Ryan Mitchell, “Myanmar and the Hegemonic Discourse of International Criminal Law”, in Bergsmo, Kaleck and Hlaing, 2020, pp. 286–287, see above note 3 (<https://www.legal-tools.org/doc/dvhpqx/>).

<sup>1</sup> As stated by Lord John Dalberg-Acton (1834–1902) in a letter dated 5 April 1887 to Bishop Mandell Creighton (1843–1901).

<sup>2</sup> Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity*, Other Press, New York, 2009, p. 60.

narrowly-defined procedural borders. While these borders are maintained to keep proceedings apolitical, permeability of such borders may nevertheless be political.<sup>6</sup>

Prosecution for colonial crimes is often frustrated by a lack of specific prohibition of the conduct in question at the time of commission or of temporal jurisdiction. While the former may pose an absolute impediment to prosecuting colonial crimes, the latter may be subject to interpretation. Whereas a strict interpretation would exclude the prosecution of crimes continuing from before the activation of temporal jurisdiction and continuing thereafter, a liberal interpretation would allow it. Matthias Neuner's chapter conducts a study of the continuous nature of crimes such as slavery, enforced disappearance and unlawful deportation, as interpreted in international jurisprudence.<sup>7</sup> In citing examples from the International Criminal Tribunal for Rwanda ('ICTR'),<sup>8</sup> Neuner reasons a dearth of support for a liberal interpretation of the scope of temporal jurisdiction. However, the International Criminal Court ('ICC') is yet to render a decision in this regard with reference to Rome Statute of the ICC ('ICC Statute'). One may thus consider the possibility of an international prosecution for potentially continuing unlawful deportation or transfer by an occupying power of its own population into territory occupied by it, provided the perpetrator had the requisite *mens rea* and position to commit or facilitate such crimes. Such claims, however, can only be admitted against conduct which had already become 'criminal' when committed.

The Yangon conference,<sup>9</sup> and subsequently *Colonial Wrongs*, also alluded to forms of domestic redress. *Double Standards: International Criminal Law and the West*<sup>10</sup> by Wolfgang Kaleck served as background reading for the conference. Here, and also in his chapter,<sup>11</sup> Kaleck notes the successes and failures of universal jurisdiction prosecutions against Augusto Pinochet and Adolfo Scilingo and their positive effect on co-operation between international rights organizations and European states.

Active willingness to prosecute under the doctrine of universal jurisdiction implies an acceptance of the identity of planetary citizenship.<sup>12</sup> The idea that a state is willing to provide a platform to listen to grievances, colonial or otherwise, using its own resources, which naturally takes away from its pending domestic disputes, exhibits its willingness to ameliorate the concerns of those in the international community who have been wrongfully neglected. However, it must be admitted that universal jurisdiction is still traditionally exercised by former colonizers against nationals of former colonies. While it is argued that the targets are currently chosen in a strategic manner, so as to ensure 'low cost' trials and higher convictions, these arguments are eerily similar to those adopted by the legal teams of internationalised tribunals in perpetuating selectivity in prosecuting international crimes. It must thus be acknowledged that confidence in the instrumentalization of universal jurisdiction cannot be achieved until colonial powers feature on the prosecutorial radar. The landmark Senegalese trial of the late Chadian President Hissène Habré suggests growing capacity, albeit reparations remain elusive.<sup>13</sup>

<sup>6</sup> Eric A. Posner and Miguel F.P. de Figueiredo, "Is the International Court of Justice Biased?", in *The Journal of Legal Studies*, 2005, vol. 34, no. 2, pp. 599–630 (finding strong evidence that judges favour states that appoint them and whose wealth level is close to that of their own states).

<sup>7</sup> Matthias Neuner, "The Notion of Continuous or Continuing Crimes in International Criminal Law", in Bergsmo, Kaleck and Hlaing, 2020, pp. 141–172, see above note 3 (<https://www.legal-tools.org/doc/rofnqd/>).

<sup>8</sup> ICTR, *The Prosecutor v. Nahimana et al.*, Appeals Chamber, Judgement, 28 November 2007, ICTR-99-52-A, para. 724 (<https://www.legal-tools.org/doc/04e4f9/>).

<sup>9</sup> The Yangon conference, titled "Colonial Wrongs, Double Standards, and Access to International Law", held on 16–17 November 2019 in Yangon, Myanmar, resulted in the *Colonial Wrongs* anthology (for relevant project resources, see <https://www.cilrap.org/events/191116-17-yangon/>).

<sup>10</sup> Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, TOAEP, Brussels, 2015, p. 61 (<https://www.toaep.org/ps-pdf/26-kaleck>).

<sup>11</sup> Wolfgang Kaleck, "On Double Standards and Emerging European Custom on Accountability for Colonial Crimes", in Bergsmo, Kaleck and Hlaing, 2020, p. 13, see above note 3 (<https://www.legal-tools.org/doc/ghnj8s/>).

<sup>12</sup> U Thant, *View from the UN*, David & Charles, London, 1977, p. 454.

<sup>13</sup> Human Rights Watch, "Chad: No Reparations for Ex-President's Vic-

Alternatives to international criminal law as an appropriate platform to address colonial grievances should also be identified. Hugo van der Merwe and Annah Moyo, in their chapter, propose reliance on tools of transitional justice, such as truth commissions, human rights trials and reparation programmes.<sup>14</sup> They argue for a broader formulation of these tools in terms of their scope: (i) time-frame (to include pre-colonial and colonial policies and soft abuses of influence); (ii) geographical limits (to include the role of external actors); and (iii) types of abuses addressed (to include abuse of socio-economic, in addition to civil and political, rights). These tools are able to establish a holistic historical record of abuse and identify structural handicaps left by colonizers in the wake of independence of former colonies. Further, externally imposed and initiated transitional approaches tend to limit truth-telling and are often tokenistic in form. Inclusion of socio-economic abuses within the subject-matter jurisdiction of truth commissions more accurately depicts the perils of daily life. This is especially important since realities of colonization are often overshadowed by headlining events which receive international outcry. Most victims of colonization, however, find themselves far-removed from such events, suffering more sustained forms of abuse which may affect generations. While international criminal law may turn a blind eye to such crimes, international law cannot afford to.

The role of colonial wrongs in perpetuating contemporary atrocities must also be identified. In reacting to such contemporary atrocities, Kyaw Yin Hlaing's chapter warns of unidimensional international condemnation, which is perceived by locals as possessing neo-colonial overtones.<sup>15</sup> For the Burmese, for instance, overwhelming sympathy for the suffering of Rohingyas naturally characterizes the discourse, but leaves little space for them to discuss root causes of the conflicts in Rakhine, including colonial grievances which have often been silenced as primitive expressions of criminal intent. External investigative and accountability mechanisms are subsequently seen as means of systematic alienation of self-determination, reminiscent of the loss of power that accompanied colonialism. Genuine access to international law is perceived as far removed.

De-escalation processes should, in other words, simultaneously work to understand colonial grievances and hold those responsible for contemporary atrocities accountable. A genuinely conflict-sensitive approach requires moving away from being reactive and damnation-driven, which secures justice only for fresh victims, to fostering internal healing of long-inflicted wounds which fester as root causes of conflict and violence. For me, as an Indian, it seems rather obvious that deterrence for acts such as initiating or driving mass exodus of perceived 'foreigners' cannot be achieved merely because of its criminalisation by the ICC Statute or customary international law. To prevent such acts, deep-rooted insecurities and other psychological motivators which polarise communities, sometimes for decades, must be identified and alleviated through mechanisms such as the ones highlighted earlier in this policy brief as well as new forms of engaged listening and consultation. Singling out the acts of deportation and the associated horrors as a chief arena for Western-led retributive justice, while at the same time demonising experts who seek a broader approach (in particular those who explain the relevance of past Western practice and its economic objectives), looks all too familiar to a national of a former colony.

Advocacy and narrative reinforcement against the commission of current atrocities should not be dampened. Rather, my point is that to emphasise that strict observance of a requirement of 'clean hands' (that is, only addressing colonial grievances of those who have not violated international norms) underestimates two key considerations. First, colonial grievances of those *with* 'clean hands' continue to fall unto deaf ears. And second, some contemporary atrocities may not only have been borne out of the commission of colonial wrongs, but also from the international community's continued apathy towards such wrongs.

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tims", 27 May 2022.

<sup>14</sup> Hugo van der Merwe and Annah Moyo, "Transitional Justice for Colonial Era Abuses and Legacies: African versus European Policy Priorities", in Bergsmo, Kaleck and Hlaing, 2020, pp. 41–46, see above note 3 (<https://www.legal-tools.org/doc/16d06r/>).

<sup>15</sup> Kyaw Yin Hlaing, "The Importance of Hearing Colonial Wrongs in Myanmar", in Bergsmo, Kaleck and Hlaing, 2020, pp. 360–362, see above note 3 (<https://www.legal-tools.org/doc/vhj72r/>).

### 3. Reconstructing Third World Approaches to International Law

Scholars of ‘Third World approaches to international law’ (‘TWAIL’) continue to position themselves at the periphery of the international legal order, offering largely explanatory and reactive critiques of its norms. In his foreword to *Colonial Wrongs*, Ambassador Narinder Singh authoritatively recounts the constraints former colonies face in interacting with international law.<sup>16</sup> Missing in his regret-filled recollection, however, is an acknowledgement of the self-efficacy of the Third World to bring about attitudinal and infrastructural reforms. Importantly, the Third World continues to rely on the power, ability and altruism of the ‘invisible college’ of international lawyers and diplomats to alter international law to create an additional seat at the table. What results is half-concessions by sovereigns wanting to appear conscientious, potentially saving face for past abuses and crimes that slipped undetected or unpunished.

Morten Bergsmo’s chapter introduces one of the main purposes behind *Colonial Wrongs*: to create mechanisms which may reduce excessive polarisation between the demands for international accountability for contemporary atrocities and the former colonies’ authorities, and the latter’s voluntary withdrawal from international law, by facilitating a conversation about “what can realistically be done to meaningfully respond to the sense of double standards”.<sup>17</sup> Taking this argument forward, I propose that such consultations should not only seek to record trauma, grief and dissent, but should witness the participation of former colonies and other Third World countries as central actors in the international legal order. It is not enough, for example, to simply applaud the representation of the Dalit community at the Durban World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance,<sup>18</sup> hailing international law as creating an inclusive cosmopolitan society. To manifest such a society, the Third World must occupy driving positions in international law-making and application processes, to ensure that the international legal order also reflects their legitimate values and interests.

To achieve this, the Third World has to first *reclaim its agency*. Instead of lamenting over the inevitable phenomenon of brain-drain – the practice of young students and professionals migrating to foreign jurisdictions in search for superior education and employment opportunities – Third World governments should conditionally embrace it. They should not discourage young international law students from seeking education or providing their services abroad. Rather, they should identify colonial grievances as the possible root cause for the structural inability to provide equivalent avenues for growth. Governments of Third World countries should then foster a culture where young international law students are re-educated and re-imagined as harbingers of change, capable of penetrating the portcullis of international justice institutions to advance discourses that can make international law more global, including on colonial grievances.

This is not posited as mutually exclusive with the need for developing indigenous infrastructure for international law scholarship and participation, through focused emphasis on education, recruitment and practical experience. In fact, the former may never be achieved without the latter. Another prerequisite for the functioning of the former approach is that ‘colonial wrongs’ narratives cannot be hijacked to explain otherwise unrelated lack of legislative and political will or post-colonial corruption.

Furthermore, former colonies must be mindful that ‘reverse double standards’ stifle realistic addressal of colonial grievances. In their declaration accepting jurisdiction of international justice mechanisms, for example, former colonies should lead by example by defining their conferral of temporal jurisdiction broadly, that is, not excluding “disputes

<sup>16</sup> Ambassador Narinder Singh, “Foreword”, in Bergsmo, Kaleck and Hlaing, 2020, pp. xi ff., see above note 3 (<https://www.legal-tools.org/doc/dkclvy/>). Ambassador Singh is also a former Chair of the United Nations International Law Commission.

<sup>17</sup> Morten Bergsmo, “Myanmar, Colonial Aftermath, and Access to International Law”, in Bergsmo, Kaleck and Hlaing, 2020, p. 248, see above note 3 (<https://www.legal-tools.org/doc/16ccdi/>).

<sup>18</sup> For an overview of the participation of the Dalit community at the Durban conference, see Shiv Visvanathan, “Durban and Dalit Discourse”, in *Economic and Political Weekly*, 2001, vol. 36, no. 33, pp. 3123–3127.

[arising] prior to the date of [the] declaration”.<sup>19</sup> Only then can they reasonably expect former colonizers to follow suit. Similarly, they cannot afford complacency in challenging abuse of political power or capital within their own jurisdictions. From a global citizenship perspective, such complacency may lead to far graver consequences and may affect wider audiences than colonial wrongs, as in the case of the rampant deforestation practices in Brazil, the Democratic Republic of the Congo and Indonesia.<sup>20</sup> In creating a culture- and context-sensitive international order, former colonies must conduct themselves similar to their expectations of others.

It also matters whether international law pedagogy shapes the addressal of colonial grievances as acts of charity or as concerns of states with a higher average socio-economic status. Especially for the disciplines of international law and international criminal law, legal education, in terms of branding-awareness and -capacity, prestige in English-language domains, recruitment opportunity, and perhaps engagement with upper echelons of academia, is dominated by Anglo-American universities, although that is not necessarily reflected in the real quality of their academic staff or research capacity (certainly not in terms of innovation and creativity).<sup>21</sup> The wisdom, assumptions and relevant issues of importance transmitted by these universities are heavily influenced by their historic, geopolitical and cultural contexts. With some notable exceptions, universities also tend to hire individuals of certain pedigrees and experiences which align with their purported conventions, concretizing their definitions of merit. Ryan Scoville and Milan Marković, studying international law pedagogy in the United States in 2015, concluded the tendency of American law schools to favour “domestic markers of achievement, such as diplomas from leading American universities, federal judicial clerkships, and positions at major U.S. law firms”.<sup>22</sup> Amongst the select few professors who had acquired international experience, only 19 percent had acquired it in non-western countries, such as China, Russia and South Africa.<sup>23</sup>

While at least some studies have analysed professional and educational diversity of international law professors and their curricula abroad,<sup>24</sup> similar studies in India are scarce. There is virtually no comprehensive data on compulsory or elective courses in international law and allied disciplines in terms of factors such as availability, duration, topical inclusivity, quality and origin of reference materials used, and ideological orientation.<sup>25</sup> B.S. Chimni, one of the pioneers of TWAIL, more than 21 years ago, observed heavy reliance on positivist methodology and textbooks in teaching and research of international law in India.<sup>26</sup> Such an approach

<sup>19</sup> See, for example, India, “Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court”, in *United Nations Treaty Series*, 27 September 2019, vol. 950, p. 15.

<sup>20</sup> Mutoy Mubiala, “Climate Change and Mass Deforestation in the Congo Basin”, Policy Brief Series No. 127 (2022), TOAEP, Brussels, 2022 (<https://www.legal-tools.org/doc/6i8h8w/>); Rainforest Action Network, “Keep Forests Standing: Exposing Brands and Banks Driving Deforestation”, March, 2020 (finding that the palm oil, pulp and paper industries, majority contributors of deforestation in Indonesia are owned, controlled and funded by a handful of Indonesian tycoons and “foreign investors from Singapore, Scotland and South Korea”).

<sup>21</sup> Anthea Roberts, *Is International Law International?*, Oxford University Press, 2017, pp. 1–18.

<sup>22</sup> Ryan Scoville and Milan Marković, “How Cosmopolitan are International Law Professors?”, in *Michigan Journal of International Law*, 2016, vol. 38, p. 126.

<sup>23</sup> *Ibid.*, p. 128.

<sup>24</sup> PILMap.org, “Who Studies International Law? A Global Survey” (available on its web site) (a global survey on which universities require compulsory training in public international law).

<sup>25</sup> For an example of requisite efforts, see NUS Centre for International Law, “Teaching and Researching International Law in Asia (TRILA) Project: 2020 Report”, 2020. This study, however, suffers from natural issues of comprehensiveness; recording, for example, responses from only two Indian international law experts.

<sup>26</sup> B.S. Chimni, “Teaching, Research and Promotion of International Law in India: Past, Present and Future”, in *Singapore Journal of International & Comparative Law*, 2001, vol. 5, p. 371.

may restrict alternate critiques only to those who actively seek them out.

These trends seem to persist to this day. For most law students in India, the discipline of international law has been equated with a study of international relations, a domain reserved for government officials, as opposed to academics. Quality and legitimacy of a course curriculum is judged by its emulation of the curricula of foreign universities, especially the likes of Oxford, Cambridge, Harvard and Yale. Introductory reference materials have remained virtually constant, referring to oft-cited luminaries, such as Ian Brownlie, James Crawford and Malcolm Shaw.<sup>27</sup> An acknowledgment must be registered as to the solidification of Anglo-American ascendancy resulting from such codifications of their preferred epistemology of international law. Instead of posing such questions, Indian education culture still prefers rote learning, rendering teaching mechanical.

Unfortunately, TWAAIL scholars have failed to place emphasis on alternative models of pedagogy.<sup>28</sup> Consequently, TWAAIL only somewhat features in largely Anglosphere-centric discussions on the histories that bore modern international law. Not only does this reduce relatability of the discipline of international law to students of the Third World,<sup>29</sup> it ignores addressal of the *harms* of colonial wrongs as one *raison d'être* of international law.

It is not enough to stand loudly in opposition of hegemonic discourses and practices. The Third World should *reclaim its agency*, especially in international law-making. As a starting point, however, there is a need to introspect and reflect upon our methodologies.

#### 4. The Yangon Conference and the Road Ahead

The approach of the Yangon conference is also relevant in this respect. As a fellow South-Asian, I recognise the intellectual integrity and complete independence with which the conference was conceptualised and implemented in a challenging setting. Morten Bergsmo's August 2019 concept paper<sup>30</sup> first expressed the idea that colonial grievances must be met with a degree of patience and empathy to alleviate insecurity and initiate an integration of former colonies into international law. He warned with abundant clarity against the risks posed by the extreme polarisation in Myanmar, and how the lack of genuine engagement by international actors could make the situation worse (and it probably did). His paper was translated into Burmese and he was able to conduct unprecedented meetings with civilian and military leaders of Myanmar before the coup on 1 February 2021.<sup>31</sup> In these meetings, he encouraged Myanmar to participate constructively in the proceedings before the International Court of Justice.<sup>32</sup>

<sup>27</sup> Mohsen Al Attar, "Must International Law Pedagogy Remain Eurocentric?", in *Asian Journal of International Law*, 2021, vol. 2, p. 184.

<sup>28</sup> B.S. Chimni, "International Law Scholarship in Post-colonial India: Coping with Dualism", in *Leiden Journal of International Law*, 2010, vol. 23, no. 1, p. 41.

<sup>29</sup> Antony Anghie, "Critical Pedagogy: Critical Thinking and Teaching as Common Sense: Random Reflections", in *Opinio Juris*, 31 August 2021 (available on its web site).

<sup>30</sup> Morten Bergsmo, "Myanmar, Colonial Aftermath, and Access to International Law", Occasional Paper Series No. 9 (2019), TOAEP, Brussels, 2019 (<https://www.legal-tools.org/doc/64a8fc/>). Bergsmo is the Director of CILRAP.

<sup>31</sup> Based on the author's interviews with Myanmar experts.

<sup>32</sup> LING Yan explains some of the consequences when a state (in her example, China) distances itself from international dispute settlement mechanisms, including for narratives which have resulted out of colonial wrongs. See LING Yan, "On the Relevancy of Chinese Colonial Grievances to International Law", in Bergsmo, Kaleck and Hlaing, 2020, pp.

Participation from the other side of the table is apposite considering the inability of even the most capable and well-intentioned efforts by international actors to identify root causes. For instance, the final report of the Advisory Commission on Rakhine State chaired by Kofi Annan, published in August 2017 (arguably one of the more insightful reports on the situation in Rakhine and Myanmar), presented 88 recommendations for addressing the Rakhine crisis.<sup>33</sup> Purported as discussing "in depth a broad range of structural issues that are impediments to the peace and prosperity of Rakhine State",<sup>34</sup> the report identifies several 'root causes' for lack of socio-economic development and communal violence. The only mention of colonial policies, however, is made to explain the rapid increase in Muslim population in the state of Rakhine, without any discussion on the corresponding ideological radicalization that bred xenophobic attitudes. No recommendations are thus made in this respect.

The anthology *Colonial Wrongs and Access to International Law* initiates a long-overdue conversation about past healing. What must follow is not only a mindful implementation of proposals therein, but further discussion upon execution strategies. For instance, for the efficacy of tools of transitional justice, the identity of the primary sponsor or legitimizing power is highly consequential. Active and passive sponsorship may affect how the institution is perceived and trusted. If sponsorship flows externally, should appointments of relevant positions be outsourced or be handed to local governments? Should referenda guide these decisions? Who should be responsible for training judges and staff? It is imperative to reflect carefully upon these questions.

In his chapter in *Colonial Wrongs*, Joshua Castellino<sup>35</sup> highlights the alienation of some marginalized indigenous communities from the discourse on decolonization by those who were in a better position to advocate for it. The latter groups were then accepted as 'legitimate spokespersons', and sovereignty, from the perspectives of the marginalized groups, was simply passed on from foreign colonizers to domestic colonizers. Is international law capable of addressing different colonial grievances arising from different sections of the same society against different colonial actors? The answer will essentially boil down to how 'internationalized' international law truly is.

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367 ff., see above note 3 (<https://www.legal-tools.org/doc/pv6egh/>).

<sup>33</sup> Advisory Commission on Rakhine State, "Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State", August 2017 (<https://www.legal-tools.org/doc/c76b63/>).

<sup>34</sup> Kofi Annan Foundation, "Advisory Commission on Rakhine State: Final Report", 24 August 2017.

<sup>35</sup> Joshua Castellino, "Colonial Crime, Environmental Destruction and Indigenous Peoples: A Roadmap to Accountability and Protection", in Bergsmo, Kaleck and Hlaing, 2020, p. 589, see above note 3 (<https://www.legal-tools.org/doc/2rkrx/>).



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