

THE INTERNATIONAL CRIMINAL COURT  
AS A "TRANSITIONAL JUSTICE" MECHANISM IN AFRICA:  
THE GOOD, THE BAD AND THE UGLY

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Much scholarly writing on the International Criminal Court (the ICC) gives the unmistakable impression that that court can function effectively as one of the primary "transitional justice" mechanisms on the African continent, and that it should, indeed, be deployed more or less frequently, liberally and robustly as such.<sup>1</sup> But to what extent can this manner and degree of utilization of the ICC actually advance the cause of transitional justice on the African continent? Or would it rather impede the attainment of transitional justice's presumed end goals of a sustainable and just peace in the relevant parts of the continent? What, in any case, does transitional justice mean when situated within the broad African context? Is there only one settled, coherent, and even monolithic conception of transitional justice which must be inexorably applied within the African context; one that requires the ICC to play a prominent role on the continent?

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<sup>1</sup> See for example Drazan Dukic "Transitional Justice and the International Criminal Court – in 'the Interests of justice'?" 89(867) *International Review of the Red Cross* 691; Dire Tiladi, "The African Union and International Criminal Court: The Battle for the Soul of International Law" (2009) 34 *S. Afr. Y.B. Int'l L.* 57; Elise Keppler, "Managing Setbacks for the International Criminal Court in Africa" (2012) 56(1) *Journal of African Law* 1.

Utilising the broad optic of critical third world approaches to international law and institutions (TWAIL),<sup>2</sup> this paper sets out to accomplish a number of key objectives: First, it examines the aspect of transitional justice orthodoxy which increasingly appears to view that field of praxis as organized around a monolithic ethic that requires a fixed, almost invariable, kind of international criminal justice response to atrocities committed in the context of repression or conflicts, especially in the African context. Second, the paper interrogates the idea that given the nature of social and political realities in many parts of the Africa today, the ICC ought to have a as central a role as it currently has in transitional justice praxis on that continent. The idea here is not to cast doubt on the suitability of the ICC to play some type of role in transitional justice efforts in certain contexts on the African continent, but it is rather to question whether it can be relied upon to fulfil that function to the extent that all-too-many commentators have seemed to suggest, or at least imply. In its bid to accomplish this goal, the good, the bad and the ugly dimensions of the ICC's actual and potential interventions as a transitional justice mechanism in Africa are discussed. Thirdly, the paper attempts to (re)conceptualize the ICC's role as a transitional justice mechanism on the African continent. Thereafter, the paper ends with a summary of its key arguments.

As this paper is situated within the broad TWAIL analytical tradition and framework, it is only appropriate at this juncture to offer a brief explanation of the character and purport of that a broad approach. Reference to TWAIL here is to a (not so new) tradition of "critical internationalism" with intellectual roots stretching all the way back to the Afro-Asian anti-colonial struggles of the 1940s-1960s, and even before then, to the Latin American de-colonization movements. In its renaissance, contemporary TWAIL scholarship has engaged strongly with other critical schools of international legal scholarship.<sup>3</sup> TWAIL scholars deploy a wide range of "analytic techniques/sensibilities"<sup>4</sup> in their commitment to providing alternative approaches that "assail the creation and perpetuation of international law" in ways which subordinate the third world in the global order.<sup>5</sup> These analytical

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<sup>2</sup> For further reading about the disciplinary commitments of this tradition of international legal scholarship, see James Gathii, "Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory" (2000) 41 *Harvard International Law Journal* 263; James Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" (2011) 3 *Trade Law and Development* 26; and Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16 *Wisconsin International Law Journal* 353.

<sup>3</sup> See Obiora Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43 *Osgoode Hall L. J.* 171.

<sup>4</sup> See *ibid.* at 176 for a further exegesis of some familiar techniques deployed by this critical scholarship.

<sup>5</sup> See Vijayashri Sripathi, "The United Nation's Role in Post-Conflict Constitution-Making Processes: TWAIL Insights" (2008) 10 *International Community Law Review* 411 at 416; see also Makau Mutua, "What is TWAIL?" (2004) 94 *Am. Soc'y Int'l L.* pp. 31, 37.

techniques include (but are not limited to) the following: (i) seeking to write the third world's broadly shared historical experiences of being discriminated against and subjugated, in part, via the instrumentality of international law and institutions (such as the ICC), into the processes and outcomes of international thought and action; (ii) taking the equality of third world peoples much more seriously, leading to an to the dogged insistence that all thought and action concerning international law and relations (such as though an action regarding the ICC) should proceed on the assumption that third world peoples and leaders deserve no less dignity, no less security, and even no less freedom from punitive international actions than do the citizens and leaders of the more powerful states; (iii) a deep interrogation of all assertions of universality (for e.g. the claim that the ICC's attention is as focused on the rest of the world as it is on Africa) seeking to root out and expose the ways in which all-too-many of these claims tend to elide or mask underlying politics of domination; (iv) and mapping/documenting/analyzing the ways in which third world resistance has shaped and continues to shape the character.

It should also be noted that as it is used here, the term "the third world" is understood more as a "chorus of voices"<sup>6</sup> with broadly similar historical experiences and concerns, and less as a fixed geographical space<sup>7</sup>; although, of course, certain "geographies of injustice" do remain discernible and significant in our time.<sup>8</sup> Despite this caveat, the overall here is that clearly, this broad TWAIL approach will be of great utility in this paper as aspects of transitional justice orthodoxy and certain understandings of the transitional justice role of the ICC on the African continent are subjected to scholarly scrutiny.

## I. QUESTIONING THE TRANSITIONAL JUSTICE ORTHODOXY ON AFRICA

Here, the overarching question is the extent to which the transitional justice orthodoxy on Africa which tends to treat the field of transitional justice itself as monolithic (at least when Africa is at issue), and which tends to insist on the deployment of *international* criminal justice in nearly every single conflict or post-conflict situation on that vast continent (while eschewing that sort of approach elsewhere in the world), is in fact responsive *enough* to the requirements of peace-building and justice in that region. A related question is whether there is a measure of bias in the way this

<sup>6</sup> See Karin Mickelson, *supra* note 2.

<sup>7</sup> See Balakrishnan Rajagopal, "Locating the Third World in Cultural Geography" (1998-99) *Third World Legal Studies* 1.

<sup>8</sup> See Upendra Baxi, "Operation Enduring Freedom: Toward a New International Law and Order?" in A. Anghie, B. Chimni, K. Mickelson and O. Okafor, (eds.), *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003) at 46.