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Introduction

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THE THIRD WORLD, INTERNATIONAL LAW, AND THE “POST-9/11 ERA”: AN INTRODUCTION

BY OBIORA CHINEDU OKAFOR*

The continuing encounter among the peoples who now generally tend to self-identify as “third world” and the set of norms and discourses that we refer to as “international law” has had a long, contested and complicated—if in the end, mostly problematic—history. Over three generations of the scholars who have self-identified as “third world” have sought to grapple with the intricacies and complexities of this relationship, while seeking to demonstrate the injustice of far too many of its outcomes.

Drawing from earlier generations of third-world scholars (such as Upendra Baxi, Keba M’Baye, Christopher Weeramantry, Oji Umozurike, Mohammed Bedjaoui, and R.P. Anand), as well as from other critical approaches to social and legal scholarship, the contemporary international law scholars who self-identify as part of TWAIL (the critical Third World Approaches to International Law movement), some of whom have contributed to this volume, have equipped themselves with a broad range of analytical tools and sensibilities—a large scholarly repertoire—that has allowed them to re-read international law in a “third-world” mode, to attempt to write the shared experience of third-world peoples into international legal discourse, and even to re-tell the formative stories of the discipline.

Given the important claims that have been made, even by some progressive scholars, regarding the seemingly fundamental inaugural character of the historical moment that we currently inhabit, what many refer to as the “post-9/11 era,” and given the ferment that such claims signify, does pressing one or more TWAIL optics into the service of the scholarly interpretation of the nature of this historical moment point us toward alternative (even more accurate) ways of imagining this “post-9/11” historical moment? Does taking the shared experience of those peoples and scholars that tend to self-identify as “third world” much more seriously than has hitherto been the case lead us to envision and articulate alternative, if more globally valid, stories about international law, global institutions, and international practices? Does the deployment of a TWAIL sensibility allow us to re-assess and re-configure the many international law reform and

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retrenchment projects that have been either proposed or launched in the wake of the 9/11 attacks in the United States, such as the presumed necessity to authorize unilateral invasions, preventive wars, preventive detentions for long periods, and torture?

Deploying a range of TWAIL analytical techniques, this special issue grapples intensely with this broad thematic and offers crucial insights into the nature and implications of the current historical moment. It also sheds much light on the ways of understanding more fully the contemporary relationships third-world peoples and the “post-9/11” provisions and practices of international law and global institutions. In this way the volume enriches the scholarly debates about the nature of our contemporary world and the policy implications of its specific character.

More specifically, the “newness” of the “post-9/11” world is systematically challenged in the volume, especially in the contributions by Antony Anghie, Upendra Baxi, Ikechi Mgbeoji and Obiora Okafor. These scholars systematically expose the severe blind spots in the dominant accounts of the character of our contemporary world that have occluded similar (and sometimes even more massive) third-world suffering from the gaze of those who author the dominant stories of international law and global order. The result, in their view, has been the creation and centring of pervasive false consciousness regarding the supposed uniqueness in *global* history of the events of 9/11. Thus, for Baxi, the myth that the events of 9/11 were new or unique in *world* (as opposed to *U.S.*) history,

flattens historical time, reducing many histories of multiple terrorisms to a single date (that is, 9/11), summoning a singular reconstitution of global public memory that simultaneously also organizes collective amnesia of sources and causes, means and methods, ideologies, and structures of varieties of collective political violence called “terrorism.”¹

Anghie, Mgbeoji, Okafor, and indeed every contributor to this volume would agree.

These authors unpack, often with systematic and deliberate precision, the myth of U.S. and western innocence that has allowed the case for the uniqueness of the despicable acts of terrorism that 9/11 signifies to be vastly overstated. For instance, Mgbeoji’s article suggests that not nearly enough has been made of the fact that many “powerful states, especially the United States, are some of the leading proponents of terrorism.”² Okafor

¹ “The ‘War on Terror’ and the ‘War of Terror’: Nomadic Multitudes, Aggressive Incumbents, and the ‘New’ International Law” (2005) 43 Osgoode Hall L.J. 7 at 28-29.

² “The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards a North-South (De)construction of the Texts and Contexts of International Law’s (Dis)engagement with Terrorism” (2005) 43 Osgoode Hall L.J. 105 at 109.

discusses a number of recent examples where the U.S. or its allies have subjected third-world peoples to massive and long-running terror campaigns, albeit within so-called proxy wars.³ And for their part, Baxi and Anghie point to the colonial era to illustrate the historical continuity of the terror and horrors visited on third-world peoples by some of the more powerful countries of the North.⁴ The lesson here is that it is only by heavily discounting third-world experience and history, and thus “buying into” the false consciousness of U.S. and western innocence, that the 9/11 terrorist attacks can be convincingly portrayed as unique in world history. While one or two features of that form of terrorism make it seem distinct from earlier forms of that terrible practice, those differences are neither profound nor significant enough to render it unique in world history.

Another argument that virtually all the contributors to this volume share is that the logical necessity and appropriateness of the specific kinds of international legal reform that have been proposed in response to the 9/11 attacks stands deeply challenged by the considerable quantity and convincing quality of the evidence that can be adduced against that claim. While virtually all the contributors to this volume agree with this argument and provide convincing reasons for its validity, James Gathii’s article best exemplifies the way in which serious (TWAIL) analysis reveals and foregrounds the shallowness of the claims that *fundamental* international law reforms, such as authorizing unilateral invasions and pre-emptive wars, have become necessary in the wake of the 9/11 attacks.⁵ As Gathii’s painstaking work suggests, the evidence clearly shows that virtually all the over one hundred and eighty states that make up the United Nations have strongly rejected this view, while only a tiny group of five or so powerful states, agree with it.⁶ In any case, the overwhelming reception of this claim among the world’s peoples has also been negative.⁷

As a consequence, the contributors to the volume expose the serious dangers that are posed to third-world peoples (and indeed to the world as a whole) by the operation of the afore-discussed myths of newness and innocence, as well as by the entailed proposals for international law

³ “Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall L.J. 173 at 187-87.

⁴ *Supra* note 1 at 24; and Anthony Anghie, “The War on Terror and Iraq in Historical Perspective” (2005) 43 Osgoode Hall L.J. 145 at 60-64.

⁵ “Assessing Claims of a New Doctrine of Pre-Emptive War under the Doctrine of Sources” (2005) 43 Osgoode Hall L.J. 67 at 101-102.

⁶ *Ibid.*

⁷ *Ibid.* at 102-03.

reform. This warning is particularly clear in the articles contributed by Anghie, Baxi, Gathii and Mgbeoji. However, even Karin Mickelson's paper on South-North engagements in the international environmental law area "post-9/11" is quite wary of the negative implications, especially for the Third World, of the diversion of scarce energy and resources from other serious problems in favour of an obsessive focus on security, the use of force, terror, and the like.⁸ Moreover, as Gathii has warned:

Were it to be accepted, the adoption of the pre-emption doctrine gives these States [the U.S. and about four others] the exceptional authority to police the world *without restraint*, and at the expense of States not meeting the approval of this band of States.⁹

Baxi is similarly convinced that "the newly instituted official prose of the 'war *on terror*' now presents a 'clear and present danger' to the otherwise much vaunted ontological robustness of human rights" and to world order in general.¹⁰ For Mgbeoji, these U.S.-led proposals for the authorization of unilateral invasions and pre-emptive strikes signify an "excessive reliance upon military might and self-righteousness [that] portend grave dangers for global security."¹¹

Central to the overall thrust of the contributions to this volume is the way in which most contributors enlighten us about the technologies, techniques, and means through which the dominant response to the 9/11 attacks actively seeks to renew, or has the unintended effect of renewing, the imperial project of control and subjugation over third-world (and other) peoples. Quite sadly, the chilling lesson here is that imperialism of one kind or the other is alive and well, even in our own time. Anghie, in this volume, makes this point in a way that almost every TWAIL scholar will agree with. According to him:

[W]hat is evident is the resemblance between the new initiatives that are being proposed by the pre-emption doctrine and much earlier imperial themes. A UN that is transformed to accommodate pre-emption doctrine will simply become a vehicle of this "new" imperialism, and third-world countries [and scholars] have not been slow to recognize this reality.¹²

⁸ "Leading Towards a Level Playing Field, Repaying Ecological Debt, or Making Environmental Space: Three Stories about International Environmental Cooperation" (2005) 43 Osgoode Hall L.J. 137 at 138.

⁹ *Supra* note 5 at 100 [emphasis added].

¹⁰ *Supra* note 1 at 25.

¹¹ *Supra* note 2 at 133-34.

¹² *Anghie, supra* note 4 at 64.

It may well be that some, including many self-professed human rights advocates, do not feel as threatened by this “new” imperialism, and would even go as far as endorsing a brand of imperialism that will purportedly spread human rights to parts of the third world (*à la* Iraq and Afghanistan!), but that is not for most third-world peoples, the sense that should be made of their horrible historical experience of colonial and imperial subjugation.

More happily, it is important to note here that many scholars in the North seem to share important parts of the *TWAIL*ian conclusions regarding the nature of our “post-9/11” world that are presented in this volume. As Margaret Beare’s review in this volume of Kent Roach’s brilliant book on Canada and the 9/11 attacks shows, both Roach and Beare are as likely as any *TWAIL* scholar to be pronounced “guilty” for challenging quite effectively the preferred message of the dominant school of thought on the 9/11 attacks: that is, that the “attacks in New York and Washington signalled an era of *profoundly* different terrorism.”¹³

If the volume helps convince even a few students and scholars about the soundness of the alternative, more global, understanding of our post-9/11 world and its implications for international law reform, then it would have justified all the effort that went into it.

¹³ Book Review of *September 11: Consequences for Canada* by Kent Roach (2005) 43 Osgoode Hall L.J. 195 at 197 [emphasis added].

