

RECOGNISING THE RACIAL PAST AND DISCRIMINATORY PRESENT OF INTERNATIONAL LAW – THE INTERNATIONAL COMMUNITY’S RESPONSE TO THE RUSSIAN INVASION OF UKRAINE

by

LLM CANDIDATE: **USAID MUJTABA RAZZAK**

&

SUPERVISOR: **TSHEPO MADLINGOZI**

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DECLARATION

I, 1620460 (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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RECOGNISING THE RACIAL PAST AND DISCRIMINATORY PRESENT OF INTERNATIONAL LAW – THE INTERNATIONAL COMMUNITY’S RESPONSE TO THE RUSSIAN INVASION OF UKRAINE

ABSTRACT

On 24 February 2022, Russia unilaterally invaded Ukraine without any prior United Nations Security Council (‘UNSC’) approval. Within ten days of this invasion, the United Nations General Assembly (‘UNGA’) adopted resolution A/49/L.1 condemning Russia’s invasion of Ukraine and demanding the immediate removal of Russian troops from Ukrainian territory. Moreover, on 28 February 2022, only four days after the initial invasion, the International Criminal Court’s (‘ICC’) Chief Prosecutor Karim A. A. Khan of the United Kingdom decided to ‘open an investigation into the situation of Ukraine’. In the Middle East, territorial wars, or wars relating to borders have been fought between Palestine and Israel since 1948. There is evidence that an investigation was launched into the case of Palestine on 03 March 2021. But my criticism is this; whereas it took the ICC merely 4 days to launch such an investigation in Ukraine, it took the ICC nearly 70 years to do the same in Palestine. The UNSC is reduced to a council where political decisions are influenced based on gratuity of allies and own political agendas where the international law framework itself provides for a loophole for international law to be manipulated, construed, and controlled to the whims and fancies of the powerful (big 5) nations through the use of the veto power. Then, I argue, international law as it currently stands, is in need of serious remodelling.

I. INTRODUCTION – THE RACIAL PAST OF INTERNATIONAL LAW

When George Santayana, a famous Spanish philosopher in his book *The Life of Reason*, wrote ‘those who cannot remember the past are condemned to repeat it’¹, what did he mean? The answer is a little more psychological and practical than it is philosophical. In 1914, Sigmund Freud published his essay ‘Remembering, Repeating and Working-Through’ where he argued that the chances of repeating a repressed or denied memory are weighty.² Thus, it means that in the context

¹ George Santayana ‘The Life of Reason’ (2005) *MIT Press* at ch XII.

² Robert Gildea ‘Empires of the Mind’ (2019) *Cambridge University Press* at 13.

of history, if the actual lived historical realities are denied, the same history will present itself in the future.

The harsh reality of international law's history is its era of slavery, of colonialism and of imperialism.³ Criticism of the modern regime of international law is not a new phenomenon. Academics, mostly hailing from the global South or the third world, have been outward in their criticisms against the modern institution of international law. These groups of scholars and academics and their approach to international law became known as Third World Approaches to International Law ('TWAIL').⁴ These approaches to international law are not just a matter of scholarly discourse but necessitated by how far apart the post-colonial narrative and reality were to the actual faced reality of colonialism. The focus of this paper will revolve around the international community's response to the Russian invasion of Ukraine. A critique of this response through a cursory study of TWAIL will be done to illustrate the drastic difference in the international community's response to terror and warfare elsewhere in the world in last few decades. After attempting to unpack the discrimination of international law, partly in its formulation and partly in its dispensation, I propose suggestions to combat this glaring, transparent yet alluded problem of international law. Suggestions will revolve around re-writing the historical evolution of international law and significantly relying less on western proposed narratives of international law which do not recognise the racial past, nor the discriminatory present of international law.

The objectives of this research report is to highlight the shortfalls of the historical developments of international law as highlighted by TWAIL. Furthermore, it will note and highlight the current forms of discrimination of international law through an analysis of the Russian invasion of Ukraine. Lastly, it will provide an analysis of the various solutions in order to rectify the said discrimination. I would like to underscore that I shall use the terms global North, Western and/or European Nations interchangeably as I will illustrate how all of them, either collectively or individually, have preserved hegemony in international law. Furthermore, I shall use the terms global South, African and/or third-world countries interchangeably, as I will illustrate

³ Ibid at 16-36.

⁴ Makau Mutua *What is TWAIL?* (2000) *Proceedings of the ASIL Annual Meeting* Vol. 94 Cambridge University Press at 31.

how all of them, either collectively or individually, have been subject to the undue hegemony prevalent in international law

II. NARRATIVES OF INTERNATIONAL LAW

(a) *Traditional Narratives*

There are two narratives to international law history, as put forward by Robert Gildea, the narrative of the colonial – the narrative of the empire.⁵ And the post-colonial narrative of the colonised – the narrative of colonialism.⁶ The narrative of the empire is based on wealth, on riches, and on control over massive geographical terrains.⁷ The narrative of colonialism, however, is based on the lived reality of colonialism, of a brutal global crime, of loot and plunder, of war and torture, and of expropriation.⁸ Therefore, by extension, according to this perspective of international law history, there are two broad connotations, the connotation of money, power and control, and the connotation of inequality, violence and exclusion.

Colonial history was therefore written from the perspective of the privileged rather than the oppressed, from the lens of the imperialist rather than the subjects of imperialism, from the narrative of the colonialist rather than the colonised.⁹ The post-colonial history, however, saw the script being flipped. It was now written by the colonised, by the oppressed, by those who suffered from the faced reality of colonialism.¹⁰ Needless to say, a historical rift was created between the colonial global north and the colonised global south.

An example of the narrative of the empire is by Hugh-Trevor Roper. Speaking to the BBC in 1963, a history professor at Oxford University, came with a massively robust and dismissive judgement of the historical significance of African history.¹¹ He said, the only history of Africa, at the moment, is the ‘history of the Europeans in Africa. The rest is darkness... and darkness is not a subject for history.’¹² Such a dismissive critique is what almost all academic scholars, hailing

⁵ Op cit note 2 at 1.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid at 9.

¹⁰ Ibid.

¹¹ Ibid at 8.

¹² Ibid.

from European descent, affirmed in their quest to write about the ‘mighty’ colonial empire. Accordingly it is argued that these scholars did not do justice to the field of history for they wrote from a biased perspective. After all, as Winston Churchill is credited to have said, ‘History will be kind to me, for I intend to write it.’¹³ History, as I put forth, was not a matter of writing about what had actually happened, but rather reduced to the mere fantasies of the mind of the academic scholars who wrote about their biased perspectives for the rest of the world. My argument is based on sound academic sources, as these perspectives dominated the era of slavery and colonialism because the colonised world was not given an opportunity to write about their own experiences.¹⁴

An African proverb states, ‘Until the lion learns to write, every story shall glorify the hunter.’¹⁵ The lion, however, learnt to write in the post-colonial world. The lion struck back, not with the force and violence of its hunter counterpart, but with the power of words. Post-colonial scholars now attempted to re-write the colonial history by writing from the perspectives of those who were at the receiving end of colonialism, from the perspectives of non-Europeans, from non-Western perspectives.¹⁶ An example of such a narrative is posited by Richard Drayton, Rhodes University professor of Imperial History, who says that a history of colonialism will always falter, will be ‘inaccurate’, will be ‘delusional’, if it did not mention the ‘tyranny, inequality and structural violence’ of the colonial empire.¹⁷

Many Western academics in the post-colonial world admit the brutalities of the past, but they fail to go beyond admittance to a point of criticism. Malcolm Shaw, for example, in his comprehensive textbook of International Law, puts Eurocentrism at the centre of International law evolution and fails to provide any historical facts on colonisation and to the dismay of international law academics, does not provide any history of racism that the global south was subjected to in the imperial and colonial era apart from mentioning the existence of racism.¹⁸ Therefore, post-colonial scholars, credited with writing textbooks for students who wish to study international law as a field, do not provide historical background to the racial and colonial past of international law.

¹³ Paul Milward ‘Winston Churchill’s Poetic Speeches of World War II’ (2011) *The International Churchill Society* accessed from: <https://winstonchurchill.org/resources/in-the-media/churchill-in-the-news/winston-churchills-poetic-speeches-of-world-war-ii/>.

¹⁴ Op cit note 2 at 10.

¹⁵ LaGarrett J King ‘When Lions Write History’ (2014) *Multicultural Education* accessed from: <https://files.eric.ed.gov/fulltext/EJ1065311.pdf>.

¹⁶ Op cit note 2 at 10.

¹⁷ Ibid.

¹⁸ Mohsen Al Attar ‘I Can’t Breathe: Confronting the Racism of International Law’ (2020) *AfSDJN* accessed from: <https://www.afronomicslaw.org/2020/10/02/i-cant-breathe-confronting-the-racism-of-international-law/>.

Hence, questions are raised when Boris Johnson declares in open parliament that Britain ‘...used to run the greatest empire the world has ever seen’¹⁹ – which empire was he talking about? Was he referring to an empire built on the backs of slaves? The empire built from the loot of others? The empires built on the land of the natives? This was the history of international law. Slavery was law. Colonialism was legal. Thus slavery and colonialism became the fundamental grounding of International Law.

It was, however, this same international law that saw justice being meted out to the perpetrators of World War II in the form of the Nuremberg trials.²⁰ The same international law that saw the advent of the United Nations, that saw the establishment of a universal human rights declaration.²¹ It is also, the same international law that will be the subject of criticism in this research report. At the end of the case studies which I will explore in this paper, the research question which I will attempt to answer may become clearer – can a regime of international law, embedded in gross inequalities, ever attempt to be equal without a robust re-formulation of international law and without having the colonial powers and the colonised nations work hand-in-hand to create an equal legal system? By equal, as will be explained, I mean equality in all forms of social and political spectrums – where one nation or group does not have an undue advantage which it seeks to use and manipulate and suppress the other group.

The colonial history has repeated itself in the form neo-colonialism and neo-imperialism in the modern world and this is largely because of the denial of colonial history. Undoubtedly, International law aims to be equal and fair in dispensation.²² It seeks to provide States with an opportunity to engage with other States in meaningful transactions promoting global unity. The Charter of the United Nations and the Universal Declaration of Human Rights, all echo the above sentiment.²³ However, I ask that if the subjects of international law, such as Great Britain, are still in their whimsical fantasies of their lost ‘glorious’ empires, is the dispensation of international ever going to be equal?

Surely, such behaviour is synonymous to colonialism. What might one call such an order? This form of colonialism in the post-colonial world is what Kwame Nkrumah in 1965 called ‘Neo-

¹⁹ Op cit note 2 at 1.

²⁰ Malcolm N. Shaw ‘International law’ (2017) 7th ed *Cambridge University Press* at 34.

²¹ Ibid.

²² Ibid at 4.

²³ Ibid at 34.

Colonialism’.²⁴ It was an attempt by colonial powers to keep their interests alive in ex-colonies by offering ‘financial and military dependency’ – ‘gentlemanly capitalism’ as Cain and Hopkins call it – to the now formally independent colonies.²⁵ As Derek Gregory mentions in the aftermath of the Iraq war that ‘many of us continue to think and act in the ways that are dyed in the colours of the colonial power.’²⁶ Hence, neo-colonialism, neo-imperialism, are not just terms that exist in a post-colonial world, there are real contexts to these terms that define our contemporary existence in a post-colonial world. The big five (5) of the United Nations Security Council is still made up of largely colonial powers such as France and Britain.²⁷ It is also made-up of neo-colonial and imperial powers of Russia, China and the United States²⁸. Without a drastic remodelling of the United Nations system, an equal dispensation of international law may perhaps never exist.

Therefore, whilst international law aims to be equal in its application and dispensation, it is an unfortunate reality that international law is applied rather capitalistically and dispensed unequally by States who have a controlling stake in its implementation, especially in the United Nations.

(b) *Third World Approaches to International Law*

TWAIL is a scholarly movement borne out of a critique of international law as a medium and discipline which reinvents colonialism in new ways; either in the form of neo-colonialism or in the form of power imbalances of the third world in international law development.²⁹ TWAIL scholars hail from the third world and attempt to write from the perspective of the lion, as explained above, and attempt to highlight the narrative of the colonised and bring it to the fore.³⁰ Scholars such as Antony Anghie and B.S Chimni argue that the crux of TWAIL is found within the ‘lived realities’ of third world encounters with international law – pre and post-colonial.³¹ Anghie believes that colonialism or colonial history is fundamental to the making and development of

²⁴ Op cit note 2 at 98.

²⁵ Ibid at 99.

²⁶ Ibid at 11.

²⁷ Michael W. Doyle ‘Striking First: Preemption and Prevention in International Conflict’ (2008) *Princeton University Press* at 32.

²⁸ Ibid.

²⁹ Robert Knox ‘A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law’ (2014) *London School of Economics and Political Sciences* at 110-111 accessed from: [Knox_A_Critical_Examination_of_the_Concept_of_Imperialism.pdf](#) (lse.ac.uk).

³⁰ Ibid at 111.

³¹ Ibid.

international law.³² However, as discussed above, the history of colonialism was mainly told from the perspective of the colonisers. Due to such fundamentalism, international law in its current form cannot achieve an equal dispensation if its history is not retold, this time, from the perspective of the colonised.

Chimni produces a Marxist account of international law which is categorised as a third world account by Knox.³³ Chimni argues that imperialism and its colonial consequence have internal working relations with capitalism.³⁴ Therefore, Chimni believes that colonialism was a direct result of capitalism which is why decolonisation for Chimni was a ‘contradictory phenomenon’.³⁵ Hence, Chimni argues that the rise of capitalism was inevitably going to produce a system of colonisation or a system of power imbalances. Thus, decolonisation in a capitalist world was surprising. However, whilst decolonisation, in its initial phase at least, was somewhat progressive, it regressed more and more with power imbalances introducing itself in new ways i.e. neo-colonialism.³⁶ For Chimni, power imbalance is thus reflective of the character of a capitalist based international law.

Knox provides two versions of TWAIL, one which accounts for an inherently pessimist view of international law which is that international law is the source of production and reproduction of imperialism, of colonialism and of the discriminatory present of international law which we experience.³⁷ On the other hand, a slightly more positivist approach that international law is merely a tool which advanced imperialism due to a ‘historical encounter’.³⁸ Both these approaches, although radical in their arguments, reach the conclusion that international law needs to be reformulated, the former account which argues for constant reformulation, whilst the latter argues for merely the historical reformulation which gave rise to the current discriminatory form of international law.

Ultimately, TWAIL scholars recognise the discrimination of international law, but as Anghie puts it, ‘the third world cannot abandon international law’.³⁹ Whilst international law may not be equal in its dispensation, especially towards the third world, the third world cannot separate

³² Ibid at 115.

³³ Ibid at 127.

³⁴ Ibid.

³⁵ Ibid at 129.

³⁶ Ibid.

³⁷ Ibid at 283.

³⁸ Ibid.

³⁹ Ibid at 151.

itself from international law development. The solutions which they posit, which I shall discuss later in this report, are solutions which use international law and allows for a reformulation of international law history to adequately place international to everyone's disposal. With such discourses around formulating the historical narrative around international law, the current inequalities posited by the dispensation of international law cannot be ignored. Such inequalities have come to the fore through the Russian invasion of Ukraine and the international community's response thereof as opposed to the international community's response to wars and conflicts elsewhere,

III. THE DISCRIMINATORY PRESENT OF INTERNATIONAL LAW

This paper revolves around the International Community's response to the Russian invasion of Ukraine, as opposed to conflicts and invasions elsewhere, and through this analysis, this paper will determine a clear trajectory of discrimination that certain States within the international community implement under the current regime of international law. Due to the focus on invasion/attacks/acts of aggression, international laws that exist regarding these acts will be discussed before the case studies are analysed.

It is an established principle that 'States shall refrain... from the threat or use of force' against other nations.⁴⁰ Furthermore, in the event that the use of force becomes necessary, the authorisation of the United Nations Security Council (UNSC) is compulsory, as stated under article 39 of the UN Charter.⁴¹ According to Michael Walzer, a definite act of aggression only becomes permissible under two conditions, (1) the aggression is in defence of a prior act of aggression and (2) it is an aggression carried out in pre-emption or anticipation of an act of aggression that is 'imminent', that is 'overwhelming' and does not afford time to deliberate.⁴² This is the Customary International law position. Aggression, as defined by article 8bis of the Rome Statute, refers to 'the exercising of control over or to direct the political or military action of a State'.⁴³

Hence, it is concluded that International law, at least in its frameworks, tries to limit

⁴⁰ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with Charter of the United Nations (1970) *G.A res 2625 Annex 25* at 121.

⁴¹ Charter of the United Nations (1945) art 39.

⁴² *Op cit* note 27 at xiii.

⁴³ Rome Statute of the International Criminal Court 1998 at art 8bis.

aggression or the physical overpowering of one State over another. However, these laws are only seldom followed as will be illustrated through the case studies. I argue that the reason for this digression from international law frameworks is because of the neo-colonial and imperial mindset of the aggressors. It is one thing for certain members of the international community to be biased in their response to certain acts of aggression and its loud silence over other acts, but it is another thing to have utter disregard for international law principles – such disregard, I argue, comes with having having some form of power or control in current international politics or some prior power and control in the colonial era of international law.

In the following research report, I argue that international law, in its current form, does not remedy the current crises that the global south is undergoing. Neither does it solve humanitarian crises around the world, which it so desperately wants to deter. In fact, I argue that international law is rather discriminatory towards the global south. There are several case studies that I will put forward in this regard with references to several international case law. First, the international community's reaction to the conflict of the Russian invasion of Ukraine will be analysed. By international community, I mean all nations and States that are currently part of the United Nations framework in any manner, but a special emphasis is made on the global north.

Due to the invasion being a significantly new episode, not much coherent or core academic research has been done on the subject as yet. As a result, the sources of research will include opposite the editorial page (op-ed) reviews. The case studies will then be put forward which revolve around the humanitarian issues in Palestine and the US invasion of Iraq. These will be made through an analysis of sound academic reviews and commentary. The international community's response to the Russian invasion of Ukraine will then be contrasted to the response in the above case studies. Lastly, this research report will attempt to put forward several solutions for this apparent shortfall of international law.

(a) Case in point – Russia's invasion of Ukraine

This invasion, occurring on European soil, was the first of its kind to have occurred after World War II ('WWII').⁴⁴ This is because invasions post WWII have predominantly occurred in the Middle East and Africa but not in a European nation.⁴⁵ On 24 February 2022, Russia unilaterally

⁴⁴ Peterson K Ozili 'Global Economic Consequence of Russian invasion of Ukraine' (2022) SSRN at 4 accessed from: [Global-Economic-Consequence-of-Russian-Invasion-of-Ukraine.pdf](#) (researchgate.net).

⁴⁵ Ibid.

invaded Ukraine without any prior UNSC approval.⁴⁶ Within ten days of this invasion, the United Nations General Assembly ('UNGA') adopted resolution A/49/L.1 condemning Russia's invasion of Ukraine and demanding the immediate removal of Russian troops from Ukrainian territory.⁴⁷ Moreover, on 28 February 2022, only four days after the initial invasion, the International Criminal Court's Chief Prosecutor Karim A. A. Khan of the United Kingdom decided to 'open an investigation into the situation of Ukraine'.⁴⁸ Ironically, USA applauded the ICC's investigation into the situation in Ukraine, despite the fact that they had never ratified Rome Statute, the document founding the ICC's jurisdiction.⁴⁹

It is interesting to note that neither Ukraine nor Russia have ratified the Rome Statute.⁵⁰ Ukraine, however, has declared that it recognises the court's jurisdiction, which then, according to article 12(3) of the Rome Statute, would grant the court indeterminate jurisdiction until an opposing declaration is made.⁵¹ Therefore, whilst Ukraine has not formally ratified the Rome Statute, it does recognise the Court's jurisdiction. Therefore, the ICC may pursue investigations into Ukraine but may only pursue an official case through ad hoc international criminal tribunal.⁵² This was the case in the Nuremberg Trials post WWII.⁵³

The clear problems with the Russian invasion of Ukraine is that Russia undeniably violates established international law provisions and further Customary international law rules.⁵⁴ Russia did not seek prior UNSC approval before the invasion as per article 39 of the UN charter, neither did the invasion fall under the two categories of defence or pre-emption as noted above. Furthermore, there are reports on numerous human rights violations committed by Russian troops against Ukrainian civilians.⁵⁵ Appropriately, Russia was expelled from the Council of Europe.⁵⁶ The International Community, most notably the European Union and the United States, further

⁴⁶ United Nations 'The UN and the War in Ukraine' (2023) *UNRIC* accessed from: <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/>.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Op cit note 44 at 7.

⁵⁰ Ukraine 'Situation in Ukraine' (2022) *International Criminal Court* accessed from: [https://www.icc-cpi.int/ukraine#:~:text=Ukraine%20is%20not%20a%20State,\(3\)%20of%20the%20Statute.](https://www.icc-cpi.int/ukraine#:~:text=Ukraine%20is%20not%20a%20State,(3)%20of%20the%20Statute.)

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Supra note 40, 41 and 43.

⁵⁵ United Nations 'Ukraine' (2023) *OHCHR* accessed from: <https://www.ohchr.org/en/countries/ukraine.>

⁵⁶ Op cit note 44 at 5.

imposed sanctions on Russia's banks, oil reserves and military trade and exports.⁵⁷ Russia was further excluded from major sports and cultural events following the invasion.⁵⁸

But it was not only Russia that bore the brunt of the blame for the invasion. Nations or representatives of nations that did not speak out against Russia's invasion were either forced to do so or sacked completely. For example, South Africa, along with 16 other African countries abstained from the vote on the above UN resolution.⁵⁹ Criticism then, instead of focusing on Russia's brutality, focused on African countries and their abstention from condemning Russia. Nearly eight months after the invasion, Ukrainian members of Parliament still implore South Africa to condemn Russia.⁶⁰ Ironically, it was Africans themselves whom Ukraine and the global north so empathetically implored to condemn Russia that were racially profiled and treated differently during the refugee crisis.⁶¹ To a reasonable person, this would demonstrate the double standards of European and Western nations, as it would appear, prefer subordination of others and despise those that could dominate them.

Another incident was the sacking of Pakistani Prime Minister Imran Khan. Imran Khan visited Russia during the invasion of Ukraine and Pakistan further abstained from voting on the UN resolution.⁶² Pakistan came under fire immediately after mounting pressure from the West in this regard.⁶³ Within days, Imran Khan was voted out of power after a motion of no-confidence.⁶⁴ Since then, Khan has accused the United States of being the foreign power behind his recusal and has often cited 'imported government' in his attempts to regain power.⁶⁵ He believes that the tipping point of the US in ousting Khan was largely due to the non-condemnation of Russia's actions. Khan had called this the 'threat memo' received from the US outlining regime change in

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Aggrey Mutambo '17 African countries abstain from UN vote to condemn Russia invasion' (2022) *The East African* accessed from: <https://www.theeastafrican.co.ke/tea/news/world/17-african-countries-abstain-from-un-vote-russia-3735288>.

⁶⁰ Tamsin Metelerkamp 'We fight for our independence – Ukrainian MP calls on South Africa to condemn Russian invasion' (2022) *Daily Maverick* accessed from: <https://www.dailymaverick.co.za/article/2022-10-20-ukrainian-mp-calls-on-south-africa-to-condemn-russian-invasion/>.

⁶¹ United Nations 'Ukraine: UN expert condemns racist threats, xenophobia at border' (2022) *OHCHR* accessed from: <https://www.ohchr.org/en/press-releases/2022/03/ukraine-un-expert-condemns-racist-threats-xenophobia-border>.

⁶² Timesofindia.com 'Imran Khan vs Army Chief over US ties, Ukraine' (2022) *The Times of India* accessed from: <https://timesofindia.indiatimes.com/world/pakistan/imran-khan-vs-pakistan-army-chief-over-us-ties-ukraine-conflict/articleshow/90608761.cms>.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

Pakistan.⁶⁶ Therefore, another instance of Western hegemony is highlighted in the undue hegemony that the Western and European powers have over the rest of the world. Alignment of interests became key in the Russian invasion of Ukraine in this international law system where nations that did not condemn Russia were targeted and repeatedly implored to issue such condemnation.

To the dismay of Ukraine, and perhaps the global north, not everyone shared the same pain as the global north for the situation in Ukraine. Within days of the invasion, amidst calls for boycotts and sanctions to be placed on Russia, many news reporters and commentators established a clear sense of hypocrisy and double standards displayed by Western media, news analysts and almost the entire Western Political system. This is where I place my criticism too. To clarify, Russia certainly violated the territorial integrity of another nation which I abhor. It violated several international law principles, violated the Rule of Law in Armed Conflicts ('RULAC'), and violated several international human right laws for which Russia should be condemned by the international community and strict action needs to be taken against the Russian Federation. On the other hand, I too share the sentiments of hypocrisy and double standards that many have cited since the Russian invasion occurred. A few criticisms that I shall cite will be clear to the reader why I reserve the sentiments noted above. A few, however, will be made clear once I cite the invasion of territorial integrity elsewhere and the international community's response thereof.

During the early days of the conflict, a CBS news senior correspondent, Charlie D'Agata, said that Ukraine 'isn't a place... like Iraq or Afghanistan. This is a relatively civilised, relatively European' society.⁶⁷ There was another comment made, this time from a former legal figure. It was David Sakvarelidze, Ukraine's former deputy general prosecutor who said 'It's very emotional for me because I see European people with blonde hair and blue eyes being killed.'⁶⁸ I would argue that this was an emotional moment, indeed, but because humans were being killed, not Europeans and blondes.

It is ironic that a similar sentiment is actually noted in article 38(1)(c) of the Statute of the ICJ which states that international law disputes shall be decided in accordance with 'the general

⁶⁶ Ibid.

⁶⁷ Al Jazeera Staff 'Double Standards': Western coverage of Ukraine war criticised' (2022) *Al Jazeera* accessed from: <https://www.aljazeera.com/news/2022/2/27/western-media-coverage-ukraine-russia-invasion-criticism>.

⁶⁸ Ibid.

principles of law recognised by civilised nations.’⁶⁹ It is interesting that drafters of the statute still categorise nations as civilised or uncivilised and it is appalling to see such wording in an official codified statute of international law. Therefore, noting the massive criticism from the global north, and the immediate responses to the Russian invasion, I cannot help but become sceptical at the responses of the international community towards Russia. Could this not have been the same in the case of Israel’s illegal occupation of Palestinian territory as rightfully put forward by Minister Naledi Pandor, Minister of International Relations and Cooperation of South Africa?⁷⁰

I conclude the case in point and shall now provide a contrast to the above responses, namely through the analysis of the case of Palestine and the US invasion of Iraq.

V. CASE STUDIES

(a) The Case of Palestine

Territory has been the forefront of the case in Palestine with Israel often cited as a ‘settler colonial state’.⁷¹ Israel has been in a permanent state of war with Palestine since 1948 – the start of the first ‘Arab-Israeli’ war.⁷² Thereafter, through UN mediation and armistice agreements with neighbouring Arab countries, Israeli state borders were officially set up in 1949. Ronit Lentin argues that Israel’s occupation of Palestine did not come into being in 1967 – after the six day war – nor did it come to being in 1948 with the inception of the State of Israel, but it was a gradual colonial project, manifested in the nineteenth century.⁷³ Patrick Wolfe, an Australian anthropologist, further suggests that settler colonialism is not an event, it is a gradual building of a structure.⁷⁴ Therefore, territorial wars, or wars relating to borders have been fought between Palestine and Israel since 1948.⁷⁵

Israel has constantly been criticised for its war against Palestine and for committing gross

⁶⁹ Statute of the International Court of Justice 1945 at s38(1)(c).

⁷⁰ Naledi Pandor ‘State Statement by the Minister of International Relations and Cooperation, Dr Naledi Pandor, during the Media Briefing on the Russia / Ukraine Conflict’ (2022) *South African Government* accessed from: <https://www.gov.za/speeches/minister-naledi-pandor-russia-ukraine-conflict-8-apr-2022-0000>.

⁷¹ Ronit Lentin ‘Traces of Racial Exception: Racialising Israeli Settler Colonialism’ (2018) *Bloomsbury Academic* at 6.

⁷² *Ibid* at 5.

⁷³ *Ibid* at 6.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

Human Rights violations on Palestinian territory that include but not limited to ethnic cleansing, racial state, settler colony and has often been related to an Apartheid state.⁷⁶ As such, Israel's occupation of Palestine is considered the longest military occupation in the world.⁷⁷ Thus, the long military operation in Palestine is one reason why such gross human rights violations have occurred and are ongoing in Palestine.

It was mentioned in the introduction that slavery and colonialism were systems 'conceived, constituted, managed and maintained through the rule of law'.⁷⁸ It is precisely for this reason why the colonial system was able to operate for nearly a century. It is also the reason why the Israel has imposed colonialism in Palestine – because Israel's occupation is embedded within law.⁷⁹ The global north, however, remains largely silent on the issue but this will be discussed further in my critique of the international community's selective response to certain conflicts. Israel has managed to keep its colonial project intact because it places itself above international law.⁸⁰ This is because whilst Israel has ratified major Human Rights Conventions, it is not party to the optional protocols of the conventions, neither does it accept jurisdiction of any treaty body committee.

For example, Israel has ratified the 1949 Geneva Convention, but it has not signed the additional protocols of 1977 which keeps it far from the RULAC's remit.⁸¹ Lastly, Israel annually renews its State of Emergency – which it is criticised of doing by the RULAC – and that becomes a major factor in Israel maintaining its military regime in Palestine.⁸² Therefore, Israel has systemically avoided international law jurisdiction and systematically upheld the state of emergency in Palestine, thereby avoiding the scrutiny of national legislation as well.

But I now list my criticism towards, not only Israel's occupation of Palestine, but also the international community's response, or lack thereof, to the whole conflict. Just as Israel, Ukraine did not ratify the Rome Statute, but the ICC prosecutor still launched a proprio motu (on his own accord) investigation into the situation of Ukraine. Why did the ICC not take charge of such investigations in Israel? There is evidence that an investigation was launched into the case of Palestine. On 03 March 2021, the prosecutor of the ICC announced that it would open an

⁷⁶ Ibid at 7.

⁷⁷ Ibid at 6.

⁷⁸ Ibid at 30.

⁷⁹ Ibid.

⁸⁰ Ibid at 40.

⁸¹ Ibid at 41.

⁸² Ibid.

investigation into the situation of Palestine. But my criticism is this; whereas it took the ICC merely 4 days to launch such an investigation in Ukraine, it took the ICC nearly 70 years to do the same in Palestine. Even then, as explained above, all investigations were side-lined because of the massive international focus given to Ukraine.

Most of the international community, largely the global north, was swift in condemning Russia by means of legal interventions because a ‘European’ nation was invaded but such has never been the case for Palestine. I argue that there is a clear form of hypocrisy of the international community where, on one hand, it condemns the invasion of Ukraine and forces the ICC to take definitive action against Russia and even supports the rights of the Ukrainian people to resist and fight back, yet the same sympathy is not shared for the Palestinians. However, this must not be construed as my saying that the international community has never condemned Israel. For example, in the advisory opinion of the ICJ *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, the Court held that the wall amounted to de facto annexation of Palestinian land and declared it as illegal, along with the illegal settlements in occupied Palestine.⁸³ Whilst this action of Israel was rightly criticised and found to be against international law principles, the broader question relating to the legitimacy of the occupation regime of Israel was not raised.⁸⁴

There have also been numerous UN resolutions that have been drafted in favour of the Palestinians and against the illicit activities of Israel. However, these resolutions cannot be enforced because the UNSC approval does not come through, at least from one of the big 5 of the UNSC which is the United States who uses its power of veto to deter any resolution made against the State of Israel.⁸⁵ This is further a major critique of international law where the international law framework itself provides for a loophole for international law to be manipulated, construed, and controlled to the whims and fancies of the powerful (big 5) nations. This is the same case with Russia who is part of the big 5 and, like the United States, also holds the power to veto. Russia has also used the veto power to its advantage by vetoing any resolution made against it in the wake of the invasion of Ukraine.

I, therefore, come to the conclusion that the UNSC is thus merely reduced to a council

⁸³ Op cit note 20 at 902 see also *Construction of a Wall* advisory opinion, ICJ Reports, 2004.

⁸⁴ Ibid at 937.

⁸⁵ Op cit note 27 at 32-34.

where political decisions are influenced based on gratuity of allies and own political agendas. Then, international law, as it currently stands, is in need of serious remodelling. Whilst the above criticisms highlight the misuse of the UNSC, the case study I shall now discuss seeks to completely ignore the UNSC and hence, raises the question of the importance of having a UNSC, if at all. This case study is on the US invasion of Iraq.

(b) The United States' Invasion of Iraq

In the case of *Nicaragua v United States of America*, the United States used force against Nicaragua in what they cited as 'collective self-defence' of El Salvador.⁸⁶ The United States asserted that they merely responded to Nicaragua providing Salvadorian rebels with arms and weaponry – an unproven assertion at that – and the United States qualified this assertion as an armed attack.⁸⁷ The International Court of Justice ('ICJ') rejected this assertion of the United States and held that the scale of the attack of the United States on Nicaragua was no less than a cross-border armed invasion.⁸⁸ Thus, the United States was accused of launching an attack categorised as no less than an invasion into a foreign nation. Surprisingly, seventeen years later, the US found itself actually invading a foreign nation when they invaded Iraq in 2003.

In March 2003, the US launched an offensive on Iraq which was unsanctioned by the UNSC.⁸⁹ The offensive was launched in the wake of the 'Bush Doctrine' of 2002 after the 9/11 attacks on US soil.⁹⁰ The Bush Doctrine was adopted and designed to 'prevent' foreign threats to the US or US allies with Weapons of Mass Destruction ('WMDs').⁹¹ Notable is the prevention attitude of the doctrine which seemingly transitions into an anticipatory attitude. The doctrine soon became known as the 'one percent doctrine' where even a one percent chance of a threat of WMDs materialising was a threat too big and an 'unacceptable risk'.⁹² Thus, the Bush Doctrine of prevention transitioned into a doctrine of pre-emption and anticipation. As Michael Doyle points out, if the Bush Doctrine was to be adopted today, India and Pakistan would probably be the first

⁸⁶ Ibid at 8; see also *Nicaragua v United States of America* ICJ (1984).

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid at 88.

⁹⁰ Ibid at 87.

⁹¹ Ibid at 25.

⁹² Ibid.

to use their nuclear powers against each other citing anticipatory reasons.⁹³

Nonetheless, the doctrine saw a full-scale invasion on Iraq in 2003. Like all other invasions of territorial integrity noted above, the US invasion of Iraq was no exception to violations of international law principles, international human rights law and a serious undermining of the UN system and framework set up to avoid exactly this.⁹⁴ The chronicles of the Abu Ghraib prison where the US army was involved in heinous crimes of sexual and physical assault, abuse and torture against Iraqi civilians detained in the prison is by far the most condemned event of the Iraq war which not only received criticisms from the international community, but also within the United States.⁹⁵ All-in-all, the US invasion of Iraq was a brutal and illegal invasion of a foreign nation based on a doctrine that seeks to violate existing international law standards and procedures. In fact, in bypassing the UNSC authority to sanction an invasion, the US openly declared its violation of the rule of law.

It seemed that the invasion was grounded in pre-emption or anticipation, however, official reasons for the invasion cited by the US and Britain ‘never mentioned prevention.’⁹⁶ Instead, the justifications for the invasion provided by the US relied on Iraq’s breach of UNSC resolution 678, 687 and 1441.⁹⁷ Furthermore, it was also whether the invasion was in anticipation of Iraq using the ‘alleged’ WMDs against the US or its allies or whether the invasion was in response to Saddam Hussein’s despotic regime.⁹⁸ In all these confusing narratives, the US illustrated that it was above the law and that international law frameworks could be.

The ICC launched a preliminary investigation into the crimes committed in the Iraq war but, due to the United States not being party to the Rome Statute, the investigation did not yield fruitful results and ultimately terminated in 2006.⁹⁹ The investigation was re-opened again in 2014 with the surfacing of new evidence but even then, the investigation was terminated once again in 2020 citing inadmissibility of the cases before the ICC.¹⁰⁰ The crux came down to whether the United States ratified the Rome Statute and accepted the jurisdiction of the ICC. The answer was

⁹³ Ibid at 28.

⁹⁴ Philip Zimbardo ‘The Lucifer Effect: Understanding How Good People Turn Evil’ (2007) *Random House* at 403-415.

⁹⁵ Ibid.

⁹⁶ Op cit note 27 at 110.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Preliminary Investigation ‘Iraq/UK’ (2020) *International Criminal Court* accessed from: <https://www.icc-cpi.int/iraq>.

¹⁰⁰ Ibid.

that it did not. Thus, following hollow procedural avenues, the US got away from international legal liability. Moreover, it still took two years for an investigation to be launched against the United States. Four days was all it took in Ukraine. Moreover, the United States did not wait for authorisation from the UNSC to launch an offensive in Iraq and instead, openly violated international law. Perhaps the biggest failure of all was that the WMDs, which were reason for the invasion of Iraq to force Iraq to comply with resolution 1441 and dispose of its WMDs, were never found in Iraq's possession.¹⁰¹ Therefore, the US led a wild-goose chase right into Iraq's territory and came out subjecting its civilians with massive casualties and human rights abuses.

VI. FINDINGS

It has been illustrated that the calibre of response from the international community, particularly the global north, in the Russian invasion of Ukraine, does not even come close to the response, or lack thereof, in the case of Palestine and the US invasion of Iraq. Perhaps, as David Sakvarelidze, Ukraine's former deputy general prosecutor observed, the killings and deaths of blonde people with blue eyes are superior to that of killings and deaths elsewhere. The above case studies have illustrated a clear power imbalance in the dispensation of international law where geo-political regions that are closest to the interests of the global north are given importance over other regions. It is true, then, that power and control are the dominant factors of the international law system, not its legal framework. As Richard Tuck correctly points out, 'powerful imperial nations act in dangerous ways.'

It is appalling indeed to write this piece of analysis and coming to the conclusion that the international community is hypocritical, biased, discriminatory and still racist in its attitude towards conflicts that take place on non-European soil. The response of the international community; condemnation, sanctions, boycotts, criminal adjudication, all avenues to force Russia to withdraw its troops from Ukraine is lauded indeed. It is disappointing, however, to note that not even a fraction of the above avenues were imposed on the United States or imposed on the current colonial state of Israel. My research would implore me to question that perhaps in the near future, an African nation that has lost of all sense of integrity decides to invade a western nation, it shall

¹⁰¹ Op cit note 27 at 110.

too escape liability because it did not ratify the Rome Statute nor the ICC's jurisdiction. Unfortunately, that could never be the case. I argue that this is unfortunately hypocrisy at its best and international law at its worst.

VII. A WAY FORWARD

In my criticisms, I shall draw on already existing solutions posited by the other scholars. I shall try my best at a fusion of solutions; one which hails from the Global South in the form of TWAIL and its recommendations to the current crises of international law – and the other which draws on the recommendations hailing from a Western perspective. After all, Western academia too have provided works which note the shortfalls in international law. In doing so, I shall try and get the best of both worlds and champion a solution which, in my opinion, shall be the most useful in closing the gap of international law. I shall first discuss the recommendations of Makau Mutua.

(a) Makau Mutua

In his article, Makau Mutua breaks down TWAIL's objectives into 3 broad categories; (one) to understand international law as it currently stands in its efforts of maintaining hegemony of imperial Europe over non-European subjects through racialised international norms and institutions, (two) to present an alternative model of international governance and (three) to uplift the conditions of the Third World.¹⁰² I shall, for the purposes of recommendations, only unpack the second point which seeks to provide an alternative to international governance.

By seeking to develop an alternative model of international governance, Mutua asserts that it will be one which is already decolonised, free from the imperial and colonial foundation that the current regime of international law is faced with.¹⁰³ As mentioned in the narratives of international law, TWAIL focuses heavily on scholarly intervention.¹⁰⁴ Naturally, Mutua argues that without re-writing the history of the past, one cannot hope to move onto the future.¹⁰⁵ In 2015, a call for decolonising university curriculum echoed through major South African Universities which included the University of the Witwatersrand, University of Cape Town and University of

¹⁰² Op cit note 4 at 31.

¹⁰³ Ibid at 32.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid at 35.

Pretoria.¹⁰⁶ This was reflective of Mutua's decolonisation arc – decolonisation must take place in every sphere of the third world. And for Mutua and the general communion of TWAIL scholars, history must be decolonised.¹⁰⁷ Therefore, Mutua argues that before we attempt to change the systematic framework of international law, its foundation, that is the history of international law must first be decolonised. That means a more truthful history of colonialism needs to be written before a reformulation of international law. The process has started, but a century of colonial writing glorifying the colonial era cannot be undone in a matter of a few years.

(b) Antony Anghie

Anghie's views are much like that of Mutua. Anghie affirms that the colonial history of international law has been 'reproduced' albeit 'soberly'.¹⁰⁸ Thus, Anghie echoes the sentiments of the Third World academics and academics quoted in this paper where international law has maintained a systemic hegemony of Europeans and Western History over non-Europeans and the third world. It is 'sober' because it is not done openly as was the case in the 19th and 20th century but is now maintained through social and economic institutions in the form of what Nkrumah labelled neo-colonialism.¹⁰⁹ But despite its criticisms, Anghie maintains that the third world is in need of international law because the contemporary world is governed by international in almost every major international event.¹¹⁰ Therefore, Anghie maintains that international law has become part and parcel of international governance. Hence, he argues rather optimistically when he speaks of the need for an international system of governance because the third world has long been excluded from participation in international law and therefore, cannot hope to be excluded any further and that too by own volition.

Anghie's main point, like Mutua and like TWAIL argues in general, is understanding history, not just the colonial history, but history of the contribution of one's community to the global order of international law – not one posited by a Eurocentric frame, but one that correctly

¹⁰⁶ Centre for Human Rights 'Renowned Critical Legal Scholar Makau Mutua Identifies Steps to Decolonise University Curricula' (2017) *University of Pretoria* accessed from: Renowned critical legal scholar Makau Mutua identifies steps to decolonise university curricula - Centre for Human Rights (up.ac.za).

¹⁰⁷ Ibid.

¹⁰⁸ Antony Anghie 'Imperialism, Sovereignty and the Making of International Law' (2004) *Cambridge University Press* at xiii.

¹⁰⁹ Ibid at 118.

¹¹⁰ Ibid at 127.

reflects the history as it happened.¹¹¹ In doing so, Anghie hopes that the past may never be repeated in the various forms it has now taken, i.e. neo-colonialism and imperialism.¹¹² However, Anghie is sceptical in coming to the conclusion whether ‘it is even possible to create an international that is not imperial’.¹¹³ The question is open-ended but perhaps the answer may not be known until the world has decolonised its history and understanding of the past. Therefore, in essence, Anghie argues in the same trajectory as Mutua, albeit rather rationally, when he calls for an understanding the colonial history for what it was. It is only then that international law can hope to be less imperial and neo-colonial as it is today.

(c) Michael Doyle

Doyle’s views of international law are strongly grounded in Western and European values. It would seem that Doyle does not mind the current framework of international law, apart from its questionable UNSC structure.¹¹⁴ Doyle argues that the UNSC has been admirable but does hold sufficient credibility to decide for States.¹¹⁵ On the contrary, Doyle argues that States should be able to decide for themselves – even if it means invading a foreign nation.¹¹⁶ After all, Doyle seemed appreciative of the Bush Doctrine and, through his writing in *Striking First*, suggests supporting the United State’s decision of invading Iraq in 2003.¹¹⁷ But I do not wish to go deeper into these criticisms. My point in listing Doyle’s suggestions in this paper is due to the strong criteria that Doyle suggests in relation to invasions which has been the focus of this paper. Although, might I add, the above suggestions need to be viewed only insofar as it puts stronger measures in place to avoid invasions from happening and not used as a checklist to see whether one qualifies for a rightful invasion or not. Furthermore, Doyle’s recommendations are narrowed to only this problem or gap of international law which seeks to regulate acts of aggression and hence, because this paper focuses on the problems of international law at large through the case studies of invasion, it becomes somewhat necessary to include these recommendations in the paper.

¹¹¹ Ibid at xiii.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Op cit note 27 at 32.

¹¹⁵ Ibid.

¹¹⁶ Ibid at 36.

¹¹⁷ Ibid at 110.

Doyle acknowledges the various provisions of international to regulate conflict and acts of aggression.¹¹⁸ But he proposes a stronger criterion is needed to efficiently prevent acts of aggression. Doyle argues that acts of aggression must first qualify four criteria's: (1) Legality – the act must be legal which means that it needs to be within the current framework of international law which relates to a UNSC sanctioned act of aggression, (2) Likelihood – this relates to pre-emptive acts where the likelihood of an impending attack is judged with utmost severity, (3) Legitimate Proportionality – the act must not only be proportional but also legitimate and (4) Lethality – the act must be measured by the consequences it may have.¹¹⁹ I believe the above is a strong criterion in addition to existing rules on acts of aggression. However, the challenge, as the challenge currently stands in international law, is the enforcement of the criteria because the UN lacks enforcement mechanisms of its own. Furthermore, there is no criteria which relates to breach of the criterion and the consequences thereof. Without such, any nation like the United States or Russia may well invade another Iraq or Ukraine and seemingly get away with it all if there are no consequences to breaches.

(d) Robert Gildea

Robert Gildea writes on the French and British colonial empires and how these nations feel targeted in the contemporary world in what he calls 'colonising in reverse'.¹²⁰ This relates to an impending French and British identity, where migration from the third world has forced these nations to lose an inherently French or British identity.¹²¹ As Sri Lankan writer Ambalavaner put it, 'we are here because you were there.'¹²² My reason for mentioning this is merely to point out the irony that the third world considers international law as inherently Eurocentric but European nations feel they have become victims to the effects colonisation too. Of course, the mere migration of the third world is not even close to the drastic and brutal colonialism that the third world underwent in the 19th and 20th centuries, and so, Gildea's perspective of colonising in reverse is utterly dismissive and in fact, borne out of colonial superiority. But merely to offer perspective, the end result of Gildea's narrative also implores Britain and France to 'work through their colonial

¹¹⁸ Ibid at xii and 44-46.

¹¹⁹ Ibid at 46.

¹²⁰ Op cit note 2 at 122.

¹²¹ Ibid.

¹²² Ibid.

histories’ by understanding the post-colonial narrative and to revisit its colonial past with the lens of the colonised, rather than that of the colonisers.¹²³ In doing so, Gildea hopes that an equal terrain of international law may be possible.

Therefore, despite the dismissive narrative of a European perspective that still seeks to victimise themselves in all the hell (for lack of a better word) that they have caused on the rest of the world, the end result seems awfully similar to that of TWAIL – confront the colonial past and move together on the road to international law’s reformation.

(e) Emil Hansen

In his critical review of Lora Anne Viola’s *Closure of the International System* and Guy Sinclair’s *To Reform the World*, Emil Hansen juxtaposes international as both, ‘a reformist’s promise yet a tool for domination.’¹²⁴ Hence, it is confirmed that international law still subordinates the third world and at the same time, it is only through international law, or at least its reform, that the subordination may end. In Viola’s view, the nation state is enough to govern itself and its interactions with other nations based on mutuality.¹²⁵ This perspective, however, is borne out of a cynical and pessimist approach that international can never be equal because there will always be a duality within international law between the reformist and the dominant. On the hand, Sinclair offers a more purposive reform to international law and that is to include international regional organisations in international law participation, such as the African Union for example.¹²⁶

(f) A Fusion of Recommendations

In my opinion, international law is a reality in the contemporary world, with the world becoming a global village and therefore, measures of governance need to be determined so that one nation does not transgress its limits with another. Therefore, I am dismissive of Viola’s ‘closure’ of international law as it does not sit well with the reality of the modern world. Having suggested this, from the remainder of the solutions that I have presented above, I shall now list a timeline

¹²³ Ibid at 261.

¹²⁴ Emil S Hansen ‘To Reform the World or to Close the System? International Law and World-Making’ (2022) *E-International Relations* accessed from: <https://www.e-ir.info/2022/02/20/to-reform-the-world-or-to-close-the-system-international-law-and-world-making/>.

¹²⁵ Ibid.

¹²⁶ Ibid.

approach to the above solutions which shall, in my opinion, be the best way forward and a fusion of solutions means that it shall cater for almost all perspectives.

The first is in this timeline approach, is Doyle's criterion which attempts and prevent acts of aggression. This has been the focus of the paper in general and therefore, it does well that in deploying Doyle's criteria, invasions and acts of aggression can be limited. However, as I have mentioned, another criterion needs to be added and that relates to the enforcement and policing of States to abide by the criterion and existing international law provisions. Doing this, at least for the time being, a major gap of international law will be closed.

This, however, is a temporary solution to an otherwise permanent problem of international law. Permanent insofar as it is not treated at its source and that is, the historical grounding of international law. This paper has echoed the sentiments of third world academia that international law is faulty because it does not truthfully confront its history of slavery and colonialism. Thus, as held sacred by Mutua and Anghie, academics from the third world need to work vigorously in re-writing the colonial narrative from the perspective of colonised than the coloniser. Once the third world accepts and narrates its tale of colonialism which affirms that there has been a major fault in the very formulation of international law, then only can, in the words of Gildea, European nations understand and be willing to listen to the third world perspective. This is rather optimistic. However, perhaps this is only solution to reforming international law, as Knox puts it, is to understand the 'other'.¹²⁷ Only then, once both sides affirm that the historical formulation of international law is embedded in colonialism and a neo-colonial mindset, can one begin to reform international law, either by remodelling the existing international law framework, for example, remodelling the UNSC, or introduce a new form of international governance with a new institution that is far from the parochial view that international law has today. Lastly, can one put Sinclair's expansion of International organisations to include regional international law mechanisms which will supplement the democratic framework of the new international law regime.

VIII. CONCLUSION

International law is inherently based in colonialism and the colonial history has dominated the neo-colonial regime of the current international law dispensation. This paper attempted to bring

¹²⁷ Op cit note 29 at 73.

out the fallacies of international law, its hopes in being equal but its practice in continuing domination of the neo-colonial and imperial powers. This paper addressed only part of the problem of international law through careful scrutiny of invasions and acts of aggressions by neo-colonial and imperial powers against the third world. In doing so, it brought to the fore an imbalanced and an unequal reaction of the international community to the Russian invasion of Ukraine, as opposed to the weak and ignorant responses of the international community in the United State's invasion of Iraq and Israel's violation of international law in its colonial settlement occupation in Palestine. The clear hypocrisy of international law, in aiming to be equal, but perpetually creating a hierarchical system with imperial and colonial powers on top, becomes visible, to scholars and to the general public alike.

TWAIL has been the most focused on retelling the colonial history from the perspective of the colonised. It focuses specifically on how the current regime of international law is near illegitimacy based on its fictionalised telling of international history from the perspective of the colonisers. It argues that in order to solve the problems of international law, the past needs to be addressed by the third world and embraced by the European and Western nations. It therefore implores scholars from the third world to write about the lived realities of colonialism, to write about the contributions that the colonised world has made to the international system, to negate that there is only one history and that is European but to embrace its history, before and during the colonial era. TWAIL understands that centuries of history cannot be unwritten in a mere forty to fifty years post colonialism and therefore, increasing focus needs to be shifted towards retelling history by the third world. Only then, can we move forward and deconstruct the 'sober' domination of international law and its capitalistic hegemony it has over the third world. These ideas, albeit to the self-interest of European nations such as France and Britain, has been echoed by Western scholars too in their attempt to reform what constitutes British or French identities. The end result, however, is still largely associated with the decolonisation of history. In

conclusion, the past seeks to reinvent itself in news ways, precisely because history has been forgotten or tainted with a biased narrative. A legal regime is only as successful as its subjects make it to be. To rectify this spoiled history, the actual history needs to be retold. The task falls onto the third world – to address the inaccuracies of the past. After all, those who ignore or forget the past is surely doomed to repeat it.

XI. BIBLIOGRAPHY

Books

Antony Anghie 'Imperialism, Sovereignty and the Making of International Law' (2004) *Cambridge University Press*

George Santayana 'The Life of Reason' (2005) *MIT Press*

Malcolm N. Shaw 'International law' (2017) 7th ed *Cambridge University Press*

Michael W. Doyle 'Striking First: Preemption and Prevention in International Conflict' (2008) *Princeton University Press*

Philip Zimbardo 'The Lucifer Effect: Understanding How Good People Turn Evil' (2007) *Random House*

Robert Gildea 'Empires of the Mind' (2019) *Cambridge University Press*

Ronit Lenin 'Traces of Racial Exception: Racializing Israeli Settler Colonialism' (2018) *Bloomsbury Academic*

Journals and Journal Articles

Emil S Hansen 'To Reform the World or to Close the System? International Law and World-Making' (2022) *E-International Relations*

LaGarrett J King 'When Lions Write History' (2014) *Multicultural Education*

Makau Mutua *What is TWAIL?* (2000) *Proceedings of the ASIL Annual Meeting* Vol. 94 *Cambridge University Press*

Mohsen Al Attar 'I Can't Breathe: Confronting the Racism of International Law' (2020) *AfSDJN*

Peterson K Ozili 'Global Economic Consequence of Russian invasion of Ukraine' (2022) *SSRN*

Robert Knox 'A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law' (2014) *London School of Economics and Political Sciences*

Electronic Resources

Paul Milward 'Winston Churchill's Poetic Speeches of World War II' (2011) *The International Churchill Society*

United Nations ‘The UN and the War in Ukraine’ (2023) *UNRIC*

Ukraine ‘Situation in Ukraine’ (2022) *International Criminal Court*

United Nations ‘Ukraine’ (2023) *OHCHR*

Aggrey Mutambo ‘17 African countries abstain from UN vote to condemn Russia invasion’ (2022) *The East African*

Tamsin Metelerkamp ‘We fight for our independence – Ukrainian MP calls on South Africa to condemn Russian invasion’ (2022) *Daily Maverick*

United Nations ‘Ukraine: UN expert condemns racist threats, xenophobia at border’ (2022) *OHCHR*

Timesofindia.com ‘Imran Khan vs Army Chief over US ties, Ukraine’ (2022) *The Times of India*

Al Jazeera Staff ‘Double Standards’: Western coverage of Ukraine war criticised’ (2022) *Al Jazeera*

Naledi Pandor ‘State Statement by the Minister of International Relations and Cooperation, Dr Naledi Pandor, during the Media Briefing on the Russia / Ukraine Conflict’ (2022) *South African Government*

Preliminary Investigation ‘Iraq/UK’ (2020) *International Criminal Court*

Centre for Human Rights ‘Renowned Critical Legal Scholar Makau Mutua Identifies Steps to Decolonise University Curricula’ (2017) *University of Pretoria*

Case Law

Nicaragua v United States of America ICJ (1984)

Construction of a Wall advisory opinion ICJ Reports (2004)

Legislation

Charter of the United Nations (1945)

Rome Statute of the International Criminal Court 1998

Statute of the International Court of Justice 1945

Delegated Legislation

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with Charter of the United Nations (1970) *G.A res 2625*