Colonial Wrongs, Double Standards, and Access to International Law

organised by

the Centre for International Law Research and Policy (CILRAP)

in co-operation with

China University of Political Science and Law (Beijing),
Centre for Diversity and National Harmony (Yangon),
the European Center for Constitutional and Human Rights (Berlin),
the Institute for International Peace and Security Law (University of Cologne),
and Maharishi Law School (New Delhi),

in Yangon, 16-17 November 2019.

This international expert meeting is based on the concept note 'Myanmar, Colonial Aftermath, and Access to International Law'[1] and the monograph *Double Standards: International Criminal Law and the West*.[2] To understand the nature and purpose of the meeting, it is necessary to be familiar with both publications, as well as the programme document before you, including the attached abstracts of the papers to be presented.

Session 3 is about colonial Burma. This does *not* mean that past colonial practices of the United Kingdom are being singled out by the project. Of the programme's seven sessions, five contain case studies, four of which do not concern the United Kingdom or Burma: The Great Lakes Region and Namibia (Session 2), China and Japan (Session 4), and Indigenous Populations and Romani (Session 5).

The meeting is *not* about Rakhine or the contemporary situation in Myanmar. As stated in the public call for papers, the meeting "is part of a series of events on colonial wrongs and double standards that are being planned together with the European Center for Constitutional and Human Rights and others".[3] This meeting is being held in Yangon because the situation in Myanmar is illustrative of problems that can arise if colonial grievances are long ignored by moderate actors and abused by other actors. The location highlights why the topic of the

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[1] Morten Bergsmo, 'Myanmar, Colonial Aftermath, and Access to International Law', Torkel Opsahl Academic EPublisher, Brussels, 2019 (http://www.toaep.org/ops-pdf/9-bergsmo). Please make sure that you read the online version (which contains amendments dated 16 August and 16 October 2019).

[2] Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015 (http://www.toaep.org/ps-pdf/26-kaleck).

[3] See https://www.cilrap.org/events/191116-17-yangon/.

meeting is important. Similar problems exist in other former colonies, and subsequent events in this project will be located in several such locations.

The colonial (or similar) wrongs on which the project is focused is conduct that could amount, in contemporary terms, to core international crimes as defined by the Statute of the International Criminal Court. The case studies focus on colonial wrongs that have lingering, negative consequences today, and how measures taken after the colonial period ended – including international(ised) criminal justice and reconciliation measures – have not fully addressed related grievances in affected populations.

The *substantive questions that motivate this project and the expert meeting in Yangon* include the following: a) relevant patterns identified by the case studies; b) the extent to which contemporary international law addresses lingering consequences of colonial wrongs; c) the risks of double standards and related perceptions in affected populations; d) wider implications of such risks for the Third World Approaches to International Law movement and legitimacy of international law; e) whether traditional truth and reconciliation mechanisms are adequate to address lingering grievances linked to colonial wrongs; f) important elements for *a new tool that could be used to address such grievances, including ensuring the participation of relevant expertise in the listening to, analysing of, and otherwise engagement with the grievances through consultation or other processes*; and g) the relevancy of legal notions such as subjugation, reoccupation and continuing core international crimes.

CILRAP is responsible for the public call for papers and the content of this programme, both of which have been prepared independently (without consultation with representatives of any government), as has been its practice since 2006.[4]

An audio-visual recording of each lecture presented at the meeting will be released open access in CILRAP Film[5] shortly after the event, for the benefit of those who may be interested around the world. The discussions on the papers will not be filmed and they are conducted pursuant to the Chatham House Rule.

The Yangon meeting also serves as the 2019 LI Haopei Seminar.[6]

[4] You find a list of 50 previous international expert conferences, meetings and events at https://www.cilrap.org/events/.

[5] See https://www.cilrap.org/cilrap-film/.

[6] See https://www.fichl.org/li-haopei-lecture-series/.

Programme

Saturday, 16 November 2019

09:00 Session 1: The Challenge of Colonial Wrongs and Double Standards
Chair: Claus Kreß[7]

1. *Double Standards and the Problem of Access to International Law*
   By Morten Bergsmo[8]
2. *The Transfer of Civilians as a Collective Harm (and Wrong)*
   By Shannon E. Fyfe[9]
3. *Colonial Aftermath and the Need for an Effective International Legal Order*
   By Narinder Singh[10] and Devasheesh Bais[11]

Comment by Brigid Inder OBE[12]

13:30 Session 2: The Great Lakes Region
Chair: Wolfgang Kaleck[13]

4. *Addressing Colonial Wrong-Doing in the Great Lakes Region of Africa*
   By Mutoy Mubiala[14]
5. *Possible Impediments to Justice for Colonial Crimes: A Belgian Perspective*
   By Christophe Deprez, Christophe Marchand and Crépine Uwashema[15]

Comment by Gregory S. Gordon[16]

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[8] **Morten Bergsmo** is the Director of the Centre for International Law Research and Policy (CILRAP).

[9] **Shannon E. Fyfe** is an Assistant Professor of Philosophy at George Mason University, where she is also a Fellow in the Institute for Philosophy and Public Policy, and an Adjunct Professor at the Antonin Scalia Law School. She holds a Ph.D. in philosophy and a J.D. from Vanderbilt University.

[10] Ambassador **Narinder Singh** was formerly the Legal Adviser of the Ministry of External Affairs of India and Chairman of the United Nations International Law Commission. He has also served as Secretary-General of the Indian Society of International Law.

[11] **Devasheesh Bais** is Advocate at the High Court of Madhya Pradesh, India, and Fellow at the Centre for International Law Research and Policy (CILRAP).

[12] **Brigid Inder** OBE, currently Advisor and Senior Consultant, was formerly co-founder and Executive Director of the Women's Initiatives for Gender Justice and Special Advisor on Gender to the Prosecutor of the International Criminal Court.

[13] **Wolfgang Kaleck** is founding General Secretary of the European Center for Constitutional and Human Rights (ECCHR). Among other honours, he received the 2019 M.C. Bassiouni Justice Award.

[14] **Mutoy Mubiala** is an Associate Professor of International Human Rights Law at the University of Kinshasa (DRC). He worked as a Human Rights Officer at the United Nations Office of the High Commissioner for Human Rights from 1994 until his retirement in 2019. He holds a Ph.D. from the Graduate Institute of International Law (University of Geneva).

[15] **Crépine Uwashema** is Advocate at *Juscogens* law firm in Brussels. She presents on behalf of the three co-authors.

[16] **Gregory S. Gordon** is Professor at the Faculty of Law of the Chinese University of Hong Kong, and CILRAP Research Fellow. He is currently a Visiting Fellow at the European University Institute in Florence.

16:00 Session 3: Colonial Burma
Chair: Morten Bergsmo

6. *The 'Chittagonians' in Colonial Arakan (Rakhine State): Seasonal Migrations, Settlements and the Socio-Political Impact*
   By Jacques P. Leider[17]
7. *The Importance of Hearing Grievances Linked to Colonial Wrongs in Burma*
   By Kyaw Yin Hlaing[18]
8. *Myanmar and the Hegemonic Discourse of International Criminal Law: Three Critiques*
   By Ryan Mitchell[19]

19:30 Dinner

Sunday, 17 November 2019

08:30 Session 4: China and Japan
Chair: Ryan Mitchell

9. *On the Relevancy of Chinese Colonial Grievances to International Law*
   By LING Yan[20]
10. *Use and Abuse of Colonial Grievances and Double Standards: China and the Five Principles of Peaceful Co-Existence*
    By CHAN Ho Shing Icarus[21]
11. *Inter-State Violence, Colonial Violence and International Criminal Law: Japan's Wars of Aggression and the Perception of Double Legal Standards*
    By Claus Kreß

    Comment by Kevin Crow[22]

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[18] **Kyaw Yin Hlaing** is Director of the Center for Diversity and National Harmony (CDNH). He was formerly Assistant Professor in the Department of Asian and International Studies at the City University of Hong Kong, from where he obtained his Ph.D.

[19] **Ryan Mitchell** is Assistant Professor, Faculty of Law, Chinese University of Hong Kong. He holds a Ph.D. from Yale University.

[20] **LING Yan** is a Professor at China University of Political Science and Law (CUPL). She is Co-Director of the LI Haopei Lecture Series.

[21] **CHAN Ho Shing Icarus** is a Fellow at the Centre for International Law Research and Policy (CILRAP).

[22] **Kevin Crow** is Assistant Professor of International Law and Ethics at the Asia School of Business and International Faculty Fellow at MIT. He holds a Ph.D. from the Universität Halle-Wittenberg Transnational Economic Law Center (International Law).

11:00 Session 5: Indigenous Populations and Romani
Chair: Brigid Inder OBE

12. *Past Wrongdoing Against Romani and Sami in Norway and the Prism of Modern International Criminal Law*
    By Gunnar Ekeløve-Slydal[23]
13. *Colonial Self-Exemption and Genocide in Canada*
    By Asad G. Kiyani[24]

13:45 Session 6: Some Key Legal Notions
Chair: Crépine Uwashema

14. *The Doctrine of* Debellatio *or Subjugation: Its Past and Contemporary Relevancy*
    By YANG Ken[25]
15. *The Notion of Continuous or Continuing International Crime*
    By Matthias Neuner[26]

15:30 Session 7: Agendas, Risks and Way Forward
Chair: Morten Bergsmo

16. *Transitional Justice Policy Priorities: African versus European Agendas*
    By Hugo van der Merwe[27] and Annah Yvonne Moyo
17. *Double Standards in International (Criminal) Law Past and Present: Thoughts on Ways Forward*
    By Wolfgang Kaleck
18. *Colonial Wrongs, Memory and Speech Along the Atrocity Spectrum*
    By Gregory S. Gordon

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23 **Gunnar M. Ekeløve-Slydal** is Associate Professor at the University of South East Norway and Deputy Secretary General, Norwegian Helsinki Committee.

24 **Asad Kiyani** is Assistant Professor, Faculty of Law, University of Calgary. He holds a Ph.D. from the Faculty of Law, University of British Columbia.

25 **YANG Ken** is a Researcher at the European University Institute in Florence.

26 **Matthias Neuner** is Trial Counsel, Office of the Prosecutor, Special Tribunal for Lebanon. Previously, he was Trial Attorney at the Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia for almost ten years.

27 **Hugo van der Merwe** is the Director of Research, Knowledge and Learning at the Centre for the Study of Violence and Reconciliation in South Africa and Co-Editor in Chief of the *International Journal of Transitional Justice*. He holds a doctorate in Conflict Analysis and Resolution from George Mason University.

Abstracts

Session 1: The Challenge of Colonial Wrongs and Double Standards

1. **Double Standards and the Problem of Access to International Law**
   By Morten Bergsmo

   This chapter will be based on and further elaborate the project concept paper, 'Myanmar, Colonial Wrongs, and Access to International Law'.

2. **The Transfer of Civilians as a Collective Harm (and Wrong)**
   By Shannon E. Fyfe

   The great promise of international institutions was that they would bring all peoples under the rule of law, where rights would be protected regardless of where one came from. Yet colonialism and its lingering effects continue to present a challenge for international institutions aimed at achieving this ideal. The ICC, for instance, has been criticized on two fronts for its failures to acknowledge or address the impacts of colonialism on the Global South.

   First, critics have argued that there is a *distributive justice* problem in international criminal law, since the ICC has no jurisdiction over the bad acts of colonial powers in the nineteenth and early twentieth centuries. While there is no accountability for these bad actors, accountability is sought for current bad actors within communities which suffered at the hands of colonial powers. That one is rightly held legally accountable for one's actions, while another is not, does not change the fact that one has been rightly held legally accountable for one's actions. But the imbalance in the distribution of accountability is a problem for both the actual and perceived legitimacy of the ICC.

   Second, critics have argued that there is also a *substantive justice* problem in international criminal law, as the legal framework seeking accountability for current bad actors cannot adequately consider the lingering impacts of past colonial wrongs. As many TWAIL scholars have noted, it might be the case that that the international community's insistence on ensuring that individual leaders are subject to international criminal justice is unfair, given that "the causes of violence are rooted in histories of colonial subject formation, contested governance and resource ownership".[28]

   International crimes related to the movement of people, including deportation and the transfer of civilians into occupied territory, offer a clear example of how the two distinct phases of bad acts challenges our goals of achieving substantive and distributive justice. In this paper, I analyse the collective harm which the prohibition against transferring civilians into occupied territory seeks to avoid, as well as the corresponding wrongdoing. Throughout, I use the illustrative case of the transfer of civilians into and out of Myanmar to motivate and develop my account, though it is of wider applicability.

   In distinguishing the harm from the wrongdoing, I proceed in two steps. First, I analyse the specific sort of collective harms caused by deportation and the transfer of civilians into occupied territory, using an objective list account of well-being and harm. An objective list of well-being interests should contain those things without which it

[28] Kamari Clarke, 'Rethinking Africa through Its Exclusions: The Politics of Naming Criminal Responsibility', 83(3) *Anthropological Quarterly* (2010), pp. 625–651, 628.

will be impossible for a group, and its individual members, to fulfil "more ultimate aspiration",[29] including continuing to exist as a community and maintaining its demographic composition. I then consider the wrongfulness of the acts separately, in order to assess responsibility in light of the harm caused by the discrete acts, but while also taking into account larger questions of responsibility and oppression.

Disaggregating questions of harm and wrongdoing, I argue, is a crucial step in understanding how we should go about preventing, interrupting, and holding individuals responsible for crimes related to the transfer of civilians, in part because the articulation of the harms does not rely on the ability of an international criminal justice institution to identify an individual who is responsible for the harm. While international law should endeavour to develop in ways that reduce both the distributive and substantive justice problems, it cannot and should not attempt to erase the impact of the subjugating and oppressive effects of colonial international law, as well as colonial actors. Accordingly, we ought to identify and articulate harms, past and present, before we identify (and hold accountable, either through the law or through public acknowledgement) the individuals, collectives, and historical forces responsible for the harms.

3. **Colonial Aftermath and the Need for an Effective International Legal Order**
   By Narinder Singh and Devasheesh Bais

   This paper will address a) the dilemma of colonial wrongs that have lingering consequences, which can in certain circumstances create a sense of double standards as discussed in the concept paper; b) how this resonates with the Indian colonial experience; c) the importance of the TWAIL literature, but that we should also see that some of it is quite angry or reactive; while this is understandable, it may not be enough if we look to the challenges we face in the international community today; d) how nations need an effective system of international law, in the interests of peace and prosperity; and e) the need to strengthen treaties and that former colonies should play an active role in such processes.

   Comment by Brigid Inder OBE

Session 2: The Great Lakes Region

4. **Addressing Colonial Wrong-Doing in the Great Lakes Region of Africa**
   By Mutoy Mubiala

   Fact-work in the Great Lakes Region has largely demonstrated the community-based nature of the protracted conflicts and recurrent mass atrocity crimes in the region, as well as the 'pre-criminal responsibility' of former colonial powers for their historical wrong-doing, in particular, the divide and rule policy (the Roman *divide et impera*), one of the main root causes of these conflicts and the related mass atrocities. This case study on Burundi, the Democratic Republic of the Congo and Rwanda will show that neither retributive nor restorative transitional justice processes experienced by the affected countries have yet addressed this colonial wrong-doing at the origins of the culture of mass killings in the Great Lakes Region. There is, therefore, an 'accountability gap' between the post-colonial perpetrators and the colonial entities and actors. In certain

[29] Joel Feinberg, *Harm to Others*, Oxford University Press, 1984, p. 37.

instances, the latter has contributed to the criticisms of the 'double standards' in international criminal justice.

There have, however, been a few examples of initiatives illustrating "the attempt to address historical wrong-doing […] through the lens of current international law classifications", including in Canada, Germany and Norway. The German track pertains to German-Namibian governmental negotiations, and the activities of the European Center for Constitutional and Human Rights (critique of the process, deconstruction of certain legal assumptions, and mobilisation of civil society) and others concerning the former colonial power Germany for her historical responsibility in the extermination (genocide) of the Ovaherero and Nama peoples in Namibia (former South West Africa). Against this background, and in a Third World Approaches to International Law's perspective ('TWAIL'), the objective of this paper on the Great Lakes Region is to contribute to the efforts aimed at developing a new tool for inclusive processes or consultations on the existing and rampant 'accountability gap'. The paper will discuss the novel concepts of 'pre-criminal accountability', 'accountability gap' and 'para-legal claims' aimed at contributing to a theoretical framework for the proposed policy dialogue on how to address colonial wrong-doing. The paper concludes that addressing the latter could contribute to the realization of equal access to international law. It also proposes the establishment of 'joint claims tribunals' to address colonial wrong-doing in practice.

5. **Possible Impediments to Justice for Colonial Crimes: A Belgian Perspective**
   By Christophe Deprez, Christophe Marchand and Crépine Uwashema

Justice for colonial wrongs is a difficult matter. Collective or individual responsibilities have rarely been established in history. This may be described as an 'accountability gap'. While this gap may partly be due to circumstantial and factual reasons, it is also the result, specifically, of legal impediments that are faced by victims in their quest for justice. Such impediments exist on the plane of international(ised) justice, at the level of former colonies, as well as in the domestic legal order of former colonial states.

This paper takes the latter perspective as a starting point. Drawing from their experience in assisting victims of colonial crimes and their families in Belgium, the authors will seek to examine the 'accountability gap' from the perspective of the criminal law and practice of a former colony. They will do so by presenting a selected series of concrete legal impediments that victims may face in litigating at the Belgian level, as well as potential solutions to tackle them.

The analysis will be structured in four sections, each addressing one specific, possible legal impediment. Firstly, the characterization of colonial wrongs as war crimes will be examined, with a discussion on legal nature of colonial conflicts under international humanitarian law and possible implications in terms of criminal prosecutions in Belgium. Secondly, the paper will address the non-application of statutory limitations for international crimes and its contours in the Belgian experience. Thirdly, the authors will turn to the Belgian experience in establishing parliamentary commissions of inquiry on colonial wrongs, and the impact that such process may have in the context of criminal proceedings. Fourthly and finally, in the light of recent legislative developments, the paper will leave the domain of individual responsibility and turn to perspectives on the criminal liability of Belgium as a State.

Comment by Gregory S. Gordon

Session 3: Colonial Burma

6. **The 'Chittagonians' in Colonial Arakan (Rakhine State): Seasonal Migrations, Settlements and the Socio-Political Impact**
By Jacques P. Leider

The settlement of Chittagonian agriculturists in the district of Akyab (now Sittway) was a primary cause of agricultural change, rapidly evolving population growth, and demographic shifts in the relations of Buddhist and Muslim populations during the late British colonial period. Quoted as a case in point of the transfer of Indians to Burma, it represents a peculiar situation of rural migration much unlike the largely urban commercial, policing and bureaucratic functions played by Indians in Burma/Myanmar's major ports and cities. The paper is an attempt to reconstruct the economic rationale, sum up the statistical evidence and embed the chronology of Chittagonian migrations in the socio-political surroundings of a colonial backwater. The continuities and discontinuities revealed by the available archival data throw light on colonial mind-sets and policies and conjecture the conflict-laden context of local identity formations, intra-communal tensions and state failures in policing the border starting in the early post-colonial period.

7. **The Importance of Hearing Grievances Linked to Colonial Wrongs in Burma**
By Kyaw Yin Hlaing

Myanmar today continues to be shaped by its colonial history, which has also contributed to the policies and narratives peddled by opportunistic actors such as nationalists and racist extremists. Since the end of the First Anglo-Burmese War, when the colonial government brought in Indians to assist with its administration and running of the economy, the indigenous Myanmar people have resented the economic dominance of the Indians and the Chinese. Communal violence in Rakhine State in 1942 was also blamed on the British arming immigrants from Bengal.

The influx of immigrants was perceived as a threat to the livelihood, culture, and existence of the local population. This perception was reinforced by General Ne Win and his military government, which claimed that Myanmar was not truly independent in 1948 due to the continued dominance of the Indians and the Chinese. The Ne Win-led military government was initially welcomed by the masses, despite the regime later being referred to as the one that 'ruined the country'. Some of its policies, including the 1954 Myanmar Buddhist Women's Special Marriage and Succession Act, the 1963 Tenancy Law, and the 1982 Citizenship Law, were regarded by majority of citizens as instrumental and necessary in rectifying 'colonial wrongs'.

This paper seeks to illustrate that contemporary grievances on citizenship and immigration, anti-Muslim sentiment, and even local perception of the International Criminal Court can trace their roots to the colonial experience. Understanding this history can help to explain seemingly irrational public behaviours, institutions, and laws. While exploring these issues, the author also notes how these wrongs have been exploited by authoritarian administrations, nationalists, and extremists to justify their problematic policies and actions.

8. **Myanmar and the Hegemonic Discourse of International Criminal Law: Three Critiques**
By Ryan Mitchell

This presentation seeks to critically analyse the discourse on ethnic minority communities and human rights in Myanmar, and more particularly various mooted potential responses oriented towards criminal accountability. The dominant paradigm, generally stated, consists of one or more 'international crimes' committed by a 'state government' against a 'stateless people', in particular the crime of 'forced displacement' as defined under the Rome Statute.

Drawing on both TWAIL and other critical approaches – such as the methods of analysis associated with the field of conceptual history (*Begriffsgeschichte*) – this presentation questions semantic, epistemic, and genealogical aspects of the dominant paradigm. Semantic critique involves determining whether the language used in international criminal law circles to describe ethnic conflicts in Myanmar adequately reflects or engages with local understandings, past and present.[30] Epistemic critique questions whether the knowledge-categories noted above, that is, 'crime', 'state government', and 'stateless people', are useful as frameworks for identifying actors and events in the context of alleged atrocities informed by a background of colonialism.[31] Finally, genealogical critique in this case focuses on the origins of the international legal community's concept of 'forced displacement'. That specific sources of international law, such as the state practice and *opinio juris* framing customary international law, can be structurally biased in favour of former colonial states and against former colonies is a significant starting point for this third dimension of critique.[32]

The preliminary conclusions advanced in this presentation are: 1) that the semantic structures of international criminal categories can serve to obscure historical atrocities even as they seek to identify those currently ongoing; 2) that international criminal law considered as an epistemic framework can serve to 'front-load' accountability for situations of conflict upon currently-available state actors who fit the traditional model of perpetrators, while creating *de facto* immunity for less obvious but equal or greater contributors to alleged crimes; and 3) that the origins of the notion of 'forced displacement' itself arise from a discourse of population management by international organizations, beginning in the interwar era, that has systematically elided the responsibility of leading international actors for creating unstable categories of 'peoples' and 'places' (that is, jurisdictional spaces) that supply the norm with its pragmatic significance. As a result, mechanisms of fact-finding, reconciliation, and transitional justice (as well as development assistance) may provide more appropriate and effective responses to such conflict situations than the prosecutorial toolkit of international criminal law.

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[30] For critiques of international law's frequent function as a 'hegemonic discourse' that obscures alternative vocabularies or legal/political responses, see, for example, Bhupinder S. Chimni, "Third world approaches to international law: a manifesto", in *Int'l Comm. L. Rev.* 8 (2006): 3; Usha Natarajan, "TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring", *Or. Rev. Int'l L.* 14 (2012), p. 177.

[31] See, for example, Antony Anghie, "The Evolution of International Law: colonial and postcolonial realities", in *Third World Quarterly*, 27.5 (2006), pp. 739-753.

[32] See, for example, Bhupinder S. Chimni, "Customary international law: A third world perspective", in *American Journal of International Law*, 112.1 (2018), pp. 1-46.

Session 4: China and Japan

9. **On the Relevancy of Chinese Colonial Grievances to International Law**
   By LING Yan

   The first part of the paper recalls the Chinese history of the 'century of humiliation' in the period between 1839 and 1949 when China was a semi-colonial and semi-feudal country. The second part of the paper discusses the impact of the grievances on the China's attitude towards international law. It focuses on the issues concerning respect for sovereignty and territory integrity, non-interference of internal affairs and human rights, peaceful settlement of international disputes, and Japan's war crimes.

10. **Use and Abuse of Colonial Grievances and Double Standards: China and the Five Principles of Peaceful Co-Existence**
    By CHAN Ho Shing Icarus

    In the 1950s, the New China, India and Myanmar declared the 'Five Principles on Peaceful Co-existence' or the 'Panchsheel', namely: (1) mutual respect for territorial integrity and sovereignty; (2) mutual non-aggression; (3) mutual non-interference in internal affairs; (4) equality and co-operation for mutual benefit; and (5) peaceful co-existence. While made in the wake of colonialism, those principles have been rejuvenated as the People's Republic of China's (PRC) official foreign policy and lauded as its major contribution to international law. Despite the familiar language, they have shown to differ not only with the Western approach, but also the PRC's own practice. This paper examines the two-way relationship between the PRC's contemporary practice and China's 'semi-colonial' past: while the colonial wrongs and double standards have informed its approach, the PRC also actively (ab)uses such narratives to reinforce its agenda. Such an understanding is hoped to throw light on the way forward in international law, both for the PRC and the rest of the world. Relevant States should not only be open about past colonial wrongs, but also come with clean hands without double standards. Failing that, they only have themselves to blame for their condemnations falling on deaf ears.

11. **Inter-State Violence, Colonial Violence and International Criminal Law: Japan's Wars of Aggression and the Perception of Double Legal Standards**
    By Claus Kreß

    Japan had first suffered threats of force by the United States and had then been acting as a diligent pupil of the colonial powers in the course of its Asian expansion, a story that Oona Hathaway and Scott Shapiro have recently retold in their important recent book *The Internationalists*. Japan then dramatically underestimated the legal revolution of the Briand Kellogg Pact. At Tokyo, Japanese leaders, in line with the new legal paradigm of the outlawry of aggressive warfare, were convicted for their involvement in Japanese wars of aggression. Immediately after Tokyo, the Japanese could observe – at times brutal – European violence in order to uphold their colonial rules in the neighbourhood. The Japanese thus experienced the fact from a close distance that the post-World War II colonial use of force by European powers did not violate the prohibition of the use of force because this use of force did not occur, to use the terms of Article 2, paragraph 4, of the UN Charter, in those States' "international relations". The way Japan has been dealing with the legacy of the Tokyo Trial has given rise to criticisms

within and outside Asia and this continues to be the case today. Many of these criticisms are justified. Yet, it would appear worth making an attempt to understand the broader context of Japan's struggle with her aggressive past. This may be especially true for European critics.

Comment by Kevin Crow

Session 5: Indigenous Populations and Romani

12. **Past Wrongdoing Against Romani and Sami in Norway and the Prism of Modern International Criminal Law**
By Gunnar Ekeløve-Slydal

The study describes previous assimilation policies towards the Romani and the Sami in Norway. The use of the Sami languages in schools and public life was long forbidden, and the Sami people became socially and economically marginalized in their own homelands due to policies of settling ethnic Norwegian farmers in their traditional territories. The Romani experienced harsh policies aimed at eradicating their culture, including by enforced sterilization, removing children from Romani families and placing them in orphanages or ethnic Norwegian families, and by enforced placing of Romani families in a labour colony.

The second part of the study discusses how such measures, which were implemented by Norwegian authorities well into the post-World War II period, represented infringements on core values protected by international criminal law and human rights, such as territorial and bodily integrity, equal access to the law, and protection of family, religion, language and culture.

The final part discusses recent attempts to repair harm caused by past wrongdoing, including by compensation schemes and support to Sami and Romani culture and languages, by establishing increased Sami control over their territory, and by establishing official truth processes (2011-2015 for the Romani people, and from 2018 for the Sami). While some commentators and representatives of the peoples have argued that justice mechanisms should become part of the restorative process, this has not happened. Some argue that while Norway has been a strong supporter internationally of justice mechanisms, it has been reluctant to see any role for such mechanisms in relation to systematic abuses by Norwegian authorities of the rights of the Sami, the Romani and a few other minorities.

It is clear, however, the study concludes, that Norwegian authorities show genuine will to address some of the harm caused by past wrongdoing, while much still remains to be done in order to achieve reconciliation and rebuilding trust between authorities, the majority population and members of the minorities.

13. **Colonial Self-Exemption and Genocide in Canada**
By Asad G. Kiyani

Labelling state action as genocide has a long and controversial history in Canada that often centres on whether the oppression and subjugation of Indigenous peoples was 'true' genocide or merely 'cultural' genocide. Left unsaid in these debates is how the Canadian state not only engaged in genocidal practices, but actively shaped

international and domestic law to limit its own liability for all forms of genocide, 'true' or otherwise. This paper uses principles of Third World Approaches to International Law to explore how the Canadian state's self-exculpation from responsibility for genocide reflects the double standards inherent in international law as part of a project to exempt colonial wrongs from the ambit of international and domestic criminal law. While Canada is willing to design, support and/or staff institutions that prosecute genocide overseas, and occasionally prosecute foreign genocidaires, it has purposefully shaped the law to preclude Canadian liability for genocide against Indigenous peoples in Canada.

This engineering of international and domestic law reflects the denial of access to justice in two familiar ways and one unacknowledged modality particular to cultural genocide. The first familiar form is that harms suffered by Indigenous peoples cannot be addressed as genocide, cultural or otherwise. This is in part a consequence of the second form of denial – the exclusion of Indigenous interests from the design of both international and domestic legislation. The third, under-recognized form of denial is in the judicial system, where Canadian courts have demonstrated that even if the law did permit cultural genocide claims, those claims would fail because courts seem unable to understand the nature of the harms suffered by Indigenous groups. In other words, access to justice is denied not only by executive actions in the international sphere and legislative actions in the domestic sphere, but by the ontological deficit that presents itself in the judicial sphere.

This paper charts the history of Canada's shaping and interpretation of the prohibition against genocide, as well as the law's persistent ontological deficit: the state (including the judiciary) inability to understand Indigenous societies' ways of being, self-organization and self-actualization, and thus the inability to understand the harm suffered by Indigenous peoples. In doing so, it connects traditional TWAIL treatments of international law to TWAIL's disaggregation of the state from its citizens, and to its problematization of continuing settler-colonial relationships outside the Global South.

Session 6: Some Key Legal Notions

14. The Doctrine of *Debellatio* or Subjugation: Its Past and Contemporary Relevancy

By YANG Ken

Under nineteenth century international law, the 1885 abolition of Burmese Monarchy marked the completion of the legal process that was subjugation (in Latin, *debellatio*), that is, the extermination of a belligerent state's statehood and sovereignty, through the combined steps of annihilating its armed forces and the subsequent annexation of its territory.[33] According to historian Thant Myint-U, the decision for Imperial Britain to shift away from its signature policy of "indirect rule", was rooted in the assessment that local order had already collapsed, and that Burmese elites were incapable of accommodating British interests.[34] The decisions to annex Burma into the British Indian Empire and impose direct rule, however, ended up as the most crucial cause of the destruction

[33] L. Oppenheim, *International Law: A Treatise*, First Edition (1906), Vol. 2, §§ 264, 265, pp. 277-9. The Third Edition (1921) of *Oppenheim's International Law*, edited by Roxburgh, made zero alteration to the original entry (also at §§ 264, 265, pp. 358-60).

[34] Thant Myint-U, *The Making of Modern Burma*, 2004, pp. 6-8.

of social fabric of late-nineteenth century Burma, and had substantively exacerbated existing ethnic tensions.[35]

Entering the twentieth century, efforts to reinvent *jus ad bellum* for outlawing war, combined with universalization of the principle of self-determination, seemed to have rendered the doctrine of subjugation obsolete.[36] Having experienced radical efforts from both Germany and Japan to "drastically change certain economic, cultural, governmental, and even religious institutions" of regions they had occupied during World War II,[37] the principle of the inalienability of sovereignty (through the use of force) subsequently became the foundation of the post-war order. Ironically, such principle was also used to justify Britain's reoccupation of Burma in 1945 as well as ensued efforts in the restoration of colonial regime, despite of the war-time declaration for independence of 1943.[38]

The present project aims to further elaborate the legal grounds supporting Britain's post-World War II re-occupation of Burma, implemented with the obvious appearance of double standard. It consists of three parts: Part I reviews the evolution of the doctrine of subjugation within international law treatises from late nineteenth century onwards; drawing inspiration from TWAIL literature, it aims to reveal that centre-periphery dynamics entrenched in the application of such principle, that until World War II, the inalienability of sovereignty remained a principle exclusive to the European family of civilized nations, whereas non-European realms were still regarded as 'fair game' for the exercise of *debellatio*. Part II tracks the shift away from subjugation during the interwar period, beginning with the relegation of *debellatio* as a legal phenomenon within academic literature ("[some well-reputed writers] teach that *debellatio* has no consequences in the point of law, but only in point of fact", noticed Oppenheim in 1921).[39] Part III points to the contemporary revival of the doctrine of subjugation embodied in the United States' post-2003 occupation of Iraq, and the striking parallels between the new 'transformative occupation' and the old colonial regime in Burma.

15. **The Notion of Continuous or Continuing International Crime**
By Matthias Neuner

This paper is on the notion of continuous or continuing international crime. It discusses the theoretical basis and fundamental notion of this concept as well as whether, how and to what extend this concept was accepted and developed through the jurisprudence of international courts, the work of the International Law Commission and other (international) bodies, international treaty or customary law, and the academia. Acknowledging this emerging notion's current application to enforced disappearances, (sexual) slavery, unlawful deportation etc. it will discuss whether an argument exists that it could apply also to forcible or unlawful transfer of population in certain post-colonial situations and circumstances.

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[35] Mary Callahan, *Making Enemies: War and State Building in Burma*, 2003, pp. 21-3.

[36] Eyal Benvenisti, *The International Law of Occupation*, 1993, pp. 96-8.

[37] Grant Harris, "The Era of Multilateral Occupation", in *Berkeley Journal of International Law*, vol. 24, no. 1, 2006, p. 5.

[38] Eyal Benvenisti, *The International Law of Occupation*, *op. cit.*, p. 97.

[39] L. Oppenheim, *The Future of International Law*, 1921, p. 57.

Session 7: Agendas, Risks and Way Forward

16. **Transitional Justice Policy Priorities: African versus European Agendas**
    By Hugo van der Merwe and Annah Yvonne Moyo

This paper will explore the tensions between the policy priorities of African and European states in addressing colonial era abuses as part of transitional justice ('TJ') processes at national level in African countries. Against the backdrop of recently developed transitional justice policy frameworks (AU, ACHPR, EU, German) the paper will explore how these contrasting policies enable or constrain national TJ policy development processes.

The African Union adopted a *Transitional Justice Policy* in February 2019 which encourages that adoption of a range of transitional justice measures to deal with legacies of violent conflicts and systemic or gross violations of human and peoples' rights. While it does not directly call for these mechanisms to engage with the crimes committed by colonial powers during these periods of colonialization, it makes reference to transitional justice as a process that can assist societies "to come to terms with the traumas of slavery, *colonialism*, apartheid, systematic repression and civil wars". It also calls on such processes to address the root causes of conflict, which has been interpreted by truth commission to include colonial legacies. The recently launched *African Commission for Human and People's Rights Study on TJ* has specifically highlighted that the "causes of these conflicts could often be traced back to the *structural violence of the colonial period*".

The European Union's *Policy Framework on Support to Transitional Justice* (adopted in 2015) contains no mention of the colonial era, but it suggests that these processes should "aim to transform the society by identifying and dealing with root causes of conflict and violence that may reside in discrimination, marginalisation or violation of social, economic and cultural rights". In practice, EU funding and expertise have however tended towards advising that states focus on more narrow mandates (civil and political rights) and more recent periods of conflict. Where there have been initiatives to engage with colonial era abuses (for example, Kenya and Namibia) these have been outside the EU's TJ engagement framework. Even the recently adopted German strategy to support TJ makes no mention of its responsibility for genocide in Namibia.

These policy frameworks have contributed in different ways to strengthening key human rights norms that shape transitional justice policies at the national level. Transitional justice processes in Africa have responded to the evolution of international norms and regional politics that have increasingly highlighted colonial era abuses. The use of specific norms in national transitional justice processes demonstrate how these have evolved in response to shifting local and regional politics of transition.

Very few truth commissions have included colonial periods specifically in their mandates. Most often, the time period to be investigated for such commissions runs from the end of colonial rule or some more recent point relating to particular abusive regimes. Two recent exceptions to this are Mauritius and Tunisia. Other truth commissions only engage with colonialism as a factor that should be considered as a causal concern, not as a period of mass and systematic abuses that require investigation, exposure and accountability.

This presentation will reflect on the evolution of international norms that have facilitated the focus on colonial era abuses in transitional justice processes and examine how the regional transitional justice framework promote (or marginalise) these justice demands.

17. **Double Standards in International (Criminal) Law Past and Present: Thoughts on Ways Forward**
By Wolfgang Kaleck

As criminal and human rights lawyers, we have to explore the imperial and colonial dimensions of current political situations, including those under observation, examination or investigation for current international crimes. Taking this approach should not lead to excuses, legitimise post-colonial violence, or argue against accountability today. There are many valuable critiques of the current state and practice of contemporary international criminal justice and other legal measures, including the frequent unequal application of the measures. For example, many consider criminal proceedings even against superior individuals for core crimes as ill-suited. However imperfect they might be, they provide both legal categories and fora to combine pragmatic concrete improvements with a more fundamental critique.

This paper will be overarching, addressing questions such as a) why the problem of double standards should concern us today; b) whether the rhetoric of double standards has been politically instrumentalised and neutralised; c) how I see the development of remedies for colonial grievances; d) the arguments in favour of using the courts for such grievances; e) the risks of such an approach (Could it weaken inter-national law? Could it serve as a distraction from the need for reform or accountability in former colonial societies?); and f) dynamics and ownership of the process of discussing these issues, and the ECCHR's further inquiry and programme, as a globally active human rights organization, which includes a consideration of alternative tools of addressing crimes of the past. These tools can complement existing mechanisms. From our experiences many survivors and their communities demand at least a robust truth-seeking mechanism and are very sceptical when it comes to reconciliation, especially if proposed by the same sectors of society that were responsible for the crimes, without any acknowledgement or apology.

18. **Colonial Wrongs, Memory and Speech Along the Atrocity Spectrum**
By Gregory S. Gordon

This paper will contain a summary analysis of the papers presented at the Yangon conference and provide an analysis of the role that discussion of colonial wrongs can play in the scholarly framework I have constructed of 'speech along the atrocity spectrum'. Pursuant to that framework, in regions experiencing ethnic tension, there is a period before persecution reaches critical mass when 'salutary' speech may help stem mass violence. In areas where colonial mismanagement has traditionally stoked ethnic tension, this paper will consider whether discourse acknowledging such mismanagement may constitute a type of salutary speech within the framework that may ease the friction and thereby help prevent commission of core international crimes.