doi:10.1017/aju.2018.82

SYMPOSIUM ON B.S. CHIMNI, "CUSTOMARY INTERNATIONAL LAW: A THIRD WORLD PERSPECTIVE"

DECOLONIAL CIL: TWAIL, FEMINISM, AND AN INSURGENT JURISPRUDENCE

*Vasuki Nesiah**

In advancing a Third World Approaches to International Law (TWAIL) analysis of customary international law (CIL) and its dominant doctrinal conceits, B.S. Chimni shows how the jurisprudence of custom has been co-constitutive with colonization and capitalism.[1] He contends that CIL's most fundamental assumption—the "supposed distinction between 'formal' and 'material' sources of CIL"—privileges Western states while legitimizing CIL as a neutral and universal body of law.[2] In dialogue with Chimni, this essay extends the conversation in two directions. First, I show that there are important resonances between Chimni's deconstruction of the distinction between "formal" and "material" sources of CIL, and a feminist critique of the public/private distinction in international law. Chimni describes his approach as postmodern. I argue that its analysis of the conceptual architecture of the dominant doctrine and its systematic exclusions is also, at its core, a feminist approach to international law. Second, and inspired by Chimni's critique, I explore insurgent jurisprudential traditions that challenge the hierarchies, inequalities, and biases in received doctrine regarding the sources of CIL. Chimni's decolonial approach acknowledges CIL's imperial past, and prepares the ground for democratizing and pluralizing sources by paying attention to a so-called *opinio juris communis* that incorporates the interests of those critical of, or oppressed by, the dominant world order.[3] Building on this ground, I draw on the Panchsheel principles, first nations' conceptions of sovereignty and citizenship, and practices of fugitive freedom by maroon communities to begin to supply content and form to a counterrepertoire of custom.

TWAIL Resonances with Feminist Critique

Chimni's deconstruction of the formal/material distinction presents a striking echo of feminist critiques of the public/private distinction in international law. Almost three decades back, Hilary Charlesworth, Christine Chinkin, and Shelley Wright's path-breaking intervention *Feminist Approaches to International Law* interrogated the normative structure of international law as premised on a public/private distinction.[4] Like the formal/material distinction

* *Associate Professor of Practice, The Gallatin School, New York University.*

[1] Chimni finds potential in past efforts to reform CIL (including by the Bolsheviks), but criticizes them for leaving intact the formal/material distinction and its relationship with the imperial and capitalist character of CIL doctrine. B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AJIL 1, 44 (2018).

[2] *Id.* at 1. He argues that the "doctrine of CIL was a western construct" and that "its rules came to be derived from western state practice on which the dominant positivist method placed great stress." *Id.* at 44.

[3] *Id.* at 46.

[4] Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AJIL 613, 644 (1991).

that Chimni unpacks in relation to the history of CIL, Charlesworth et al. showed how approaching international law through the public/private distinction also privileges and renders visible some at the expense of others. They noted that the public/private distinction has a plurality of (often interrelated) references in international law:

> One such distinction is between public international law, the law governing the relations between nation-states, and private international law, the rules about conflicts between national legal systems. Another is the distinction between matters of international "public" concern and matters "private" to states that are considered within their domestic jurisdiction, in which the international community has no recognized legal interest. Yet another is the line drawn between law and other forms of "private" knowledge such as morality.
>
> At a deeper level one finds a public/private dichotomy based on gender.[5]

Charlesworth et al. argued that these different registers of the public/private distinction cohered in the privileging of formal state practice such that "[i]nternational legal structures and principles masquerade as 'human'—universally applicable sets of standards," but are "more accurately described as international men's law."[6]

This insight drew upon a long history of feminist scholarship interrogating the public/private distinction in a range of social and historical contexts associated with the Western liberal tradition.[7] For instance, some feminist scholars have looked at how, in certain contexts, the notion of a public/private distinction was naturalized to entrench and legitimize a gendered division of labor, and accompanying inequalities and hierarchies.[8] Others have examined how the entrenchment of the public/private distinction, institutionally and discursively, has masked the continuities between different dimensions of social and political reality that were zoned as public or private, and how the force fields of gendered structures of power extended and reproduced in different realms.[9] Yet others have tracked the tensions and complementarities that arise from both the power and contradictions of the public/private distinction.[10] For some scholars the distinction is a heuristic that helps illuminate social relations; for others, it is a dimension of social relations. Quite significantly, the scholarship of Charlesworth, Chinkin, and Wright brought to bear these broader feminist analytical moves on the dominant traditions of international law by analyzing the work of the public/private distinction in relation to a number of subjects in international legal terrain, including torture, the right to development, and the right to self-determination.

The resonance between Chimni's TWAIL analysis and Charlesworth et al.'s feminist analysis is two-fold. First, both track how the distinctions they address (formal/material in one case and public/private in the other) contribute to mystification. In doing so, they show how the naturalization of the given binary and its associated spheres of identity and action enables dominant actors and agendas to travel under the sign of the universal. Thus,

[5] *Id.* at 625-26.

[6] *Id.* at 644.

[7] Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, 25 Stud. Transnat'l Legal Pol'y 143 (1993); Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 Harv. Hum. Rts. J. 87 (1993); Symposium, *The Public/Private Distinction*, 130 U. Pa. L. Rev. 1289 (1982).

[8] Carole Pateman, The Disorder of Women: Democracy, Feminism, and Political Theory 118 (1989); Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 Austl. Y.B. Int'l L. 190 (1992).

[9] Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 Buff. L. Rev. 237 (1987); Ruth E. Gavison, *Feminism and the Private-Public Distinction*, 45 Stan. L. Rev. 1 (1992).

[10] Frances E. Olsen, *The Family and the Market*, 96 Harv. L. Rev. 1497, 1527 (1983); Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 Chi.-Kent L. Rev. 847 (2000).

https://doi.org/10.1017/aju.2018.82 Published online by Cambridge University Press

dominant constellations of power and hierarchy are sustained and reproduced by characterizing the public/private distinction as apolitical and merely descriptive.

Second and relatedly, both interventions show how the distinctions they address are contradictory and circular. Both sides of the supposed public/private binary are constituted through each other, and there is no natural distinction between formal/material or public/private—it is always contingent and political, with discursive and material consequences for international law's distributive impact, be it on axes of gender, nation, or otherwise. Building on both these insights, TWAIL and feminist analyses share remarkable convergence in drawing attention to bias in favor of the juridical power of the state and the positivist accounts of Western state practice that have dominated international law.

When examining their larger oeuvres, it is clear that there are significant differences between Chimni's Marxist TWAIL scholarship and Charlesworth et al.'s liberal feminist scholarship, but perhaps precisely because of those differences, it is their critical complementarities that are most striking.[11] Be it through categorization as "formal" (versus material) or "public" (versus private), they both argue that dominant biases are accompanied by the marginalization and exclusion of social realities, norms, and practices that would otherwise unsettle and challenge the formal/material or public/private filter. For instance, Charlesworth et al. point to how the International Court of Justice's (ICJ) advisory opinion on Western Sahara declares that "'economics, sociology and human geography are not law.'"[12] Critical analysis of these kinds of exclusions and blinders in the rigidly positivist and black-letter conceptions of dominant approaches is pivotal to both TWAIL and feminist accounts of the maldistributive consequences of dominant traditions, as well as to TWAIL and feminist proposals for rethinking approaches to the sources, norms, and doctrines of international law.

The Blank Spaces of the Historical Record

Following the 1991 article by Charlesworth et al., a rich body of feminist historical scholarship emerged to explore feminist genealogies of international law, challenge the public/private distinction, and think through the contours of alternative histories. In foregrounding the private sphere and those arenas historically marginalized and excluded, many of these efforts sought "to fill in the blank spaces of the historical record and to represent the lives of those deemed unworthy of remembering."[13] The resonance between feminist projects and the analytical thrust of the challenge to the formal/material distinction is instructive in tracking the radical implications of Chimni's intervention as going even further than the parameters he outlines. In particular, feminist historiography suggests that one of the most important implications of his deconstruction of the formal/material distinction is "to fill in the blank spaces of the historical record."[14]

While arguing that CIL's history is imperial and capitalist, Chimni presents his decolonial vision as an agenda for CIL's future. His account shows how the beneficiaries of the international system succeeded in shaping the history of international law and the sources of CIL to the advantage of the "short-term and systemic interests of global capitalism."[15] As noted earlier, his analysis draws attention to the fact that the archive of postcolonial state practice

[11] Charlesworth et al. note that the "Third World critique" may have prepared "the philosophical ground for feminist critiques." Charlesworth et al., *supra* note 4, at 644. For Chimni's analyses of the areas of convergence and divergence, see B.S. Chimni, International Law and World Order 358-439 (2d ed., 2017).

[12] Charlesworth et al., *supra* note 4, at 625 n.73 (quoting Western Sahara, Advisory Opinion, 1975 ICJ Rep. 12, 77 (Oct. 16) (Gros, J., sep. op.)).

[13] Saidiya Hartman, Lose Your Mother: A Journey Along the Atlantic Slave Route (2008).

[14] *Id.* at 16.

[15] Chimni, *supra* note 1, at 1.

https://doi.org/10.1017/aju.2018.82 Published online by Cambridge University Press

is thin—due to the fact that most states of the Global South gained formal independence relatively recently, and even after independence, the practices and histories of these states have been neglected. This has entrenched a bias augmenting the weight of Western state practice such that "[a]ny talk of generality of practice or representative practice in the formation of CIL by default became a reference to the practice of western states."[16]

While acknowledging the dominance of an approach to CIL sources that has served imperial and capitalist interests, and the importance of highlighting that fact, one could also argue that a decolonial approach to custom and CIL requires that we look beyond a Global North-centric history of sources, even in critique. Arguably, describing the history of CIL purely through the Global North-centric imperial and capitalist framing inadvertently reinscribes the very bias Chimni wants us to challenge. Thus echoing the feminist history research agenda that emerged from the deconstruction of the public/private distinction, one may see the capitalist and imperial history of CIL as only one, albeit dominant, historical thread. Indeed, the logic of Chimni's proposal for CIL going forward is also implicitly an agenda for looking for spaces that escaped or formed in resistance. One could instead take Chimni's intervention as a provocation to unsettle received CIL histories, scratch "the blank spaces of the historical record," and surface the plurality of sources that constitute the larger domain of CIL to "represent the lives of those deemed unworthy of remembering."[17] In other words, in unsettling the building blocks of historical knowledge (such as the purported distinction between formal and material sources), what are the alternative histories that become thinkable?

The Sources of CIL: Towards a Decolonial Repertoire

Chimni's proposal for the future development of CIL interpretation aims to foster a counterrepertoire of custom that can democratize and pluralize the sources currently feeding CIL. I suggest that a turn to history will reveal antiimperial/anticapitalist international law-relevant norms and practices that are already hidden in plain sight. I draw attention to three examples that could contribute to Chimni's decolonial repertoire.

First is the approach to sovereignty and intersovereign international relations that was captured in the notion of Pancasila or Panchsheel, the "Five Principles of Coexistence."[18] These principles are (1) mutual respect for sovereignty and territorial integrity; (2) nonaggression; (3) noninterference in internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence. Informing the preamble to the 1945 Indonesian Constitution and then referenced by presidents Sukarno, Nehru, and others, the Panchsheel Principles offer an alternative normative foundation of international relations that foregrounds national and collective self-determination and pacifism. These are not merely fanciful alternative visions of world order, but ones that received explicit institutional embodiment and expansion in noteworthy intra-Asian state engagements, including the 1954 Sino-Indian Treaty regarding a cooperative approach to Tibet and the 1955 Bandung conference. The Principles were also included in allied initiatives such as the Non-Aligned Movement and the proposals for the New International Economic Order that foregrounded solidarities grounded in self-determination, cooperation, and mutual support.

A second example of a subaltern practice of transnationalism that could contribute to our understanding of CIL history is found in first-nation approaches to environmentalism, citizenship, and hospitality, which Canadian scholars have described as inhering in ideas and practices in various North American territories. For instance,

[16] When the numerical weight of postcolonial states carried the possibility of shaping state practice (such as with the New International Economic Order), the West developed the "persistent objector" doctrine giving countervailing weight to Euro-American dissent and preserving CIL doctrine's undemocratic and imperial character.

[17] Hartman, *supra* note 13, at 16.

[18] Anthony Anghie, *Bandung and the Origins of Third World Sovereignty*, *in* Bandung, Global History and International Law (Luis Eslava et al. eds., 2017).

https://doi.org/10.1017/aju.2018.82 Published online by Cambridge University Press

James Sákéj Youngblood Henderson describes Canada's Victorian treaties as "based on the life-giver's blessings and ecological sovereignty" and arising "implicitly from spiritual covenants and cognitive training."[19] This alternative epistemological anchor opens a repertoire of legal practice founded not merely in written doctrine, but also in ceremonial performance relevant to international law. Marie Batiste and Henderson describe the meetings of the international working group of indigenous peoples as an "international ceremony for Indigenous peoples" that generates "new rituals" and draws on a decolonial and transnational indigenous peoples' history of ecological practice regarding "good order and human rights."[20] What Henderson is describing is precisely an expansion of our historical perspective on the sources of CIL through a "reclaiming and revitalizing [of] Indigenous heritage and knowledge."[21]

A third and final example involves the fugitive practices of freedom that emerged in maroon slave communities across the Americas. Maroon communities formed by fugitive slaves envisioned freedom in collective terms and forged insurgent free societies through collective and interdependent approaches to security and sanctuary.[22] Such communities were formed throughout the period of the Black Atlantic in Brazil, Cuba, the United States, Mexico, Jamaica, Haiti, Colombia, and elsewhere across the Americas. The Underground Railroad and other historical efforts that contributed to maroon communities represent norms and precedents to practices of sanctuary and immigration that remain relevant and generative today.[23] Indeed, some theorists see the renegade thinking and outcast communities that emerged from fugitive slaves as central to how we conceptualize democracy and the practice of freedom.[24] Maroons played a central role in the Haitian revolution, other slave rebellions, and the legacies of human rights and freedom struggle that we draw from these traditions.[25]

Imagining an Insurgent Jurisprudence

Inspired by Chimni's interest in decolonizing CIL and the interest of feminist historians and others in thinking through the blank spaces of the historical record, I have tried to offer a concrete sense for what an alternative CIL repertoire may look like. The Bandungian notion of Pansheel, indigenous notions of ecological sovereignty, and the approaches to sanctuary and rebel freedom in Maroon communities that I have described are themselves complex and contested and their potential value will depend on context and our political goals. I gesture to them not to romanticize them but because they are suggestive of the plural and heretedox directions we need to explore if we want to take up Chimni's challenge of defining, challenging, and analyzing CIL in new ways. This is not a project of recounting neglected customs in the name of inclusion and historical completeness, but a forward-looking project of rebel imagination. Indeed, in precarious times, building, citing, and mobilizing decolonial sources works, as per Walter Benjamin, "to articulate the past historically."[26] This "does not mean recognizing it 'the way it really was,'"

[19] James Sákéj Youngblood Henderson, The Indigenous Law Foundation of Victorian Treaties, Speech at the University of Alberta (Mar. 2008).

[20] Marie Ann Battiste & James (Sa'ke'j) Youngblood Henderson, Protecting Indigenous Knowledge and Heritage: A Global Challenge (2000).

[21] *Id.* at 13.

[22] Maroon Societies: Rebel Slave Communities in the Americas (Richard Price ed., 1996).

[23] Eric Foner, Gateway to Freedom: The Hidden History of the Underground Railroad (2015).

[24] Stefano Harney & Fred Moten, Undercommons (2013).

[25] Eugene D. Genovese, From Rebellion to Revolution: Afro-American Slave Revolts in the Making of the Modern World (1979).

[26] Walter Benjamin, Illuminations (Hannah Arendt ed., 1969).

https://doi.org/10.1017/aju.2018.82 Published online by Cambridge University Press

but "appropriating a memory as it flashes up in a moment of danger."[27] This may be precisely the kind of imagination that resonates with how migrants negotiating legal precarity might look to the norms and practices of sanctuary that we associate with fugitive maroon communities of a previous era.

The repertoire[28] of decolonial CIL sources is not unlike the "little traditions" or "peoples' histories" that historians working in diverse contexts such as Romila Thapar[29] and Howard Zinn[30] have researched and analyzed. Such a repertoire is also allied with "deviationist doctrine"[31] or "minor jurisprudence"[32] as elaborated by legal scholars such as Roberto Unger and Peter Goodrich. "Within such a history or pantheon of radical sources and practices of law would be included the rebels, critics, marginals, aliens, women and outsiders who over time repeatedly challenged the dominance of any singular system of legal norms."[33] This is what Chimni's deconstruction of the definitions and distinctions of customary sources is urging us toward—an unsettling of the building blocks of historical knowledge to imagine an insurgent jurisprudence.

[27] *Id.* at 391.

[28] Diana Taylor, The Archive and the Repertoire: Performing Cultural Memory in the Americas (2003).

[29] Romila Thapar, The Past Before Us (1993).

[30] Howard Zinn, A People's History of the United States (2005).

[31] Roberto Unger, The Critical Legal Studies Movement (1996).

[32] Peter Goodrich, Law in the Courts of Love: Literature and Other Minor Jurisprudences 1 (2013).

[33] *Id.* at 2.

https://doi.org/10.1017/aju.2018.82 Published online by Cambridge University Press