1999

Rejoinder: Twailing International Law

James T. Gathii
Loyola University Chicago, School of Law, jgathii@luc.edu

REJOINDER: TWAILING INTERNATIONAL LAW

James Thuo Gathii

Brad Roth's response to my Review of his book seeks to privilege his approach to international law as the most defensible.[1] His response does not engage one of the central claims of my Review — that present within international legal scholarship and praxis is a simultaneous and dialectical coexistence of the dominant conservative/liberal approach with alternative or Third World approaches to thinking and writing international law. Roth calls these alternative approaches critical and does not consider them insightful for purposes of dealing with issues such as anticolonialism. Roth's characterization of my Review as falling within critical approaches to international law seems too quick and, in fact, fits in very nicely with neoconservative dismissals of the progressive left, and indeed, of Third World scholarship. For example, the rise of the Critical Race Theory movement in American legal academia received the sort of response that Roth gives to my Review.[2] Roth defends his formalistic and doctrinaire approach to the study of international law, which is divorced from the social, historical, and political context within which international law operates. In short, he defends international law as an iron cage of rules and doctrines as if the law was not itself a "crucial site for the production of ideology and the perpetuation of social power."[3]

Such a view of international law, or indeed any social phenomenon, simply elides the issues raised in my Review. Roth's characterization of my Review as "politically dysfunctional" epitomizes his failure to engage the pitfalls of formalist and doctrinaire thought in that it fails to engage the truism that states advance their interests, in part, through the medium of international law.[4] It fails to debate whether international law is constitutive and not merely a reflection of the hi-

1. *See* Brad R. Roth, *Governmental Illegitimacy and Neo-Colonialism: Response to Review By James Thuo Gathii*, 98 MICH. L. REV. 2056 (2000).

2. *See, e.g.*, Jeffrey Rosen, *The Blood and the Crits: O. J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, THE NEW REPUBLIC, Dec. 9, 1996, at 27. For examples of the writings of Critical Race Theorists, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995). For an application of Critical Race Theory to International Law, see Ruth Gordon, *Racing American Foreign Policy*, Lecture at the Annual Meeting of the American Society of International Law (April 2000).

3. *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 2, at xxiv.

4. *See* Roth, *supra* note 1, at 2057.

erarchical character of international society. As such, law does not stand outside the raw interests of states, but it produces those interests as much as it is the product of them. Consequently, the characterization of my Review as politically dysfunctional is all the sadder since any fair reading suggests otherwise. If nothing else, I engage in a careful and elaborate academic review of his book. I am not surprised, though, that Third World intellectuals receive little respect from some of their Western counterparts like Roth, even when they make credible intellectual contributions. In fact, Roth claims that his book is "far more effectively anti-colonial than . . . [my] critique of it."[5] What better way of denying me a voice could there be?

The essential point concerning the variety of Third World positions that I illustrate in my Review, and which Roth misses, is that Third World positions exist in opposition to, and as a limit on, the triumphal universalism of the liberal/conservative consensus in international law. In addition, these Third World positions are often shaped by the liberal/conservative consensus as much as the liberal/conservative approaches are shaped by countervailing Third World positions. A good example of this reciprocal definition of positions is the traditional liberal/conservative defense of the existing hierarchies of the international political economy. This defense is based on two pretexts: that free enterprise is a *given* norm of the international economy and that the Third World has an interest in subverting hierarchies and displacing free enterprise as a *given* norm of international economic relations. This dialectic of defense and subversion was exemplified by the New International Economic Order ("NIEO") in the 1970s. The liberal/conservative consensus opposed the NIEO and defended free enterprise as a basic norm of international relations, in part on the basis that sovereignty was a political concept that could not extend to economic relations between states. This position was defined in response to Third World challenges to foreign control over their natural resources without adequate compensation. It was also defined in view of the unfair terms of international trade and commerce that developing countries experience.

This example highlights my point. While the liberal/conservative position constructs the legal framework that is consistent with the hegemonic interests of the industrialized world, Third World positions challenge it and suggest, contrary to the liberal/conservative position, that a re-imagining or, indeed, revision of international economic and legal relations would not unduly destabilize international society. Third World scholars suggest that such a reformulation of international law might instead be one part of a larger process of creatively

5. *Id.* at 2057.

addressing issues of global justice and inequality.[6] Although it may seem from this example that Third World Approaches to International Law ("TWAIL") are diametrically opposed to the liberal/conservative consensus, such a view understates the fact that aspects of each approach inter-penetrate each other. Such interpenetration generates creative tensions. For example, in foregrounding the interests of the industrialized economies, liberal/conservative positions are in tension with Third World Approaches that foreground the interests of the non-industrialized economies. These tensions are fruitful and cannot be ignored. As I stated in my Review, it is these new spaces generated by the interpenetration of the West and the non-West that takes us beyond the given grounds of opposition between Western liberalism and Western conservatism, or even between the West and the non-West.[7] These new spaces, in turn, create a new conceptual space for revision of accepted praxis, orthodoxies, and hierarchies (be they nonmaterial or material). These new spaces suggest that simply grounding or locating our struggles in doctrinal and formal categories is only part of a larger picture that cannot be completely subsumed by such categories outside of the social processes within which they operate.[8]

It is thus odd that Roth seems to make much of the point that his brand of analysis is superior because it does not, like mine, abandon "the very devices that give the poor and weak a modicum of leverage."[9] Yet, Roth does not tell us the ways in which the norms and doctrines of international law preclude the very realization of these noble goals. Perhaps Roth should do better than engage in a selective and misleading characterization of not only my analysis, but of TWAIL scholarship as well. TWAIL scholarship, like allied approaches to the study of law, has a long tradition of examining the promises of such concepts as the norm of sovereign equality of states against the existing reality of economic hierarchy and subordination between nations. Such an analysis does not throw legal concepts overboard, but rather foregrounds the existing reality of economic hierarchy and subordina-

6. For some thoughts on this, see James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184, 203-11 (1998) (reviewing SURYA PRAKASH SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW (1996) and SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS (1996)).

7. *See* James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2001 (2000) (reviewing BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999)).

8. *See* James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 HARV. INT'L L.J. 263 (2000).

9. Roth, *supra* note 1, at 2057.

tion between nations in relation to the norm of sovereign equality.[10] It does not take any cleverness to do that and Third World scholars need not learn this from their Western counterparts. That law legitimizes oppressive social order is at the very center of my critique of Roth's failure to examine how international law de-legitimated non-Western societies as incapable of possessing sovereignty — an argument that laid the basis for colonial conquest.

By contrast to this Third World position that expresses ambivalence to international legal norms and doctrines, Roth regards his international law of governmental illegitimacy as necessarily emancipatory. He predicates this view on at least two propositions. First, governmental illegitimacy has the endorsement of Third World progressive leaders from whom Roth has "copiously" quoted. Such leaders include Kwame Nkrumah, Raul Castro and Julius Nyerere.[11] Second, Roth states that he is interested in serving "to the extent possible, the long-term interests of the inhabitants of weak states."[12] I do not challenge either proposition. Yet they are both predicated on the simplistic assumption that being "pro-small states" and "pro-left leaning Third World leaders" is as necessarily progressive as a defense of international legal norms and doctrines. For Roth, it is as if progressives are only those allied to his position. Roth seems to suggest that since I do not subscribe to his view of who a progressive is, I am necessarily reactionary.[13] This is a curious claim since being in the company of Third World political leadership is hardly evidence of being avant garde or progressive.[14] One only has to remember that barely ten years after the 1955 Non-Aligned Movement meeting in Bandung, Indonesia, a country that Roth has aligned himself with, forcibly put East Timor under its dictatorship. Hence, these responses are inadequate for at least two further reasons. First, they fail to engage my primary criticisms of his book: its failure to engage the colonial history of the international law of governmental illegitimacy and the underlying private order upon which governmental

10. One of the best Third World articulations of this theme is MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979). According to Bedjaoui, "[t]raditional international law has helped to make independence a completely superficial phenomenon, beneath the surface of which the old forms of domination survive and the economic empires of the multinational corporations, and the powers that protect them, prosper." *Id.* at 81.

11. *See* Roth, *supra* note 1, at 2064.

12. *Id.* at 2061.

13. *See id.* at 2064 (stating that "[i]n repudiating conventional legal analysis [which incidentally I do not] as Eurocentric, Gathii dismisses both the significance of Third World participation in shaping contemporary norms and the extent of the Third World's stake in the continued vitality of these norms — an attitude not, so far as I can tell, broadly shared among Third World leaders, scholars, or peoples.").

14. For a trenchant exposé of this position, see Ray Kiely, *Third Worldist Relativism: A New Form of Imperialism*, 25 J. CONTEMP. ASIA 159 (1995).

legitimacy/illegitimacy is predicated. Second, they are based on very simplistic assumptions about what is desirable for the Third World. These assumptions fail to take into account the complex relationship of normative and doctrinal work with the history of international law, and the oppressive reality over which international law gives credence at the expense of the Third World.

The lack of engagement with colonialism and the private order that legitimates public power is not a problem specific to Roth, but rather one associated with the triumphal universalism of the liberal/conservative approaches of which his book is a part. The disengagement with these issues, in my view, characterizes an essential neoconservative realist position. Contrary to what Roth may think, I am not therefore mistaken in characterizing his book as a neoconservative realist approach to international law.[15] To the extent that colonialism and the economics underlying the exercise of public power are not a part of the discussion about legitimacy, the task of engaging legitimacy is both incomplete and consistent with the hegemony of the industrialized countries and their allies over the rest of the World. The tragedy is that Roth perceives his project as striking a "blow for anticolonialism,"[16] but his book epitomizes complicity with a Western discourse that silences issues of Western power, economic justice, and the very neocolonialism that Roth purports to oppose. Although I do not represent the Third World, I am from it. Needless to say, I believe that the Third World contributes — and has indeed contributed to — international legal theory as much as Roth contributes.

In conclusion, a basic problem with *Governmental Illegitimacy* is that it separates political and economic liberalism in its discussion of governmental illegitimacy. This distinction between political and economic issues is rather artificial and does not even characterize post-realist legal thought in American academia. In American academia, legal realism has shaken the foundations of the type of conceptualist and doctrinaire thought that Roth defends within the context of international law. Roth's work reveals the degree to which liberal/conservative international legal writing has remained insulated and aloof from some of the most significant developments in legal theory in the last century. Is such aloofness accidental? Whether accidental or not, such aloofness is ill-suited to addressing the challenges associated not only with neoliberalism or globalization in mainstream parlance, but also with issues relating to the Third World. Indeed, my Review sought to debunk Roth's simplistic characterization of the post-Cold War moment as if it merely could be captured as being a clash between universalism and cultural particularism. This is a poor

15. *See* Roth, *supra* note 1, at 2061.

16. *Id.* at 2060.

rehash of the Eurocentricism that characterizes much of the analysis in the book. Instead of seeing the world through this simplistic lens, I suggest that the post-Cold War situation is one characterized by the recognition of multiple identities and heterogeneity, and the rejection of universalist modes of reasoning. Such multiplicity and heterogeneity, in turn, can best be appreciated if seen for what these identities and, indeed, norms and doctrines of international law are: constructed and contingent. The challenge for liberal/conservative approaches to international law, therefore, is to engage this postcolonial predicament rather than to defend international norms in the abstract, as Roth does in his defense of their utility for small states. For these reasons, the Third World has a lot to offer the First. Twailing international law will surely continue the dialectic that my Review of Roth's book provoked. There is no better way of developing international legal theory, or even addressing substantive questions of international justice, than through such a dialogue. That my Review has led to this dialogue, as I intended, is therefore a welcome result.