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Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory, Symposium Issue Foreword

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Symposium Issue Foreword

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Welcome to this special symposium Issue on international law and the developing world, which coincides with the recent renewal in interest, research, and publication in this area.[1] The Issue's contributions are

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1. *See* Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN'S L.J. 189 (1993); Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995); Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996); Antony Anghie, *"The Heart of My Home": Colonialism, Environmental Damage and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993); Antony Anghie, *Francisco De Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999); BHUPINDER S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (1993); Bhupinder S. Chimni, *Marxism and International Law: A Contemporary Analysis*, ECON. & POL. WKLY., Feb. 6, 1999, at 337; Bhupinder S. Chimni, *The Geopolitics of Refugee Studies: A View From the South*, 11 J. REFUGEE STUD. 351 (1998); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337 (1996); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353 (1998); LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES (Obiora Chinedu Okafor & Edward Kofi Quashigah eds., 1999); Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, THIRD WORLD LEGAL STUD. 1 (1998-1999); Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443 (1997); J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1 (1995); J. Oloka-Onyango & Sylvia Tamale, *"The Personal is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691 (1995); SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI-SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996); Hani Sayed, *Beyond Old and New: Engaging the*

thoughtful and critical; the articles explore in important and new ways some of the most urgent themes in international law affecting developing countries over the last several decades and the challenges they face in the new millennium. The articles are by a broad range of scholars with varied experiences, perspectives, and national backgrounds. Featured here are both established scholars as well as a new and emerging generation of international legal thinkers. I am also delighted that the keynote address of the symposium—where this Issue's authors presented their articles along with other panelists[2]—was delivered by the former Vice-President of the International Court of Justice, Christopher G. Weeramantry.[3] Justice Weeramantry's scholarly commitments and judicial pronouncements at the World Court challenge all of us to use international law with a sense of justice, fairness, and historical perspective when addressing the issues that face developing countries.[4]

The aim of this foreword is to provide a brief outline of three theoretical frameworks under which the articles in this Issue contribute to international legal theory. Before proceeding, I would like to thank the *Harvard International Law Journal*, particularly Editor-in-Chief Douglas Remillard and Symposium Chair Sarah Prosser. Their commitment and work in organizing this Issue and the February 2000 Symposium, "International Law and the Developing World: A Millennial Analysis," are greatly appreciated. Thanks, too, to the authors and panelists of the Symposium. As the Special Symposium Editor of this Issue, I have learned from their insightful, critical, and *new* thinking on the place of international law in relation to the developing world. I must also mention the great response we received from around the world when the articles were solicited. Unfortunately, due to space limitations, the *Journal* was unable to publish many fine articles. This is surely a sign of the need for more publications on this topic.

Let me now outline three ways in which these articles contribute to international legal theory.[5]

Muslim Cosmopolitan, 93D ANN. MEETING AM. SOC'Y INT'L L. 362 (1999); James Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184 (1998).

2. *See* Symposium Panel Reports, *International Law and the Developing World: A Millennial Analysis*, 41 HARV. INT'L L.J. 595 (2000).

3. *See* Christopher G. Weeramantry, Keynote Address, *International Law and the Developing World: A Millennial Analysis* (Feb. 26, 2000), *in* 41 HARV. INT'L L.J. 277 (2000).

4. *See* LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY (Antony Anghie & Garry Sturgess eds., 1998).

5. For a more extensive outline of each article, see Symposium Panel Reports, *International Law and the Developing World: A Millennial Analysis*, 41 HARV. INT'L L.J. 595 (2000).

INTERNATIONAL LAW AS CULTURALLY CONSTITUTIVE AND HISTORICALLY CONTINGENT: LEGITIMATION AND RESISTANCE

The first set of articles demonstrates how the cultural constitutivity and historical contingency of international law rules relate to themes of resistance and legitimation. By re-reading international law as culturally constitutive and historically contingent, these articles explain certain features of international society otherwise inexplicable within prevailing approaches to the study of international law. Obiora Okafor demonstrates that the frailty of the nation-state in Africa is partly connected to the imposition—through international law—of Eurocentric notions of the nation-state on culturally heterogeneous African nations.[6] This imposition eventually translated into illegitimacy in the eyes of certain sub-state groups excluded from state power and resources. Balakrishnan Rajagopal shows how an ahistorical reading of international legal history underestimates Third World resistance as a factor in the expansion, consolidation, and renewal of international institutions.[7]

This theme of cultural constitutivity and historical contingency develops the insights of first and second generation Third World scholarship. While one of these earlier streams of scholarship recognized and analyzed the historical origins of international law in Europe, its engagement with international law was often premised on how best to reform international law and how it could address the concerns of developing countries.[8] Hence, due to its commitment to making international law relevant outside its European origins, this scholarship understated how rules and institutions of international law reflect a process of engagement between European and non-European cultures and races. Okafor and Rajagopal go beyond this traditional telling. Their articles explicitly and implicitly regard the place of international law in non-European countries as involving an engagement of different cultural traditions. Cultural difference was in turn predicated on notions of racial superiority and inferiority that characterized the discourse of European colonization of non-European countries. It is in this crucible of the colonial encounter, between powerful and often overwhelming Eurocentric visions of international law, on the one hand, and non-European experiences incommensurable with these Eurocen-

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6. *See* Obiora Chinedu Okafor, *After Matyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa*, 41 HARV. INT'L L.J. 503 (2000).

7. *See* Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L.J. 529 (2000).

8. For more on the earlier scholarship, see *infra* note 45 and accompanying text.

tric visions, on the other, that rules and institutions of international law were forged.[9]

Okafor explains how the intersection of colonialism, international law, and expansionist states "reversed centuries of organic political development"[10] in Africa as the international legal order became the normative order within which African states were to be rebuilt afresh. It is the adoption of this normative order that, in Okafor's view, underlies the structural illegitimacy of the African state. By structural illegitimacy, he is referring to the direct inheritance of "the colonial era's violent and brutal state-building" from the colonial state by its successor.[11] As a result, the post-colonial state was only new in the sense that its mandate was being overseen by a new elite that that did nothing to make the state legitimate in the eyes of the heterogeous population of the newly independent state. Thus the post-colonial state will remain illegitimate to the extent to which it is unable to "reconfigure itself or to attract the widespread adherence of its constituent sub-state groups . . . ."[12] Okafor demonstrates that the construction of the post-colonial African state with European statecraft invariably led to the mutual fear and animosities of post-colonial Africa since the rules of colonial international law protect boundaries that defy any consistency with the reality "on the ground." Hence on this account, the rules of international law are not only Eurocentric, but they create a social and political entity: the post-colonial state. Okafor forcefully shows that the rules are constitutive of this entity; and not only, or merely, a reflection of Eurocentricity.

Rajagopal challenges the received history of the expansion, consolidation, and renewal of international institutions. He departs from the traditional telling which emphasizes that international institutions emerged due to functional needs or leading individuals. Instead, Rajagopal shows how "international law has been constituted by its continuous evocation of and interaction with the category 'Third World' . . . ."[13] He argues that international law has not taken seriously *the local* as an agent of change.[14] By "the local" he refers to to a "collection of peasant, environmental, and feminist movements, and a host of others who are in global and regional alliances with states, individuals, international institutions, and private groups."[15]

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9. For ground-breaking work on this theme, see Antony Anghie, Creating the Nation State: Colonialism and the Making of International Law (1995) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the *Journal*).

10. Okafor, *supra* note 6, at 510.

11. *Id.* at 511.

12. *Id.*

13. Rajagopal, *supra* note 7, at 532.

14. *See id.* at 530.

15. *Id.* at 533.

Specifically, he shows how protests by these groups over the last four decades have shaped the programs of the Bretton Woods Institutions (BWI). For example, BWI anti-poverty programs of the 1970s arose in part from the protests against the human costs of development. Other factors include what he refers to as the U.S. agenda to pacify the "'poor, dark, and hungry masses' of the Third World,"[16] as well as to prevent the spread of communism.[17] Considering the November 1999 Seattle protests at the failed commencement of a new WTO round of talks, this new form of politics that Rajagopal refers to as "social movements" will continue to shape the programs of international institutions in unpredictable and complex ways.

INTERNATIONAL LAW: MARKET FAILURES AND IMPERFECT RULES, BUT NOT BEYOND REDEMPTION

The second set of articles makes the case that international law can play a mediating role in addressing some blind spots of market reform. Because prevailing rules or practices consistently involve or impose high *transaction* costs on developing countries, legal intervention is recommended to obtain efficient outcomes. The authors argue this directly and indirectly. Amy Chua explains the fundamental conflict between free markets and democracy: the former results in a concentration of wealth, while the latter tends to disperse political power.[18] The absence of developing world institutions to mediate this conflict can exacerbate tensions between minority "outsider" elites and majority "indigenous" poor. Eleanor Fox demonstrates that market failures in competition policy can result from the removal of market restraints.[19] She is critical of the narrow focus on efficiency in competition law and illustrates her argument by examining innovations in Indonesia and South Africa where competition law addresses issues of equity. Kenneth Vandevelde examines bilateral investment treaties (BITs), and similar to Fox, he is concerned about their narrow focus.[20] BITs facilitate foreign investment to increase productivity in developing countries without simultaneously addressing whether such investment indeed works to increase productivity or even to promote equitable distribution of wealth.

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16. *Id.* at 548.
17. *See id.* Part II.C.1.
18. *See* Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287 (2000).
19. *See* Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 HARV. INT'L L.J. 579 (2000).
20. *See* Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 Harv. Int'l L.J. 469 (2000).

In examining the paradox of free market democracy, Chua argues that it is "irresponsible to promote markets and democracy in the developing world in the absence of institutions capable of mediating the conflict between them."[21] She believes the paradox arises because markets tend to increase the power of market-dominant minorities, while democracy increases the power of the relatively impoverished majority. This paradox is exacerbated in developing countries since, unlike developed countries, they lack structures to mediate the tensions between majoritarian rule and free markets. Consequently, she argues that many processes of privatization and liberalization, in part intended to undermine the power of wealthy groups, merely result in displacing corruption from the public to the private sphere. This further entrenches the power and wealth of market-dominant minorities.[22]

To address this paradox, Chua recommends the establishment of a variety of programs, especially those that emphasize trust and networks, or those that invest in social capital, anti-corruption initiatives, and anti-discrimination policies. While noting the beneficial effect "pay-offs" to the poor can have in mediating the paradox, through tax and transfer mechanisms, she recommends more ambitious programs such as inter-ethnic stakeholding. She argues that Malaysia somewhat succeeded in designing ethnically targeted market interventions that balanced efficiency with other goals, while Indonesia did not.[23]

Similarly, Fox is interested in balancing competitiveness and efficiency, on the one hand, with the attainment of equality, on the other. Her focus is competition law, and in particular, how to design competition law in developing countries that have large inequalities of wealth without either undermining the efficiency goals of competition or making it possible for elites to capture the marketplace at the expense of others. Fox notes that "[e]fficiency . . . is seldom the value or goal closest to the hearts and minds of the legislators who enact competition laws."[24] This is especially so in South Africa where the racist policies of apartheid produced great inequities of wealth and power across racial lines. Thus Fox's endorsement of restricting competition—under clear laws supported by independent and effective institutions—to promote social justice departs from conservative positions that regard such restrictions on competition as invalid. She observes that South Africa's experiment is novel insofar as, for example, it provides for taking into account firms owned or controlled by historically disadvantaged persons as a possible exception to competition policy.[25]

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21. Chua, *supra* note 18, at 292.
22. *See id.* at 310–11.
23. *See id.* Part III.B.1.b.
24. Fox, *supra* note 19, at 593.
25. *See id.* at 586.

However, while Indonesian law is similarly infused with notions of equal treatment and leveling of advantage, she cautions it is not based on clear criteria, and is thus susceptible to misuse or elite capture.

Vandevelde, like Fox, identifies a market failure situation in the balancing between social goals such as distributional objectives, on the one hand, and allocative in/efficiencies and competitiveness, or lack thereof, on the other. The context of his analysis is bilateral investment treaties (BITs). His central claim is that foreign investment under BITs is often inefficient because BITs focus "on controlling and protecting the desired investment flow rather than on maximizing productivity through market allocations of capital."[26] In his view, BITs "merely shift control of an asset from a local investor to a foreign investor without increasing the productive capacity of the asset."[27] And thus, they "do not promote the movement of capital, but rather the movement of control over capital."[28] Foreign investors, rather than the host states, therefore benefit from BITs.

To deal with this market failure, Vandevelde suggests a combination of spending, taxation, and regulation through performance standards. A subsidy would allow the continued existence of domestic industry while allowing foreign competition, though even this solution may fall foul of the national treatment provisions of BITs. Taxation may be a better alternative since some BITs exclude taxation, and thus the non-discrimination provisions of national treatment may not arise. He also suggests performance requirements for foreign investment which would allow host states to reap benefits of investments while maximizing the allocative efficiencies that BITs promise. He notes that "[d]iscriminatory regulation of foreign investment generally violates the non-discrimination provisions of virtually all BITs. Thus [performance requirements] may necessitate the creation of exceptions to the non-discrimination provision."[29] Therefore at the very least, if the purpose of BITs is to promote the economic prosperity of host states, Vandevelde argues that they should not prevent these states from shaping them in a way to "promote the desired distributional outcome, and make the nature of the trade-offs between production and redistribution the most transparent."[30]

Vandevelde, Fox, and Chua share a skepticism in the premise that the market spontaneously allocates resources to their most efficient use. Rather, they show that the marketplace is fraught with uncertainty and contingency (market failure) as part of its social experience. This is

26. Vandevelde, *supra* note 20, at 491.
27. *Id.* at 492.
28. *Id.*
29. *Id.* at 495.
30. *Id.* at 501–02.

not, however, to suggest that any of them endorse the sort of interventionist policies that characterized command economies. Rather, they see the state playing a strategic role with clearly articulated rules and effective institutions to ensure their implementation. Such a strategic role is evidenced in the case of South Korea, where the state allocated capital to private firms at below-market interest rates, but on the basis of clear and enforceable performance criteria. This strategy, among others, led to significant export-led growth with the state playing a disciplinary role, rewarding successful industries and punishing unsuccessful ones.[31] These articles and examples, such as South Korea, call upon us to rethink our assumptions and reinvent our praxis since there are no easy or ready recipes waiting to be applied as quick-fix universal solutions to the challenges facing developing countries.

INTERNATIONAL LAW: INDETERMINATE AND NOT NECESSARILY BIASED AGAINST DEVELOPING COUNTRIES

The third set of articles argues that notions of international law, development policy, and local custom do not have predetermined outcomes. For example, these notions do not necessarily always favor the First World and discriminate against the Third World. Likewise, they are not necessarily in favor of men or women. Rather, international law rules, development policy, and culture, understood on their own terms, are open-ended interpretive arenas. Amr Shalakany makes this argument in examining international commercial arbitration by exploring how bias is not the discernible and determinate outcome of doctrines and institutions.[32] Celestine Nyamu examines gender hierarchy and demonstrates that custom—contrary to assumptions in human rights and development policy—has both positive and negative impacts on women.[33]

Shalakany offers an alternative understanding to the traditional arguments of Third World scholars that Western bias accounts for consistent outcomes that have favored the West and disfavored the Third World in international arbitration. Third World scholars "have overestimated the effect of legal necessity as the instigator of bias in arbitration."[34] In his view, bias in international commercial arbitration arises because of a "disciplinary sensibility"[35] that underplays, ignores, and understates the role of public law in private contractual relationships.

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31. *See* ALICE H. AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION 14–18, 76–78 (1989).

32. *See* Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419 (2000).

33. *See* Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381 (2000).

34. Shalakany, *supra* note 32, at 424.

35. *See id.* Part IV.

He teases out this politics by exposing the tacit assumption of a public/private distinction implicit in private law. Similarly, Shalakany argues that the invocation of juristically technical notions such as "general principles of international contract law" reflect less of a *per se* bias against the Third World. Instead, such technocratic turns arise from the adoption of stylized legal reasoning that has a well-articulated template of competing doctrinal definitions, sources, and authorities. This stylized legal reasoning is the backdrop against which legal indeterminacy gives the individuals presiding over arbitrations different technocratic solutions that have legitimacy within this system.

Shalakany shows how three Libyan arbitrations concerning the same subject matter and judged by three different arbitrators each ended in three different decisions based on different reasoning (although all decisions were against Libya). He thus illustrates that legal indeterminacy is a plausible explanatory tool to understand bias, and that exclusive reliance on legal logic to account for bias is simply inadequate.[36]

He proposes that our doctrinal analysis be enriched by concentrating on three "bipolar manifestations of the public/private distinction: contract/politics, equals/unequals and property/sovereignty."[37] It is along these axes that the arbitrators carved out their stylized discourse. Hence, for example, "[o]nce Libya's actions were associated with politics and the coercive exercise of sovereign powers in an unequal relationship, Libya was simply denied access to a whole set of legal interpretations which could have been more favorable to its position."[38] Consequently, the arbitrators were able to argue that the controversy was contractual and not political, between two equal parties, and about property—not sovereignty.

Contrary to previous Third World scholarship, Shalakany thus concludes that bias is not the discernible and determinate outcome of doctrines and institutions.[39] His notable contribution lies in showing that politics is not located only in the public realm of sovereign power, but also in the private realm of contracts and property law.

Nyamu's article articulates this theme of indeterminacy and bias in the context of approaches to development and human rights which treat the customs of non-European peoples as a problem that *must* be abolished as a precondition for the full realization of women's rights and economic empowerment. She cautions against endorsing "dominant articulations of culture as accurate representations of a commu-

36. *See id.* at 451–52.
37. *Id.* at 455.
38. *Id.* at 456.
39. *See id.* at 465.

nity's way of life"[40] to which we can only respond in the language of human rights or equitable participation in development. Nyamu takes issue with the assumptions that customs and cultures of non-European societies lack built-in recognition of women's rights and that they consign women to perpetual inferiority.

Nyamu's alternative approach calls for engaging the politics of culture. This involves understanding culture as flexible and varied rather than stable, rigid, or static. It means examining culture's interaction with formal legal institutions, how such interaction produces gender hierarchy, and finally, using this understanding of culture to "challenge the arguments that deploy culture as a justification for gender inequalities."[41]

The "effective transformation" of developing countries by using notions of human rights is more likely to be successful, Nyamu argues, if human rights advocates "focus on sustaining engagement with communities rather than conducting sporadic investigations and directing reports primarily at governments."[42] In this way, culture would then be fully understood in its daily existential experience.

Nyamu has put this approach and understanding to work. Her field research in Kenya reveals examples of customary practices that allow women to possess, control, and own land notwithstanding judicial interpretations of culture that preclude women from such acts. These contrary examples illustrate what she refers to as "the politics of culture,"[43] and by demonstrating the existence of such practices, she succeeds in undermining the received or romanticized fictions of custom that legitimate exclusion of women's possession, control, and ownership of land. Instead, custom can be viewed as a legally sanctioned entity rather than a naturally occurring stable phenomenon.[44] Nyamu views this legal sanction of culture as the construction of custom within a context of gendered relations of power. For this reason, she argues that women living in a plural legal context must utilize not only formal law and institutions, but also those positive aspects of custom to advance their interests. In essence, she argues that custom or culture may both challenge and reinforce gender hierarchy. The paradoxical outcome is clear: Although intended to challenge the subordinate position of women in society, human rights and development approaches also legitimate gender hierarchy so that both victories and losses occur simultaneously rather than a clear succession of victories which leads to a better society.

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40. Nyamu, *supra* note 33, at 401.
41. *Id.* at 382.
42. *Id.* at 392.
43. *See id.* Part III.C.
44. *See id.* Part II.C.1.

CONCLUSIONS: LEARNING FROM AND EXTENDING THIRD WORLD INTEGRATIONIST AND NATIONALIST INTERNATIONAL LEGAL SCHOLARSHIP

These articles significantly reflect the currents and trends of the renewed interest in developing countries and international law. Perhaps there is, after all, an emerging amalgam of shifting approaches to international legal theory that is particularly Third World.

Elsewhere I have characterized the work of developing world scholars on international law in the last fifty years as falling on two ends of a spectrum: an integrationist strand which sees promise in developing country participation in international law through legal reform; and a nationalist strand which sees no hope for developing countries within the present structure of international law without fundamental restructuring of the discipline and of international economic and political relations.[45] While these earlier efforts and convictions are an enduring and important legacy of international legal scholarship as it relates to the Third World, the articles in this Issue simultaneously learn from and transcend this earlier and existing work. Their contribution is significant for international legal theory since they explore in innovative and novel ways the discipline's relationship to the Third World. In particular, they look back to history and other disciplines, blurring the lines between international law and such fields as economics, development theory, post-colonial theory, critical race theory (CRT), history, and anthropology, among others. The articles do so by examining the continuities and discontinuities between colonialism and post-colonial statehood, on the one hand, and their relationship to market governance, patriarchy, and grassroots resistance on the other.

These articles do not proclaim a single triumphant truth; rather, they show a variety of voices in dialogue and conversation with each other and with existing theories of international law. However, one feature is distinctive throughout: each article resonates, in one way or another, with the agenda of Third World Approaches to International Law (TWAIL).[46] At least four of the seven contributors (Nyamu, Oka-

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45. *See* Gathii, *supra* note 1.

46. TWAIL's first conference was organized by a network of scholars at Harvard Law School and took place on March 7–8, 1997. Its vision statement reads in part:

> We are a network of scholars engaged in international legal studies, and particularly interested in the challenges and opportunities facing 'third world' peoples in the new world order. We understand the historical scope and agenda of the dominant voice of international law and scholarship as having participated in, and legitimated global processes of marginalization and domination that impact on the lives and struggles of Third World peoples.

The drafters were Bhupinder Chimni, James Gathii, Vasuki Nesiah, Elchi Nworojee, Celestine Nyamu, Balakrishan Rajagopal, and Hani Sayed. For attempts to place TWAIL in the wider context of approaches to the study of international law, see David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9, 36 (1999); David Kennedy, *New Approaches*

for, Rajagopal and Shalakany) have at one point claimed to fall within this generic approach.[47] Shalakany states that TWAIL sets to "reclaim the discursive energy of previous engagements with [international law]" while attempting to harness the critical insights of New Approaches to International Law (NAIL) in constructing a more nuanced style of Third World critique, especially in terms of the relationship between notions of law and neoliberal policies of development.[48] Rajagopal characterizes TWAIL as a polemical or counter-hegemonic term designed to rupture received thinking;[49] as "emerging to challenge the statist, elitist, colonialist, Eurocentric, and masculine foundations of international law."[50] Makau wa Mutua recently asserted that TWAIL is not a dogma.[51] Indeed, it seems that TWAIL comprises a variety of shifting positions[52] and it is also in dialogue with CRT, critical race feminism, Lat-Crit Theory (Latina/o Critical Legal Theory), NAIL, and Black-Crit Theory (Black Critical Legal Theory), among others. Such collaboration is essential, especially in terms of revealing and resisting processes of subordination in and among various communities.[53]

Although TWAIL is influenced by a variety of disciplines and approaches to the study of international law, for at least three reasons it is particularly different from traditional Western approaches to international law. First, TWAIL places colonialism as an important backdrop against which to appreciate the historic role of international law in

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to Comparative Law: Comparativism and International Governance, 1997 UTAH L. REV. 546, 580–81 (1997). *See also* Nathaniel Berman & Christopher Weeramantry, *In the Wake of Empire*, 14 AM. U. INT'L L. REV. 1515 (1999).

47. A recent edition of the *American Journal of International Law* identified seven methods in the study of international law. This list could be assumed to represent the entire range of methods or approaches to the study of international law (thus presupposing that developing world lawyers also fall within these approaches). Such an assumption would be false because the choice of the seven methods merely reflects a prior process of inclusion and exclusion. *See* Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999). *See also* Letter from Professor Henry J. Richardson, III, Temple Law School, 94 AM. J. INT'L L. 99 (2000) (regarding the exclusion of Critical Race Theory and Lat-Crit approaches). *See also* Reply from Professors Steven Ratner and Anne-Marie Slaughter, *id.* at 101.

48. *See* Shalakany, *supra* note 32, at 423 n.17.

49. *See* Rajagopal, *supra* note 1, at 4.

50. *Id.* at 13.

51. *See* Makau wa Mutua, *What is TWAIL?*, 94TH ANN. MEETING AM. SOC'Y INT'L L. (forthcoming 2001).

52. *See* James Gathii, *Neo-Liberalism, Colonialism and International Governance: De-Centering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. (forthcoming 2000) (book review).

53. *See* Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349 (1998). The synergies between TWAIL and CRT were also explored at a recent *Villanova Law Review* symposium—"Convergence and Divergence: Critical Race Theory and International Law" (October, 1999). The papers presented at that symposium will be published in the Spring 2000 issue of the *Villanova Law Review*. *See also* Ruth Gordon, *Racing American Foreign Policy*, 94TH ANN. MEETING AM. SOC'Y INT'L L. (forthcoming 2001).

relation to developing countries (as seen in this Issue's articles by Okafor and Rajagopal). Second, TWAIL views the national/domestic context as an element of ambivalent value rather than as a barrier to the presumed or *given* emancipatory potential of universalist projects of rights and markets (as seen in this Issue's articles by Chua, Fox, Nyamu, Okafor, and Vandevelde). Third, TWAIL utilizes the analytical apparatus of economics and examines the complex relationship of international capital and identity issues (as seen in this Issue's articles by Fox, Chua, Nyamu, Rajagopol, and Vandevelde). However one may characterize the contributors to this volume and their various influences, they clearly demonstrate that the relationship between international law and developing countries is at the center of theoretical and political international law projects.

Yet, although the articles in this volume fall into three broad overlapping themes—resistance/legitimation, market/market failure, and bias/indeterminacy—these themes have their own fruitful internal politics and tensions which are discernable within and among them. On the resistance/legitimation theme, one view foregrounds the continuing constitutive role of colonialism (Okafor) or the constitutive role of Third World resistance (Rajagopal). On the markets/market failures theme, one view foregrounds the analytic apparatus of economics (Vandevelde), or the institutional nexus between economics and politics (Fox and Chua). On the bias/indeterminacy theme, both Nyamu and Shalakany combine a sense of the open-endedness of custom, human rights interventions, and international arbitration with a sense of how outcomes can nevertheless be described as biased in favor of the West or patriarchy.

These creative tensions are fruitful and cannot be ignored. They take us beyond the nationalist/integrationist paradigm by creating a new conceptual space for revision of accepted praxis, orthodoxies, and hierarchies (be they non-material or material); and they benefit from alternative approaches to the study of international law without being subsumed by them.