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TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography

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TWAIL: A BRIEF HISTORY OF ITS ORIGINS, ITS DECENTRALIZED NETWORK, AND A TENTATIVE BIBLIOGRAPHY

JAMES THUO GATHII*

This article traces the contemporary origins of Third World Approaches to International Law (TWAIL) in the late 1990's. It argues that since then, TWAIL-ers have not sought to produce a single authoritative voice or text. Instead, they have generated a vibrant ongoing debate around questions of colonial history, power, identity and difference, and what these mean for international law. TWAIL scholarship has also considered possibilities for egalitarian change in a broad variety of areas in the fields of public international law and international economic law. In doing so, TWAIL-ers have addressed multiple issues related to society, politics, identity and economic - with an underlying commitment to democratic values and concerns in relations within and between the Third World and developed countries.

As a distinctive way of thinking about international law, TWAIL is a historically aware methodology – one that challenges the simplistic visions of an innocent third world and a colonizing and dominating first world. This methodology proceeds from the assumption that is not possible to isolate modern forms of domination such as governmentality, from the continuation of older modes of domination (colonial and pre-colonial).

This article argues that TWAIL has become an expansive, heterogeneous and polycentric dispersed network and field of study. As a field, TWAIL is being continuously re-invented and shaped by new scholars infusing their passion into its central concerns. These scholars are refashioning and contesting what they take as central TWAIL tenets and inventing their own TWAILS. Thus, TWAIL is a discipline in transition, expansion, definition and internal contestation about the varied agendas of its scholars, all at the same time.

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I. INTRODUCTION

Since the late 1990's, Third World Approaches to International Law (hereinafter "TWAIL") has grown as a critical scholarly network, around the world. TWAIL, however, has not sought to produce a single authoritative voice or text. Instead, it has generated a vibrant ongoing debate around questions of colonial history, power, identity and difference, and what these mean for international law.¹ It has also considered possibilities for egalitarian change in a broad variety of areas in the fields of public international law and international economic law.² TWAIL scholarship has addressed multiple issues related to society, politics, identity and economics- with an underlying commitment to democratic values and concerns in relations within and between the Third World and developed countries.

This paper traces the origins of TWAIL in the contemporary period. It argues that TWAIL is a decentralized network of academics who share common commitments in their concern about the third world. As a decentralized network, TWAIL is not organized around vertical hierarchies of knowledge production. In Part II, the article traces the origins of TWAIL in the late 1990s, and shows that TWAIL has developed into a vibrant decentralized network of scholars. It also provides a tentative and certainly incomplete bibliography of TWAIL scholarship. Part III, briefly discusses the further diffusion of TWAIL into a decentralized

¹ See, Antony Anghie, *TWAIL: Past and Future*, 10(4) INT'L COMTY L. REV. 479 (2008); Seth Gordon, *Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31 AM. INDIAN L. REV. 401 (2007); James T. Gathii, *Rejoinder: TWAILing International Law*, 98 MICH. L. REV. 2066 (2000).

² See for example, ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW*(2005); MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER*(1979); James T. Gathii, *Third World Approaches to International Economic Governance*, in *INTERNATIONAL LAW AND THE THIRD WORLD, RESHAPING JUSTICE*, 255 (Richard Falk, Jacqueline Stevens, & Balakrishnan Rajagopal, eds., 2008).

network. Part IV discusses what TWAIL has become today. Part V discusses some central TWAIL themes, and addresses, among other issues, the charge of TWAIL nihilism; the article then ends with a conclusion

II. TWAIL'S ORIGINS

In the spring of 1996, a group of Harvard Law School graduate students initiated a series of meetings to figure out whether it was feasible to have a third world approach to international law and what the main concerns of such an approach might be.³ On Friday, April 26th, 1997 background papers were presented to the group by Bhupinder Chimni who was a Visiting Fellow at the Graduate Program at Harvard Law School in the 1995-1996 academic year and myself. In June that year, Bhupinder Chimni and I spoke of these initial thoughts about TWAIL at the New Approaches to International Law, (hereinafter "NAIL") conference in Madison, Wisconsin. In the fall of 1996, the group agreed to start planning the first TWAIL conference.

The group consisting of Celestine Nyamu, Balakrishnan Rajagopal, Hani Sayed, Vasuki Nesiah, Elchi Nowrojee, Bhupinder Chimni and myself, coined the name of the group as "Third World Approaches to International Law", (TWAIL). Prof. David Kennedy, the Faculty Director, and Jorge Esquirol, the Academic Director of the Graduate Program at Harvard at the time were both very supportive of the TWAIL initiative. In fact, the group procured funding for the March 1997 conference from the Graduate Program.⁴ Another important participant in this group's discussions was Antony Anghie. Although he had already graduated from the Graduate Program at Harvard and was teaching at the College of Law at the University of Utah, he was a mentor to all the TWAIL-ers at Harvard. Makau Wa Mutua, who was a Director of the Human Rights Program at Harvard, but had moved on to teaching at the University at Buffalo Law School, was another important mentor and supporter. Their contacts and advice proved invaluable to a very successful TWAIL conference, dubbed *New Approaches to Third World Legal Studies Conference*, on March 8 and 9th, 2007 at Harvard Law School.

In addition to the many graduate students at Harvard who were from a variety of third world countries, and several US based law professors, the attendees in the

³ Those meetings had grown out of a conference held at Harvard Law School in December, 1995 among scholars interested in post-colonialism, critical race theory and law and development studies.

⁴ The budget line that the Graduate Program used to support the conference was based on my Senior Fellowship at the Program that year. The Graduate Program supported vibrant and cutting-edge academic enrichment activities through the Senior Fellowship Program.

1997 program included Shadrack Gutto⁵ from the University of Witwatersrand in South Africa; Bojan Bugarcic⁶ from Slovenia; Obiora Okafor⁷ who was then a graduate student in Canada; and Karin Mickelson⁸, a Professor at the University of British Columbia. Since then, Obiora Okafor and Karin Mickelson –who have been engaged in scholarship on the third world and international law for long– have become collaborators in the TWAIL project.⁹ Other participants from outside the U.S. at the conference included Antony Carty¹⁰ and Ratna Kapur.¹¹

One of the primary aims of the 1997 conference was to develop new ways of thinking about the relationship between international public law and international economic law, and issues of global wealth and poverty. We wanted to critically appraise the work of the first generation of public international law scholars from the third world, and we were particularly interested in engaging the universal claims made by public international law and international economic law. Another goal was to begin mapping previous approaches to international law in the third world. The group also wondered as to what extent the critiques of formalism, of rights and sovereignty which were ascendant in many approaches to international law in developed countries, was relevant for third world scholars. We were also interested in how scholarship in both public international law and international economic law in developed countries overshadowed that which was being produced in developing countries where there were fewer resources devoted to scholarly production. Clearly, an analysis of issues of power and knowledge were at the centre of the TWAIL project as the TWAIL vision statement indicates.¹² There was also a clear commitment and concern about how best to integrate critiques of neo-liberal economic restructuring to the legal scholarship we were all engaged in.

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⁶ Law Professor at the University of Ljubljana.

⁷ Professor of Law at Osgoode Hall Law School, held faculty positions at the University of Nigeria and Carleton University. Served as an SSRC-MacArthur Foundation Visiting Scholar at Harvard Law School's Human Rights Program and named a Canada-US Fulbright Scholar at MIT.

⁸ Associate Professor at University of British Columbia.

⁹ See for example, Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353-419 (1998).

¹⁰ Professor of Law at University of Aberdeen.

¹¹ Director of the Centre for Feminist Legal Research in New Delhi, India. She is currently the Joseph C. Hostetler-Baker and Hostetler Professor of Law Endowed Chair at Cleveland-Marshall College of Law.

¹² Karen Mickelson, *Taking Stock of TWAIL Histories*, 10 INT. COMMUNITY L. REV. 355, 357 (2008) (hereinafter Mickelson).

Was it possible for the third world to de-link from the first world? Was economic nationalism an option? These were questions many of us were working on in our individual projects.¹³ The group was also concerned about how the history of international law was being told. Led primarily by Antony Anghie, TWAIL scholarship has indeed helped to re-examine the historical foundations of international law. This has happened in a variety of ways. First, TWAIL scholarship, more than any other scholarly approach to international law, has brought the colonial encounter between Europeans and non-Europeans to the center of this historical re-examination of international law.¹⁴ In doing so, TWAIL scholarship has not only rethought international law's relationship to the colonial encounter, but has also challenged the complacency in international law to treat the colonial legacy as dead letter, overcome by the process of decolonization. They have pushed the agenda of the third world in international law beyond examining whether the third world participated in the making of international law and in international institutions.¹⁵ TWAIL has also gone beyond critiquing rules of international law on the basis that they are overtly biased against third world countries. For many TWAIL-ers, while international law guarantees sovereign equality and self-determination, it carries forward the legacy of imperialism and

¹³ See, for example, James T. Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98(6) MICH. L. REV. 1996 (2000); Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589-657 (1996); Makau Wa Mutua, *Savages, Victims, and Saviors: the Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201-245 (2001) (hereinafter Mutua – *Savages, Victims, and Saviors*); Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 B.U. INT'L L.J. 81 (1993) (hereinafter Rajagopal); Vasuki Nesiah, *The Ground Beneath Her Feet: TWAIL Feminisms*, in THIRD WORLD APPROACHES TO INTERNATIONAL LAW: LAW, POLITICS AND GLOBALIZATION (Antony Anghie *et al.* eds., 2003) (hereinafter TWAIL – Anghie *et al.* eds.).

¹⁴ See, for example, ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW*, 2005 (hereinafter ANGHIE); James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007); James Gathii, *How American Support for Freedom of Commerce Legitimized King Leopold's Territorial Ambitions in the Congo, in TRADE AS THE GUARANTOR OF PEACE, LIBERTY AND SECURITY? CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES* 97 (Padideh Alai, Tomer Broude & Colin B. Picker eds., ASIL STUD. TRANSNAT'L LEGAL POL'Y 2006).

¹⁵ For books examining contribution of former colonies to international law, see T.O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1974); and *AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW*, (Jeremy Levitt ed., a 2010). For an example of a book that challenged the colonial origins of international law in the first generation of TWAIL-ers, see U.O. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* (1979). For a review of these two traditions, see James Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olowale Elias*, 21 LEIDEN J. INT'L L., 318 (2008).

colonial conquest.¹⁶

Perhaps the best statement of this thesis is Antony Anghie's classic book: *Imperialism, Sovereignty and the Making of International Law*.¹⁷ In this book, Anghie argued that doctrinal and institutional developments in international law cannot be understood as "logical elaborations of a stable, philosophically conceived sovereignty doctrine...[but rather] as being generated by problems relating to colonial order".¹⁸ For Anghie, the enduring significance of issues such as racial discrimination, economic exploitation and cultural subordination can best be understood by re-examining the relationship between international law and colonialism. One lens through which Anghie does this, is by focusing on the civilizing mission and the dynamic of difference embodied in various jurisprudential approaches of international law, from naturalism to positivism and beyond. For Anghie, the dynamic of difference – particularly of cultural difference between Europeans and non-Europeans – was an important impetus in the generation of some of the defining doctrinal problems of international law. Thus, the dynamic of difference preceded the public-private distinction, the sovereign-non-sovereign distinction and so on.¹⁹ Anghie shows how efforts to incorporate non-European peoples through doctrinal innovation, mobilized notions of racial, social and cultural difference in the work of natural law jurists like Vitoria,²⁰ and positivists like W.E. Lawrence,²¹ alike. That legacy of the dynamic of difference, he argues, was embodied in international legal innovations such as the mandate and trusteeship systems, while all the time seeking to "obscure its colonial origins, its connections with inequalities and exploitation inherent in the colonial encounter".²² For Anghie, the contemporary edifice of international law, while embodying important safeguards for third world states such as the equality of states, still carries forward the legacy of colonial disempowerment and subjugation, not only in the rules relating to international economic governance, but also those relating to international human rights and the use of force.²³

The vision statement, reflecting many of these concerns discussed above was crafted in 2007 and launched at the conference in March, of that year. It reads as follows:

We are a network of scholars engaged in international legal studies, and particularly interested in the challenges and

¹⁶ See ANGHIE, *supra* note 14.

¹⁷ See *id.*

¹⁸ *Id.* at 6-7.

¹⁹ *Id.* at 9, 29.

²⁰ See discussion in ANGHIE, *id.* at 23.

²¹ *Id.* at 56.

²² *Id.* at 117.

²³ *Id.* at 114.

opportunities facing ‘third world’ peoples in the new world order. We understand the historical scope and agenda of the dominant voice of international law scholarship as having participated in, and legitimated global processes of marginalization and domination that impact on the lives and struggles of third world peoples.

Members of this network may not agree on the content, direction and strategies of third world approaches to international law. Our network, however, is grounded in the united recognition that we need democratization of international legal scholarship in at least two senses: first, we need to contest international law’s privileging of European and North American voices by providing institutional and imaginative opportunities for participation from the third world; and second, we need to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples.

Thus we are crucially interested in formulating and disseminating critical approaches to the relationships of power that constitute, and are constituted by, the current world order. In addition, we appreciate the need to understand and engage previous and prevailing trends in third world scholarship in international law.²⁴

III. THE FURTHER DIFFUSION OF TWAIL

TWAIL has never really been organized as a movement or association with formal membership. Rather, it has operated as a loose network. Hence, TWAIL’s wings have spread far and wide. While there have been major TWAIL conferences, such as at Osgoode Hall in 2001 (TWAIL II organized by Obiora Okafor) and Albany in 2007 (TWAIL III, organized by me), there have been numerous other TWAIL happenings. TWAIL IV was organized in 2008 at the University of British Columbia by Karin Mickelson and Ibrónke Odumosu²⁵. An edited publication in the *International Community Law Review* followed.²⁶ In the summer of 2010, another workshop was organized at the University of Paris, Sorbonne to engage

²⁴ Mickelson, *supra* note 12, at 357-358.

²⁵ Assistant Professor at College of Law, University of Saskatchewan.

²⁶ Karin Mickelson, Ibrónke Odumosu & Pooja Parmar (eds.), *Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities*, 10(4) INT’L COMMUNITY L. REV.(SPECIAL ISSUE) (2008) (hereinafter Mickelson *et al.* – *Situating TWAIL*).

English speaking TWAIL scholars, with French international law scholars. A TWAIL V conference is planned at the University of Oregon Law School in October, 2011 organized by Michael Fakhri²⁷.

TWAIL courses have been taught across the world – from the one I audited, taught by Makau Wa Mutua at Harvard in the late 1990's, to Obiora Okafor's regular TWAIL course at Osgoode that's been taught for the last decade, to Anghie's Imperialism and International Law course taught in Australia, New Zealand and the US among other places, and to Cyril Choudhury's Georgetown Law School TWAIL course, to name only a few.

Several edited TWAIL collections have been published in the last several years.²⁸ A few have been in the *International Community Law Review*²⁹, but there have been others in other journals including the *Harvard International Law Journal*.³⁰ These, however, have been the tip of the iceberg. As my initial and incomplete effort to develop a TWAIL bibliography that follows this article shows, there has been a rich flowering of TWAIL scholarship. Ph.D. theses on TWAIL have been written in the past, and continue to be written today.³¹ As the bibliography shows, this scholarship has been produced in many places around the world, on many themes covering a broad spectrum of interests from corporate and tax law, to issues of war and peace, constitutional reform and the whole spectrum of public international and international economic law. Clearly, if there was ever a claim about a TWAIL centre or authority, the broad range of this scholarship and the divergent places at which it has been produced, disproves such a notion. As will be argued in the next

²⁷ Assistant Professor at University of Oregon.

²⁸ In terms of books, see *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., Martinus Nijhoff 2003) (hereinafter *THIRD WORLD & INT'L ORDER – Anghie et al. eds.*); *INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE* (Richard Falk, Balakrishnan Rajagopal & Jacquelin Stevens eds., 2008).

²⁹ *Proceedings of the 3rd World and International Conference (TWAIL III) April 2007, Albany Law School, NY*, 9 *INT'L COMMUNITY L. REV. (SPECIAL ISSUE)* 331 (2007); See also Mickelson *et al. – Situating TWAIL*, *supra* note 26, at 351.

³⁰ Symposium, *International Law and the Developing World*, 41 *HARV. INT'L L. J.* 263 (2000) (Special Editor: James Thuo Gathii).

³¹ See for example, Vijayashri Sripathi, *United Nations Constitutional Assistance (UNCA): A TWAIL Perspective* (2011) (unpublished Ph.D. dissertation, Osgoode Hall Law School, York University); Chikezi Igwe, *Dehumanising International Law or Responding to A New Reality? A Critical Analysis of Post-911 Suggested Changes to the Laws of War* (2009) (unpublished Ph.D. dissertation, Osgoode Hall Law School, York University); Usha Natarajan, *The 2003 Iraq Invasion and the Nature of International Law: Third World Approaches to the Legal Debate* (2008) (unpublished Ph.D. dissertation, Australian National University School of Law).

part of this article, TWAIL is a decentralized network of scholars, with common themes and concerns, but no overarching structure of authority.

IV. WHAT IS TWAIL TODAY?

There are a few things that TWAIL-ers share. Among them, is a historically aware methodology – one that challenges the simplistic visions of an innocent third world, and a colonizing and dominating first world. This methodology proceeds from the assumption that it is not possible to isolate modern forms of domination such as governmentality, from the older modes of domination.³²

As the attached bibliography shows, TWAIL scholarship has expanded into an expansive, heterogeneous and polycentric dispersed network and field of study. As a field, TWAIL is being continuously re-invented and shaped by new scholars infusing their passion into its central concerns.³³ These scholars are refashioning and contesting what they take as central TWAIL tenets and inventing their own TWAILS. Thus, TWAIL is a discipline in transition, expansion, definition and internal contestation about the varied agendas of its scholars, all at the same time. However, there is still a broad agreement on some basic commitments as pointed out above.³⁴ From this perspective, TWAIL today is a mixture of newer and older ideas.

³² On this see James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007).

³³ See for example, Ernesto Hernandez-Lopez, *Boumediene v. Bush and Guantanamo, Cuba: Does the “Empire Strike Back”*, 62 SMU L. REV. 117 (2009); Mohsen al Attar & Rosalie Miller, *Towards an Emancipatory International Law: the Bolivarian Reconstruction*, 31(3) THIRD WORLD Q. 347 (2010); Michelle Burgis, *Faith in the State? Traditions of Territoriality, International Law and the Emergence of Modern Arab Statehood*, 11 J. HIST. INT’L L. 37 (2009); Amr Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism*, 41 HARV. INT’L L. J. 419 (2000) (hereinafter Shalakany); Usha Natarajan, *A Third World Approach to Debating the Legality of the Iraq War*, 9 INT’L COMMUNITY L. REV. 405 (2007) (see in particular from page 421 discussing the limitations of what the author calls ‘the Third World Approach,’); Prabhakar Singh, *Indian International Law: From Colonized Apologist to a Subaltern Protagonist*, 23 LEIDEN J. INT’L L. 79 (2010) (hereinafter Singh) (see in particular part 7 of this article for a critique of some streams of TWAIL scholarship); Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT’L COMMUNITY L. REV. 355 (2008) (in part discussing limitations of the TWAIL vision statement from 1997).

³⁴ See Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective*, 43 OSGOOD HALL L.J. 171, 176 (2005) (hereinafter Okafor) (“despite its healthy internal differences and variegation, TWAIL scholars . . . are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order.”). For another view, see Luis

The emergence of TWAIL evidences a move away from the dominant Eurocentric vision of international law. This vision of international law, though post positivist, continues to be organized around vertical hierarchies of knowledge production. Knowledge production in international law is no longer confined to leading texts and scholars based primarily in Europe and North America. However, it is also true that TWAIL, as a recent scholarly project, emanated from the efforts of third world scholars based primarily in North America, but it has joined existing streams of critical international law literatures from the geographical third world.³⁵ Hence, TWAIL's novelty does not lie so much in heralding a critical third world voice, but rather in intervening within the dominant discourses of international law, particularly within North America, Australia and Europe.³⁶ North American based TWAIL-ers are only a small part of a larger tradition of third world scholarship in international law that dates back decades.

In this sense, a major theme of TWAIL work is building on resistance towards projections of both metropolitan power and authority over third world peoples – whether that power is military, economic, political, cultural or otherwise. Balakrishnan Rajagopal's work has in particular emphasized this theme of resistance, not by elite academics, but by third world masses, to projects such as big dams, ostensibly intended for their benefits.³⁷ There has been occasional

Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3(1) TRADE L. & DEV. 103 (2011).

³⁵ See generally, Singh, *supra* note 33 (author from the Jindal Global Law School, India). B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMMUNITY L. REV. 3 (2006) (author at the Jawaharlal Nehru University in New Delhi, India) (hereinafter Chimni); Joe Oloka Onyango & Sylvia Tamale, "The Personal is Political," or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism, 17(4) HUM. RTS. Q. 691-731 (1995) (both authors teach at the University of Makerere School of Law in Uganda) (hereinafter Onyango & Tamale); M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT'L L. 19-57 (2006) (author teaches at the University of Singapore) (hereinafter Sornarajah); Shalakany, *supra* note 33 (author teaches at American University in Cairo); Helena Alviar Garcia, *Legal Reform, Social Policy, and Gendered Redistribution in Colombia: The Role of the Family*, 19 AM. U.J. GENDER SOC. POL'Y & L. 577 (2011); Celestine Nyamu Musembi, *De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories About Property Rights*, 28 THIRD WORLD Q. 1457 (2007) (author teaches at the School of Law of the University of Nairobi, Kenya).

³⁶ Makau Wa Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000) (hereinafter Mutua – *What is TWAIL?*); Chimni, *id.*; Upendra Baxi, *What May the Third World Expect from International Law*, 27 THIRD WORLD Q. 713 (2006); Okafor, *supra* note 34; James 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) (hereinafter Gathii – *Alternative and Critical*).

³⁷ See for example, BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003)

resistance by third world judges on international tribunals as well.³⁸ One of the most well remembered is the dissent of Indian Judge Radhabinod Pal in the International Military Tribunal for the Far East in Tokyo that would have acquitted Japanese defendants charged with crimes against peace, and war crimes.³⁹ Referring to the history of violence the prosecuting powers had meted out in Asia, Pal was sceptical of the motivations of these powers. For Pal, peoples under colonial rule could not be expected “to submit to eternal domination only in the name of peace”.⁴⁰ In his view, anti-colonial justice took “precedence over peace rather than peace taking precedence over justice”.⁴¹ Pal justified the actions of Japanese leaders as defensive rather than as aggressive wars.⁴² His sympathy with the Japanese right may be objectionable on any number of grounds, but the legacy of his dissent and its legal and philosophical

(hereinafter RAJAGOPAL). See also, B. Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World strategy*, 27 *THIRD WORLD Q.* 767, 783 (2006); Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 *HARV. HUM. RTS. J.* 1 (2002); Sundhya Pahuja, *The Postcoloniality of International Law*, 46 *HARV. INT’L L.J.* 459 (2005).

³⁸ Judge Weeramantry’s dissent in *Case Concerning Kasikili Sedudu (Botswana v Namibia)*, 1999 I.C.J. 199 (December 13) is a good example. I discuss this dissent in James Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 15 *LEIDEN J. INT’L L.* 581-622 (2002), re-published in *THIRD WORLD & INT’L ORDER – Anghie et al. eds., supra* note 28, at 75. See also, the dissenting opinion of Judge Tanaka in *South West Africa Cases, (Liberia v South Africa; Ethiopia v South Africa)*, Second Phase Merits (1966) I.C.J. 6, 250 (finding that Liberia and Ethiopia could enforce the mandatory obligations of South Africa and rejecting South Africa’s argument that racial discrimination was consistent with international law and endorsing the view that all people are equal is a fundamental principle of international law). See also dissenting opinion of Judge Mohamed Shahabuddeen in the *Advisory opinion on the Legality of Nuclear Weapons* that “The essence of the question is whether the exercise of the right of self-defence can be taken to the point of endangering the survival of mankind. To this the Court responds that ‘in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake’. That is the material holding on which this opinion hinges. In so far as that holding suggests that there is a deficiency in the law, I do not think there is; in so far as it suggests that the facts are not sufficient to attract an application of the law, I am not able to agree. In my opinion, there was a sufficient legal and factual basis on which the Court could have proceeded to answer the General Assembly’s question - one way or another. And hence my respectful dissent from its conclusion that it cannot.”

³⁹ R. PAL, *INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: DISSENTIENT JUDGMENT OF JUSTICE R.B. PAL* 115 (1953).

⁴⁰ *Id.*

⁴¹ S. Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 *EUR. J. INT’L L.* 1100, 1096 (2010).

⁴² *Id.*

grounding had much in common with “*pan-Asianism and anti-communism, with the non-aligned movement over anti-colonialism and self-determination, and with Western anti-militarists over American foreign policies*”.⁴³

International law and colonialism do not define all power relations. Therefore, TWAAIL too does not exhaust the subject of the position of oppressed peoples either – just like there is no single modernity, there is no single TWAAIL. As has been discussed, a central project of TWAAIL is to challenge the hegemony of the dominant narratives of international law, in large part by teasing out encounters of difference along many axes – race, class, gender, sex, ethnicity, economics, trade, etc – and in inter-disciplinary ways – social, theoretical, epistemological, ontological and so on. The approaches within TWAAIL include critical, feminist, post-modern, Lat-Crit Theory (Latina and Latina Critical Theory Inc.), post-colonial theory, literary theory, modernist, Marxist, critical race theory and so on.⁴⁴ It is also not my opinion that TWAAIL scholars ought to dwell on the pervasive binarisms of modernism such as between public and private as well as the distinction between market and state, national and international and so on.⁴⁵

This diversity of influences in TWAAIL scholarship occurs because unlike certain critical intellectual movements, it is not characterized by leading figures producing works that set the parameters and boundaries of inquiry. Rather, TWAAIL, as alluded to above, has a fluid architecture of many different individuals who mix, reuse, and re-combine various TWAAIL and non-TWAAIL ideas and themes. Within this network, no one individual, or set of individuals has direct control of TWAAIL scholarly production. As a result, there is no full knowledge of all the parts, or even anything remotely suggesting control. One of the disadvantages of such an open-ended and diffuse network is that it is not easy to organize effectively, the way in which other critical movements scholars, like Lat-Crit, have done.⁴⁶

⁴³ *Id.* at 1100.

⁴⁴ On Marxism and Twail, see Bhupinder Chimni, *Alternative Visions of Just World Order: Six Tales from India*, 46 HARV. J. INT’L L. 389 (2005); Bhupinder Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT’L L. 1 (2004).

⁴⁵ For a critique of such modernism, see ROBERTO UNGER, *LAW IN MODERN SOCIETY*, 1976.

⁴⁶ See ANNUAL LATCRIT CONFERENCE (ALC), <http://www.latcrit.org/> (this site quite clearly demonstrates the organizational efforts of the LatCrit group). Latcrits hold an annual conference (sixteen to date) and have regular law review volumes that publish conference proceedings. Unlike TWAAIL they have an organizational structure and guidelines for forewords, afterwords and cluster introductions for their symposium publications, see: http://latcrit.org/latcrit/publications/publishedsymposium/foreword_afterwordguidelines2006.pdf.

V. SOME CENTRAL TWAIL THEMES

One of TWAIL's central insights is bringing the *problématique* of colonialism to the centre. The point, simply put, is that by having exercised substantial economic, military, political power over the former colonies, Europe and the United States have established patterns of dominance that persist till date. In short, the colonial legacy of the nineteenth and twentieth centuries places a substantial constraint on the former colonies, to the benefit of former colonial powers.⁴⁷ This is evident in a variety of respects. Of all former colonial possessions that have adopted the Western State; many still carry forward large elements of the inherited legal structures from their metropole⁴⁸; culturally many have adopted as official languages, the languages of their former colonial powers⁴⁹; religious majorities in these former colonies with the exception of middle eastern countries have adopted Judeo-Christian morality like their former colonial powers.⁵⁰

In a sense, contemporary TWAIL scholarship has made a major contribution by producing under-represented and alternative knowledge about international law. To quote Arturo Escobar, we might say the critical impulses in TWAIL historical scholarship are:

[D]issolving some of the strong structures of Euro-modernity at the level of theory by favoring flat alternatives; positing the fact that epistemic differences can be – indeed are – grounds for the construction of alternative worlds; calling on scholars and activists to read for difference rather than just for domination; or imagining that aiming for worlds and knowledges otherwise is an eminently viable cultural-political project.⁵¹

Undermining the culturally Eurocentric modernity has been the project of many generations of third world international law scholars from Africa, Asia, Latin America and elsewhere.⁵² In this sense, TWAIL is an embodiment of oppositional

⁴⁷ On this theme, see Sornarajah, *supra* note 35.

⁴⁸ Eric W. Larson, *Institutionalizing Legal Consciousness: Regulation and the Embedding of Market Participants in the Securities Industry in Ghana and Fiji*, 38 L. & SOC'Y REV. 737, 745 (2004) (in discussing Ghana and Fiji stating "As former British colonies, both continue to use the British legal system").

⁴⁹ Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. Third World L.J. 159, 183 (1998).

⁵⁰ See Anthony R. Reeves, *Sexual Identity as a Fundamental Human Right*, 15 BUFF. HUM. RTS. L. REV. 215 (2009).

⁵¹ See ARTURO ESCOBAR, TERRITORIES OF DIFFERENCE: PLACE, MOVEMENTS, LIFE, *REDES* 310-311 (2008).

⁵² These efforts have been outlined in James Gathii, *International Law and Eurocentricity*,

discourses to Eurocentricity. While TWAIL has its deconstructive angle, it is also a broad umbrella that embraces constructive and reconstructive efforts. Such constructive and reconstructive efforts are important in TWAIL's agenda, given that self-determination did not prove to be the transformational moment of colonial resistance. TWAIL-ers often ask what can be done today not only to exorcise Eurocentricity and its legacy from international law, but also how to transform international law to be more sensitive to the concerns of third world states.⁵³ TWAIL-ers do not have a false notion of third world innocence and first world guilt or dominance. Many TWAIL-ers are also critical of many third world governments.⁵⁴ They do not regard international law as having been cleansed of its imperial legacy by post-World War II guarantees of self-determination and sovereign equality for non-European countries and peoples, however, they also do not regard international law as simply an apology masking the raw power and philosophical commitments of its western progenitors.

It is also safe to say that first generation TWAIL approaches, of the immediate post-independence era, particularly but not exclusively those in Asia and Africa, are also different from a lot of contemporary TWAIL scholarship. An example of a first generation TWAIL approach is contributionism⁵⁵ which pervaded most of the writing from the non-West on International law particularly in the immediate post-colonial period, is premised on a model of inter-civilizational participation in the process of crafting genuinely universal norms. Contributionism overstates the participation by diverse constituencies in the creation of global norms, and understates the biases and blind spots that evidence the interests that prevail at crucial stages of implementation of international legal norms.⁵⁶ While

9 EUR. J. INT'L L. 184 (1998) (hereinafter Gathii – *Int'l Law & Eurocentricity*).

⁵³ Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILLANOVA L. REV. 851, 852 (2000) (discussing the Western domination of international law and how TWAIL can restructure the system as it stands).

⁵⁴ Mutua – *What is TWAIL?*, *supra* note 36 (“TWAIL opposes the complicity of Third World states in the international legal and economic order with a view to silencing the voices of the powerless.”).

⁵⁵ T.O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1974); and *AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW* (Jeremy Levitt ed., 2010). For an example of a book that challenged the colonial origins of international law in the first generation of TWAIL-ers, see U.O. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* (1979). For a review of these two traditions, see James Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 LEIDEN J. INT'L L. 318 (2008). See also my brief discussion in James T. Gathii, *Humanizing the Pax-Americana Global Empire*, in *Humanizing Our Global Order: Essays in Honor of Ivan Head*, 4 WASH. U. GLOBAL STUD. L. REV. 121 (2005).

⁵⁶ James Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 LEIDEN J. INT'L L. 317 (2008).

contributionism has not been abandoned, contemporary TWAIL approaches are likely to also investigate, selectively embrace, and combine the egalitarian values of Third World and Western international legal, ethical and political norms, rather than relying on dominant narratives that reinforce the hierarchical or narrow aims of either.⁵⁷ For example, Celestine Nyamu's important critique of customary law norms impact on women's rights did not spare how formal law entrenches women's subordination.⁵⁸ At the same time, she was also able to tease out those positive attributes of both customary and formal law which she argued ought to be mobilized to protect women's rights. This acknowledgement of the messiness of law – that it has both transformative as well as regressive potential is a hallmark of third world approaches to international law.⁵⁹ Contemporary TWAIL approaches have therefore sought to expand or open up new conceptual spaces for international legal scholarship and praxis not by debunking certain contemporary international law norms for a newer, purer, truthful post-imperial international law, but rather a kind of international legal scholarship that takes international legal history seriously particularly in terms of the relations between formerly colonial countries and their colonial overlords.⁶⁰ Such a process is a necessarily 'subversive and messy task' that simultaneously inhabits both its imperial legacy of colonialism and its post-imperial guarantees of sovereign equality and self-determination.

It is the tensions and politics produced by either foregrounding or backgrounding international law's imperial or post-imperial legacy that create fruitful tensions or new conceptual spaces for richer, subtler and more nuanced renditions of international law that overcome the given grounds of opposition between its critics and its loyalists. Contemporary TWAIL approaches also demonstrate how the cultural constitution or make-up and historical contingency of international law relates to themes of resistance and legitimation. TWAIL scholarship has also theorized and demonstrated the significance of resistance and protest as factors in the expansion, consolidation, and renewal of international institutions.⁶¹ By emphasizing resistance and protest rather than a unilinear process of reception of

⁵⁷ See Okafor, *supra* note 34, at 179 (discussing how TWAIL-ers take equality seriously and are wary of western ideas of universality which have led to subjugation).

⁵⁸ Celestine Nyamu-Musembi, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41(2) HARV. INT'L L.J. 381 (2000) (hereinafter Nyamu-Musembi).

⁵⁹ In my essay, James Gathii, *Third World Approaches to International Economic Governance*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 255 (Richard Falk, Balakrishnan Rajagopal & Jacquelin Stevens eds., 2008) I trace how rules of international economic law could be interpreted favorably to third world positions.

⁶⁰ Nathaniel Berman, *Between 'Alliance' and 'Localization': Nationalism and the New Oscillationism*, 26 N.Y.U. J. INT'L L. & POL. 449 (1994); David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 UTAH L. REV. 545 (1997).

⁶¹ Rajagopal, *supra* note 13.

universal norms from the centre to the periphery, TWAIL-ers have shown the growth of international law as a process of engagement or interaction of different cultural and political values that are often in conflict but that at times overlap and reinforce each other. Protest and resistance in turn illustrate how the third world in alliance with environmental, feminist, farmer and other organizations, together with transnational alliances have shaped, reshaped or been co-opted into projects of global governance in areas as diverse as the environment, intellectual property rights and human rights.⁶² For example, Western scholars of international law have traditionally urged African governments like Ethiopia to adopt liberal solutions such as embracing civil and political rights as an antidote to the perennial governance challenges.⁶³ Such an approach presupposes that problems such as abuse of power could be addressed by simply embracing liberal institutions and international human rights norms to promote democracy.⁶⁴ Makau Wa Mutua has referred to this simplistic view as abolitionism and argues that it fails to take into account the historical association of international law with colonial conquest and western domination in Africa.⁶⁵ The suspicion and circumspection with which some African scholars and states have treated international law is therefore explicable, in part, on this basis. The willingness of TWAIL-ers to make international legal history an important part of their scholarship has enabled them to simultaneously focus on the potential and limits of international law for third world countries.

TWAIL approaches have the additional utility of simultaneously presenting opportunities to examine how the mobilization of concepts of international law, such as sovereignty of Third World states, have served to deify state power at the

⁶² One of the best examples of this is RAJAGOPAL, *supra* note 37. See also Hope Lewis, *Transnational Dimensions of Race in America*, 72 ALB. L. REV. 999 (2009); Lindsay F. Wiley, *Moving Global Health Law Upstream: A Critical Appraisal of Global Health Law as a Tool for Health Adaptation to Climate Change*, 22 GEO. INT'L. ENV'T'L. L. REV. 439 (2010); Duncan French, *Global Justice and the (Ir)relevance of Indeterminacy*, 8 CHINESE J. INT'L. L. 593 (2009). See also Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41(2) HARV. INT'L. L.J. 529 (2000); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337 (1996).

⁶³ E.g. Rhoda Howard, *The 'Full Belly' Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467-490 (1983). Even the World Bank has strongly advocated for adoption of liberal rights as an antidote to economic underperformance and as a product of market reforms. For a critique, see Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L.J. 853 (2005).

⁶⁴ Makau Wa Mutua, *The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa*, 17 MICH. J. INT'L L., 339 (1995).

⁶⁵ See Mutua – *Savages, Victims, and Saviors*, *supra* note 13.

expense of individual rights and freedoms.⁶⁶ In doing so, TWAAIL approaches have the advantage of illustrating the difficulties of the long standing idea that bias against the third world is the discernible and determinate outcome of doctrines and institutions of international law.⁶⁷ Thus, TWAAIL approaches reject accounts of international law as originating in the West and radiating outwards to the backward non-European periphery. As noted above, Antony Anghie's work in particular stands out in re-characterizing this telling of international legal history.⁶⁸ Thus, TWAAIL scholarship has sought to challenge and to reconfigure Eurocentric accounts of international law.⁶⁹

Recently, Jose Alvarez argued that TWAAIL-ers, would in his view, not subscribe to asking the Security Council to take desired action with reference to the genocide in Sudan.⁷⁰ This seems to be a backhanded suggestion of TWAAIL nihilism – that TWAAIL offers no positive agenda for action or reform in international law and relations. Alvarez's own work has contained many TWAAIL-like themes, and has often been as critical of certain liberal approaches to international law just as TWAAIL scholarship has been. His critique of the Security Council's work under its growing counter-terrorism mandate and invocation of the term - hegemonic international law, for example, is very reminiscent of TWAAIL work.⁷¹ Many TWAAIL-ers that I am aware of have been very critical of African governments for seeking to jump ship out of the International Criminal Court, asking for more international action –including from the Security Council on the Sudan situation, clamping down on terrorism – just as scholars of many other stripes have done.⁷² In fact, as Antony Anghie and Bhupinder Chimni have argued,

⁶⁶ See for example, Makau Wa Mutua, *Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 HUM. RTS. Q. 96-118, (2001); OBIORA OKAFOR, *THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES AND INTERNATIONAL INSTITUTIONS* (2007).

⁶⁷ For more on this see Gathii – *Alternative and Critical*, *supra* note 36; and Shalakany, *supra* note 33.

⁶⁸ See ANGHIE, *supra* note 14.

⁶⁹ See for example, Gathii – *Int'l Law & Eurocentricity*, *supra* note 50.

⁷⁰ Jose Alvarez, *My Summer Vacation Part II: Revisiting TWAAIL in Paris*, available at: <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/>.

⁷¹ Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 881 (2003). See also Henry Richardson III, *U.S. Hegemony, Race and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27 (2003).

⁷² Makau Wa Mutua, *The International Criminal Court in Africa: Challenges and Opportunities Norwegian Peace Building Centre (NOREF)* (September 2010), available at <http://www.peacebuilding.no/eng/Publications/Noref-Reports2/The-International-Criminal-Court-in-Africa-challenges-and-opportunities>. (arguing in part African governments should be pressured not to get away with impunity); James Gathii, *Kenya's Credible Commitment to Keep Its Date With the ICC*, NAIROBI L. MONTHLY (Jan. 2011). Charles Jalloh & Algahi Maron, *Ending Impunity: The Case for War Crimes Trials in Liberia*, J. AFR. LEGAL STUD. 53 (2005).

because third world states “often act in ways which are against the interests of their peoples”, rules of international law ought to be evaluated from the “actualized experience of these peoples” rather than those of the states.⁷³

This false charge of nihilism is however not confined to Jose Alvarez – he is only its most recent exponent. A few years ago, David P. Fidler critiqued TWAIL almost along the same lines.⁷⁴ Many scholars in Europe and North America have sometimes also not responded very favourably to third world scholarship and third world views of international law – which is perhaps a reflection that until recently non-third world approaches dominated scholarly norms about international law.⁷⁵ While such sharp charges do not always characterize reactions to third world scholarship, there is credibility to the sometimes dismissive attitude towards third world international legal scholarship. This notwithstanding, TWAIL scholars have a broad agenda of seeking to “transform international law from being a language of oppression to a language of emancipation—a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples and which, thereby, promotes truly global justice” and this remains at the centre of the TWAIL agenda.⁷⁶

One of the reasons why TWAIL-ers are charged with being nihilistic is because TWAIL has a critical perspective. However, TWAIL critics fail to acknowledge or realize that TWAIL-ers do not critique for the heck of it. They critique with a view to build on and transform the egalitarian aspects of international law, and do not critique to derive satisfaction out of deriding the work. Let me raise one last example to illustrate how critique and construction occur simultaneously in TWAIL. I will use the example of TWAIL feminists. TWAIL-ers such as Vasuki Nesiiah⁷⁷, Sylvia Tamale⁷⁸, Celestine Nyamu⁷⁹, Dianne

⁷³ Antony Anghie & Bhupinder Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77 (2003) (hereinafter Anghie & Chimni).

⁷⁴ David P. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2(1) CHINESE J. INT'L L. 29 (2003).

⁷⁵ M.W. Janis, *Towards a New International Order by Mohammed Bedjaoui*, 6 B.C. INT'L & COMP. L. REV. 355, 359 (1983) (Book Review) (stating that Western lawyers would find Bedjaoui's Third World approach “uncongenial”); See Boleslaw Boczek, *Ideology and the Law of the Sea*, 7 B.C. INT'L & COMP. L. REV. 1, 2 (1984) (characterizing third world critiques of the law of the sea as ideological and citing the works of third world scholars like R.P. Anand for challenging ‘traditional rules of international law’); See also John King Gamble Jr. & Maria Frankowska, *International Law's Response to the New International Economic Order: An Overview*, 9 B.C. INT'L & COMP. L. REV. 257 (1986) (claiming third world demands on the NIEO were ‘so extreme and beyond the pale of international law’, and being generally very critical of third world scholars in support of the NIEO).

⁷⁶ Anghie & Chimni, *supra* note 73, at 79.

⁷⁷ See for example, Vasuki Nesiiah, *The Ground Beneath Her Feet: TWAIL Feminisms, in*

Otto⁸⁰, Penelope Andrews⁸¹, Berta Hernandez⁸², Hope Lewis⁸³, Lama Abu-Odeh⁸⁴, Adrian Wing⁸⁵, Athena Mutua⁸⁶, Leslye Obiora⁸⁷, Sundhya Pahuja⁸⁸, Sylvia Kangara⁸⁹, Mosope Fagbongbe⁹⁰ among others have produced a significant body

TWAIL - Anghie *et al.* eds..

⁷⁸ See, e.g., Onyango & Tamale, *supra* note 35, at 727 (calling for a “second look at the archaic structures of legal regulation of all facets of social, political, and economic existence”).

⁷⁹ See for example, Nyamu-Musembi, *supra* note 58 (arguing for gender equality proponents to “engage with the specific politics of culture”. In one specific example, the author seeks to challenge the very law used in courts arguing that the customary law only aids certain litigants).

⁸⁰ See for example, Dianne Otto, , Key-note Address at The Third World and International Law Conference III: The Gastronomics of TWAIL’s Feminist Flavourings: Some Lunch-Time Offerings (April 20-21, 2007).

⁸¹ See for example, Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women’s Rights in South Africa*, 26 N.C. J. INT’L L. & COM. REG. 693 (2001).

⁸² See for example, Berta Esperanza Hernandez-Truyol, *Women’s Rights as International Human Rights: Concluding Remarks Making Women Visible: Setting an Agenda for the Twenty-First Century*, 69 ST. JOHN’S L. REV. 231(1995) (calling for women’s rights to be a human right and citing a variety of examples of how to attain that goal).

⁸³ See for example, Hope Lewis & Isabelle R. Gunning, *Cleaning Our Own House: “Exotic” and Familiar Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123 (1998) (calling for changes in criminal codes to prevent undue harm to minorities, passage of the CEDAW by the United States, and to prevent human rights violation in foreign affairs).

⁸⁴ See for example, Lama Abu-Odeh, *Honor: Feminist Approaches to*, in 2 ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURES 225-227 (Suad Jospheh ed., 2005).

⁸⁵ See for example, GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Wing ed., 2000); Adrien Katherine Wing & Tyler Murray Smith, *The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift: The New African Union and Women’s Rights*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 33, 35 (2003) (providing an “examination of the likelihood for improvement of women’s rights under a new continent-wide organization-the AU”).

⁸⁶ See for example, Athena Mutua, *Gender Equality and Women’s Solidarity across Religious, Ethnic, and Class Difference in the Kenya Constitutional Review Process*, 13 WM. & MARY J. WOMEN & L. 1 (2006) (calling for women to organize for rights cohesively rather than finding equality in comparison to men).

⁸⁷ See for example, R.W. Perry & L. Amede Obiora, *Bridging False Divides: Toward a Transnational Politics of Gender*, in A CRITICAL MORAL IMPERIALISM ANTHOLOGY 255, 258 (Berta Esperanza Hernández-Truyol ed., 2002) (addressing rights integration in local contexts).

⁸⁸ See for example, Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT’L. L.J. 459, (2005) (arguing that international law is post-colonial in an attempt to unify competing visions of international law).

⁸⁹ Sylvia Kangara, *Western Legal Ideas* (July 30, 2010) (unpublished manuscript on file with African Family Law).

of critical feminist scholarship from a variety of critical perspectives including TWAIL. There is no doubt that these TWAIL feminists are anything but nihilists. Critiques of TWAIL which have narrowly construed TWAIL, have ignored how TWAIL feminists such as Mosope Fagbongbe have outlined their agenda as including “the formulation of human rights norms and the development of alternative strategies...to facilitate not a mere reformation but a radical overhaul of international human rights law for the benefit of the Third World and Third World Women in particular.”⁹¹ This she argues is the best way to address the fact that the “majority of Third World still live in poverty, need and deprivation.”⁹² One can hardly argue that the very important work TWAIL feminists have undertaken - to critique patriarchal customary and religious norms and practices in the Third World - and the manner in which the language of rights is often mobilized to entrench rather than end such norms and practices, is nihilistic. To argue that conservative religious, cultural, and customary norms, with conservative free market reforms have reduced public spending in health care and therefore undermined making progress towards substantive gender equality, is nihilistic, and misses the point about what TWAIL is by a wide margin.⁹³

TWAIL scholarship makes bold critiques and equally bold reform proposals – even while realizing how difficult it is to make these reform proposals to promote justice, equality and egalitarian values. For TWAIL reform through Security Council authorizations of the use of force in Sudan or elsewhere as Jose Alvarez suggested, is not the obvious solution or reform proposal that TWAIL-ers would opt for.⁹⁴ Therefore, whether or not TWAIL-ers would endorse the use of force in one situation or another to measure TWAIL, is a woefully tilted and unfair baseline for anyone to use. While reform and retrenchment in the international legal order occur simultaneously, resort to force by powerful countries against less powerful countries carries with it dangers that may far outweigh the immediate benefits. TWAIL-ers are only too keenly aware about how uses of force have been used to the detriment of third world peoples, just as Diane Otto had recently reminded us about how feminism has been used to legitimize the authority of a hegemonic Security Council.⁹⁵ As Antony Anghie has noted, we can think of the history of

⁹⁰ See for example, Mosope Fagbongbe, *The Future of Women's Rights from a TWAIL Perspective*, 10 INT'L COMMUNITY L. REV. 401 (2008) (focusing on strengthening critical feminism to prevent further marginalization of women).

⁹¹ *Id.* at 409.

⁹² *Id.*

⁹³ In relation to this, see also James Gathii, *Exporting Culture Wars*, 13 U.C. DAVIS J. INT'L. L. & POL'Y 67 (2006).

⁹⁴ See for example, James Gathii, *Failing Failed States: A Response to John Yoo*, (2011) (unpublished manuscript) (on file with California Law Review Circuit).

⁹⁵ Dianne Otto, *Power and Danger: Feminist Engagement with International Law through the UN Security Council*, 32 AUSTL. FEMINIST L.J. 97 (2010) (arguing that by only selectively

international law as being “*preoccupied with the issues of consolidating and expanding empire, and governing other peoples*”.⁹⁶ That is as true today as it was in the period of classical colonialism, and thus while TWAIL-ers would be the first to critique atrocities committed against third world peoples, they would not necessarily endorse military action as the corrective choice of means. This however is not to suggest that TWAIL-ers would not under any circumstances endorse forcible action, but the conditions under which some TWAIL-ers might is a debate for another day.

VI. CONCLUSION

TWAIL has come a long way. There is now a growing and impressive body of work spanning many areas of international law and beyond as the attached bibliography demonstrates. This body of work has helped to crystallize a third world voice in international law – a voice that is only beginning to be demarginalized as a legitimate body of inquiry and scholarship. For example, as I noted earlier, courses on third world approaches to international law and imperialism and international law are now taught in many parts of the world. Further, scholars identified as TWAIL-ers have served as Executive Council members in the largest international law society in the world, the American Society of International Law (ASIL).⁹⁷ In addition, Antony Anghie was, in 2010 invited to deliver the main keynote at the ASIL Annual Meeting, the Grotius Lecture. This together with the enormous growth in scholarly production relating to TWAIL themes shows that TWAIL-type work is no longer as marginalized in the academy. However, attributing individual TWAIL career accomplishments ought not to be easily equated with TWAIL success. Much growth in TWAIL remains and I am optimistic that as this Journal’s Special Issue on TWAIL illustrates - there is a growing scholarly TWAIL tradition around the world that is already undertaking this challenge.

This article has been brief and schematic, rather than comprehensive. It has sought to capture a sliver of the origins of TWAIL in the contemporary period and in North America in particular. However, TWAIL goes back decades in the scholarship of the first generation of post-colonial scholars in Latin America, Asia, Africa and elsewhere.⁹⁸ TWAIL’s contemporary roots in North America are largely

engaging in feminist discourse, the actual structural causes of inequality are not addressed while the organization appears to be taking progressive steps).

⁹⁶ Letter from Antony Anghie to Jose Alvarez, President of the American Society of International Law, *available at*:http://www.asil.org/ilpost/president/pdfs/ilpost0807_8.pdf.

⁹⁷ These include Antony Anghie, Makau Wa Mutua and myself. Makau Wa Mutua is currently one of the Vice-Chairs of the ASIL.

⁹⁸ The work of scholars such as Elias Olawale, Mohammed Bedjaoui, Bhupinder Chimni, Shadrack Gutto, U.O. Umzurike among others who can be counted as part of

influenced by factors like professional rewards, penalties, and institutional pressures that play a role in determining the location of intellectual labour.⁹⁹ I know, for example, being an academic in North America has perhaps given me more access to research materials on Africa and International Law and on many other topics, than if I was in Nairobi. Western universities also generally give their faculty academic freedom and pay well enough that they can devote a substantial amount of their time to research and writing. That may not necessarily be true in many third world faculties, particularly in the era of authoritarian governance in Africa. In certain third world countries higher education, and particularly its more progressive orientations, was decimated under authoritarian governance and market economic reforms. This, in part, contributed to the emergence of third world born intellectuals in North America, Europe, Australia and elsewhere. This is not to suggest that such production is not possible in the geographical third world. Bhupinder Chimni's location at the Jawaharlal Nehru University in New Delhi, India and Issa Shivji's¹⁰⁰ faithful and equally distinguished career at the University of Dar-es-Salaam in Tanzania shows the rich possibilities of production of TWAIL scholarship from the geographical third world. A lot of other TWAIL work is also being and has historically been produced in the geographical third world.

Equally importantly, as this article shows, TWAIL is a decentralized network of scholars with common commitments and concerns; it is not a collective with fixed and pre-set commitments under a central command. Moreover, the location of some TWAIL-ers, far from the reality of the issues that are of central concern to them, does not delegitimize their intellectual production.¹⁰¹ Many TWAIL-ers, including myself, also have close connections and working relationships with, and are major participants of many locally grounded progressive movements, in many parts of the geographical third world.¹⁰² Indeed, as Balakrishnan Rajagopal argued

the TWAIL 1 generation long preceded the work of current TWAIL-ers.

⁹⁹ See R.S. Rajan, *The Third World Academic In Other Places; or the Post-Colonial Intellectual Revisited*, 23 CRITICAL INQUIRY 597 (1997).

¹⁰⁰ See for example, Letter from Issa Shivji to organizers of a U.K. conference in 2003 Letter from Shivji to Organizers of a U.K. conference in 2003 (explaining that he could not participate in the conference when people were being massacred in a wide protested against the Iraq invasion by a US/UK led coalition), available at: http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/shivji1.

¹⁰¹ Cf. Arif Dirlik, *The Post-Colonial Aura: Third World Criticism in the Age of Global Capitalism*, 20 CRITICAL INQUIRY 328 (1994).

¹⁰² For example: I worked closely in Kenya with the Kenya National Human Rights Commission while it was investigating post-election violence and helped write its report that in turn became one of the primary sources of information for the indictment of six Kenyans in the international criminal court. Obiora Okafor makes frequent trips to Nigeria to work with and research various social movements in the labour and human rights fields.

several years ago, it is sometimes appropriate to think of the third world less in geographical terms, and more in terms of TWAIL's agenda of advocacy of oppositional practices that challenges power hierarchies and how they work.¹⁰³

Balakrishna Rajagopal does the same with reference to all sorts of social movements around the world. Antony Anghie has good connections with various groups in Sri Lanka.

¹⁰³ Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, THIRD WORLD LEGAL STUD. 1, 2 (1998-1999).

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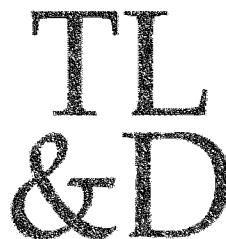
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