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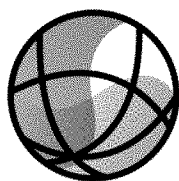
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## THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

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### Africa and the Radical Origins of the Right to Development

James Thuo Gathii\*

#### Abstract

*This article builds on my earlier scholarship on African approaches to international law through examining the evolution of the right to development. Previously, I identified two approaches to international law in Africa – a contributionist (or weak) approach and a critical (or strong) approach. Through analysis of the right to development in the work of two eminent Senegalist jurists, Doudou Thiam and Keba Mbaye, I show that while Thiam adopts a radical stance that falls within the realm of critical approaches, Mbaye charts a third way: One that shares aspects of both approaches but has distinct characteristics of its own. These distinct elements show diverse and nuanced African perspectives, many of which are neither narrowly universalist in a Eurocentric sense nor parochially ethnocentric because they take too seriously Africanity. Acknowledging disparate and often competing strands of Third Worldism is important in a moment of declining United States unipolarity. This decline opens an entry point for assessing third world visions of regional and global order from the past and their continued vitality and relevance today.*

#### Key Words

African approaches to international law; Thiam; Mbaye; right to development; universality; TWAIL; critical approaches.

#### 1 Introduction

In my prior work, I have argued that there are two major approaches to international law in Africa: a contributionist (or weak) approach, and a critical (or strong) approach.<sup>1</sup> Below, I explain what I mean by these two terms, contributionist and critical. This article updates that earlier work through examining the origins of the right to development. In so doing, it identifies two approaches to thinking about the right to development: A radical tradition represented in the scholarship of Doudou Thiam,

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\* Wing-Tat Lee Chair of International Law, Loyola University Chicago School of Law. An earlier draft was presented at the *Keba Mbaye Conference on African Approaches to International Law with a Focus on International Human Rights Law*, Center for Human Rights, University of Pretoria, 5-6 December 2018.

<sup>1</sup> James Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184; James Gathii, 'Reviews: Mapping New Boundaries in African International Law' (2011) 2:3 *Transnational Legal Theory* 429; James Gathii, Obiora Okafor & Antony Anghie, 'Africa and TWAIL' (2010) 18:1 *African Yearbook of International Law* 9; James Gathii, 'Africa' in Bardo Fassbender et al (eds.), *The Oxford Handbook of the History of International Law* (OUP, 2012).

which aligns well with the critical tradition of African international legal scholarship; and another one that complicates these two approaches to African international legal scholarship. Keba Mbaye represents this third approach to international law in Africa. With the onset of a *Draft Convention on the Right to Development*,<sup>2</sup> it is particularly useful to revisit the insights of two eminent Senegalese scholars influential in the right's formation and early evolution.

Under the radical vision, the right to development was conceptualized as a right of formerly colonial countries to recover the losses suffered from the depredations of colonial conquest and plunder. This radical vision of the right to development has since been submerged in the mainstream retelling of the origins and history of the right to development. This article identifies a different approach in the work of Keba Mbaye on the right to development. Like the radical approach, Mbaye links the underpinnings of Africa's underdevelopment to the history of colonial rule. However, unlike the critical traditions that the radical vision of the right to development is associated with, Mbaye embraces the universality of international law – although he does so in a way that recognizes the particular agency of African peoples.

Contributionism is strongly allied to a belief that international law is the product of many civilizational contributions.<sup>3</sup> Similarly, Mbaye invoked a broad range of inspirations, including African and European sources, to justify the recognition of development as a right. In his 1972 lecture at the International Institute of Human Rights in France, he argued that every 'man has a right to live and right to live better'.<sup>4</sup> For him, it was not necessary to establish whether the right is solely an individual or collective right.<sup>5</sup> Unlike the critical tradition where the right to development is claimed by formerly colonized states, in Mbaye's view the right was claimable by individuals. However, the state plays the role of legal trustee and can also claim the right to development on behalf of its people.<sup>6</sup> Mbaye's approach is distinguishable from Doudou Thiam, a Senegalese international lawyer who I introduce more fully below, in the very different ways they invoked and used the right to development. Unlike Mbaye, Thiam's was a more radical approach, consistent with the critical tradition of African international law scholarship. In the critical tradition, the marginalization of third world states and peoples cannot be fully understood apart from the global

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<sup>2</sup> UN Doc. A/HRC/WG.2/21/2/Add.1, 20 January 2020.

<sup>3</sup> Surya Prakash Sinha, *Legal Polycentricity and International Law* (Carolina, 1996); Yasuaki Onuma, *A Transcivilizational Perspective on International Law* (Brill, 2010).

<sup>4</sup> Keba Mbaye, 'Le droit du developpement comme un droit de l'homme' (1972) 5 *Revue des droits de l'homme* 503.

<sup>5</sup> *Ibid*, 508.

<sup>6</sup> Keba Mbaye, 'Introduction: Human Rights and the Rights of Peoples' in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff, 1991).

structures that condition national dynamics.<sup>7</sup> Further, global systems including those of international human rights cannot fully be understood outside of the national contexts that shape their content.

This article traces these two traditions on the right to development through the thinking of two leading Senegalese international jurists – Keba Mbaye and Doudou Thiam. Keba Mbaye lived from 1924 to 1997 and Doudou Thiam from 1926 to 1999. They began their studies in Senegal and pursued further education in France, both becoming international lawyers with global repute. Thiam studied in Senegal before obtaining a political science and law degree at the University of Poitiers in France. From 1959 to 1960, he served as Minister of Finance, Economic Affairs and Planning in Mali. After that, from 1960 to 1968 he served as the first Foreign Minister of independent Senegal under the presidency of Leopold Sedar Senghor. Later, he became a member of the International Law Commission (ILC) between 1970 and 1999. He served as Special Rapporteur on the *Draft Code of Crimes Against the Peace and Security of Mankind* from 1982 to 1995.<sup>8</sup> This *Draft Code* is regarded as a forerunner to the establishment of the International Criminal Court.<sup>9</sup> He held several ILC offices including Chairman in 1981.

Keba Mbaye for his part had a distinguished career as a judge and scholar.<sup>10</sup> He served as Vice-President of the International Court of Justice from 1983 to 1991 and, before that, as Chief Justice of the Supreme Court of Senegal as well as President of the International Commission of Jurists from 1977 to 1985. He also served as President of the Court of Arbitration for Sport, the highest Olympic tribunal whose founding statutes he drafted.<sup>11</sup> Mbaye was a member of the International Olympic Committee and was in charge of the Committee that ended the Olympic boycott of South Africa after the end of apartheid.<sup>12</sup> He also helped establish the Organization for the Harmonization of Business Law in Africa (OHADA), whose primary goals are

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<sup>7</sup> James Gathii, 'The Agenda of Third World Approaches to International Law' in Jeffrey Dunoff & Mark Pollack (eds.), *International Legal Theory: Foundations and Frontiers* (CUP, forthcoming 2020).

<sup>8</sup> Tribute to the memory of Doudou Thiam in the *Yearbook of the International Law Commission Volume 1, Summary of Records of the Meetings of the Fifty-First Session 3 May to 23 July 1999*, 224-225 [https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1999\\_v1.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1999_v1.pdf) (accessed 13 August 2020).

<sup>9</sup> Ibid, 224 para 7. Mr. Lukashuk notes that 'Doudou Thiam left behind many models; the history books would not fail to record that it was he who prepared the Rome Statute of the International Criminal Court.' For his work and influence on the definition of genocide, see William A. Schabas, *Genocide in International Law: The Crime of Crimes* (CUP, 2009) 94, 95, 97, 102, 137, 146.

<sup>10</sup> French Society for International Law, *Keba Mbaye: 1924-2007* <http://www.sfdi.org/internationalistes/mbaye-keba/> (accessed 13 August 2020).

<sup>11</sup> Court of Arbitration for Sport, *History of the CAS* <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (accessed 13 August 2020).

<sup>12</sup> 'Keba Mbaye, 82, Olympics Official, Is Dead', *New York Times* (January 2007) <https://www.nytimes.com/2007/01/13/sports/othersports/13mbaye.html> (accessed 13 August 2020).

to promote economic integration in French-speaking African states and to attract foreign investment.<sup>13</sup> As Chair of the United Nations Human Rights Commission at the same time that he was President of the International Commission of Jurists, in 1977 Mbaye oversaw the passage of *Resolution 4 (XXXIII) on the Right to Development* and called upon the Secretary General of the United Nations to issue a report about it.<sup>14</sup> The United Nations eventually passed a resolution recognizing the right to development in 1987.<sup>15</sup> Mbaye also called upon and persuaded African governments to craft an *African Charter on Human and Peoples' Rights*,<sup>16</sup> chairing the group of experts that drafted it. In 1993, he urged politicians to respect elections results and resigned as the President of the Senegalese Constitutional Court after he came under pressure to certify Presidential election results.<sup>17</sup>

Since both Mbaye and Thiam wrote about international law and practiced it in the post-independence moment, they are an apt pair to compare. Both believed in the ability of international law to change the circumstances of those they cared about. Mbaye certainly did with his commitment to the right to development. Although Thiam believed in the right to development as well, for him it was a right that belonged to formerly colonized countries to correct the inequities wrought by colonialism. In revisiting this debate, it becomes possible to see which of these competing visions of the right to development has prevailed and why. In so doing, this article reexamines and chronicles a part of the rich legacy of ideas on the right to development that were advanced by postcolonial leaders after decolonization and how they shaped the way we understand international law today. It adds to small but growing literature that focuses on the role of intellectuals from the global south often invisible in mainstream international law scholarship.<sup>18</sup>

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<sup>13</sup> Keba Mbaye, 'La contribution de l'OHADA à l'arbitrage commercial international' in Briner L. Robert, Fortier Yves, Berger Klaus Peter, and Bredow Jens (eds.), *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* (Carl Heymanns, 2001); Keba Mbaye, 'L'histoire et les objectifs de l'OHADA' (2004) 205 *Les petites affiches* 4, at 5; Martin Kirsch, 'Historique de l'OHADA' (1998) 827 *Revue pénale* 129, at 129; Barry Walsh, *In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa* (World Bank, 2010) 44.

<sup>14</sup> Claude E. Welch Jr., *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Penn Press, 1995) 68.

<sup>15</sup> The United Nations General Assembly recognized the right to development in UNGA Res. 41/128, 4 December 1986. On 20 January 2002, the UN Working Group on the Right to Development released a *Draft Convention on the Right to Development*. It relies heavily on the *1986 Declaration* and the nine core human rights treaties. It is not clear whether this *Draft Convention* will help alleviate the differences that exist between the global south and north on the right to development. See Nico Schrijver, 'A New Convention on the Human Right to Development: Putting the Cart before the Horse?' (2020) 38:2 *Netherlands Quarterly of Human Rights* 84.

<sup>16</sup> Howard B. Tolley Jr., *The International Commission of Jurists: Global Advocates for Human Rights* (Penn Press, 1994) 145-148, 178-183.

<sup>17</sup> Welch (1995) 31.

<sup>18</sup> Cynthia Farid, 'Legal Scholactivists in the Third World: Between Ambition, Altruism and Access' (2016) 33 *Windsor Yearbook of Access Justice* 57 (examining the work of Kamal Hossain); Usha Natarajan, 'A TWAIL Reading of the Arab Spring: Reflections on Sovereignty over Natural Resources', *Inaugural RP Anand International Law Essay*

In the first section, I revisit and update my prior contention that there are two approaches to international law in Africa, describing the contributionist and critical traditions. In the second section, I uncover the radical origins of the right to development through the work of Thiam, which lies within the critical tradition.<sup>19</sup> This is followed by an examination of Mbaye's approach to the right to development, which both converges and diverges from contributionist and critical traditions in significant ways and constitutes a distinct approach in itself. Overall, this essay elucidates the varied, complex and contesting African contributions to and aspirations for international law.

## 2 Approaches to International Law in Africa

Writing in 1963, Hans W. Baade concluded that there is 'at the present no typically African school of thought in public international law, as contrasted with, say, Latin American doctrine'.<sup>20</sup> He further astoundingly concluded that there was little danger to traditional western values lurking in a 'specific "African" conception of law, national or international'.<sup>21</sup> According to this condescending and Eurocentric view, Africa had yet to develop its own concept of international law. The assumption made was that unless Africa had laws resembling those created in Europe and North America, it still lived in the dark ages. Konrad Ginther long warned about this 'European ghetto' of international law that he argued had to be lifted to enable multicultural learning and, more crucially for purposes of this article, to redefine the foundations of international law to be suitable for decolonization and development.<sup>22</sup>

As alluded to above, in my prior work I argued that there are two major approaches to international law in Africa: a contributionist (or weak) approach and a critical (or strong) approach.<sup>23</sup> Thus, unlike Baade and like Ginther, I have no doubt

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(2011) <http://www.publicinternationallaw.in/node/116> (reflecting on the scholarship of R.P. Anand); Adil Hasan Khan, 'International Lawyers in the Aftermath of Disasters: Inheriting from Radhabinod Pal and Upendra Baxi' (2016) 37:11 *Third World Quarterly* 2061; James Gathii, 'A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias' (2008) 21 *Leiden Journal of International Law* 317.

<sup>19</sup> This essay does not focus on the positivism and formalism that have characterized debates about the status, content and legal nature of the right to development. Instead, it follows in the tradition of Mohammed Bedjaoui's *Towards a New International Economic Order* (Holmes & Meier, 1979), which is a powerful critique of formalism in international law and a commitment to more a fair and just international economic order. See also Margot E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62:1 *International and Comparative Law Quarterly* 31, at 46–47; Margot E. Salomon, 'Winners and Others: Accounting for International Law's Favourites' in Conor Gearty and Costas Douzinas (eds.) *The Cambridge Companion to Human Rights Law* (CUP, 2012) 271, at 284–285.

<sup>20</sup> Hans Baade, 'Foreword' in Hans Baade (ed.), *African Law: New Law for New Nations* (Oceana, 1963).

<sup>21</sup> *Ibid.*, 8.

<sup>22</sup> Konrad Ginther, 'Re-Defining International Law from the Point of View of Decolonisation and Development and African Regionalism' (1982) 26:1 *Journal of African Law* 49, at 66.

<sup>23</sup> Gathii (1998); Gathii (2011); Gathii, Okafor & Anghie (2010); Gathii (2012).

that there are indeed African approaches to international law. For the purposes of this paper, I outline two of these approaches. I fully acknowledge these two approaches are ideal types, and in some of my later work I accept the limits of periodization inherent in such an endeavor.<sup>24</sup> Further, as Christopher Gevers argues, there is need for a more granular and contextual approach to thinking about the apparent divergences between these two approaches.<sup>25</sup> While Gevers' approach reads African international legal scholarship through the lens of African literature and its own engagement with decolonization, my approach compares engagement of African international legal scholarship with colonialism and anticolonialism on the one hand, and its engagement with 'western' views on decolonization on the other. Without going into too much detail, this part of the paper outlines contributionist and critical approaches as a backdrop to the subsequent discussion on radical visions of the right to development.

### *The Contributionist Approach*

Contributionism is the most longstanding and enduring tradition of African international law. Contributionists argue that international legal history should be corrected to reflect that Africa was, and continues to be, a central player in the making of international law. For contributionists, international law is the product of numerous civilizations rather than the sole product of Europe. From this perspective, Africa is 'an innovator and generator' of norms of international law. For example, Taslim Olawale Elias's 1972 monograph, *Africa and the Development of International Law*, looked to the distant past; and *Mapping New Boundaries in African International Law* in 2008 edited by Jeremy Levitt examines Africa's international law contributions in the post-independence era.

Contributionists emphasize the role of Africa in creating new norms of international law, a possibility facilitated by decolonization. Decolonization propelled African states and peoples from the indignity of colonial, racist and alien rule to full and equal participation in the international legal system. For contributionists, decolonization celebrates Africa's arrival into modern international law, which Africa has helped craft.

Furthermore, Elias pointed out that prior to European conquest Africa had always been a participant in the international community. He rejected colonization as

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<sup>24</sup> Gathii (2020). See also footnote 40 on George Galindo's plea to avoid periodization.

<sup>25</sup> Christopher Gevers, 'Literal 'Decolonisation': Re-reading African International Legal Scholarship through the African Novel' in Jochen von Bernstorff & Phillip Dann (eds.), *The Battle for International Law: South and North Perspectives on the Decolonization Era* (OUP, 2019).

signifying the move from a people without history towards global incorporation, or as a transitory epoch from fragmented alienation towards collective international solidarity. According to Elias:

[i]f we are to grasp something of the significance of Africa in current international affairs, we must begin with a brief account of the role which different parts of the so-called dark continent played since recorded history in their internal as well as their external relations.<sup>26</sup>

For Elias, colonialism interrupted the way African states such as Carthage interacted with European states in the precolonial period. Having discussed precolonial African-European trade and diplomatic links, Elias portrays colonialism as an abrupt interruption to Euro-African contact. This interruption of African sovereignty had consequences since:

only sovereign states were at any time the subject of customary international law. The drama of international legal relations was being played out, so far as Africa is concerned, by European governments among themselves with regard to economic, technical and cultural matters. Customary law was developing in many respects as a result of the continuous changes taking place in the continent, but the African dependencies were mere spectators in the game. African dependencies' contribution, if any, lay in the fact that they were suppliers of the raw material for evolving rules and practices of international relations during the heyday of colonial rule.<sup>27</sup>

Africa's sovereignty in abeyance during colonial rule was restored upon independence, while membership in United Nations guaranteed their equality with other states. Hence, Elias was optimistic and confident about the 'equal participation' of African states, writing:

[i]ndependence has led to membership of the United Nations and its organs and the consequent widening of the international horizon of all member nations, resulting in the establishment of new institutions and processes and in the enlargement of participation in the making and development of contemporary international law. *No longer is the law of the world court to be confined within the sometimes narrow limits set for it by the older few; modern international law must be based on a wider consensus, in the sense that it must be a reflection of the principal legal systems and cultures of the world ...* The contribution which the third world in general, and Africa in particular, is making to contemporary international law will in time increase both in quantity and quality especially within the framework of the United Nations.<sup>28</sup>

Elias emphasized that the equal participation and contribution of newly independent states to the international community was the most significant achievement of

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<sup>26</sup> T.O. Elias, *Africa and the Development of International Law* (Sijthoff Leiden, 1972) 3.

<sup>27</sup> *Ibid*, 21.

<sup>28</sup> *Ibid*, 33 (*emphasis added*).



formerly colonized countries. As Elias argued in his 1989 text, *The United Nations Charter and the World Court*, 'universality rather than limited application ... must now be the catchword in the expanding frontiers of international law under the United Nations Charter.'<sup>29</sup> Elias emphasized the 'equal dignity and worth' of all United Nations members and the need not only to abolish inequalities among them but for both new and old states to cooperate with goodwill to achieve United Nations goals.<sup>30</sup> In Elias, we see a commitment to sovereignty and human dignity informed by the *United Nations Charter*, a commitment that he called modern international law.

Unlike African critical theorists of his time, Elias' contributionist project did not explore how ostensible sovereign equality in the United Nations era could disguise unequal North-South relationships. Similarly, Nasila S. Rembe placed hope in the sovereign equality of states notwithstanding their differences in economic, military and other capabilities.<sup>31</sup> Elias went further though, seeking to displace the Eurocentric notion that Africa was a primitive backwater. He sought to displace the view embodied in international law that Africans were neither Christian nor civilized and as such were not entitled to enjoy sovereignty over their land or their people. He showed similarities between African and European societies including the concept of sovereignty. The argumentative strategy employed by Elias and other contributionist scholars was aimed at establishing accommodation for African cultural heritage as a part of international civilization that contributes to international law.

In establishing these similarities, contributionist scholars failed to examine some of the ways in which international law justified exploitation through claims of European superiority based on racial, cultural and indigenous difference in the colonial era. Elias fell short of unearthing the various ways in which the colonial apparatuses of international law were carried forward in the United Nations era.<sup>32</sup> Makau Mutua argues that such an approach 'sought inclusion [of African states] without being critical

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<sup>29</sup> T.O. Elias, *The United Nations Charter and the World Court* (Nigerian Institute of Advanced Legal Studies, 1989) 2.

<sup>30</sup> *Ibid.*, 8.

<sup>31</sup> Nasila S. Rembe, *Africa and the International Law of the Sea: A Study in the Contribution of African States to the Third United Nations Conference on the Law of the Sea* (Springer, 1980) 7. Rembe opines 'that although state sovereignty presupposes legal equality, states may be greatly unequal in size, population, economic and military capabilities ... [yet] despite the influence of other factors in inter-state relations, the concept of sovereign equality of states remains an important aspect in the conduct of state relations.' Rembe places hope in the fact that, though African states lack real power, 'their numerical strength has increased their voting power'. Similarly, the economic inequality between newly independent and old states was not lost on mainstream scholars of international law who were in many respects much like Elias. For example, Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law Cases and Materials Third Edition* (West Group, 1993), argue that the 'growing gap between the economically developed and the economically less developed countries' was a major development of the post-Second World War period that 'signaled a new departure in the evolution of international law.'

<sup>32</sup> For an excellent exploration of the legacies of colonialism, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005).

of the normative edifice of international law.<sup>33</sup> Contributionists may in this sense validate a kind of Africanity that does not seriously engage with the colonial origins of international law. However, this is precisely what Elias was trying to displace. His revisionist legal historiography aimed to disallow any reading of international law as exclusively European or colonial. He defended the unity and coherence of international law as a truly universal discipline. Elias was a very different scholar from someone such as Mohammed Bedjaoui who saw modern international law as the continuation of, rather than the overcoming of, a colonial tradition. Elias looks back and tells us that if you want to understand nineteenth century international law, do not just look to what European states were doing, or take the writings of European jurists such as Wheaton or Lorrimer to be definitive. Look to Africa as well.<sup>34</sup>

### *The Critical Approach*

Unlike contributionists, critical theorists such as Mohammed Bedjaoui and U.O. Umozurike centered their analysis on the structural and economic underpinnings of African states in the world.<sup>35</sup> While contributionists identified the exclusion of Africa from international law, African critical scholars in the post-Second World War era focused on power and wealth imbalances between African countries and the rest of the world, seeing such imbalances as reasons to be skeptical of international law. Critical scholars examined the continuity of colonialism and imperialism in contemporary international law, critiquing the postcolonial state as well as international political economy.

For the critical tradition, self-determination through political independence brought about a new period of subjugation through a postcolonial statehood modeled along European lines.<sup>36</sup> Unlike contributionists, critical theorists saw self-determination not as a moment to return Africa to a past of reciprocal equal exchanges with Europe and the rest of the world, but rather as a moment of betrayal. In the critical tradition, analysis of early African contact with Europe placed emphasis on issues such as the slave trade and colonial rule, while the contributionist tradition emphasized commerce and diplomatic relations. For the critical tradition, customary international law was regarded not as originating in the course of commercial and

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<sup>33</sup> Makau Mutua, 'Typologies of Scholarship on Africa' (2013) 107 *Proceedings of the Annual Meeting of the American Society of International Law* 189.

<sup>34</sup> The foregoing paragraphs are based on Gathii (2012).

<sup>35</sup> U.O. Umozurike, *International Law and Colonialism in Africa* (Nwamife, 1979).

<sup>36</sup> Obiora Chinedu Okafor, *Re-defining Legitimate Statehood: International Law and State Fragmentation in Africa*. (Martin Nijhoff, 2000); Makau Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 *Michigan Journal of International Law* 1113.

diplomatic links between Africa and Europe, but rather arising as a consequence of industrial capitalism in the west and the territorial and commercial ambitions of western powers.<sup>37</sup> For the critical tradition, international law was regarded as a handmaiden of the expanding economic interests of colonizing countries.

Thus, critical theorists focus on the manner in which modern international law continues the legacy of colonial disempowerment, while at times providing some space for resistance and reform. For African critical theorists, a central question is how to 'defang international law of its imperialist and exploitative biases against the global south' in general and Africa in particular.<sup>38</sup> For some, such as Justice Joel Ngugi of the High Court of Kenya, international law cannot be reformed from within its own assumptions.<sup>39</sup> For such scholars, the fact that international law is based upon western epistemological assumptions as the yardstick against which non-western peoples and legal forms are to be evaluated, requires debunking those starting assumptions to the extent that they are based on the presumed superiority of the west.<sup>40</sup> For such scholars, the legitimization of the third world state by postcolonial elites was not the end of decolonization but the problematic reproduction and universalization of the western state.<sup>41</sup>

The subsequent section continues to consider the critical tradition in African international law, making the case that one can trace the radical origins of the right to development to African jurists such as Doudou Thiam in the post-Second World War period. Following from this, the contributions of Keba Mbaye are examined as evidencing a third strain of African international law scholarship that is neither wholly contributionist nor wholly critical. By examining the case made by African jurists for

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<sup>37</sup> B.S. Chimni, 'Customary International Law: A Third World Perspective' (2018) 112:1 *American Journal of International Law* 1.

<sup>38</sup> Makau Mutua, 'Review' (2010) 104:3 *The American Journal of International Law* 532.

<sup>39</sup> Joel Ngugi, 'Making New Wine in Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization' (2002) 8 *UC Davis Journal of International Law and Policy* 73.

<sup>40</sup> In this respect, TWAIL scholars share much in common with decolonial scholars such as Walter D. Mignolo, 'The Enduring Enchantment (or the epistemic privilege of modernity and where to go from here)' (2002) 101:4 *South Atlantic Quarterly* 927, at 936. For a similar view, see Diane Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5:3 *Social & Legal Studies* 337. Notably, there is debate about whether to split TWAIL into different traditions dominant in certain periods, as I have in this essay by arguing there is a contributionist and critical approach in African international law scholarship. For example, George Galindo, 'Splitting TWAIL?' (2016) 33 *Windsor Yearbook of Access to Justice* 40, argues that such periodization 'invariably affects any theory, methodology or historical narrative supported by TWAIL scholars since the fixing of periods produces bias and reductions and can obliterate possibilities for the emergence of different perspectives'. Ignacio De La Rasilla, 'The Problem of Periodization in the History of International Law' (2019) 37:1 *Law and History Review* 275, explains that periodization is 'a task that involves making decisions of exclusion and inclusion regarding scale, time, space, and the planning of the use of archival, bibliographical, and other relevant historical sources'. See also James Gathii, 'The Promise of International Law: A Third World View', *Grotius Lecture*, American Society of International Law Virtual Meeting (2020) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3635509](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509).

<sup>41</sup> Mutua (1995).

a right to development in the late 1960s, it becomes clear that the critical tradition of international law in Africa predates the rise of dependency theories of the early 1960s, and that Africa played a central part in anticolonial resistance within international law in the middle of the twentieth century.<sup>42</sup>

### 3 The Radical Vision of the Right to Development

#### *Contextualizing the Radical Vision of the Right to Development*

In the late 1960s, then Senegalese Foreign Minister, Doudou Thiam, in a 1967 speech to the Group of 77 argued that 'Africa demands a new international law' to replace colonial international law (*pacte du conquete*). That new international law would have a right to development for the third world: '*nous devons proclamer ... pour les nations du Tiers-Monde le droit au developpement*.'<sup>43</sup> Under this vision, the right to development belonged to the third world, the former colonies. He conceptualized it as a collective right to correct the wrongs wrought by colonial rule. The role of international law then, through this demand of a right to development, included a rejection of the old international law that Mohammed Bedjaoui argued undergirded colonial subjugation.<sup>44</sup> According to Bedjaoui, '[t]he new legal order must make provision within itself for the development of all nations in the world and must provide for international economic cooperation raised to the dignity of a legal institution acknowledged to be fundamental.'<sup>45</sup> From the outset, this radical vision of the right to development, which was a clarion call of the New International Economic Order (NIEO) and the *Charter of the Rights and Duties of States*, was ridiculed by first world states and scholars.<sup>46</sup> First world states argued that these radical demands constituted an unjustifiable effort to

<sup>42</sup> Gevers (2018). This view differs from that which traces critical international legal scholarship from Africa to the dependency movement and the rise of a radical political economy critique based at the University of Dar-es-Salaam.

<sup>43</sup> Doudou Thiam, 'L'Afrique demande un droit international d'un nouveau' (1968) 1:1 *Verfassung und Recht in Uebersee* 52; Philip Alston, 'The Right to Development at the International Level' in Rene-Jean Dupuy (ed.), *The Right to Development at the International Level* (Kluwer, 1990). Notably, Alston notes that Ecuador in the 1940s had drafted a version of the *Declaration of Rights and Duties of States* that included a reference to states having a right to peaceful and secure development.

<sup>44</sup> Bedjaoui (1979).

<sup>45</sup> Ibid, 114.

<sup>46</sup> Antony Anghie, 'Legal Aspects of the New International Economic Order' (2015) 6:1 *Humanity* 145, at 145-146, argues that the NIEO was viewed with some hostility by developed countries. The responses were varied. Irving Kristol accused the Third World of 'maumaung' the West, which was its actual or potential benefactor. Henry Kissinger began a concerted campaign to organize the rich against the poor. More moderately, Willy Brandt headed a Commission that eventually published the report that would bear his name, which attempted to demonstrate how all countries, rich and poor alike, could benefit from international reform. See Danie J. Sargent, 'North/South: The United States Responds to the New International Economic Order' (2015) 6:1 *Humanity* 201.

extend the concept of sovereignty to economic relations.<sup>47</sup> By their account, economic relations were best left to market forces free from government intervention. First world scholars argued that academic voices like those of Bedjaoui who supported this radical vision were shrill, inept and polemical.<sup>48</sup>

For those who advocated for the right to development from a radical perspective, colonialism and its legacies are a central feature to the making not only of postcolonial Africa, but of the modern international order.<sup>49</sup> Indeed, the political leaders who supported a right to development from the mid-twentieth century, particularly in the debates surrounding the New International Economic Order and the *Charter for the Economic Rights and Duties of States*, focused on colonial-capitalist modernity and its violent processes of domination and exploitation. For Mohammed Bedjaoui, this meant that:

the right to development is nothing other than the right to an equitable share in the economic and social well-being of the world. It reflects an essential demand of our time since four-fifths of the world population no longer accept that the remaining fifth should continue to build its wealth on their poverty.<sup>50</sup>

Bedjaoui went on to argue that the right to development flows from the right of self-determination – in fact, that the right to development was inherent, built into, and forming an inseparable part of the right to self-determination.<sup>51</sup> Bedjaoui had advocated for Algerian self-determination in earlier writings and the right to development according to Bedjaoui was ‘much more of a right of the State or of the people, than a right of the individual.’<sup>52</sup> Bedjaoui’s account of international law was that it had ‘made use of a series of justifications and excuses to create legitimacy for the subjugation and pillaging of the Third World, which was pronounced

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<sup>47</sup> Norbert Horn, ‘Normative Considerations of a New International Economic Order’ (1982) 16 *Journal of World Trade Law* 338, at 343. For an alternative view, see B.S. Chimni, ‘The Principle of Permanent Sovereignty Over Natural Resources: Toward a Radical Interpretation’ (1998) 38 *Indian Journal of International Law* 208, at 208, 214, arguing in favor of examining material as opposed to statist interpretations of international law.

<sup>48</sup> Marc Williams, ‘Book Review (of *The Objectives of the New International Economic Order* by Ervin Laszlo; *A New International Economic Order: Toward a Fair Redistribution of the World’s Resources* by Jyoti Shankar Singh; *Issues and Prospects for the New International Economic Order* by William G. Tyler; *Towards a New International Economic Order* by Mohammed Bedjaoui)’ (1980) 2:4 *Third World Quarterly* 782.

<sup>49</sup> For the analogous claim made in the international relations field, see Branwen Gruffydd Jones, ‘African Anti-Colonialism in International Relations: Against the Time of Forgetting’ in M. Iñiguez de Heredia, Z. Wai (eds.), *Recentering Africa in International Relations* (Palgrave, 2018).

<sup>50</sup> Mohammed Bedjaoui, ‘The Right to Development’ in Bedjaoui (1991).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* Bedjaoui elaborates further noting that ‘the most important and comprehensive [aspect of the right to development] is the right of each people freely to choose its economic and social system without outside interference or constraint of any kind, and to determine, with equal freedom, its own model of development.’

uncivilized'.<sup>53</sup> Suffice to say, critics of this approach, such as Jack Donnelly, argued that conceptualizing development as a right was a fallacy since there was no right to be developed.<sup>54</sup>

Notwithstanding these criticisms of a radical right to development until well into the 1970s, the then-Organization of African Unity (OAU) did not shy away from mentioning colonialism in its blueprints for development. For example, in the preamble of the 1973 *Addis Ababa Declaration*, also referred to as the *African Declaration on Cooperation, Development and International Independence*, the OAU noted:

Believing that neither language differences nor differences of economic size or structure constitute insurmountable obstacles to economic co-operation and regional integration, and that all barriers to intra-African co-operation, *especially those which are remnants of colonialism or by-products of the vertical relations of dominance exercised over Africa by the developed countries, can be eradicated.*<sup>55</sup>

This Declaration also expressed hope for the 'establishment of a more equitable international order in the economic, commercial and monetary fields'.<sup>56</sup> This radical approach was also embodied in the *Lagos Plan of Action for the Implementation of the 1980 Monrovia Strategy for the Economic Development of Africa* that emphasized self-reliance and self-sustaining development.<sup>57</sup> This vision rejected neoclassical development that dictated to African governments through international financial institutions how they had to reform their economies. Doudou Thiam argued that the agenda of developing countries was to 'lay the foundations for a new world society' and this required bringing about a revolution whose agenda he argued would require these countries to:

tear down all the practices, institutions and rules on which international economic relations are based, in so far as these practices, institutions and rules sanction injustice and exploitation and maintain the unjustified domination of a minority over the majority of men ... The right of peoples to self-determination, the sovereign equality of peoples, international solidarity – all these will remain empty words, and, forgive me for saying so, hypocritical words, until relations between nations are viewed in the

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<sup>53</sup> Ibid, 49. Bedjaoui further argued that classic international law 'recognized and enforced a "right of domination" for the benefit of the "civilized nations". This was a colonial and imperial right, institutionalized at the Berlin Conference on the Congo'.

<sup>54</sup> Jack Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 *California Western International Law Journal* 473.

<sup>55</sup> *African Declaration on Cooperation, Development and International Independence* (28 May 1973) [https://archives.au.int/bitstream/handle/123456789/5947/African%20Declaration%20on%20Cooperation%20Development%20and%20Economic%20Independence\\_E.pdf?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/5947/African%20Declaration%20on%20Cooperation%20Development%20and%20Economic%20Independence_E.pdf?sequence=1&isAllowed=y) (accessed 14 August 2020).

<sup>56</sup> Ibid.

<sup>57</sup> For an overview, see Claude Ake, *Democracy and Development in Africa* (Brookings, 1996).

light of economic and social facts. From this point of view, the facts contradict the principles.<sup>58</sup>

Thiam argued this new world vision was embodied in the *United Nations Charter*. He regarded the 1955 Bandung Conference as providing developing countries an opportunity to:

formulate a new world economic charter. We shall attend, not in order to present a list of complaints, but to demand and claim what is ours, or, more precisely, what is due to man, whatever his nationality, his race or his religion ... [T]his means that the Bandung we are proposing will not be a Bandung of hatred; it will be a Bandung of justice, balance and reason; it will be a Bandung held under the aegis of man.<sup>59</sup>

As Mahmood Mamdani has acknowledged, the first generation of Africa's postcolonial intellectuals primarily examined Africa's political economy to the exclusion of other variables to account for the predicaments of the postcolonial state.<sup>60</sup> Today's critical scholars that embrace Third World Approaches to International Law (TWAIL) are as critical of the missteps of postcolonial states that have exacerbated their own challenges in the postcolonial period as they are of the legacy of colonialism in contemporary international law.<sup>61</sup>

On the best strategy for pursuing an African agenda in the postcolonial era, African countries were as divided as African scholars and practitioners of international law. Within the OAU, there was the radical Casablanca Group that wanted immediate political unity and a supranational continental body. On the other hand, there were the moderate Monrovia and Brazzaville Groups that advocated for a loose confederation of states engaged in intergovernmental cooperation on a gradual timetable.<sup>62</sup>

This divergence on one of the central African problems in the 1960s – continental unity – continues today in many settings on contemporary international legal issues. Kwame Nkrumah, Modibo Keita, Sékou Touré, and Cheikh Anta Diop argued in favor of African continental solidarity and unity in the OAU in the 1960s. For them, continental solidarity and unity were fundamental prerequisites for Africa's

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<sup>58</sup> As quoted in Daniel J. Whelan, "'Under the Aegis of Man': The Right to Development and the Origins of the New International Economic Order' (2015) 6:1 *Humanity* 93. See also *Index to Proceedings of the United Nations General Assembly: Twenty-First Session 1966, Fifth Special Session 1967*, 94 [https://library.un.org/sites/library.un.org/files/itp/a21-special\\_sess-5\\_0\\_1.pdf](https://library.un.org/sites/library.un.org/files/itp/a21-special_sess-5_0_1.pdf) (accessed 13 August 2020).

<sup>59</sup> As quoted in Daniel J. Whelan, "'Under the Aegis of Man': The Right to Development and the Origins of the New International Economic Order' (2015) 6:1 *Humanity* 93, 94.

<sup>60</sup> M. Mamdani, 'Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism' in P.I. Ozo-Eson and U. Ukiwo (eds.), *Ideology and African Development, Proceedings of the Third Memorial Programme in honour of Prof. Claude Ake* (African Centre for Democratic Governance, 2001) 1-2.

<sup>61</sup> These scholars include among others Antony Anghie, B.S Chimni, Michael Fakhri, Karin Mickelson, Makau Mutua, Usha Natarajan, Vasuki Nesiiah, Obiora Okafor, Balakrishnan Rajagopal and Celestine Nyamu.

<sup>62</sup> Zdenek Cervenka, *The Organization of African Unity and its Charter* (Praeger, 1969) 15.

economic transformation, particularly in its economic relations at the global level.<sup>63</sup> The underlying assumption was that if development policies were collectively formulated and implemented by African states, then it was easier to achieve the continent's socioeconomic objectives. For Nkrumah in particular, defeating neocolonialism required continental solidarity, since the former colonial powers and their multinational corporations were continuing to exploit Africa in the postcolonial era.<sup>64</sup> Continental unity was seen as a natural extension of the newly acquired right to self-determination.

We see the continuation of this radical view among a small group of African states that argue that the *African Continental Free Trade Agreement* is exactly the kind of economic bloc that Nkrumah thought was necessary to counteract Africa's marginality in the global economy.<sup>65</sup> That small group of African states is also currently advocating for a united approach to negotiating with the European Union for the possible renewal of the *Cotonou Partnership Agreement*, which is set to expire in December 2020.<sup>66</sup> By contrast, the vast majority of African states have taken the Brazzaville perspective of each country negotiating on its own with the European Union. The Brazzaville or moderate perspective in the immediate post-independence era was articulated by leaders such as Félix Houphouët-Boigny, Jomo Kenyatta, and Léopold Senghor, who supported gradual rather than immediate continental integration and advocated for cooperation rather than confrontation with former colonial powers.

Doudou Thiam wrote in 1963 that the nature of the relationship between Africa and the rest of the world would be determined by whether Africans can unite in what he called macro-nationalism, or remain fragmented in micro-nationalism.

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<sup>63</sup> According to Nkrumah, 'Divided we are weak; united, Africa could become one of the greatest forces for good in the world. I believe strongly and sincerely that with the deep-rooted wisdom and dignity, the innate respect for human lives, the intense humanity that is our heritage, the African race united under one federation, will emerge not as just another world bloc to flaunt its wealth and strength, but as a great power whose greatness is indestructible because it is built not on fear, envy and suspicion, nor won at the expense of others, but founded on hope, trust, friendship and directed to the good of all mankind.' Kwame Nkrumah, *I Speak of Freedom: A Statement of African Ideology* (Heinemann, 1961).

<sup>64</sup> Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (Thomas Nelson, 1966); Kwame Nkrumah, *Africa Must Unite* (Praeger, 1970) and Nkrumah (1961).

<sup>65</sup> African Union Commission Chairperson, Moussa Faki, reflected the views of this group of African states when he said at the signing of the Agreement in March 2018, '[f]or Africa, after decades of independence, marked by persistent under-development and a marginal place in the international system, the terms of the debate are laid down in almost Manichean terms: Unite or Perish, as Kwame Nkrumah said at the Addis Ababa founding Summit'. See African Union, 'AU Member Countries Create History by Massively Signing the AfCFTA Agreement in Kigali' (21 March 2018) <https://au.int/en/pressreleases/20180321/au-member-countries-create-history-massively-signing-afcfta-agreement-kigali> (accessed 29 September 2020).

<sup>66</sup> The *Cotonou Partnership Agreement*, originally set to expire 29 February 2020, is extended to December 2020 while the ACP and EU consider further negotiations. See European Commission, 'Press Release: New Africa-Caribbean-Pacific/EU Partnership: Moving Forward towards a New Partnership Fit for the Future' (February 2020) [https://ec.europa.eu/international-partnerships/news/new-africa-caribbean-pacific-eu-partnership-moving-forward-towards-new-partnership-fit-future\\_en](https://ec.europa.eu/international-partnerships/news/new-africa-caribbean-pacific-eu-partnership-moving-forward-towards-new-partnership-fit-future_en) (accessed 13 August 2020).



Thiam, who at the time was a member of the International Law Commission, believed that African states were more interested in protecting their individual sovereign status than in using collective unity to correct injustice.<sup>67</sup> He also noted that the desire for economic development among African states had made outside assistance a more fundamental influence on foreign policy than socialism.<sup>68</sup> Most significantly, Doudou Thiam, much like many contemporary Third World Approaches to International Law scholars (TWAILers), could see in 1962 that sovereignty would not resolve the economic imbalance between developed and developing worlds. He noted that, in its 20 years, the United Nations had not made a dent on this inequality and that it had failed to meet the goals of its first 'Development Decade'.<sup>69</sup> Although Thiam acknowledged development was in the first place the responsibility of newly-independent countries, he argued that 'meeting those responsibilities must be tied to the fulfillment of duties held by developed countries'.<sup>70</sup> The *1967 Charter of Algiers* of the Group of 77, an important forerunner of the New International Economic Order, summarized the Third World agenda. These were:

declining terms of trade; a drop in the share of exports of the developing world in the global economy, and thus of their purchasing power; growing indebtedness of the Third World; the inability of most countries to take advantage of improvements in technology ... virtual stagnation in food production, which, coupled with population increases ... aggravated the chronic conditions of under-nourishment and malnutrition.<sup>71</sup>

Not much has changed for many formerly colonial countries, especially those in Africa.<sup>72</sup> For Thiam, as for many current day TWAILers, the postcolonial period was a continuation of colonial economic disparities.<sup>73</sup> For Thiam, the *United Nations Charter* and the *Charter of Economic Rights and Duties of States* were a 'call for justice in the basic rules of international economic relations'.<sup>74</sup>

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<sup>67</sup> Doudou Thiam, *The Foreign Policy of African States: Ideological Bases, Present Realities, Future Prospects* (Phoenix House, 1965); Charles Rooks, 'Review: The Foreign Policy of African States by Doudou Thiam' (1967) 61:2 *American Political Science Review* 553.

<sup>68</sup> Thiam (1965).

<sup>69</sup> Whelan (2015). This conclusion was reached by Mahbub ul Haq, a Pakistani development economist. See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap, 2018); *United Nations Index to Proceedings of the General Assembly: Twenty-First Session 1966, Fifth Special Session 1967*, 93 [https://library.un.org/sites/library.un.org/files/itp/a21-special\\_sess-5\\_0\\_1.pdf](https://library.un.org/sites/library.un.org/files/itp/a21-special_sess-5_0_1.pdf) (accessed 12 August 2020).

<sup>70</sup> Moyn (2018).

<sup>71</sup> 1967 Charter of Algiers <https://www.g77.org/doc/algier~1.htm>.

<sup>72</sup> Moyn (2018).

<sup>73</sup> Thiam (1968).

<sup>74</sup> *Ibid.*

The politics of international economic transformation represented in the radical and moderate positions are also evident when it comes to international human rights. Only a small group of African countries have signed a declaration under Article 34(6) of the *African Court Protocol* allowing individuals to bring cases against them in the African Court of Human and Peoples' Rights.<sup>75</sup> The vast majority of African countries are reluctant to allow international courts jurisdiction over issues they consider to be within their exclusive jurisdiction. Africa's engagement with its external partners, as well as within Africa, cannot be defined in singular or unified terms.<sup>76</sup>

The multiple layers and understandings of the right to development today should not be allowed to obscure its more radical visions. The right to development has now been appropriated in a variety of ways that embrace the status quo. Peter Uvin convincingly shows the appropriation of the right to development by international financial institutions, donor countries and agencies when he argues:

There is real danger ... in this kind of rhetorical discourse. Far from constituting the first step towards a fundamental reconceptualisation of the practice of development cooperation, it seems merely to provide a fig leaf for the continuation of the status quo. By postulating that development projects and programmes by definition constitute an implementation of human rights, the important difference between a service-based and a rights-based approach to development is obscured. To have a right to something – say, food – it not just about having enough of that: a slave can be well nourished too.<sup>77</sup>

The reconceptualizing of development as a right became appropriated by donor agencies in cooperation with formerly colonial countries, abandoning the more radical vision of the right to development in at least three ways. First, this approach shifts focus away from external and north-south issues and the constitutive role of colonial rule and its legacies,<sup>78</sup> focusing instead on domestic and internal development issues. Second, this shift represents development relationships between the global north and south as cooperative instead of confrontational.<sup>79</sup> Issa Shivji, who is similarly critical of the shift away from the radical vision of the right to development, argues that this view presupposes that development is 'a gift/charity from above rather than the result

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<sup>75</sup> Art. 34(6) African Court Protocol.

<sup>76</sup> James Gathii, *African Regional Trade Agreements as Legal Regimes* (CUP, 2011) 73.

<sup>77</sup> Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development' (2007) 17 *Development in Practice* 597, at 600.

<sup>78</sup> James Gathii, *Empowering the Weak, Protecting the Powerful: A Critique of Good Governance Proposals*, Unpublished SJD Thesis, Harvard Law School (1999).

<sup>79</sup> Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24:4 *Human Rights Quarterly* 837; Konrad Ginther, 'Participation and Accountability: Two Aspects of the Internal and International Dimension of the Right to Development' (1992) *Third World Legal Studies* 55.

of struggles from below'.<sup>80</sup> Third, this chastened view enables international financial institutions, western donors and investors to identify non-western peoples and states as development failures in need of assistance, which lays the basis for their intervention as experts with specialized knowledge and resources.<sup>81</sup> In other words, the shift away from the more radical vision of the right to development abandons the anti-imperialist politics of diplomats such as Thiam. Shivji says it best: the more radical vision associated with the right to development should be thought of as a 'category of intellectual thought and a guiding post for political struggle' that is at once pan-Africanist and anti-imperialist.<sup>82</sup>

Makau Mutua is even less hopeful about human rights discourse in Africa when he concludes that it comprises of a triad of primitive savages, innocent helpless victims, and saviors from Europe and North America that is reminiscent of the colonial era.<sup>83</sup> The savages, victims and saviors metaphor falls within the historical continuum of the Eurocentric colonial project, casting actors into superior and subordinate positions, and undermining the human rights movement's basic claim of universality and equality.<sup>84</sup> For Mutua, a historical understanding of the struggle for human dignity should locate the impetus of a universal conception of human rights in those societies *subjected* to European tyranny and imperialism.<sup>85</sup> Mutua argues that some of the most important work done for the human rights movement, including the pioneering work of many non-western activists, are not acknowledged by the contemporary human rights movement. Together with norms anchored in non-western cultures and societies, non-western scholarship has either been overlooked or rejected in the current understanding of human rights.<sup>86</sup>

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<sup>80</sup> Issa Shivji, *The Concept of Human Rights in Africa* (Codesria, 1989) 82.

<sup>81</sup> Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, 1995); Anghie (2005).

<sup>82</sup> Issa Shivji, 'Pan-Africanism or Imperialism?' *2<sup>nd</sup> Bill Dudley Memorial Lecture*, Nigerian Political Science Association, Nsuka, Nigeria (July 2005); Issa Shivji, *Pan-Africanism or Pragmatism? Lessons from Tanganyika-Zanzibar Union* (Mkuki na Nyota, 2008).

<sup>83</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania, 2002).

<sup>84</sup> Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42:1 *Harvard International Law Journal* 201, at 201, 207.

<sup>85</sup> *Ibid.*, 205.

<sup>86</sup> *Ibid.* Mutua argues that the most important events preceding the post-1945 United Nations-led human rights movements included the anticolonial struggles in Africa, Asia, and Latin America, and the struggles for women's suffrage and equal rights throughout the world.

*Keba Mbaye and the Right to Development: A Third Approach to International Law in Africa?*

Keba Mbaye's approach to the right to development, though he did not adopt the critical stance of scholars such as Mutua and Shivji, nevertheless rejected several conceptions of universal human rights. First, Mbaye rejected a solely individualist conception of rights, instead embracing the importance of both individual and collective rights.<sup>87</sup> He argued that it was necessary to create 'a socio-political system wherein individual rights are temporarily limited for the benefit of the general interest.'<sup>88</sup> Though he embraced this collective view to a certain extent, he also argued that the indicators to be used to determine the level of development in a society or group ought to refer to the plight of individuals.<sup>89</sup> Mbaye's approach to the right to development unites aspects of the critical and contributionist traditions of international law because it does not pursue a public-private distinction. Unlike contributionists who largely shut out economic issues and their colonial histories, Mbaye does not. He grounds the right to development in political economy as well as morality. Let us begin with his reference to colonialism. He argues:

The colonial adventure of Europeans has led them into contact with foreign peoples to establish with them relations of domination in which the justification has been sought in racial, moral and religious differences; that economic interest has been maintained up to this date.<sup>90</sup>

Mbaye traces how colonies were used as sources for cheap raw materials and labor by colonial powers and how development assistance facilitated the ability of former colonies to be a market for the products of developed economies.<sup>91</sup>

The continuation of colonial economic patterns into the postcolonial era is a major theme of the critical tradition.<sup>92</sup> Mbaye was cognizant of the growing economic gap between underdeveloped and developed countries and the sheer inability of development assistance to close this gap.<sup>93</sup> He raised the issue of growing third world debt and the fact that agricultural productivity was not keeping up with population

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<sup>87</sup> Keba Mbaye, 'Le droit au developpement comme un droit de l'homme' (1972) 5 *Droits de l'homme* 503, at 505.

<sup>88</sup> *Ibid.*, 506-508.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, 518.

<sup>91</sup> *Ibid.*, 515.

<sup>92</sup> Michael Fakhri, *Sugar and the Making of International Law* (CUP, 2014); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP, 2011); James Gathii, 'Neo-Liberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98:6 *Michigan Law Review* 1996.

<sup>93</sup> Mbaye (1972) 533. He notes that 'technical progress will make the planet small, putting at the doors of the rich the groveling multitude of the Third World, more angry than ever, more than ever revolted by an injustice resented more and more as a provocation.'

growth.<sup>94</sup> Further, he exposes how foreign assistance is used by developed economies to reward their third world clients, hitting yet another theme of the critical tradition of international law.<sup>95</sup> He argues that the riches of the developed world and the poverty of the former colonies requires rethinking this inequitable international system.<sup>96</sup> Further, in the critical tradition, Mbaye argues we should pay attention to underdevelopment and that some of the failures of the postcolonial state could be thought of as the effects rather than the cause of underdevelopment.<sup>97</sup>

However, the most significant justification for the right to development according to Mbaye is solidarity with the freedom of others<sup>98</sup> – the freedom of individuals to be free of famine, sickness and ignorance.<sup>99</sup> He argued that the circle of the human family was growing 'from person to the family then to the people, to the small town, to the country ... Today, the dimension is towards the universal'.<sup>100</sup> The challenge of this march according to Mbaye were 'egoisms' at 'the level of regions'.<sup>101</sup> Mbaye argued that the right to development was already inscribed in international law in the *Universal Declaration of Human Rights* as well as in the *United Nations Charter*.<sup>102</sup> For him, the right to development was not only legal but 'necessarily linked with the right to life, to live well and always better, therefore to develop oneself'.<sup>103</sup>

I categorize Mbaye in an intermediate category between contributionists and critical theorists because of how he appealed to notions of a common or shared humanity as well as what he referred to as common values to justify the right to development. He argued that 'international conscience' as well as 'well-being and justice', as part of his broader vision of universal solidarity, justified the right to development.<sup>104</sup> Unlike contributionists, he rejected legal formalism and argued that legal formalism was a narrow philosophical positivism.<sup>105</sup> Thus, he resorted to natural

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<sup>94</sup> Ibid, 533.

<sup>95</sup> Mbaye (1972) 518.

<sup>96</sup> Ibid, 522. He asks rhetorically, 'is there not another way to embark upon the coexistence of nations? Is it not time to have recourse to something else?'

<sup>97</sup> Ibid, 523.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid, 524.

<sup>100</sup> Ibid, 524-525.

<sup>101</sup> Ibid, 526.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid, 528.

<sup>104</sup> Ibid, 525.

<sup>105</sup> Ibid, 526.

law, which in his view embraced universal ethical values and universal civilization as a foundation for the recognition of a right to development.

What sets Mbaye apart from both contributionists and critical theorists is how he resorts to western philosophers such as Heidegger, Nietzsche, Descartes and Kant. Perhaps aware that he was addressing a European audience, he felt the need to connect the universal values he believed in with the universalism embraced by these European philosophers. Mbaye for example argues, '[n]one better than Kant to come to our aid in the search for an ethic of development, because it must be a categorical imperative'.<sup>106</sup> By invoking European philosophers, Mbaye departs from the contributionist tradition that looks inward to African histories, epistemologies and experiences to define an African approach to international law. Mbaye also departs from the critical tradition in so doing because, in the critical tradition, the work of natural law jurists and European philosophers is closely associated with the colonial experience. For these reasons, Mbaye in my view charts an intermediate path between contributionists and critical scholars of international law in Africa.

#### 4 Conclusion

The purpose of this article has been to emphasize that in addition to the two traditions of international law in Africa today – contributionism and critical approaches – there is a third approach in the work of Keba Mbaye. All three approaches embody different views of the right to development. From the perspective of contributionism, Africa bequeathed the right to development to international human rights. The radical approach to the right to development falls within the critical tradition, which examines the international order through a lens of marginalization and domination of the third world and its peoples by international law. Critical scholars are critical of norms of international law that are framed in liberatory goals – sovereign equality, self-determination, human rights, development and equality.<sup>107</sup> Critical scholars in the TWAIL movement reveal how such liberatory goals coexist alongside economic hierarchy and subordination between nations and carry forward within them the legacy of colonial conquest and European imperialism.<sup>108</sup>

The third approach reflected in the scholarship of Mbaye shares some similarities with both contributionists and critical scholars. Mbaye has an optimism in

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<sup>106</sup> Ibid, 523.

<sup>107</sup> Gathii (2020).

<sup>108</sup> Anghie (2005) 11-12 noting that imperialism or neocolonialism 'is a broader and more accurate term with which to describe the practices of powerful Western states in the period following the establishment of the United Nations' and that '[t]his period witness[ed] the end of formal colonialism, but the continuation, consolidation and elaboration of imperialism'; Gathii (2000).

the ability of international law to make a difference for individuals.<sup>109</sup> Like the contributionist approach, Mbaye embraces universality as an important component. Contributionism does so because it embraces the idea that African contributions to international law complete the universality of international law. Mbaye embraces universality, including universal ideas from European philosophers, to ground his justifications for the right to development in natural law. Importantly, while both contributionists and Mbaye embrace the universality and inclusivity of the international legal order, neither endorses a purely European view of universality that centers the European or North American experience as the point from which all comparison occurs.<sup>110</sup>

In the critical tradition, Mutua argues that the *Banjul Charter* is an African cultural fingerprint because it foregrounds collective rights and individual responsibilities, and because it establishes a starting point that is grounded in African realities that recognize the need to embrace universal human rights norms without being assimilated – that is, without having to accept as the starting premise a western notion of rights.<sup>111</sup> Other critical scholars who have engaged the terms of universality along the same lines include Abdullahi an Naim,<sup>112</sup> who uses Islam to legitimize and advance human rights goals, and Celestine Musembi-Nyamu,<sup>113</sup> Sylvia Tamale,<sup>114</sup>

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<sup>109</sup> According to Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40:1 *Harvard International Law Journal* 1, '[t]he optimistic international lawyers of the 1960s, even those notable scholars from developing nations, who were the most trenchant critics of the Eurocentric character of international law, were hopeful that the acquisition of sovereignty by developing nations and participation in international legal forums would result in the creation of a truly universal, just, and equal international system'. Elsewhere, I have argued that third world jurists were very likely to be both critical but also enamored with the potential of international law to make a difference for the future of the third world: Gathii, *Grotius Lecture* (2020).

<sup>110</sup> On Elias, see C.L. Lim, 'Neither Sheep nor Peacocks: T.O. Elias and Postcolonial International Law' (2008) 21 *Leiden Journal of International Law* 295.

<sup>111</sup> Makau w Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339.

<sup>112</sup> Abdullahi an Naim, 'Problems of Universal Cultural Legitimacy of Human Rights' in Abdullahi Ahmed an Naim and Francis Mading Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (Brookings, 1990) 355; Abdullahi an Naim, 'Islamic Law, International Relations, and Human Rights: Challenge and Response' (1987) 20 *Cornell International Law Journal* 317, at 317-318.

<sup>113</sup> Celestine I. Nyamu, 'Achieving Gender Equality in a Plural Legal Context: Custom and Women's Access to and Control of Land in Kenya' (1999) 15 *Third World Legal Studies* 21; Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41:2 *Harvard International Law Journal* 381.

<sup>114</sup> Sylvia Tamale, *Researching and Theorizing Sexualities in Africa in African Sexualities: A Reader* (Pambazuka, 2011) and J. Oloka-Onyango & Sylvia Tamale, "'The Personal Is Political', or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17:4 *Human Rights Quarterly* 691, at 691, 700.

Penelope Andrews,<sup>115</sup> and Justice Yvonne Mokgoro,<sup>116</sup> who provide a framework for thinking about the interaction between customary norms as they relate to women, on the one hand, and formal legal norms such as those embodied in Bills of Rights, on the other, to advance the cause of women's human rights. Proceeding from such nuanced perspectives, that are neither narrowly universalist in a Eurocentric sense, nor parochially ethnocentric because they take too seriously Africanity to the exclusion of ideals such as individual equality, seems to be to be an important insight that diverse African approaches to international law provide.

One of the main insights that emerges from these competing and alternative visions of the third world in postcolonial Africa is to acknowledge the disparate and often competing strands of Third Worldism in a moment of declining United States unipolarity. This decline opens an entry point for assessing third world visions of regional and global order from the past and their continued vitality and relevance today.<sup>117</sup> Jeffrey James Byrne observed in a truism about Algeria's then nascent anticolonial movement what is also appropriate in encapsulating the aspirations of Africa's international law scholarship: it is characterized by simultaneously 'hybrid, oscillating perhaps sometimes even contradictory identities and goals'.<sup>118</sup>

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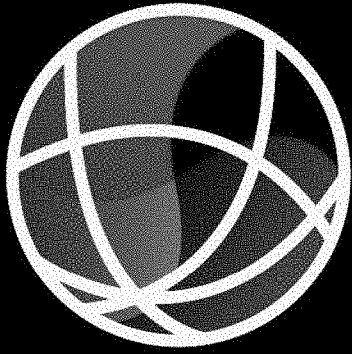
<sup>115</sup> Penelope Andrews, 'Striking the Rock: Confronting Gender Equality in South Africa' (1998) 3:2 *Michigan Journal of Race and Law* 302; Penelope Andrews, 'Spectators at the Revolution? Gender Equality and Customary Law in a Post-Apartheid South Africa' in Ren Kuppe & Richard Potz (eds.), *Law & Anthropology: International Yearbook for Legal Anthropology* (Springer, 1994) 308; Penelope Andrews, *From Cape Town to Kabul: Reconsidering Women's Human Rights* (Routledge, 2012).

<sup>116</sup> Yvonne Mokgoro, 'The Protection of Cultural Identity in the Constitution and the Creation of National Unity in South Africa: A Contradiction in Terms' (1999) 52:4 *SMU Law Review* 1549; Yvonne Mokgoro, 'Traditional Authority and Democracy in the Interim South African Constitution' (1996) 3:1 *Review of Constitutional Studies* 60, at 60.

<sup>117</sup> Jeffrey James Byrne, *Mecca of Revolution: Algeria, Decolonization and the Third World Order* (OUP, 2016); James Gathii, *Understanding African Trade Regimes on their Own Terms: Their Growing Density, Complexity and Neo-Liberalism* (Working Draft, September 2020, on file with author) discussing competing notions of pan-Africanism, as a counterweight to neoliberalism, but also to legitimize market-centered free trade regionalism.

<sup>118</sup> Byrne (2016) 18.





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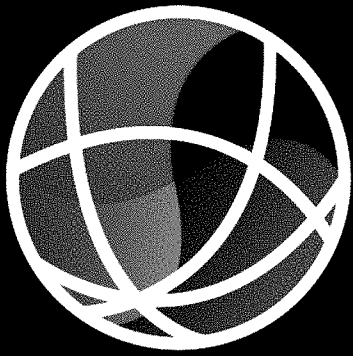
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