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The Promise of International Law: A Third World View

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TWENTY-SECOND ANNUAL GROTIUS LECTURE: THE PROMISE OF INTERNATIONAL LAW: A THIRD WORLD VIEW

James Thuo Gathii of the Loyola University Chicago School of Law, and discussant Fleur Johns of the University of New South Wales School of Law, provided the Twenty-Second Annual Grotius Lecture on Thursday, June 25, 2020, at 5:00 p.m.*

(Including a TWAIL Bibliography 1996–2019 as an Appendix)

JAMES THUO GATHII**

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Note for readers: this lecture reflects the style conventions of the AUILR.

** Wing-Tat Lee Chair of International Law and Professor of Law, Loyola University Chicago School of Law. I would like to thank Charles Jalloh, Antony Anghie, Obiora Okafor, Titilayo Adebola, Olabisi Akinkugbe Ohio Omiunu, and my colleagues at Loyola University Chicago School of Law for their comments on various ideas as I prepared this lecture. Thanks too to the International Law Reference Librarian at Loyola University Chicago School of Law, Julianne Grant, for her assistance. I could not also have prepared this lecture and the bibliography without the excellent research assistance of Loan Tran, Harrison Mbori, Shelby Kost, Jasmine Stanzick, Louis-Raymond Gomes, Lily Ealey, Dalaal Jaber, and Ethan Thuo.

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I. INTRODUCTION

Thank you very much Professor Padideh Ala’i for that very kind introduction. I would also like to thank you Dean Camille A. Nelson of the Washington College of Law and the Society for this really special honor of inviting me to give the Grotius Lecture this year. I also thank the President of the Society, Catherine Amirfar, for her leadership and stewardship. My thanks too to my friend, Fleur Johns, for accepting to be the discussant for this lecture. Like you, I look forward to her response very much.

I have titled this lecture, “The Promise of International law: A Third World View.” This lecture argues that one important way to trace the promise of international law at this moment of difficulty is to go outside the beltway of our discipline to places often unfamiliar in our textbooks and the locations where we practice and teach international law. To do that, this lecture will take you to places like Arusha, Tanzania, which until not too long ago was the seat of three international courts. By taking you to places like Arusha, Tanzania, the goal of this lecture is to make two primary points.

First, I challenge the limited geography of places and ideas that dominate the beltway of our discipline. This limited geography and set of ideas is characterized by the law of Geneva, the law of Strasbourg, the law of New York, and the law of Washington, D.C. These are the types of places that our discipline celebrates as producers of the type of international law that in turn becomes the benchmark for the efficacy of international law produced elsewhere. These are also the

locations where the bulk of international legal practice is produced and that influences and reinforces our understandings not only of international practice but also of international law more generally.

My second major point, which follows from my first point, is that the Third World is an epistemic site of production and not merely a site of reception for international legal knowledge. Recognizing the Third World as a site of knowledge production and of the practice of international law disrupts the assumptions that international legal knowledge is exclusively produced in the West for consumption and governance of the Third World. Further, that as Third World Approaches to International Law (TWAIL) scholarship argues, the Third World as understood here speaks from a subaltern epistemic location. This means that this Third World approach contests the idea that international law is applicable everywhere and that we should therefore regard it as a view from nowhere. Third World states and TWAIL scholars have contested this non-situated, universal status of international law in a variety of ways for several generations now. TWAIL challenges the view of international law that fails to engage in its complicity in histories of colonization, plunder, and enslavement—whose legacies continue to date. TWAIL also challenges views of the history of international law that consider the centrality of its involvement in slavery, plunder, and, colonization as being benign or simply ignore as inaccurate for ignoring or underpaying international law's central role in historical processes whose legacies in contemporary inequalities and inequalities continue to date.

Ultimately, I argue in favor of ending the insularity of international law characterized by a limited set of locales and ideas. I make the case why we should embrace the practice and scholarship of international law about and from the Third World as integral to our discipline and practice rather than as destabilizing, irrelevant, and different. By taking this scholarship and practice more seriously, we can both demarginalize this Third World input into international law and learn from the ways that it provides distinctive visions of international law.

II. PART ONE: INTERNATIONAL LAW'S LIMITED GEOGRAPHY OF PLACES AND IDEAS

In this part of the lecture, I challenge the limited geography of places and ideas that dominate the beltway of our discipline in both our scholarship and practice. There is now ample empirical evidence that our textbooks are more likely to be filled with cases and examples from the international law produced in places like Geneva, New York, and Washington, D.C. Our scholarship and practice privileges certain locations while excluding and rendering other locations and their international legal activities invisible. My argument is not that there is zero attention to international legal work and scholarship produced in locations that do not carry the prestige our discipline associates with locales like Geneva, New York, Washington DC, Paris, London, and The Hague¹ that are considered key international law locales.²

Rather, my point is that there is often too little, if anything at all, in our casebooks and in our practice about the international law produced in places like Arusha, Tanzania. In addition to being home to two international courts at the moment, the East African Court of Justice and the African Court on Human and Peoples' Rights, Arusha is also home to several very active international legal organizations, including the East African Law Society and the Pan-African Lawyers Union to name a few. My claim is that the international law produced here ought to receive our attention as much as the international law

1. *History of the City of Peace and Justice*, HAGUE (Mar. 16, 2017), <https://www.denhaag.nl/en/in-the-city/international-the-hague/history-of-the-city-of-peace-and-justice.htm> (introducing the role that The Hague has played in the international relations and international community over several centuries).

2. See Upendra Baxi, *Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law*, 23 IND. J. GLOBAL LEGAL STUD. 15, 24 (2016) ("Human rights and social activists have begun, at least since the Bhopal catastrophe, to understand that the inner dynamic of PIL [Public International Law] constitutes an obstacle to the promotion, protection, and preservation of human rights. But the mystery and mystique of PIL protect the epistemic insularity of its constructs: *forum non conveniens*, comity, jurisdiction in *personam* and in *rem*, *professio juris* stipulations, *lex fori*, *lex loci delicti*, and even the seemingly flexible 'public policy.' These are coated in a historical and dogmatic opacity as yet impermeable to an activist gaze.").

produced in the global capitals of international law.³ As Anna Spain Bradley has argued in another context, our approaches to international law should not continue to be “descriptively omissive” of actors and ideas outside the global capitals of international law.⁴

In some ongoing research, for example, I found that in the fifty-five contentious cases completed in the International Court of Justice (ICJ) between 1998 and 2019, only four non–Organisation for Economic Co-operation and Development (OECD) law firms⁵—by which I mean law firms based outside the West—appeared before the Court.⁶ By contrast, a total of thirty-two law firms/associations from OECD countries appeared before the Court. This is especially striking because fifty of the parties in those fifty-five contentious cases were non-OECD states. That means that non-OECD states gave instructions one hundred times in that time period and in only four cases did they give instructions to non-OECD law firms. Even further, three of the non-OECD law firms appeared together with law firms from OECD countries. This imbalance in the representation of non-OECD states by OECD law firms in my view indicates that the practice of international law entrenches the dominance of practitioners and law firms from OECD countries arguably in the court that should be the most international court of them all.

The Registrar of the East African Court of Justice recently shared with me the nearly two hundred names of the practitioners that have appeared or that appear regularly before the East African Court of

3. See, e.g., OHIO OMIUNU, INTERNATIONAL LAW ASS’N STUDY GRP., CITY REPORTS ON INTERNATIONAL LAW: LAGOS IN FOCUS (2020) (As part of the ongoing City reports on International Project commissioned by the International Law Associations’ Study Group on Cities in International Law, which focuses on non-Western cities in international legal history).

4. Anna Spain Bradley, *Recent Books on International Law*, 112 AM. J. INT’L L. 330, 334 (2018) (reviewing OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017)) (arguing that when scholars are “descriptively omissive” and neglect a broader community of actors in their work, they miss an opportunity to recast international law for a new generation as truly international and inclusive).

5. See Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, 644 (Nov. 30) (The Democratic Republic of Congo law firm of Cabinet Tshibangu and Associés as an example).

6. See JAMES THUO GATHII, *HOW INTERNATIONAL IS THE INTERNATIONAL COURT OF JUSTICE* (forthcoming 2021).

Justice since it started operations in 2005.⁷ All of the names of the practitioners there were unsurprisingly from the East African region. It is quite clear from the names I received that practitioners in OECD states do not practice before international courts in places like Arusha and neither do those who practice in places like Arusha practice in the courts based in the global capitals of international law, like in the ICJ, as some of my ongoing empirical research shows.⁸

The fact that the practicing bars in places like The Hague, rather than in places like Arusha, are the places we look up to understand international law, has an uncanny continuation of the dominance of former colonial metropolitan centers over subregional and regional courts in Africa, and the non-West in general, in the production of international legal knowledge that our discipline celebrates as the benchmark.

Now just to be clear, the East African Court of Justice and the African Court on Human and Peoples' Rights, which both became functional in 2006, have decided important cases and I am sure many of you can readily name some of those cases. That is also true of the International Criminal Tribunal for Rwanda (ICTR), which until December 2015 was based in Arusha and whose functions have been

7. E-mail from Yufnalis N. Okubo, Registrar, E. African Court of Justice, to James Thuo Gathii (Mar. 2, 2020, 09:13 CST) (on file with author) (listing advocates who have appeared before the East African Court of Justice).

8. See *List of Counsel Before the ICC*, ICC (Sept. 14, 2020), <https://www.icc-cpi.int/about/registry/Pages/list-of-counsel.aspx> (indicating some diversity in terms of the geographical location of the practitioners who are listed as counsel before the ICC); Sujith Xavier, *Theorising Global Governance Inside Out: A Response to Professor Lateur*, 3 TRANSNAT'L LEGAL THEORY 268, 279 (2012) [hereinafter Xavier, *Theorising Global Governance*] (asserting that Western lawyers still dominate the investigations, trials, and legal research in the ICTR); Sujith Xavier, *Looking for 'Justice' in All the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?*, in POST-WAR SRI LANKA: PROBLEMS AND PROSPECTS (Amarnath Amarasingam & Daniel Bass eds., 2015), reprinted in 11 OSGOODE LEGAL STUD. RES. PAPER SERIES, no. 7, 1, 16–17 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557478 (citing Elena Baylis, *Tribunal-Hopping with the Post-Conflict Justice Junkies*, 10 OR. REV. INT'L L. 361.); see also Kurt Taylor Gaubatz & Matthew MacArthur, *How International is 'International' Law?*, 22 MICH. J. INT'L L. 239, 250–60 (2001) (providing the analysis of the compiled data on the lawyers who participated in proceedings of the ICJ from 1948 and 1998).

continued in The Hague under the name the International Residual Mechanism for Criminal Tribunals (IRMCT).⁹ I also know that there is increasing attention to these African courts in journals, books, and blogs. So let me be clear—my point is not that the decisions of these courts are a largely unknown quantity, that they are unimportant, or that they are irrelevant because only practitioners from where they are based practice before them. Far from it.

Rather, my point is that the case law that dominates our discipline in terms of illustrative cases in our case books and citations we make to assert important international legal principles in litigation come less from places like the international courts in Arusha, Tanzania. Yet, the international law produced in places like Arusha is hiding in plain sight! Further and more crucially, the international law work produced in places like Arusha is not regarded as a source of important theoretical innovations in international law. My point, therefore, is that the international law produced in places like Arusha is marginalized doctrinally and theoretically, as Anthea Roberts's recent book confirms.¹⁰

Scholars studying the African human rights system like Rachel Murray, Obiora Okafor, Cristof Heyns and Magnus Killander,¹¹ and

9. *Accord* U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBS. [IRMCT], <https://www.irmct.org/en/about> (last visited Oct. 6, 2020) (explaining that the International Residual Mechanism for Criminal Tribunals (IRMCT) performs various essential functions previously performed by the International Criminal Tribunal for Rwanda (ICTR)).

10. ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* 271 (2018) (arguing that “the United States and the United Kingdom often enjoy the ‘exorbitant privilege’ of issuing the world’s ‘reserve law,’” marginalizing major civil law traditions, like the French and German systems); Xavier, *Theorising Global Governance*, *supra* note 8, at 284 (“Depicting a very singular narrative that focuses on the facts, as witnessed by those in Berlin, Hamburg, London and New York, and theorising from this perspective may not yield any results that actually help us to understand the different political compromises involved and how these institutions are created and operate. The description of the international legal order cannot be a single story.”).

11. Cristof Heyns & Magnus Killander, *Africa in International Human Rights Textbooks*, 15 AFR. J. INT'L & COMP. L. 130, 131–32 (2008) (noting that although international human rights law textbook writers have started to “integrate commentary on the African system into their work,” there are still valid concerns about continued neglect).

Solomon Ebobroah,¹² to name a few, have noted the too-often ready dismissal and neglect of African institutions because they are considered to be outside of the “ruling” or “dominant Western and European States.”¹³

On the scholarship front, Rachel Murray, who has authoritatively studied the international human rights system in Africa from its beginning, notes that international lawyers have for the most part relegated Africa’s international human rights system to the wayside. Professor Murray argues this is because these international lawyers who she writes about regard the African human rights system as having “less value” than its European and Western regional counterparts.¹⁴ Murray argues that scholarship on the African human rights system often depicts it as an example of “what not to do.”¹⁵ She notes that many textbooks and casebooks fail to “concentrate upon the progressions and developments from the African system, equating its comparatively young age with inexperience, ineffectiveness and irrelevance.”¹⁶

Murray, who for the record as far as I can tell, is not African, further notes that the “international literature on human rights and international institutions often do not cite African institutions’ case

12. See Solomon T. Ebobrah, *A Rights-Protection Goldmine or a Waiting Volcanic Eruption?: Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court of Justice*, 7 AFR. HUM. RTS. L.J. 307, 328 (2007) (welcoming the emergence of a viable sub-regional human rights system because the African mechanisms were too far away and expensive for the majority of human rights violation victims and domestic legal system did not live up to the expectations of human rights advocates).

13. See generally Charles Jalloh, Kamari Clarke, & Vincent Nmeihelle, *Introduction: Origins and Issues of the African Court of Justice and Human and Peoples’ Rights*, in *THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES’ RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES 2* (Charles Jalloh, Kamari Clarke & Vincent Nmeihelle eds., 2019) (on the origins and issues of the African Court of Justice and Human and Peoples’ Rights).

14. Rachel Murray, *International Human Rights: Neglect of Perspectives from African Institutions*, 55 INT’L & COMP. L.Q. 193, 193 (2006) (asserting that “international human rights law has focused primarily on European and Western sources and neglected those from other jurisdictions,” failing to use African institutions as examples of good practice).

15. *Id.*

16. *Id.* at 194–95; see FRANS VILJOEN, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 571–72 (2012) (focusing on the African human rights system).

law or activities as examples or suggestions of best practice or indicators of the development of international human rights law.”¹⁷ She notes that the assumption in the literature is that “the African system is behind in its approach, is still learning and, conversely, that the European system is transferable and applicable in a variety of situations.”¹⁸ She recommends overcoming this view of seeing the African human rights system “as a threat to human rights,”¹⁹ or, rather, as ineffective and irrelevant.²⁰ After outlining the contributions and “significant impact” of the African human rights system, Murray concludes that failing to take into account these impacts, by citing “seriously the rulings of these institutions, attention is drawn to them and some degree of respect may be accorded to them without losing sight of criticisms.”²¹

It is notable that Rachel Murray was writing in 2006 when she observed the obscurity of the African human rights system. Needless to say, Professor Murray is not alone in regarding the African human rights system as a positive example of human rights law and international adjudication. It is notable that Professor Murray’s response to the criticisms of Africa’s then very nascent human rights system were observed in 2006. This is because 2006 was the same year that the International Law Commission prepared its report on fragmentation of international law.²² That report did not make reference to any of Africa’s still fledgling international courts—Africa is mentioned less than ten times, mostly in reference to International Court of Justice decisions rather than Africa’s own courts, regimes, and practices of international law. By contrast, Europe is mentioned over 170 times with a whole subsection devoted to the European Court

17. Murray, *supra* note 14, at 196.

18. *Id.* at 195.

19. *Id.* at 196–97, 203 (arguing that failing to take into account the African human rights system “undermines the very validity of a universal system of human rights law . . . but also deprives the system of the respect necessary for the enforcement of its decisions”).

20. *Id.* at 194–95.

21. *Id.* at 203.

22. Int’l Law Comm’n, Report of the Study Group of the International Law Commission to the General Assembly, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, at 11, U.N. Doc. A/CN.4/L.682 (2006).

of Human Rights on the question of systemic integration. Asia appears exactly once in the main text. The six references to Asia are primarily cases on international arbitration.

Writing in 2019, Adamantia Rachovitsa²³ comes largely to the same conclusions as Rachel Murray.²⁴ Adamantia Rachovitsa discusses a stream of scholarship that argues that the African Court on Human and Peoples' Rights threatens jurisprudential chaos.²⁵ One of the causes of such jurisprudential chaos was that the court exercises too vast a jurisdiction over violations not only of regional, but also of subregional and global human rights treaties. Particular anxiety is expressed in this literature about the court expanding its scope of focus beyond the interpretation and application of the African Charter on Human and Peoples' Rights to incorporate United Nations human rights treaties. So why should scholars be concerned that the African Court on Human and Peoples' Rights can interpret, apply, and declare violations of UN human rights treaties? Should the African court's jurisdiction be limited to the African Charter on Human and Peoples' Rights and only African treaties? Would the African Court by applying and interpreting UN human rights treaties be undercutting or promoting the universality of international law? What role if any should regional courts like the African Court on Human and Peoples' Rights play, if at all, on the development of international law?

Those who argue that "different interpretations of similar or identical rules of international law can undermine the general integrity

23. See Adamantia Rachovitsa, *On the New Judicial Animals: The Curious Case of an African Court with Material Jurisdiction of a Global Scope*, 19 HUM. RTS. L. REV. 255, 256 (2019) (asserting that "the distinctiveness of the ACtHPR's jurisdiction lies in the fact that its mandate extends to the interpretation and application of any other relevant human rights instrument ratified by the States concerned").

24. Rachel Murray, *The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights*, in THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES 965, 972, 974–75, 977 (Charles Jalloh, Kamari Clarke & Vincent Nmeihelle eds., 2019) (affirming the broad jurisdiction of the African Court of Human and Peoples' Rights to interpret treaties other than the African Charter on Human and Peoples' Rights).

25. Rachovitsa, *supra* note 23, at 266–88 (addressing concerns that legal issues such as forum shopping, the ACtHPR monitoring other human rights treaties, undermining the specificity of African human rights laws, and fragmenting African human rights law may lead to jurisprudential chaos).

of international law, and the overall consistency of international law”²⁶ overemphasize the risks of divergence from global norms. This in turn overlooks how courts like the African Court on Human and Peoples’ Rights actively participate in the development of international law.²⁷

This emphasis on the risks posed by the African human rights system to what are regarded as the proper, mainstream, and successful models of regional human rights adjudication means courts like the African Court on Human and Peoples’ Rights are regarded as subordinate rather than equal participants in the development of international law. Such views presuppose non-Western international courts are or ought to be passive junior imitators of their Western counterparts and as such that they have no role in producing but only in receiving international law. Such a view that denigrates the role of non-Western international courts is simply mistaken. This mistaken view privileges both the UN and European human rights systems and presumes that the African system should be dependent on these systems.²⁸

These critiques of the African Court on Human and Peoples’ Rights are also a reflection of the dominance of how research agendas from and for a Western audience characterize non-Western international legal engagements. These non-Western legal engagements are often seen to be falling short, to be inadequate because they do not correspond to the benchmark set by the theoretical needs of and questions set in the western academy. This leaves little scope for scholarship outside these well-established systems of scholarly knowledge circulation. These critiques assume that the African Court

26. *Id.* at 275.

27. OBIORA CHINEDU OKAFOR, THE AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES, AND INTERNATIONAL INSTITUTIONS 83–84, 86–88 (2007) (noting that despite the African human rights system’s flaws, there has still been modest success); James Thuo Gathii & Jacqueline Wangui Mwangi, *The African Court of Human and Peoples’ Rights as an Opportunity Structure*, in THE PERFORMANCE OF AFRICA’S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (James Gathii ed., 2020).

28. See also Joseph R. Slaughter, *Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World*, 40 HUM. RTS. Q. 735, 756–58 (2018) (noting that Western states preventing former colonies from self-determining their human rights regimes was a tool or “secret weapon” to resubordinate the post-colonial states).

has to mimic its Western counterparts—including in ensuring nothing less than the Queen's English in their judgments and rulings.²⁹ (Ignoring of course the importance of the jurisprudence of the African Court especially for democratization and not merely for advancing human rights struggles defined from a narrow Western-centric perspective.³⁰) My point here is not in favor of recognizing the voice of the others of international law, but rather to actively resist knowledge production systems that silence them and their engagements with international law. In short, I take issue with critiques that impose an extra premium of justification onto ideas that come from outside the mainstream European and American dominated international legal community—both in the academy but also in the world of the practice of international law.

Let me give you the example of how and why the East African Court of Justice, which has redeployed from its initial design as an international trade court to become a human rights and rule of law court, serves as an example for international law elsewhere.³¹ This

29. See Apollin Koagne Zouapet, 'Victim of Its Commitment . . . You, Passerby, a Tear to the Proclaimed Virtue': Should the Epitaph of the African Court on Human and Peoples' Rights be Prepared?, EJIL:TALK! (May 5, 2020), <https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/> ("Admittedly, the practice of the African Court has encountered serious issues and has raised many reservations and criticisms from commentators. It is impossible to list here the many criticisms levelled at the Court. I had already expressed concern many years ago about the perceived lack of rigour in the reasoning of the ACtHPR judgments. States could legitimately be frustrated by the laconism of the Court's replies to some of their arguments, in particular on questions of jurisdiction and admissibility (see, for example, the Court's most recent Order)."); see also, Gathii, *supra* note 27; Başak Çali, Mikael Rask Madsen, and Frans Viljoen, *Comparative Regional Human Rights Regimes: Defining A Research Agenda*, 16 INT'L J. CONST. L. 128, 129–31 (2018) (introducing that there is a new research agenda of putting the African human rights system in conversation with human rights systems from other regions).

30. See, e.g., Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Politics Jurisprudence of the ECOWAS Community Court of Justice*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 149 (James Gathii ed., 2020) (contending that the jurisprudence of ECOWAS has social, economic, and political impacts and that compliance with the Court's decisions should not be the only measurement of juridical success).

31. See James Thuo Gathii, *International Courts as Coordination Devices for*

redeployment with its attendant risks suggests that Africa's international courts will not always replicate the European model upon which they are based. In other words, this redeployment from their original mandates to new aims shows the capability of these newer international courts to evolve in ways that could be instructive for international courts elsewhere as I will illustrate momentarily. Before doing so, let me illustrate how this redeployment of trade courts to become human rights and environmental courts happened.

In East, West, and Southern Africa, the respective subregional courts—the East African Court of Justice, the Economic Community of West African Community Court of Justice, and the Southern Africa Community Development Tribunal—were initially designed without explicit jurisdiction over human rights.³² In West Africa, explicit jurisdiction over human rights was subsequently conferred by treaty. That was not the case in East and Southern Africa. In East Africa, the relevant treaty provided that jurisdiction over human rights would be given at a future date. However, the East African Court of Justice did not wait for that conferral of jurisdiction. Instead, it established a cause of action for violations of human rights. According to the court, a case that raises a question of whether or not human rights protections enumerated under the founding treaty of the East African Community could be decided under the court's jurisdiction to interpret and apply East Africa Community treaties.³³

Opposition Parties: The Case of the East African Court of Justice, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 35 (James Gathii ed., 2020) (noting that the EACJ served as a “go-to court for opposition political parties” whose rights were infringed upon by a dominant party and that such use of the EACJ strengthened the Court).

32. See, e.g., Treaty for the Establishment of the East African Community art. 27(2), Nov. 30, 1999, 2144 U.N.T.S. 255 (“The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.”); Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 296, 301, 308, 312, 315 (2016) (noting that ECOWAS, EACJ, and SADC received human rights jurisdiction after their founding, either through adoption of human rights supplementary protocols or by establishing a cause of action without having a human rights supplementary protocol in place).

33. *Rugumba v. Sec'y Gen. E. Afr. Cmty.*, No.8/2010, Judgment, E. Afr. Ct.

You may say that these interpretive moves are quite familiar and that they pose risks for these courts. You would be right.³⁴ What is significant though is not whether or not they imitate older courts and in particular the European ones on which they are modeled. Rather, their redeployment from trade to human rights and environmental courts is indicative of an institutional flexibility that has not nearly been possible in international courts elsewhere. By defying the distinct compartmentalization of trade and human rights courts, Africa's international courts have broken the post-World War II distinction of separate courts for trade, on the one hand, and for human rights, on the other. Perhaps, there are lessons for other international courts here.³⁵

The environmental cases before Africa's international courts also

Just., ¶¶ 18–23 (Dec. 1, 2011), <https://www.eacj.org/wp-content/uploads/2012/11/Plaxeda-Rugumba-2010-8-judgment-2011.pdf> (concurring with the *Katabazi* Court in holding that the Court had jurisdiction to entertain the human rights violation case); *Indep. Med. Legal Unit v. Att'y Gen. of Kenya*, No.3/2010, Judgment, E. Afr. Ct. Just., at 3–6 (Jun. 29, 2011), <https://www.eacj.org/wp-content/uploads/2020/11/Reference-No.-3-of-2010-Independent-Medical-Legal-Unit-Vs-The-Attorney-General-of-the-Republic-of-Kenya-4-Others.pdf> (concurring with the *Katabazi* Court in holding that the Court had jurisdiction to entertain the human rights violation case); *Katabazi v. Sec'y Gen. E. Afr. Cmty.*, No.1/2007, Judgment, E. Afr. Ct. Just., at 16 (Nov. 1, 2007), https://www.eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf (noting that despite the lack of jurisdiction over human rights claims per se, the EACJ is charged with interpreting the Treaty Establishing the East African Community, which requires Partner States to “undertake . . . maintenance of universally accepted standards of human rights”); James T. Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 250–58 (2013) (discussing the development of the EACJ's human rights jurisprudence).

34. See Alter et al., *supra* note 32, at 295–306 (discussing the backlashes against ECOWAS, EACJ, and SADC after they began hearing human rights cases).

35. Max du Plessis, *The Crimes Against Humanity Convention, (Overlooked) African Lessons, and the Delicate Dance of Immunity*, 17 J. INT'L CRIM. JUST. 1, 3–4, 6, 7, 11 (2019) (arguing that the domestication of international criminal law strengthens the global human rights system because states, unlike the ICC, have universal jurisdiction, such as the Constitutional Court of South Africa holding that the South African Police Service had a duty to investigate crimes of torture in Zimbabwe because Zimbabwe was unwilling or unable to investigate the crimes itself) (citing the Constitutional Court's holding that “while the presence of the suspect in the country was required in order to prosecute the suspects, there was no analogous presence requirement for investigation under international or South African law)).

tell us something important about how Third World scholars and states have taken on environmental causes as integral to international law—rather than requiring the establishment of a specialized environmental tribunal.³⁶ The major feature of this judicial environmentalism is the manner in which Africa's international courts have embraced the principle of systemic integration, which is promoting coherence within a fragmented system of international law rules.³⁷ In effect, these courts apply and interpret rules of international law outside their immediate subregional treaty system.³⁸ The best example here is the East Africa Court of Justice's First Instance Division Serengeti decision in which the Court stopped the government of Tanzania from building a road through a UN Educational, Scientific and Cultural Organization (UNESCO) world heritage site.³⁹

It is not surprising therefore that in West Africa, international lawyers have brought environmental cases to the Economic Community of West African States (ECOWAS) Court of Justice based in Abuja, Nigeria. This has been replicated in East Africa as well as in the Inter-American Court of Human Rights.⁴⁰ Notably, the Inter-American Court of Human Rights has used the principle of indivisibility and interdependence of social, economic, and cultural rights, on the one hand, and civil and political rights, on the other, to

36. James T. Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHI. J. INT'L L. 386, 397–410 (2016) (discussing the case filed at the EACJ against the Government of Tanzania in 2010 to stop a highway being built through the Serengeti).

37. *Id.* at 431.

38. *Id.*

39. *Afr. Network for Animal Welfare v. Att'y Gen. of the United Republic of Tanz.*, No.9/2010, Judgment, E. Afr. Ct. Just., ¶ 86 (Jun. 20, 2014), <https://www.eacj.org/wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf> (issuing a permanent injunction on the basis that the proposed construction of the road was unlawful and infringed Articles 5(3)(c), 8(1)(c), 111(2), and 114(1) of the Treaty for the Establishment of the East African Community).

40. See, e.g., Giovanni Vega-Barbos & Lorraine Aboagye, *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL:TALK! (Feb. 26, 2018), <https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights> (discussing the Court's Advisory Opinion on States' obligations under the American Convention on Human Rights regarding infrastructure projects that risked significant environmental damage to the marine environment of the Wider Caribbean Region).

make the latter set of rights justiciable to environmental rights.⁴¹ This approach of seeing the environment as an integral part of the international legal framework rather than treating the environment as a specialized or self-contained regime disconnected from the rest of international law is an important reframing and insight especially in light of climate crisis concerns.⁴²

In fact, TWAIL scholars from R.P. Anand⁴³ to Karin Mickelson⁴⁴ to Usha Natarajan,⁴⁵ to name a few, have long before the current concern

41. *Id.* (noting that the Court found a legal basis in both the San Salvador Protocol on Economic, Social, and Cultural Rights and the American Convention on Human Rights to view the right to live in a healthy environment as a human right).

42. Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT'L L. 679, 725–26 (2019) (noting that climate litigation in the Global South takes a different approach from that of the Global North to climate change by articulating it as a climate justice issue and incorporating constitutional and human rights arguments).

43. R.P. Anand, *Industrialization of the Developing Countries and the Problem of Environmental Pollution*, 4 MAZINGIRA 16, 16–17, 20–24 (1980) (arguing that large-scale pollution is damaging the “thin envelope of life-sustaining atmosphere” and that coordination between rich and poor countries to facilitate development and lift people out of poverty is necessary to protect the environment); R.P. Anand, *Development and Environment: The Case of the Developing Countries*, 20 INDIAN J. INT'L LAW 1, 8–9, 16–18 (1980) (arguing that there needs to be an effective body of global environmental law to save the environment from destruction by both developed and developing countries); R.P. ANAND, *LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES* 4–6, 256–57 (1975) (noting that the 1958 Law of the Sea Conference did not regulate undersea activities beyond the continental shelf, which left a vacuum in which developed countries could exploit the resources of the seabed and further pollute the oceans).

44. Karin Mickelson, *South, North, International Environmental Law, and International Environmental Lawyers*, 11 Y.B. INT'L ENV'T L. 53, 53–60 (2000) (arguing that environmental lawyers in the Global North have failed to properly address the Global South's needs by not taking into account the broader economic, social, cultural, and historical context necessary to build an inclusive legal framework that represents their interests and perspectives).

45. Usha Natarajan, *TWAIL and the Environment: The State of Nature, The Nature of the State, and the Arab Spring*, 14 OR. REV. INT'L L. 177, 186 (2012) (“Third World states, peoples, and scholars have long been wary of the international environmental law project, perceiving it as an attempt to ameliorate Western development mistakes at the expense of Third World development.”); Kishan Khoday & Usha Natarajan, *Fairness and International Environmental Law from Below: Social Movements and Legal Transformations in India*, 25 LEIDEN J. INT'L L. 415, 416 (2012) (disagreeing with the prevailing assumptions about the developing world's negative role in the development of international environmental law and suggesting that inspiration for creative solutions to the international

about the climate crisis argued in favor of averting environmental catastrophes that have faced the Global South with urgency. They argued these catastrophes cannot be separated from other challenges that are equally as serious and as devastating.⁴⁶ In doing so, these scholars questioned the conventional understanding of international environmental law as being driven primarily by concerns for the environment (primarily on the part of the North) and having to respond to concerns about development (primarily on the part of the South). As Karin Mickelson has argued, we should not delude ourselves into “thinking that . . . ecological integrity, basic human needs, and human rights can be meaningfully dealt with in isolation from each other.”⁴⁷ She also traced the colonial legacies of international environmental law and unearthed its partial narratives about non-European peoples

environmental law problems may come from the developing world); Usha Natarajan, *International Environmental Law: How Does International Law Contribute to and Tackle Climate Change?*, THINK AFRICA PRESS (Nov. 8, 2012), <https://thinkafricapress.com/international-law-africa/environmental-law> (“As the last remaining pockets of many natural resources exist in poorer parts of the world, and as poorer regions are more vulnerable to ecological crises, [international environmental law] is an increasingly strategic site from which vulnerable peoples, and the movements, scholars, and states that represent them, can contest, negotiate, and resist international economic and development paradigms.”).

46. See Gathii, *supra* note 36, at 388 (The linkages between the environment and human needs are widely recognized by the decisions of Africa’s international courts); James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, in *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* 75–76, 80–81 (Antony Anghie, Bhupinder Chimni, Karin Mickelson, & Obiora Okafor eds., 2003) (Third World jurists like Justice Christopher Weeramantry’s powerful pro-environmental dissenting opinion in the ICJ’s 1999 decision *Kasikili/Sedudu Island* is particularly noteworthy); see also, Peel & Lin, *supra* note 42, at 683 (Courts in the Global South have been very active with climate change litigation, and those cases can “promote a reframing of our understanding of climate litigation”); James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, in *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* 75–76, 80–81 (Antony Anghie, Bhupinder Chimni, Karin Mickelson, & Obiora Okafor eds., 2003) (Third World jurists like Justice Christopher Weeramantry’s powerful pro-environmental dissenting opinion in the ICJ’s 1999 decision *Kasikili/Sedudu Island* is particularly noteworthy).

47. Mickelson, *supra* note 44, at 78.

damaging and despoiling the environment.⁴⁸ She pushed back against environmental accounts that promoted a view of rare habitats and rich biodiversity resources as worthy of protection because only Western states and environmental groups sought to do so. That is why it is impressive to see lawyers in West Africa challenging the boundaries of who can bear responsibility for environmental damage by bringing cases in the ECOWAS Community Court of Justice against multinational corporations,⁴⁹ even though the states have defined the jurisdiction of that court to exclude suit against private actors.⁵⁰ The bold vision of international law that should succeed the current one should break down these boundaries that create accountability gaps.⁵¹

48. See *id.* (criticizing the international climate law discipline has excluded but only the issues that the Global South considers as crucial, but also the issues that should be considered by all as critical to the possibility of providing a meaningful response to the global environmental challenges).

49. *Socio-economic Rights & Accountability Project (SERAP) v. Nigeria*, No. ECW/CCJ/APP/08/09, Ruling, Court of Justice of the Economic Community of West African States [ECOWAS] ¶ 3 (Dec. 14, 2010), http://www.worldcourts.com/ecowascj/eng/decisions/2012.12.14_SERAP_v_Nigeria.pdf (In these preliminary rulings by the court, while grappling with important international law principles, the court dismissed the claims against the following companies: the Nigerian National Petroleum Corporation (NNPC), Elf Petroleum Nigeria Ltd., Agip Nigeria Plc, and the Multinational Companies (MNCs): Shell Petroleum Development Company (SPDC), a subsidiary of the Royal Dutch Shell, Chevron Oil Nigeria Plc, Total Nigeria Plc, and ExxonMobil Corporation.).

50. *SERAP Niger Delta Ruling*, No. ECW/CCJ/APP/08/09, ¶ 8 (2012) (holding that the Court does not have jurisdiction over private multinational actors); Kangikoe Bado, *Good Governance as a Precondition for Subsidiarity: Human Rights Litigation in Nigeria and ECOWAS*, 57 COMMONWEALTH & COMP. POL. 242, 255–56 (2019) (“[T]he court held that the appropriate avenue open to the victims for seeking redress as regards their grievance against private parties would be the domestic court system of the Federal Republic of Nigeria”).

51. See Matiangai Sirleaf, *The African Justice Cascade and the Malabo Protocol*, 11 INT'L J. TRANSITIONAL JUST. 71, 76–77 (2017) (“The [Malabo] Protocol permits jurisdiction over both natural persons and entities on established bases—consent, territorial, nationality, passive personality and protective principles. This represents a significant advancement of [international criminal law]. The devastating impact of corporate malfeasance in Africa explains this development. The Protocol could enable African states to respond more effectively to challenges posed by corporations, thereby transforming the justice cascade.”); Joanna Kyriakakis, *Article 46C: Corporate Criminal Liability at the African Criminal Court*, in THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES 793, 834–35 (Charles C. Jalloh, Kamari M. Clarke, & Vincent O. Nmechielle eds., 2019) (arguing that the African

Let me use another example to illustrate the invisibility of international legal work in Africa. This is the important role played by one of the most senior international legal jurists who also happens to hail from Africa, Dr. (Navanethem) Navi Pillay. She was one of the judges who helped to lay the groundwork for functioning of the International Criminal Tribunal for Rwanda from its infancy. Less remembered though is the central role she played in nudging the prosecution to amend its indictment in the *Akayesu* case to include crimes of sexual violence.⁵²

This account of her role is given by the current President of the International Criminal Court, Chile Eboe-Osuji. Judge Eboe-Osuji recalls that when he worked in the Office of the Prosecutor of the ICTR, it was Judge Pillay who asked the prosecution in the trial of that case what the judges were expected “to do with the evidence of sexual violence, which had been led in the case without a charge relating to sexual violence.”⁵³ This account is confirmed by Erik Mose, who was

Criminal Court’s decision to enable corporate prosecutions is an evidence of corporate involvement in serious crimes and the distinctive nature of corporate criminality and suggesting that the changes to the ICC may come from the African leadership).

52. See Anna Spain, *African Women Leaders and the Advancement of Peacebuilding in International Law*, in BLACK WOMEN AND INTERNATIONAL LAW: DELIBERATE INTERACTIONS, MOVEMENTS, AND ACTIONS 120, 135 (Jeremy I. Levitt ed., 2015) (explaining how an unnamed witness testimony before the predominantly male judges (with the exception of female Judge Navi Pillay) led the court to ask later witnesses about acts of sexual violence); see generally Adrien Katherine Wing, *International Human Rights and Black Women: Justice or Just Us?*, in BLACK WOMEN AND INTERNATIONAL LAW: DELIBERATE INTERACTIONS, MOVEMENTS, AND ACTIONS 37, 49 (Jeremy I. Levitt ed., 2015) (explaining the significance of the *Akayesu* case, which was “the first to punish sexual violence in a civil war and determine that systematic rape could amount to genocide, as well as being an act of torture”).

53. Chile Eboe-Osuji, *Navi Pillay in Her Age: An Introduction*, in PROTECTING HUMANITY: ESSAYS IN INTERNATIONAL LAW AND POLICY IN HONOR OF NAVANETHEM PILLAY 3, 10 (Chile Eboe-Osuji ed., 2009); see also, Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16, 17 (2003) (“In the midst of trial, a witness on the stand spontaneously testified about the gang rape of her 6-year-old daughter. A subsequent witness testified that she herself was raped and she witnessed or knew of other rapes. Fortunately, the sole female judge at the ICTR at that time, Judge Navanethem Pillay, was one of the three judges sitting on the case. Having extensive expertise in gender violence and international law, Judge Pillay

the President of the ICTR at the time of the *Akayesu* decision.⁵⁴ As Judge Chile Eboe-Osuji remembers, “it is fair to say that without Navi Pillay promoting the question, the indictment in the *Akayesu* case may never have been made to plead the charge of sexual violence.”⁵⁵ According to Judge Chile Eboe-Osuji, the *Akayesu* case, which is “one of the most inspirational nuggets of jurisprudence in modern international law,”⁵⁶ would not have been possible if Dr. Navi Pillay had not helped clear the path to that decision. Yet as we all know of Dr. Pillay, she was not one to “suffer credit to be given to her alone for the *Akayesu* reasoning on sexual violence as an act of genocide.”⁵⁷ Indeed there were two other judges on that bench and there were civil society groups involved in seeking to have gender offenses be prosecuted as well.⁵⁸ As we all know, that judgment inspired “much

questioned the witnesses about these crimes. Suspecting that these were not isolated instances of rape, the judges invited the prosecution to consider investigating gender crimes in Taba and, if found to have been committed and if attributable to Akayesu, to consider amending the indictment to include charges for the rape crimes. Consequently, an amended indictment was filed, charging Akayesu with three counts of rape and other inhumane acts as crimes against humanity. The genocide court in the amended indictment also referred to the alleged sexual violence.”).

54. Erik Mose, *On the Bench with Navi*, in PROTECTING HUMANITY: ESSAYS IN INTERNATIONAL LAW AND POLICY IN HONOR OF NAVANETHEM PILLAY 25, 26 (Chile Eboe-Osuji ed., 2009) (noting that it is “common knowledge that Navi actively asked questions concerning sexual crimes, and the Prosecution subsequently filed an indictment which later led to the finding in Akayesu that rape may under certain circumstances constitute genocide”).

55. Eboe-Osuji, *supra* note 53, at 10 (“[W]ithout Navi Pillay’s presence on the Bench that tried that case, there might never have been an opportunity to consider the question of sexual violence in that judgement.”).

56. *Id.* at 4.

57. *Id.* at 10.

58. Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, in HUMAN RIGHTS ADVOCACY STORIES 193, 199–201 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009) (After one witness “confirmed that she had never been questioned about [the rape] by any investigators of the Tribunal,” the “President of the Tribunal and then Judge Aspergen returned to this line of questioning, and [the witness] testified further that she had heard that other girls had been raped in Akayesu’s bureau communal.”) (“[F]eminist activists formed a non-governmental organization (‘NGO’), the Coalition for Women’s Human Rights in Conflict Situations (‘Coalition’), in 1996 specifically to monitor the ICTR and ensure that it protected the rights and interests of women appearing before the Tribunal. In light of [the witnesses’] testimony, the Coalition submitted an amicus curiae brief.”); see Niamh Hayes, *Creating a Definition of Rape in International Law: The Contribution of the International*

legal writing and further judicial reasoning.”⁵⁹

This example further illustrates how international courts based in Africa can be thought of as copartners in an equal role as other international courts in the development of international law, rather than being in a hierarchical relationship to those based elsewhere. This example also shows the types of important, if not pioneering, doctrinal developments that have grown out of international courts in Africa.

If I may go back to Arusha one more time. In a recent book, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*, Kamari Maxine Clarke⁶⁰ chronicles the work of the largest international lawyers society in Africa, the Pan-African Lawyers Association, (PALU). Professor Clarke discusses the role of the Pan-African Lawyers Union proposals to expand the criminal jurisdiction of a future African Court of Justice and Human Rights in the proposed Malabo Protocol. She concludes that the vision of international criminal justice embodied in the proposed Malabo Protocol seeks to “redefine the nature of violence in Africa as embedded in multiple forces of plunder and economic inequalities and multiple actors ranging from individual perpetrators to leaders of multinational corporations and terrorist gang networks.”⁶¹ Even with the expanded set of international crimes that would come under the jurisdiction of the African court if the Malabo Protocol received the requisite ratifications, Professor Clarke argues there is nothing substantively different about this court because it is “envisioned as operating within a legal realm that is quite similar to other courts elsewhere.”⁶²

However, what is even more compelling about Professor Clarke’s

Criminal Tribunals, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 129, 155 n.170 (Shane Darcy & Joseph Powderly eds., 2010) (discussing the work of Patricia Viseur Sellers and the progressive impact of her work on charging gender-based and sex-based crimes in Yugoslavia and Rwanda).

59. Eboe-Osuji, *supra* note 53, at 3–4.

60. See KAMARI MAXINE CLARKE, *AFFECTIVE JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE PAN-AFRICANIST PUSHBACK* 204–05 (2019) (discussing how the Pan African Lawyers Union (PALU) drafting the protocol for the Malabo Protocol aimed at centralizing dispensation of judicial decisions and several other significant changes).

61. *Id.* at 212.

62. *Id.*

account is that it is not only framed at the level of the law and doctrine of international criminal law, or to use her words “technocratic articulations of objective certainty.”⁶³ Rather, her ethnographic account emphasizes why we should pay attention to “feelings about inequality and injustice that shape how international law is perceived and how justice is experienced affectively.”⁶⁴ By affective justice she does not mean to minimize the important legal controversies such as those relating to immunity from prosecution that tend to dominate discussions of international criminal justice in Africa. Instead, she points to the productive potential of paying attention to the “feelings of inequality [such as the view that the ICC has targeted only African or poor countries] and racial oppression that remain illegible before the law.”⁶⁵ It is this sense of affective justice that she argues has become the motive force for the pan-Africanist backlash against the International Criminal Court. For Professor Clarke, therefore, international law operates “within particular affective realms rooted in histories, memories and experiences.”⁶⁶ From that perspective, our understanding of international justice will be diminished if we only focused on whether or not African states were complying with rules of international criminal law to the exclusion of “other logics.”⁶⁷ For Professor Clarke, these other logics that are often excluded in the law and doctrine of international criminal law include what she calls deep-seated histories of injustice, such as the absence of international institutional intervention into colonialism and apartheid, and the inequalities in the way in which international criminal justice is administered today.⁶⁸

The point here is that to understand more fully what is done in the name of international law and its goals, such as the promotion of peace and the protection of rights, it is important to go beyond merely reflecting on what the rules of international law are and how they are applied. One way of doing so, as Professor Kamari Clarke challenges us, is that we should not always assume the international legal rules

63. *Id.* at 224.

64. *Id.* at 228.

65. *Id.* at 214.

66. *Id.* at 261.

67. *Id.* at 263.

68. *Id.* at 8.

and institutions are necessarily impartial, objective, and neutral. Instead, she challenges us to also pay attention to how these rules and institutions have complicated historical legacies and sometimes even destructive consequences in the ways in which they are applied. As Anne Orford has argued, “it is timely to explore other—no less scientific—methodologies that might (that do) shape the work of professional legal scholars and our relation to the many realities that we seek to study and the many institutions and publics to which we are called to account.”⁶⁹

Perhaps one lesson we can draw here is that international law scholarship ought to have a place that foregrounds thick descriptive accounts and local knowledge(s) over approaches that proceed from abstract models or universal assumptions.⁷⁰ After all, I believe the goal is that our discipline has to go beyond approaches, such as those characterized by an exclusive black letter law emphasis, that do not adequately capture the type of epistemic injustices that could result from the failure to adequately capture alternative views or, for my purposes, the experience and worldviews of non-Western peoples. It is the privileging and centrality given to certain locales and ideas in the production of very particular types of (governing) international law—against which other less visible locales and ideas are to be measured—that is the problem.

TWAIL scholars and Third World states contest these very particular types of governing international law for being promoted as applicable everywhere as if they were actually views from nowhere.⁷¹

69. Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT'L L. 369, 384 (2014).

70. See James Thuo Gathii & Jacqueline Wangui Mwangi, *The African Court of Human and Peoples' Rights as an Opportunity Structure*, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (James Gathii ed., 2020) (utilizing an in-depth case-study approach that emphasizes thick-description and analysis about how cases filed [African international] courts enables, spurs, and emboldens political and legal mobilization); PATRICK CHABAL & JEAN-PASCAL DALOZ, CULTURE TROUBLES: POLITICS AND THE INTERPRETATION OF MEANING 222–23 (2006) (arguing in favor of a practical analysis to international law as opposed to mere abstract models).

71. Annelise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, 6 L. & CRITIQUE 39, 48 (1995); see Annelise Riles, *Aspiration and Control: International Legal Rhetoric*

Third World states and TWAIL scholars have contested this non-situated, universal status of international law in a variety of ways.⁷² For TWAIL scholars, international law cannot be taught or studied as a classic and timeless discipline. Unearthing how rules of international law have and continue to be deeply implicated in justifying the oppression of non-European peoples from slavery to colonialism and beyond is the backdrop of one of TWAIL's important agenda of exposing and illustrating how rules and doctrines of international law played and continue to play a role in normalizing and justifying repressive and racist outcomes and exploring whether the promises of overcoming those adverse outcomes are possible within the strictures of international legal guarantees, such as self-determination and human rights.⁷³ I will return to this theme of epistemic locations in my discussion in Part II.

III. PART TWO: TWAIL AS A SUBALTERN EPISTEMIC LOCATION

My second major point in this lecture is that TWAIL speaks from a subaltern epistemic location. This means that TWAIL not only questions international law's presumed universality,⁷⁴ but that it

and the Essentialization of Culture, 106 HARV. L. REV. 723, 723 (1993) (cautioning that a challenge to "an essentialization of culture that privileges the role of international law as a mechanism for bridging the void between cultural boundaries" may require a "radical critique of the rhetorical authority of international law"); Babatunde Fagbayibo, *Some Thoughts on Centering Pan-African Epistemic in the Teaching of Public International Law in African Universities*, 21 INT'L CMTY. L. REV. 170, 171–72 (2019) (stating that education surrounding international law in Africa is "steeped in Eurocentric canons.").

72. See James T. Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATION AND FRONTIERS (Jeffrey Dunoff & Mark Pollack eds., forthcoming) (arguing that while Western imperialism and its consequences no longer involve territorial conquests, but have morphed into self-serving policies that affect contemporary international law of Third World peoples).

73. See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 23 (1999) (discussing the historical trend towards "excluding the uncivilized states" from the law of nations).

74. See Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 31 (2000) (arguing that the international law regime is predatory that it "legitimizes, reproduces and sustains the plunder and subordination of the Third World by the

theorizes and views international law from the perspective of the Third World.⁷⁵

The reference to the Third World in TWAIL does not refer to a geographical space, or one that is historically fixed in time or that supposedly represents a true essence of the Third World. Neither is it a view based on Third World statehood or Third World nationalism—after all, many Third World scholars such as Makau Mutua have shown how colonially created statehood replicates many of the legacies of colonial rule.⁷⁶ To be clear, therefore, the use of the term “Third World” is an anti-subordinating term whose aim or goal is to disrupt and hopefully dismantle the hierarchies on which unequal production about the knowledge of international law is produced and practiced. It provides the analytical tools to examine whether there are unequal economic, political, military, or even racist underpinnings of our various rules, practices, and scholarship on and of international law and discusses and debates what can be done to overcome these inequalities.

The point about alternative epistemic locations that is made possible by the anti-subordination perspective that I have just alluded to, is that it counteracts dominant accounts of international law (whether, for example, European, American, or otherwise). This perspective also challenges the hierarchical and unequal manner in which rules of international law from some parts of the world become predominant

West” and that universality of the international law or its promise of global order and stability justify it).

75. See Luis Eslava, *TWAIL Coordinates*, GRONINGEN J. INT’L L. BLOG (Apr. 1, 2019), <https://grojil.org/2019/04/01/twail-coordinates> (stating that the purpose of TWAIL scholarship is to “cross-examine international law’s assumed neutrality and universality in light of its longstanding association with imperialism, both historical and ongoing”).

76. See OBIORA CHINEDU OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA 73 (2000) (explaining how 17th, 18th, and 19th century European nation building models have directly influenced and projected modern international law’s homogenous political standards to the entire world); Makau Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113, 1125 (1995) (finding that the recognition of statehood is deeply rooted in colonial standards); Usha Natarajan, John Reynolds, Amar Bhatia & Sujith Xavier, *Introduction: TWAIL – On Praxis and the Intellectual*, 37 THIRD WORLD Q. 1946, 1949 (2016) (noting that TWAIL has its own biases including issues of indigeneity, gender, and caste).

while others are regarded as subordinate or irrelevant. This part of the lecture discusses examples of Third World scholarship in international law that respond to the epistemic silencing of the Third World.

Take the example of James Sakej Youngblood Henderson's scholarship countering Eurocentric representations of indigenous inadequacy in international law. Henderson advocates for indigenous humanities not merely as an art of self-affirmation, but as an alternative epistemological point of departure for international law.⁷⁷ A point of departure that would overcome what he calls the "cognitive annihilation" of indigenous heritages and worldviews.⁷⁸ Unlike the written rules and doctrines of international law, indigenous lawyers, he argues, "are reintroducing ancient visions of human relationships . . . as discursive remedies to our suffering, rather than quibbling word games and conceptual riddles as in Eurocentrism. The remedies [he argues] are in our vision, consciousness, and feelings. They remain in the places and ceremonies that our Creator placed them; it is for us to continually rediscover and renew these teachings."⁷⁹

Similarly, Adrien Wing has argued that there are "spirit injuries" that arise from a combination of physical, emotional, and spiritual harms of discrimination and oppression that arise in the context of self-determination struggles to overcome racist, alien, or colonial rule.⁸⁰ Spirit injuries may occur on both a personal level, leading to the "slow

77. James (Sákéj) Youngblood Henderson, *Postcolonial Indigenous Legal Consciousness*, 1 INDIGENOUS L.J. 1, 21 (2002) (discussing the "cognitive imprisonment and imposed inferiority" of indigenous peoples embedded in international law).

78. *Id.* at 7.

79. *Id.* at 4, 13.

80. See Adrien Katherine Wing, *Healing Spirit Injuries: Human Rights in the Palestinian Basic Law*, 54 RUTGERS L. REV. 1087, 1088–89 (2002) [hereinafter Wing, *Healing Spirit Injuries*] (applying "spirit injury" to the Palestinian people, namely that they have suffered many violations of their human rights (including exile, family dissolution, land dispossession, death, torture, and imprisonment) and have faced racism, cultural stereotypes, political imperialism, and dehumanizing ideology); see also Adrien Katherine Wing, *The South African Transition to Democratic Rule: Lessons for International and Comparative Law*, 94 AM. SOC'Y INT'L L. PROC. 254, 256 (2000) [hereinafter Wing, *South African Transition to Democratic Rule*] (applying "spirit injury" to the harms arising out of Apartheid in South Africa and the Palestinian independence movements).

death of the psyche, the soul, and the personal” and on a group level, leading to the “devaluation and destruction of an entire culture.”⁸¹ Wing popularized this concept of spirit injury which is “broadly applicable . . . to sociological, anthropological, and political conceptions of violence.”⁸² Such injuries that go beyond the doctrinal categories of international law indicate the different epistemic locations of international law.

TWAIL feminist scholarship also illustrates what it means to proceed from an alternative epistemic location by foregrounding race and gender. TWAIL feminists do this in part by exposing overlapping and interdependent forms of gender subordination and discrimination as a central point of inquiry. In addition, in response to U.S.-style white feminism and its claims of “universality,” early TWAIL feminist scholarship emphasized the commonality of women’s experiences could not serve as a template for feminisms in the Third World.⁸³ Critical Race Feminists, led by scholars like Adrienne Wing,⁸⁴ argue that the identities of women of color are multiplicative, in the sense that they possess multiple consciousness, based on their intersectional identities.⁸⁵ They also argue against feminist analysis that unproblematically sweep women from many parts of the world into their analysis as simplistic and inaccurate.⁸⁶ Like Critical Race

81. Wing, *Healing Spirit Injuries*, *supra* note 80, at 1089.

82. Nick J. Sciuillo, Note, *Spirit Injury and Feminism: Expanding the Discussion*, 83 PROC. GA. COMM. ASS’N 26, 27 (2013).

83. See Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship*, 16 HARV. L. WOMEN’S L.J. 189, 189–90 (1993) (arguing that the universalization of American feminist ideals is problematic because it ignores many differences that separate women around the world).

84. See Adrienne Katherine Wing, *Global Critical Race Feminism Post 9-11: Afghanistan*, 10 WASH. U.J.L. & POL’Y 19, 20 (2002) [hereinafter Wing, *Global CFR: Afghanistan*] (describing Critical Race Feminism as a theory “concerned with the legal status of women of color around the world,” while recognizing that women of the third world are uniquely discriminated against).

85. See Mari J. Matsuda, Associate Professor of L., U. of Haw., Keynote Address at the Yale Law School Conference on Women of Color and the Law: When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, *reprinted in* 14 WOMEN’S RTS. L. REP. 297, 298 (1992) (finding that women—especially women of color—inherently adopt multiple consciousnesses as a result of society’s patriarchal and racial hierarchy structure).

86. See Wing, *Global CFR: Afghanistan*, *supra* note 84, at 20 (noting that racial categories like “people of color” are socially constructed, and thus differ based on

Theorists, Critical Race Feminists examine women's experiences through race and gender "lenses" simultaneously rather than only through one of them.⁸⁷ Indeed, TWAIL feminist scholars quite easily draw on the multiple intersections of oppression that women are subjected to. In questioning white feminism's universalist claims, TWAIL feminists draw on the multiple experiences of women of color, including black, queer, transgender, lesbian, as well as their anti-colonial, anti-imperialist, and anti-capitalist stances.⁸⁸

Similarly, Henry Richardson III's important scholarship challenges how international legal history scrubbed clean the history of racial oppression and "massiveness of the slave system since before the beginning of the [American] Republic" and how that system and the accompanying history sought to show how African Americans lacked "talent and public competence . . . [and] praiseworthy personal attributes."⁸⁹ Henry J. Richardson III's book, *The Origins of African American Interests in International Law* (2008), is an excellent example of international law scholarship that recovers the epistemic silencing of African Americans in international law. In the book, Professor Richardson sought to uncover "the origins of African American's own jurisprudence about international law" in the seventeenth to nineteenth centuries. While Antony Anghie's work examines non-European encounters with international law, Richardson examines how international law sees African Americans from the perspective of "European and other militarily and

the subject's location).

87. *Id.* at 25.

88. See J. Oloka-Onyango & Sylvia Tamale, "The Personal Is Political," or *Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691, 700 (1995) (explaining how discussions concerning feminism are given far more weight when examined from the lenses of the Global North, leaving Southern voices out of the dialogue, and thus leading to the conclusion that there is universality amongst feminist perspectives); see, e.g., Dianne Otto, *The Gastronomics of TWAIL's Feminist Flavours: Some Lunch-Time Offerings*, 9 INT'L COMMUNITY L. REV. 345, 346, 350 (2007) (stating that the identity of the "African Woman" and the "Lesbian Woman" was seen by others as "divided and ranked by a myriad of dualized identity significations").

89. Henry J. Richardson III, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV., 1091, 1096–97 (2000).

economically prominent sovereigns and peoples.”⁹⁰

Yet notwithstanding being critical of the accounts of international legal history that exclude how international law was implicated in the subordination of non-Europeans for Anghie and in the slavery of African Americans for Richardson, they do not dismiss international law as hopelessly unhelpful for these subordinated peoples. In addition, notwithstanding their critique that international law mirrors our Eurocentric tools of knowledge production and that the very nature of international legal scholarship is dominated by Western(ized) analytic tools, TWAIL scholars like Richardson and Anghie are still hopeful that international law can make a difference.

Quite notably, TWAIL scholars do not only emphasize an international law comprising merely of positive rules. For example, it is especially striking that Richardson’s book powerfully argues that in the seventeenth to nineteenth centuries—during slavery—what he refers to as international law in that time period was “one candidate among several sources of [outside] norms”⁹¹ that African Americans “desired to . . . be locally authoritative” as they sought their freedom from slavery and white racism. They saw such outside law as necessary in “confirming their right to be free of slavery and [to be] treated with dignity” because the local law that governed them denied their “rights and humanity.” This appeal to outside law, Richardson argues, was part of Black resistance against “white slavery, oppression and slave culture.” According to Richardson, in the period between 1790 to 1910:

Blacks needed the State to be judged and [reined] in under international law to prevent it from continuing its membership in the international slave system, and to force it to fulfill its moral obligations to revamp its domestic law so as to eliminate domestic racism against blacks and to create the legal and material conditions for Black

90. *Id.* at 1094; see also James T. Gathii, *Henry J. Richardson III: The Father of Black Traditions of International Law*, 31 TEMP. INT’L & COMP. L.J. 325, 325 (2017).

91. HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* xxiii, 448 (2008) (asserting that other sources included “the law of God, to British postures and policies in the American Revolution, to the model of liberation presented by the Haitian Revolution, to natural-law based principles of freedom invoked by white American colonists”).

freedom and equality.⁹²

African Americans therefore sought what Richardson called “a new American interpretation of international law.”⁹³

Similarly, although Anthony Anghie’s 2004 classic, *Imperialism, Sovereignty and the Making of International Law*, offers an unparalleled analysis of the foundational and systemic nature of colonialism and its afterlife—imperialism—from the natural law period through the era of positivism to the era of pragmatism and to the end of the cold war, it is nevertheless hopeful that “international law can be transformed into a means by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power.”⁹⁴

You see this if you read Alejandro Alvarez,⁹⁵ R.P. Anand,⁹⁶ Tiejia Wang,⁹⁷ Onuma Yasuki,⁹⁸ Georges Abi-Saab,⁹⁹ Mohammed

92. *Id.* at 340.

93. *Id.* at 341.

94. ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 318 (2005).

95. *See* ALEJANDRO ALVAREZ, *AMERICAN PROBLEMS IN INTERNATIONAL LAW* 74–79 (1909).

96. *See, e.g.,* R. P. ANAND, *NEW STATES AND INTERNATIONAL LAW* 46 (2008) (claiming that the expansion of society has upset the “equilibrium” and changed the “geography” of international law. The new majority now consists of “small, weak, poor, underdeveloped, former colonies filled with resentment against their colonial masters, and needing and demanding the protection of the international society.” This new majority has new needs and demands and thus, the change in “geography . . . must be accompanied by an alteration in law.”).

97. *See* Wang Tiejia, *The Third World and International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 956, 959, 961–62 (R. St. J. Macdonald & D. M. Johnston eds., 1983) (“[A]lthough Third World countries are adamantly opposed to the imperialistic, colonialistic, oppressive and exploitative principles and rules of traditional international law, they do not reject international law itself . . . the attitude of the Third World towards international law is very clear: it neither accepts nor rejects international law in its entirety pages.”).

98. *See* YUSAKI ONUMA, *INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD* 4 (2017).

99. *See* Cyril E. Black & Richard A. Falk, *Introduction*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER*, VOLUME 4: *THE STRUCTURE OF THE INTERNATIONAL ENVIRONMENT* i, vii–xi (Cyril E. Black & Richard A. Falk eds., 1972); Georges M. Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 *HOW. L.J.* 95, 96–99, 120–21 (1962); Georges M. Abi-Saab, *The Third World and the Future of the International Legal Order*, 29

Bedjaoui,¹⁰⁰ Taslim O. Elias,¹⁰¹ Buphinder Chimni,¹⁰² Upendra Baxi,¹⁰³ Christopher Weeramantry,¹⁰⁴ and Kamal Hosain, among others.¹⁰⁵ What is striking about this group of Third World scholars is that they never sought to fit conventional tropes of the discipline. These international lawyers spread throughout the Third World in Asia, Africa, the Middle East, Latin America, and beyond and engaged in what Vasuki Nesiah has described as rebel imagination of the plural

REVUE EGYPTIENNE DE DROIT INT'L 27, 27–31, 66 (1973); *see also* Laurence Boisson de Chazournes, *Portraits de Georges Abi-Saab*, in *THE INTERNATIONAL LEGAL SYSTEM QUEST OF EQUITY AND UNIVERSALITY: LIBER AMICORUM GEORGES ABI-SAAB* 3, 6 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001).

100. *See* MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 11–16 (1979).

101. *See* T. O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* 21–24, 32–33, 62 (1972); T. O. ELIAS, *NEW HORIZONS IN INTERNATIONAL LAW* 3–4, 17–18, 21, 30–32 (1979); T. O. ELIAS, *THE MODERN LAW OF TREATIES* (1974); *see also* James T. Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 *LEIDEN J. INT'L L.* 317, 317–19 (2008); Carl Landauer, *Things Fall Together: The Past and Future Africas of T. O. Elias's Africa and the Development of International Law*, 21 *LEIDEN J. INT'L L.* 351, 351–53 (2008).

102. *See* B. S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* 8, 15–17, 23 (2d ed. 2017); B. S. Chimni, *Class and International Relations*, in *INTERNATIONAL RELATIONS: PERSPECTIVES FOR THE GLOBAL SOUTH* 68, 68–69, 347, 356 (Bhupinder S. Chimni & Siddharth Mallavarapu eds., 2012).

103. *See* UPENDRA BAXI, *HUMAN RIGHTS IN A POSTHUMAN WORLD: CRITICAL ESSAYS* 111–14 (2007); UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 286–87, 291, 306–09 (3d ed. 2008); Upendra Baxi, *What May the 'Third World' Expect from International Law?*, 27 *THIRD WORLD Q.* 713, 713–15 (2006).

104. *See* Marie-Claire Cordonier Segger & C. G. Weeramantry, *Introduction to Sustainable Justice: Implementing International Sustainable Development Law*, in *SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW* 1, 2–6 (Marie-Claire Cordonier Segger & C. G. Weeramantry eds., 2005); CHRISTOPHER WEERAMANTRY, *NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP* 12–15 (1992); CHRISTOPHER G. WEERAMANTRY, *ARMAGEDDON OR BRAVE NEW WORLD? REFLECTIONS ON THE HOSTILITIES IN IRAQ* 152–58 (2003).

105. *See* Cynthia Farid, *Legal Scholactivists in the Third World: Between Ambition, Altruism and Access*, 33 *WINDSOR Y.B. ACCESS TO JUST.* 57, 57 (2016) (examining the work of Dr. Kamal Hossain, an accomplished Bangladeshi lawyer who “voiced subaltern and Third World concerns on the global stage through a variety of mediums including domestic and international legal practice, advocacy, international organizations.”).

ways in which the promise international law could be reimagined.¹⁰⁶ These isolated rebel imaginations are what today has crystallized into TWAIL. This earlier scholarship, though produced in disparate continents and published in a wide-ranging set of places, is therefore far better understood as a part of a large protracted and ongoing struggle against the international law they were taught—and that they sought to remake so that it could become more international than they had received it.

These scholars and practitioners of international law were at the very core of the resistance to and agitation against alien, racist, and colonial rule as countries then under colonial rule sought self-determination and independence from European powers.¹⁰⁷ Perhaps the signature quote that exemplifies this attitude is Tieya Wang's when he says:

[a]lthough Third World countries are adamantly opposed to the imperialistic, colonialistic, oppressive and exploitative principles and rules of traditional international law, they do not reject international law itself. . . . The attitude of the Third World towards international law is very clear: it neither accepts nor rejects international law in its entirety.¹⁰⁸

106. See Vasuki Nesiab, *Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence*, 112 AM. J. INT'L L. UNBOUND 313, 317–18 (2018); see also Carl Landauer, *The Polish Rider: CH Alexandrowicz and the Reorientation of International Law, Part I: Madras Studies*, 7 LONDON REV. INT'L L. 321, 321 (2019) (analyzing the prominent international legal historian CH Alexandrowicz, who was known for advocating the impact of the East on the law of nations of the West, and for his work on international law generally).

107. See, e.g., Umut Özsu, "In the Interests of Mankind as a Whole": Mohammed Bedjaoui's *New International Economic Order*, 6 HUMANITY 129, 131 (2015) (providing an example of Mohammed Bedjaoui's role in Algeria, "Bedjaoui devoted the bulk of his energy to a series of reform proposals. At root, nearly all such proposals promoted the establishment of new international institutions to complement existing United Nations agencies and departments, encouraged resistance to attempts on the part of developed states to co-opt or otherwise deracinate the 'common heritage of mankind' doctrine, and called for greater use of General Assembly resolutions as a means of circumventing the influence of a Security Council dominated by great powers. . . . For Bedjaoui, the Third World was entrusted with the responsibility of militating for the new order that would make such development possible, acting not simply on its own behalf but as a representative of the 'whole world community.'").

108. Tieya, *supra* note 95, at 961–62.

For TWAIL scholars, therefore, notwithstanding its complicity in the repression and silencing of non-European and other peoples, international law—or at least parts of it—had potential to be rescued from its dark sides. Today’s TWAIL scholar activists engage with the promise or dreams that the first generation of TWAILers who were involved in anticolonial resistance and who celebrated the end of formal colonial rule in the era of self-determination. Today, Third World scholars contest the continuities of coloniality that survived decolonization. TWAIL scholars expose or unmask the Eurocentric leanings and underpinnings of international law after decolonization and how these leanings and underpinnings are very similar to the ways in which European international law constructed colonial difference between the colonized and colonizers. They expose the partiality of the post-World War II American-dominated multilateral order. By exposing the centrality and power of the United States in the post-World War II order, TWAIL scholars contested the framings of the post-World War II order along the liberal/realist framings of the period.

TWAIL scholars do not simply reject approaches to international law that have silencing effects or that preclude asking certain questions or which disallows or denigrates scholarship, views, and practice from “subaltern epistemic locations.”¹⁰⁹ Rather, Third World scholars have offered and continue to offer how international law can be built or rebuilt. In this sense, like Siba Grovogui, I believe what is at stake is not an issue of inclusion or exclusion of non-Western peoples or states within Western international law. Rather, it involves considerations of the very terms of the constitutional order of “post-

109. See Karin Mickelson, *Rhetoric & Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT’L L.J. 353, 361–62 (1997) (noting that a major purpose of TWAIL scholarship is to end the silencing and marginalization of third world voices that make visible the marginalization and oppression of third world peoples); see also Gayatri C. Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271, 271–316 (Cary Nelson & Lawrence Grossberg eds., 1988) (providing another example of how international law can provide a voice to those traditionally oppressed as a result of imperialism and capitalism); Prabhakar Singh, *Indian International Law: From Colonized Apologist to a Subaltern Protagonist*, 23 LEIDEN J. INT’L L. 79, 87 (2010) (noting how the rise of TWAIL scholarship looked at international law from the perspective of marginalized populations around the world).

Enlightenment social knowledge, its structures of thought, and related constructions of political subjectivity”¹¹⁰ of which international law is a central part.

My overriding claim here therefore is as follows: Third World scholars have always been simultaneously critical of and also clearly enamored by international law while offering how alternative or non-Western ideals could introduce new meanings, standards, rules, and norms of international law.

TWAIL scholars are therefore always conscious that their scholarship and practice is trapped within problematic structures of knowledge that represent partial interests and priorities as they struggle to move them beyond those problematic foundations. As Diane Otto posed two decades ago, the question for critical scholars like TWAILers is “whether it is possible to imagine processes whereby non-dominant, non-elite, subaltern individuals and groupings could participate as subjects of international law”?¹¹¹ This is an enduring theme in TWAIL scholarship and practice.

A recent book edited by Michael Fakhri, Vasuki Nesiah, and Luis Eslava on the legacies of the Bandung conference of 1955 dares to imagine such a non-dominant, non-elite, subaltern perspective by authoritatively retelling the history of international law by placing the non-Western world at the center, thereby decentering the Westphalian myth. In doing so, the book critically engages the Third World’s resistance to the Global North by looking beyond Europe and North America as the “organizing geopolitical and cultural fulcrum of the world.”¹¹² The book uses the Bandung conference of 1955 as a point of departure to examine how it created “new anti-colonial possibilities.”¹¹³ It is this sense of possibility that Third World scholars, peoples, and states have continued to invest in international

110. SIBA N’ZATIOULA GROVOGUI, BEYOND EUROCENTRISM AND ANARCHY: MEMORIES OF ORDERS AND INSTITUTIONS 49 (2006).

111. Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337, 338 (1996).

112. Luis Eslava, Michael Fakhri, & Vasuki Nesiah, *The Spirit of Bandung*, in *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* 6 (Luis Eslava et al. eds., 2017).

113. *Id.* at 25.

law, notwithstanding its imperial past.

Retelling international law from such a view of the Third World focuses on how it matters for the majority of the people of the world—people often subordinated in multiple ways—by their states in conjunction with international institutions, global capital, and so on.¹¹⁴ TWAIL scholars are therefore able to simultaneously challenge views of colonialism being a thing of the past that our discipline sometimes too quickly assumes by exposing the uncanny colonial continuations in the present, while at the same time, seeking reform of international law and seeing the utility of using it to promote change.

To counteract this ever-present challenge of retrenchment and backward movement, TWAIL scholars like Balakrishnan Rajagopal focus our attention to thinking of international law from below, focusing on those most marginalized particularly in development policies.¹¹⁵ Rajagopal argues that, by and large, “international law’s story telling about its own formation remains a highly elitist one that entirely overlooks the role played by non-Western, non-elitist individuals and groups.”¹¹⁶ For Rajagopal, the process of imposing development in the Third World is a major cause of poverty, misery, and violence.

Think about it: a large percentage of people in the world do not live in urban areas—they live in rural areas and are likely to be engaged in agriculture. Yet the predominant regimes of global trade and investment are not structured in ways that promote and uplift the interests of these rural farmers. Today we are more likely to hear about the fate of farmers in Europe and North America who are heavily subsidized (when we are not hearing the interests of industry), rather

114. See MOHAMMAD SHAHABUDDIN, *ETHNICITY AND INTERNATIONAL LAW: HISTORIES, POLITICS AND PRACTICES* 1–2 (2016) (examining the relationship between ethnicity and the development of international law and how salience associated with ethnicity formed political identities in international law).

115. See BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND RESISTANCE* 293 (2013) (arguing that the problem with liberal internationalism is that it excludes marginalized persons and that international law needs to become inclusive of these populations).

116. Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT’L L.J. 529, 577 (2000).

than those in developing areas whose fates are intricately linked to the heavy subsidization of their counterparts in the Global North. One only has to remember the heavy subsidization of cotton farming in the United States that the Dispute Settlement Body of the World Trade Organization (WTO) found inconsistent with the United States' WTO obligations.¹¹⁷ Those subsidies, the WTO found, had created something greater than the Great Depression in the cotton market in ways that made it impossible for farmers in Africa and Latin America who are more efficient/low cost cotton producers to benefit from selling their cotton on the global market. This is just one example of the structural conditions that disadvantage those who live in the bottom billion. Further, it is now well established as an empirical matter that the "flow of money from rich countries to poor countries pales in comparison to the flow that runs in the other direction."¹¹⁸ This means, as Jason Hickel argues, that: "The usual development narrative has it backwards. Aid is effectively flowing in reverse. Rich countries aren't developing poor countries; poor countries are developing rich ones."¹¹⁹

Rules of international law entrench these structural inequalities by privileging the rights of corporate plant breeders in agricultural markets—in ways that undermine the rights and the ability of small-scale farmers to collect, store, and benefit from their own innovations and seeds. Hence, though a large number of people in the world today live in rural areas and depend on agriculture for their livelihoods, the predominant rules of our discipline, especially those relating to intellectual property rights, are heavily weighted against the most

117. See Appellate Body Report, *United States – Subsidies on Upland Cotton*, ¶¶ 763(e)(ii), (iv), WTO Doc. WT/DS267/AB/R (adopted Mar. 3, 2005) (holding "that the United States' export credit guarantee program are prohibited subsidies" under WTO obligations); see also Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 456–57 (2002) (explaining that various compensation payments of the European Union and United States violate WTO obligations by crediting the two markets for non-existent domestic subsidies).

118. Jason Hickel, *Aid in Reverse: How Poor Countries Develop Rich Countries*, GUARDIAN (Jan. 14, 2017), <https://www.theguardian.com/global-development-professionals-network/2017/jan/14/aid-in-reverse-how-poor-countries-develop-rich-countries>.

119. *Id.*

needy and vulnerable farmers. As TWAIL scholars from Michael Fakhri¹²⁰ to Titilayo Adebola¹²¹ write, this bias in favor of big agriculture and plant breeders has attendant consequences on the livelihoods of farmers in the Global South, including their right to food. The promise of international law is highlighting those least off like the small-scale farmers, many of them often women.

This approach turns the focus of our discipline on its head, so that instead of focusing only on the formal sources of our discipline, such as treaties, custom, judicial opinions, and state practice, we can also focus on ordinary people and social movements not only in resisting rules made from above, but in forging new ones that reflect their concerns.

IV. CONCLUSION

I started this lecture by highlighting why we should take the international law in places like Arusha more seriously. As I end my lecture, I want to emphasize three points: First, that there is a remarkable energy and indeed what I can call a renaissance of Third World scholarship in international law.¹²² For example, a bibliography

120. See Michael Fakhri, *A History of Food Security and Agriculture in International Trade Law, 1945–2017*, in NEW VOICES AND NEW PERSPECTIVES IN INTERNATIONAL ECONOMIC LAW, 55, 60, 62, 80, 84 (J.D. Haskell & A. Rasulov eds., 2020) (arguing that recent agricultural trade law and policy harms the most vulnerable populations of the world and that international trade law should act as a remedy and support domestic farm programs).

121. See Titilayo Adunola Adebola, *The Regime Complex for Plant Variety Protection: Revisiting TRIPS Implementation in Nigeria*, (Sept. 2017) (unpublished PhD Thesis, Warwick Law School) (on file with Warwick Research Archive Portal) (demonstrating how TWAIL scholarship is used to evaluate international law for small-scale farmers affected by current international agriculture trade policies in Nigeria).

122. See *Founding Statement*, THIRD WORLD APPROACHES TO INT'L L. REV., <https://twailr.com/about/founding-statement/> (last visited Oct. 12, 2020) (“Scholarly agendas associated with TWAIL are diverse. They incorporate perspectives from across the fields of Third Worldist, Marxist and feminist thought, postcolonialism and decoloniality, Indigenous studies and critical race theory, and more. The common themes of TWAIL’s interventions are to unpack and deconstruct the colonial legacies of international law, and to engage in efforts to support the decolonisation of the lived realities of the peoples of the Global South and the rupture or radical transformation of the international order which governs their lives.”).

of TWAIL scholarship that I have prepared, and that is available as a weblink to this lecture as an appendix, shows a steady increase in scholarly production from 1996 to 2019. This bibliography includes articles, book chapters, and essays published not only on databases available in the Europe and North America, but also in journals and books that do not readily show up in the beltway databases of our discipline.¹²³ When I examined all these publications on a graph, I saw a steady increase in the scholarly production that associated itself with Third World Approaches beginning in 1998 through to 2012, and since then I can report that there has been a bigger and sustained upward trend.

This nearly six-hundred-item bibliography that spans both international law and international economic law is great for anyone who would like to diversify their syllabus and curriculum; it can add to the citations in briefs for cases, and in scholarly and other writing. If you are interested in digressing from the Western canon that excludes non-Western international law, or in learning from some of the scholarship that is actively engaging in decentering knowledge and knowledge production¹²⁴ in the sense that I have noted in this lecture, there is a growing scholarship you can now readily refer to.

123. See Antony Anghie & JR Robert G. Real, *Teaching and Researching International Law in Asia (TRILA) Project Report*, NUS CENTRE FOR INT'L L. 1, 7 (2020), <https://cil.nus.edu.sg/wp-content/uploads/2020/06/TRILA-Project-Report-Final-compressed-v2.pdf> (analyzing how Asian societies can increase their role in developing current international law). See generally *About*, AFRONOMICS L., afronomicslaw.org/about/ (last visited Oct. 12, 2020) (focusing on international law and international economic law as it relates to Africa and the Global South) (Another forum is the International Economic Law Collective, which “provides a space for critical reflection on the complex interactions in the growing field of international economic law and exploring how epistemological and methodological diversity in the discipline can contribute towards the development of a more holistic landscape of scholarship on law and the governance of the global economy”); *About*, THE IEL COLLECTIVE, <https://warwick.ac.uk/fac/soc/law/research/centres/globe/ielcollective/about/> (last visited Oct. 12, 2020) (analyzing the effectiveness of international economic law at incorporating a range of diverse voices and viewpoints within the discipline).

124. See John Reynolds & Sujith Xavier, “*The Dark Corners of the World*”: *TWAIL and International Criminal Justice*, 14 J. INT'L CRIM. JUST. 959, 966 (2016) (providing an example of legal scholarship from the perspective of the global South that does not conform with traditional Western law in the field of international criminal law).

One of many contributions that this TWAIL scholarship has made is directing our attention to reexamine the history.¹²⁵ As Bhupinder Chimni powerfully and carefully traces for us in the latest edition of his book, *International Law and World Order: A Critique of Contemporary Approaches*,¹²⁶ this turn to history in our discipline owes no small part to TWAIL scholars.

Second, I want to note that TWAIL scholars practice what they preach. Let me illustrate this in just one area that has featured in this lecture—human rights. Tendayi Achiume is the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. Obiora Okafor, another TWAILer, is the UN Independent Expert on Human Rights and International Solidarity and a former Chairperson of the United Nations Human Rights Council Advisory Committee. Balakrishnan Rajagopal is new UN Special Rapporteur on the Right to Housing and Michael Fakhri is the new UN Special Rapporteur on the Right to Food. Clearly, TWAIL is not cheap talk. TWAIL scholars are active in the practice of international law.

This does not of course mean that TWAIL does not have its blind spots, as every approach or method has some. This third point is particularly important at this moment in the history of the United States and indeed of the world. I cannot emphasize enough why embracing the analytical tools of Third World Approaches to International Law and its twin sibling Critical Race Theory would be important for tracing and tracking issues of race and identity not only in domestic law, but also in the imperial histories of our discipline.¹²⁷

125. See Tiyanjana Maluwa, *Reassessing Aspects of the Contribution of African States to the Development of International Law Through African Regional Multilateral Treaties*, 41 MICH. J. INT'L L. 327, 329 (2020) (arguing that postcolonial African states have been active participants in developing new rules of international law).

126. See Chimni, *supra* note 100, at 306 (noting that “[d]espite being interested in the history of international law, Kennedy never gave serious consideration to the role of colonialism and imperialism in the development of international law” and that “[i]t was not until his third world students produced work on the relationship between imperialism and international law that the theme found its way into his writings.”).

127. See James Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 37, 40 (forthcoming

After all, we can all agree that issues of race and identity have so far been underemphasized, understudied, and undertheorized in international law and that we can and need to do better, including in this learned society.¹²⁸ A major point of my lecture therefore has been that the promise of international law and in fact a full accounting of our discipline would be incomplete without critical approaches such as Third World Approaches to International Law or Critical Race Theory, particularly if we are interested in a truly international law that goes beyond the usual pathways.

Thank you for your attention and patience and I very much look forward to the response from Professor Fleur Johns.

V. APPENDIX: TWAIL BIBLIOGRAPHY 1996-2019¹²⁹

A. ENGLISH BIBLIOGRAPHY

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Abu-Odeh, L., *Egyptian Feminism: Trapped in the Identity Debate*,

2020) (arguing that TWAIL and CRT provide a unique opportunity for understanding race throughout imperialism, which inevitably shows how race influences international law).

128. See Am. Soc. Int'l L. Ad Hoc Comm., FINAL REPORT FROM THE ASIL AD HOC COMMITTEE INVESTIGATING POSSIBLE EXCLUSION OR DISCOURAGEMENT OF MINORITY MEMBERSHIP OR PARTICIPATION BY THE SOCIETY DURING ITS FIRST SIX DECADES SUBMITTED TO THE PRESIDENT FOR THE EXECUTIVE COUNCIL OF THE SOCIETY, 1, 8, 9, 13 (Jan. 2020) (noting that ASIL, throughout the course of its existence, "excluded domestic persons of color" and recommended that ASIL enforce policies within the professional organization to "attract domestic persons of color"); see also *Statement by President Catherine Amirfar Regarding Racial Violence and Injustice in the United States*, AM. SOC. INT'L L. (June 3, 2020), https://www.asil.org/sites/default/files/pdfs/ASIL_Statement_Racial_Violence.pdf (condemning systemic racial injustice of American society as exemplified by the killings of George Floyd, Ahmaud Arbery, and Breonna Taylor).

129. This Bibliography is a work in progress. Kindly send any suggestions or comments to jgathii@luc.edu.

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