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# *Rethinking International Law: A TWAIL Retrospective*

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## Abstract

*This EJIL Foreword is a personal retrospective of the Third World Approaches to International Law (TWAIL) movement. It provides an account of the origins of TWAIL and the political and intellectual context in which it emerged during the 1990s. It outlines some of the key themes and concerns of TWAIL – including 'colonial continuities', 'capitalism, imperialism and political economy', and 'TWAIL and History'. It argues that the distinction between the 'First' and 'Third' Worlds continues to be relevant by examining the operation of this distinction in various fields of international law, such as the use of force, international migration law and human rights. The Foreword then outlines two of the author's current research projects on themes that have been of major interest to TWAIL scholars: first, human rights and their relationship to imperialism; and second, race and reparations. The Foreword concludes by arguing that 'Third World Approaches to International Law' are relevant, not simply for the 'third world', but for the entire globe; it urges us to consider TWAIL as a cosmopolitan project.*

## 1 Introduction

Historians of international law have traditionally focused on conferences as a beginning point of understanding crucial shifts and developments in the discipline. Succumbing then to this trope, my presentation of Third World Approaches to International Law (TWAIL) begins with a conference. The first conference heralding the emergence of the movement that is now called TWAIL took place on 7–8 March 1997.[1] Ironically, given the topic, it took place at the Harvard Law School. It featured

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[1] For a detailed account of the background to the conference by one of its principal organizers and for one account of the Third World Approaches to International Law (TWAIL), see Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography', 3(1) *Trade Law and Development* (*TLD*) (2011) 26.

four panels[2] and issued a vision statement that pointed to the privileging of European and North American voices in international law, the need to democratize the discipline and the imperative to critique the structures of international law that reproduced relations of hierarchy and discrimination.[3] It acknowledged a continuity with a Third World[4] tradition and called for a constructive dialogue among scholars to contest the undesirable features of international law. While the participants were excited to discuss the Third World tradition of international law, there was little sense of what would emerge from the conference. It is now apparent that TWAIL scholarship has grown in range and influence and has established itself as an important movement that has illuminated and continues to illuminate the workings of international law. Those present at the 1997 conference could hardly have anticipated these developments.

The task of giving an account of TWAIL is daunting. In this retrospective, I outline the circumstances in which TWAIL emerged in the 1990s and an overview of all that has followed from it. The 1997 conference was an attempt to understand what the Third World tradition stood for and how it had to be reconceptualized in the light of the profound changes in the international order that took place after the fall of the Berlin Wall. In section 2, I outline in broad terms some of the characteristics and major developments of this 'new world order' of the 1990s and how they impacted the people of the Third World. I then discuss how these same developments, and the ideas and initiatives that supported them, contrasted with, and indeed repudiated, the vision of international law that had been developed by an earlier generation of Third World international lawyers in the 1960s and 1970s – what might be termed 'TWAIL I'. The vision of TWAIL I scholars had driven the ambitious campaign to further decolonization, consolidate Third World sovereignty, and later, to establish a New International Economic Order (NIEO), which was the central thrust of an effort to create a more equitable global system. The task that confronted the TWAIL scholars of the 1990s ('TWAIL II'), then, was to explore and demonstrate how the ideas and concerns of TWAIL I scholars continued to be relevant, even if they had to be rethought and reformulated in the context of the 1990s.

TWAIL I and TWAIL II scholars were united in their efforts to create a system of international law that acknowledged and furthered the interests of the people of the Third World. While building upon and continuing the pioneering work of their predecessors, TWAIL II scholars rethought the Third World tradition in international law.

[2] The four panels were 'The Politics of International Legal Scholarship and Practice', 'Third World Approaches to International Law', 'Law and Development at the End of the Millennium' and 'Human Rights in the Third World: Struggles of Mass or Elite Politics'.

[3] For the vision statement, see Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse', 16(2) *Wisconsin International Law Journal* (*WILJ*) (1998) 353, at 416.

[4] The term 'Third World' was deliberately and boldly chosen by the organizers of the conference. TWAIL scholars have invariably written on their particular use of the term 'Third World' in their own work. They make it clear that the term refers not only to a geographical entity but also, variously, to a project of solidarity, a heuristic to understand the plight of disadvantaged communities and the structures that bring about exclusion and inequality and a politics of anti-subordination, among other things. See, e.g., Rajagopal, 'Locating the Third World in Cultural Geography', 15(2) *Third World Legal Studies* (*TWLS*) (2000) 1.

This was attempted in different ways. TWAIL scholars extended and deepened their study of international economic law to analyse the new regimes of trade and investment that furthered the expansion of globalization. They complicated and enriched the idea of the Third World by focusing on actors and communities within the Third World other than states, the traditional unit of analysis. Indeed, TWAIL scholars scrutinized and critiqued Third World states as many of them deployed an opportunistic and destructive ethnic nationalism and problematic development policies to oppress minorities and marginalize other communities within the state. TWAIL scholars also formulated an alternative account of the history of international law, one that was based on the premise that imperialism, far from being peripheral to the development of the discipline, was central to its very identity and operations. TWAIL scholars, in exploring all the themes listed above, drew upon advances in other disciplines and approaches, such as post-colonialism, Marxism and dependency theory, critical development studies and feminism to develop a deeper understanding of the operations of a globalized international law, its impact on the peoples in the Third World and their efforts to resist and reform it.

TWAIL, as the very name suggests – Third World 'Approaches' rather than a Third World 'Approach' – has always fostered and encouraged plurality. As the vision statement of 1997 made clear, '[m]embers of this network may not agree on the content, direction, and strategies of third world approaches to international law'.[5] Nevertheless, there are certain broad themes and questions with which TWAIL scholars as a collective have been preoccupied. In section 3, I provide a thematic overview of TWAIL scholarship, discussing some of the themes on which TWAIL scholars have focused. It is a central argument of all TWAIL scholarship that the formal end of colonialism did not bring about the end of colonial relations, and, thus, TWAIL scholars have focused on tracing how colonial relations have continued, in varied and complex forms, in a supposedly decolonized world. Political economy and the relationship between capitalism and imperialism have been a constant preoccupation of TWAIL scholars, who have thus written extensively on how this relationship has shifted and changed and manifested itself at different times. Empire and imperialism have continuously evolved, and while TWAIL scholars have focused on European and Western imperialism, they are also alert to the other forms and locations of empire. Empire and imperialism are by no means a uniquely European practice, even if European Empire warrants particular attention because it is so fundamental to the making of modern international law.

Finally, in this section, I also point to another important aspect of TWAIL scholarship – that of restoring and reconsidering the efforts of Third World countries and anti-colonial scholars to rethink and remake the world. In 1955, Asian and African states gathered at a conference in Bandung, Indonesia, to discuss the international system and global justice, and they concluded by presenting a compelling vision of a reformed world order. As the participants recognized, this was a historic occasion – the first conference at which sovereign, non-European states, representing a good proportion

[5] Mickelson, *supra* note 3, at 416.

of the world's population and also seeking to speak for those who remained under colonial rule, articulated an anti-colonial global system. Nevertheless, this event, as well as the NIEO itself, was overlooked and neglected and, by the 1990s, did not feature in any significant way in discussions of large questions of global order, governance and justice that were so enthusiastically and elaborately propagated at the time. Similarly, but at a more individual level, the work of brilliant anti-colonial scholars such as Eric Williams, as well as those of earlier Third World scholars, had fallen into neglect. TWAIL scholars have revisited these events and works: both to treat them with the intellectual seriousness that they warrant and also to suggest how many contemporary debates and works of scholarship deal with issues that were originally raised by these pioneering and sometimes overlooked scholars. Thus, the task of what I term 'restoration and rethinking' has been an important dimension of TWAIL scholarship.

Ever since TWAIL emerged, questions have been raised about how the term 'Third World' should be understood and, in more recent times, about whether the assumed dichotomy between the First World and the Third World on which TWAIL appears to be founded makes sense. What is the analytic value of the term in the midst of all the changes that have taken place since the 1990s? In section 4, I argue that the term continues to serve an important purpose, even while I sometimes use the similar terminology of 'North-South' or 'global South' – more capacious and current terms for the set of concerns that were initially articulated in Bandung and that evolved and shifted with subsequent global change. I try to suggest why the term 'Third World' is relevant by surveying several regimes such as international economic law, environmental law and international criminal law. Needless to say, this is a very superficial survey. All I seek to suggest is that the First World–Third World divide is a sort of tectonic plate – that developments in each of the surveyed areas of law, whether or not they explicitly reflect this divide and even when they complicate and appear to transcend or overcome the divide, are still, however remotely, based on and affected by that divide.[6] The selection of these areas is a matter of personal choice and interest, illustrative rather than systematic and comprehensive. I focus in particular on TWAIL and human rights as the uses of human rights have been an enduring interest to TWAIL scholars and, further, as a number of TWAIL scholars are now serving as special rapporteurs in the United Nations (UN) system and their work promises to further enrich and expand human rights. I would argue that TWAIL scholars have now written important and original works on virtually every major topic of international law and, more speculatively, that a 'TWAIL' approach to any overlooked or outstanding topics of international law will reveal new dimensions of that topic.

This is a personal account of TWAIL. It is in no way intended to be objective or authoritative. But while sections 3 and 4 do purport to be overviews, sections 5 and 6 entitled 'The Colonial Origins of Human Rights' and 'The Third World and the Reparations Campaign' are much more explicitly personal and comprise my current reflections and research on these two topics. Natural rights, developed at various

[6] On the use of geological metaphors for analysis, see Weiler, 'The Geology of International Law-Governance, Democracy and Legitimacy', 2004 *German Yearbook of International Law* 547.

stages of European history – through the times of the French and American revolutions, for instance – are commonly cited as the predecessor of modern human rights law. In section 5, I outline a facet of my work in which I seek to understand a different 'natural rights' tradition, one that was formed in the colonial encounter and that was crucially connected to the rights of the European alien in the non-European world. I sketch aspects of this tradition in the work of Francisco de Vitoria and Hugo Grotius in order to locate and identify the characteristics of this 'rights bearer' – the European alien – as a prelude for exploring the relationship between this rights holder and the development of international human rights law.

Section 6 on reparations deals with some issues raised by multiple campaigns for reparations that squarely engage with imperialism and its ongoing effects. What I term the 'Third World campaign for reparations' – that is, for instance, campaigns by the Herrero against Germany and by the Caribbean countries seeking reparations for slavery – are faced with numerous legal obstacles under the existing system of international law. I contrast this with what I term the 'Western campaign for reparations'. My argument here is that it is the West that has successfully created a system of international law that enables the West and its corporations to claim 'reparations' on an ongoing basis from the Third World. The result is a continuing transfer of wealth from the Third World to the West, further entrenching misery and dislocation in the Third World. An identification of the 'Western' system of reparations is, I would argue, a crucial step for the Third World campaign for reparations and its efforts more broadly to create a fairer global system. Aspects of these arguments may also be relevant to a related campaign for climate reparations.

In section 7, I try to sketch out the significance of TWAIL for current debates over the character of international governance and order. I also make more explicit a theme that is perhaps latent in the earlier sections. The term 'TWAIL' may suggest that TWAIL scholarship is relevant only to the people of the Third World and those in the West whose interests and sympathies extend to the Third World. My argument here is that TWAIL is of universal – a problematic term – significance. We cannot achieve global justice unless we achieve justice for the people in the Third World, and it is TWAIL scholarship that reveals important and systemic inadequacies in the international order that prevent this from occurring. The further point is that TWAIL is based on an account of the history of international law that demonstrates the integral, formative, inescapable relationship between the 'First World' and the 'Third World', Europe and non-Europe. Much of 'European' history unfolded in the non-European world, and TWAIL, by focusing on this phenomenon, provides new insights into the history of Europe itself. It is encouraging and appreciated that many European scholars have taken an interest in TWAIL work and have contributed to it for precisely this reason. In writing the history of international law, TWAIL scholars are writing a history not of the past but of the present, not only of the non-European world but also of Europe itself. Finally, I would argue, the legal technologies of dispossession that were developed and applied to the Third World are now globalized – that is, they now affect the lives of people in the West itself and, as such, contribute to the social dislocation, insecurity and inequality afflicting communities in the rich First World countries themselves.

Indeed, these developments might point to a further issue: systems of exploitation have created inequality and suffering in both the First and Third Worlds, and TWAIL scholarship might contribute to the long-standing and ongoing efforts to create global solidarities between the poor in the North and the South. Broadly then, despite its title, TWAIL cannot be considered to be purely about the 'Third World'. It is TWAIL that offers an alternative, universal vision of international law and justice.

Having sketched these developments, it becomes possible to get some sort of an overview of TWAIL and its evolution in the intervening two decades – a guide of sorts to TWAIL, its origins and development, its basic intellectual orientations, its connections with other types of scholarship and, in this respect, a version of its history. There are now already several important overviews of TWAIL, and I draw upon them in presenting this account – yet another account – of TWAIL and its future.[7] Needless to say, mine is a very personal and idiosyncratic view of TWAIL. It is the view of a member of what might be termed 'TWAIL II'.[8] A new generation of TWAIL scholars has emerged that has already produced rich and path-breaking scholarship. There are, then, multiple TWAILs, and this work cannot do justice to all that is taking place within the TWAIL network of scholars. I should add that my terminology has not always been consistent: the terms 'Third World' and 'global South', for instance, have different connotations, but I use them interchangeably. The term 'global South' may seem less offensive than the term 'Third World' with all its connotations of inferiority and hierarchy. However, I use the latter term because, as I have tried to suggest, it does invoke a particular history and tradition that has inspired the TWAIL project named after it. I must add that in trying to outline the 'TWAIL tradition' I may have cited scholars whose works have added to TWAIL thinking but who do not see themselves as part of the tradition. Equally importantly, and inevitably, given the ever-expanding volume

[7] See, e.g., Gathii, *supra* note 1; Mutua and Anghie, 'What Is TWAIL?', 94 *Proceedings of the Annual Meeting of the American Society of International Law* (*PAMASIL*) (2000) 31; Chimni, 'TWAIL: A Manifesto', in A. Anghie *et al.* (eds), *The Third World and International Order: Law, Politics and Globalization* (2003) 47; Anghie and Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2(1) *Chinese Journal of International Law* (*CJIL*) (2003) 77; L. Eslava, *TWAIL Coordinates*, 1 April 2019, available at https://grojil.org/2019/04/01/twail-coordinates/; Gathii, 'The Agenda of Third World Approaches in International Law (TWAIL)', in J. Dunoff and M. Pollack (eds), *International Legal Theory: Foundations and Frontiers* (2022) 153; Gathii, 'The Promise of International Law: A Third World View Grotius Lecture', *Social Sciences Research Network* (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509; A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (2016), ch. 10; Eslava and Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law', 3(1) *TLD* (2011) 103; see also Anghie *et al.*, *ibid.*; R. Falk, B. Rajagopal and J. Stevens (eds), *International Law and the Third World: Reshaping Justice* (2008); U. Natarajan *et al.* (eds), *Third World Approaches to International Law: On Praxis and the Intellectual* (2018).

[8] The distinction between an earlier generation of TWAIL scholars (TWAIL I) and the scholars whose work commenced roughly in the 1990s (TWAIL II) is elaborated on below. It was initially made in Anghie and Chimni, *supra* note 7. Although useful heuristically and illuminated various aspects of TWAIL scholarship, it is imprecise and has rightly been questioned and problematized. For an important analysis, see Galindo, 'Splitting TWAIL', 33(3) *Windsor Yearbook of Access to Justice* (*WYAJ*) (2016) 37.

of TWAIL scholarship, this article will leave out important TWAIL work. I ask for the understanding of both these groups of scholars.

## 2 TWAIL in Context

I begin this account, then, with a sketch of the characteristics and major developments of the 'new world order' of the 1990s and how the ideas that supported this order contrasted with the vision of international law developed by TWAIL I scholars in the 1960s and 1970s, before turning to the task confronting the TWAIL II scholars of the 1990s: how to articulate a challenge to this 'new world order' while critically rethinking and developing the pioneering work of their TWAIL I predecessors.

### A *The Liberal Order Ascendant: The Global Context*

TWAIL II emerged at a time when US President George H.W. Bush, following the fall of the Berlin Wall, proclaimed a 'new world order'.[9] Globalization was, if not at its peak, then gathering inexorable momentum, the 'End of History' had arrived and the liberal order was triumphant, having overcome its socialist and Third World rivals. In this section, I sketch the character of this 'new world order' with a view to illuminating some of its key elements and the impact of that order on Third World countries and how it transformed what might be broadly termed 'North-South' relations. I outline then the political context in which TWAIL II emerged and how this new order established itself through various legal regimes, particularly in the areas of human rights, trade and foreign investments, that intensified globalization and had a profound impact on developing countries. In broad terms, the 'End of History' narrative that held that all societies had to aspire to become liberal democracies was reflected in international legal initiatives directed at transforming the Third World accordingly.

Most conventional histories of the discipline focus on the new system and visions of international law created after major wars: the Peace of Westphalia in 1648, the Congress of Vienna in 1815, the League of Nations in 1919 and the UN in 1945. The fall of the Berlin Wall in 1989, of course, could be seen as the conclusion of one such war. In this case, however, no treaty formally ended the war or articulated the rules that would now govern the world. Rather, the new world order was developed through the existing but renewed UN system and, equally importantly, expansive and powerful trade and investment regimes. The new world order could be broadly termed a 'liberal order' given that liberal philosophy was the foundation of its animating ideas of the rule of law, the individual, society, the market, the role of government and political economy. And although the international legal regimes of human rights, trade, environment, finance and investment each had unique characteristics and concerns, they were broadly founded on these liberal values and united in constructing a system in

[9] George H.W. Bush, 'Address before a Joint Session of Congress', 11 September 1990, available at https://web.archive.org/web/20160602115313/http://millercenter.org/president/bush/speeches/speech-3425.

which these values could be expanded and implemented. This overarching system was distinctive in that, by now, with the defeat both of communism and the Third World campaign for a NIEO, it confronted no ideological rivals or alternative visions of global governance. Arguably, it was not since imperialism at its zenith in the late 19th century that one system of ideas had been so globally dominant. The tenets of this order were enthusiastically taken up by international institutions, Western governments, technocrats in developing countries and non-governmental organizations (NGOs), all of whose actions and programmes received powerful legitimacy by furthering the project of transforming the Third World prescribed by this order.

Shortly after the fall of the Berlin Wall, the UN acquired a new stature and significance. The Iraq War of 1991, authorized by the UN Security Council, revealed features of this new world order, one in which the UN appeared finally empowered to begin fulfilling all the aspirations so movingly presented in its preamble – to save succeeding generations from the scourge of war, to reaffirm faith in human rights and to promote social progress in larger freedom. Despite, or perhaps because of, its failures in countries such as Rwanda, the UN expanded and refined its missions and operations, reconstructing Cambodia, managing post-war Iraq and establishing tribunals to try war crimes.

In the economic sphere, international and regional organizations promoted intensifying economic integration. Through these developments, liberalism itself was arguably transforming into what might be termed 'neo-liberalism', a system in which the market was dominant, the state receded, deregulation became the norm and corporate rights expanded.[10] After the Maastricht Treaty was concluded in 1992, the creation of the World Trade Organization (WTO) in 1994 most powerfully symbolized and embodied the system of neo-liberal globalization.[11] The WTO, moreover, was a sort of global economic constitution, one that both complemented and yet competed with the UN in terms of its institutional structure, reach and global impact. Countries eager to join the WTO undertook to transform their economies in return for membership, willingly relinquishing important sovereign powers by agreeing to submit themselves to the dispute resolution system of the WTO that was such a notable, novel and enviable feature of the whole WTO regime. The WTO system covered an extraordinary range of activities in the realm of the global economy. Evolving intellectual property law, which characterized many aspects of human activity and the natural world as 'property', was included in the WTO regime, despite the opposition of developing countries.[12] Trade in services, another economic sector in which developed countries enjoyed a significant comparative advantage, was similarly included in the system.[13]

[10] For a valuable overview of neo-liberalism and its origins, see Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018).

[11] Treaty on European Union 1992, OJ 2002 C 325/5.

[12] See Moschini, 'Intellectual Property Rights and the World Trade Organization: Retrospect and Prospects', in G. Anania *et al.* (eds), *Agricultural Policy Reform and the WTO: Where Are We Heading?* (2004), 1 at 22 (exploring the argument that '[d]eveloping countries are net "losers",' with the TRIPS Agreement).

[13] World Trade Organization, *Trade Services*, available at www.wto.org/english/tratop_e/serv_e/serv_e.htm#:~:text=Services%20trade,dynamic%20component%20of%20international%20trade.

Developing countries enjoyed a comparative advantage in textiles and agriculture, but their efforts to include these sectors within the regime of free trade were opposed by the West and ultimately unsuccessful.

Another economic regime that proved over time to be profoundly important was coming into existence through a largely decentralized process that contrasted markedly with the creation of the WTO and all the negotiations that preceded it. An incident in Sri Lanka that would otherwise have remained obscure, and hardly of note given the bloody war of which it was a part, led to the destruction of a prawn farm, which was a foreign investment. The case that followed, *Asian Agricultural Products v. Sri Lanka*,[14] decided by the International Centre for Settlement of Investment Disputes (ICSID), could be seen as the beginning of the modern international investment law system. The international law protecting foreign investment had emerged sporadically, developed through specific arbitral commissions and tribunals such as the American-Mexican Claims Commission of the 1920s and 1930s and the Iran-US Claims Tribunal from the 1980s onwards. The new investment regime created by bilateral investment treaties established a far-reaching and global system in which the jurisprudence from the Iran-US Claims Tribunal and earlier commissions was revived and elaborated. During this period, thousands of bilateral investment agreements were signed by developing countries in the belief that that they would help attract the foreign investment that was crucial to achieving economic development and growth.[15] The problem of enforcement has classically bedevilled international law. The investment regime, however, developed a very wide-ranging and effective system of enforcement that ingeniously drew upon both international and domestic legal systems. Strikingly, this formidable system of enforcement was designed to advance the rights of corporations, and it has proved potent in enforcing arbitral awards against governments. These awards have amounted to millions, sometimes billions, of dollars.

In very different ways, then, the rights of corporations were both expanded and given enhanced protection through the trade and investment regimes. The law of the WTO did not reflect some of the major interests of developing countries, but it was at least possible for developing country states to take actions against powerful states under the WTO dispute resolution system. The bilateral investment treaty system, meanwhile, was unbalanced in several respects. Strictly speaking, of course, both developed and developing countries enjoyed equal rights under the bilateral treaties. In reality, however, developing countries – almost by definition – lacked the resources to invest in any meaningful way in developed countries, and so the rights they putatively possessed were rarely exercised. Further, bilateral investment treaties classically provided corporations with standing to sue states under international law; they did not allow states to sue corporations under international law even if corporations might have been involved, for instance, in human rights violations.

[14] ICSID, *Asian Agricultural Products v. Republic of Sri Lanka – Final Award*, 27 June 1990, ICSID Case no. ARB/87/3.

[15] See J. Bonnitcha, L.N. Skovgaard Poulsen and M. Waibel, *The Political Economy of the Investment Regime* (2017), at 207.

The International Monetary Fund (IMF) and the World Bank, older institutions that preceded the UN itself, reconceived their mission and found new arenas in which to operate – not only in Asia, Latin America and Africa but also in Eastern Europe as countries in these regions began the arduous transition to the free market that the IMF and the World Bank prescribed and promoted using the highly sophisticated and novel economic and legal technologies that they had developed for these purposes. 'Shock therapy' was administered on those countries in order to propel their economies into activity.[16] The combination of these institutions and regimes – the older and Western-controlled IMF and World Bank and the newer trade and investment regimes – created a far-reaching system that furthered the neo-liberal project, profoundly affecting the economic sovereignty of developing countries. These countries, which had been so adamant about regaining and asserting their sovereignty during decolonization, felt they had no alternative but to subscribe to these regimes in order to achieve the development for which they had always yearned and that neo-liberalism had promised to deliver.

In other developments within the UN system, The International Court of Justice (ICJ) during this same period became increasingly busy and heard a number of major cases, such as the *Lockerbie* case[17] and the *Nuclear Weapons* advisory opinion.[18] Another notable feature of the times was the intense ethnic conflicts that broke out in several countries, and the appalling violence not only affirmed the fundamental importance of protecting and promoting international human rights law but also revived compelling arguments for humanitarian intervention, although this practice found no express justification in the UN Charter. The 'Responsibility to Protect' (R2P) initiative followed, which was a set of principles that outlined in what circumstances intervention was justified. R2P became a powerful and wide-ranging project embraced by organizations and think-tanks in their particular projection of human rights and international relations. The conflicts of the 1990s, such as those in the Balkans and Rwanda, all served to confirm the value of human rights and, indeed, gave the field a new impetus and range as human rights became crucial to far-reaching initiatives of social and political intervention and transformation. International criminal law was developing rapidly thanks to the Yugoslav and other ad hoc tribunals. Broadly, human rights was the foundation of some of the most ambitious projects of this time: transitional justice, good governance, state building, international territorial administration, R2P and international criminal law. Perhaps more radically, these initiatives postulated the protection of human rights as the basis of sovereignty itself, the legitimizing and animating idea of constitution making and state building. This conceptualization of the relationship between human rights and sovereignty was also evident

[16] Sachs, 'Shock Therapy in Poland: Perspectives of Five Years', *Tanner Lectures on Human Values University of Utah* (1994), available at www.tannerlectures.utah.edu/lectures/documents/sachs95.pdf (describing shock therapy and shock therapy policies).

[17] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, 27 February 1998, ICJ Reports (1998) 9.

[18] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 2006.

in the European Union's (EU) policy of recognizing sovereign states only if they undertook and adhered to human rights obligations.[19] Many of these trends were noted and exemplified in Thomas Franck's famous article on the 'right to democracy'.[20]

Even while human rights expanded as an integral part of all these efforts to reconstruct broken societies and establish justice and order within them, the specific vision of human rights that was so furthered was in some respects a narrow one. Although human rights sought to protect women, migrant workers and other disadvantaged communities, the person being protected by all these initiatives was an individual envisaged as inhabiting a specific sort of society, a liberal democracy whose character was powerfully shaped by neo-liberal economics. Earlier efforts by developing countries to expand human rights by advocating, for instance, for the 'right to development' – a right that would call for a system of political economy very different from that promoted by neo-liberal economics – faded in significance. By this time, the Western vision of individual human rights in a society implicitly assumed to be neo-liberal or aspiring to be neo-liberal had become dominant, even if resisted by social movements in the Third World and, for very different reasons, by Asian states whose opposition gave rise to the 'Asian Values' debate.[21] Human rights sought to promote democracy, but neo-liberalism was most successfully promoted by governments that were not particularly democratic in any robust sense of the term.[22]

While the Western vision of human rights expanded in all these different ways, it also faced the complex task of engaging with the forces of globalization and neo-liberal political economy inaugurated by the 'new world order'. Human rights sought to protect human dignity, but, in its efforts to do so, it had to address not only ethnic conflict and corruption within Third World states but also a system of political economy – neo-liberalism – that was now changing the world. It was not so much a liberal, but a neo-liberal, order that was coming into existence. Human rights in this period developed and expanded their reach by generating new subfields of activism and institution building, but they had very little purchase on the trade and investment regimes that powerfully drove a neo-liberal political economy that posed its own threats to human dignity.

## B *Rethinking TWAIL I and the Challenges of the Liberal Order*

It is broadly in this landscape of the early 1990s that a new generation of TWAIL scholars – scholars who I broadly term TWAIL II – began their work. In this section, I sketch how TWAIL II scholars responded to the challenges raised by the liberal order

[19] Newman and Visoka, 'The European Union's Practice of State Recognition: Between Norms and Interests', 44(4) *Review of International Studies* (2018) 760.

[20] Franck, 'The Emerging Right to Democratic Governance', 86(1) *American Journal of International Law* (*AJIL*) (1992) 46.

[21] One of the most famous articles asserting 'Asian values' and critiquing the arrogance of Western visions of human rights was authored by a senior Singaporean official. Kausikan, 'Asia's Different Standard', 92 *Foreign Policy* (1993) 24.

[22] See S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000).

of the 1990s and developed the inheritance of their TWAIL I predecessors, particularly given the failure of the major Third World initiative to create its own NIEO in the 1970s. One of the crucial questions posed by the ascent of liberalism and the demise of the NIEO was: what is the legacy of the NIEO in this new conjuncture? This was one of the key issues taken up at the 1997 conference. Crucially, scholars such as B.S. Chimni and Muthucumaraswamy Sornarajah continued to demonstrate the importance of that legacy through their analysis of the legal regimes emerging in the 1990s, an analysis informed by the same concerns that had animated the NIEO. At the same time, they and other TWAIL scholars felt the need to develop new approaches and analytic tools to renew and reformulate the Third World tradition in the context of all the developments occurring in the 1990s. This section thus sketches some of the characteristics of the scholarship produced by TWAIL II scholars in responding to these different imperatives, situating them within the political context of the 1990s and exploring the ways in which they developed, contested and departed from TWAIL I.

The NIEO campaign was the most important component of the concerted effort by the Third World in the 1960s and 1970s to reform the international order because the order failed to address the plight and concerns of the vast majority of the world's population. These states wanted to advance the process of decolonization, consolidate their sovereignty, further their economic development and take their place as equals in the community of nations, shaping the rules of the international system. These initiatives and aspirations were expressed in a number of important declarations that were passed in the 1960s and 1970s. These included the Charter of Economic Rights and Duties of States,[23] the Declaration of a New International Economic Order (NIEO Declaration)[24] and the Declaration on Friendly Relations among States.[25] Scholars from the Third World wrote extensively on all these issues, outlining a vision of a fairer global system and how it could be achieved through a reformed international law in a post-imperial world. This pioneering group of scholars included R.P. Anand,[26] Mohammed Bedjaoui,[27] T.O. Elias,[28] Georges Abi-Saab,[29] Jorge Castañeda,[30] J.J.G. Syatauw[31] and Kéba Mbaye.[32] It is this group of

[23] Charter of Economic Rights and Duties of States, GA Res. 3281(xxix) (1974), at 50.
[24] GA Res. 3201 (S-VI), 1 May 1974.
[25] GA Res. 2625, 24 October 1970. For a recent study of the importance of the declaration, see J.E. Vinuales, *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (2020).
[26] R.P. Anand, *New States and International Law* (1972).
[27] M. Bedjaoui, *Towards a New International Economic Order* (1979).
[28] T.O. Elias, *Africa and the Development of International Law* (1972).
[29] Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline', 8 *Howard Law Journal* (1962) 95; Abi-Saab, 'The Third World and the Future of the International Legal Order', 29 *Revue Egyptienne de Droit International* (1973) 27.
[30] Castañeda, 'The Underdeveloped Nations and the Development of International Law', 15(1) *International Organization* (*IO*) (1961) 38.
[31] J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961).
[32] Kéba Mbaye, *Les droits de l'homme en Afrique* (1992).

scholars – and I mention only some of them here – who constitute what has come to be somewhat crudely termed 'TWAIL I'.[33]

By the 1990s, following the oil crisis and widespread structural adjustment policies of the 1980s, the efforts of developing countries to establish a NIEO appeared to have faded in significance.[34] The developments of the 1990s seemed to further emphasize the wrong-headedness of the Third World campaign without even directly engaging with it. The liberal triumph of the 1990s seemed to assume and demonstrate, almost in passing, that decolonization had been achieved. Imperialism, the major preoccupation of TWAIL I scholars, receded from scholarly interest and attention. All these developments inevitably affected international law scholars in the Third World. As Chimni notes in his study of international law in India, scholars in India, encouraged by the promise of the NIEO and the prospects of making economic decolonization a reality, had written extensively in areas such as international economic law, the law of the sea, the UN and international dispute resolution. However, with the demise of the NIEO, many Third World international law scholars became disillusioned with that earlier project and, more generally, with international law itself.[35] Compounding the situation in many Third World countries, the optimism and aspirations accompanying independence had disappeared: anti-colonial nationalism had collapsed into racist politics that led to ongoing ethnic conflicts in many parts of Asia and Africa, and, rather than serving the people, many post-colonial regimes proved to be corrupt and authoritarian. Nationalist heroes became nepotistic dictators. The 'Cold War', furthermore, had taken an immense toll on many Third World countries in whose territories that war was fought. In many cases, Third World dictators were able to maintain power because of their affiliations with one or other great powers in that ostensibly 'cold' war.

Unsurprisingly, then, in the 1990s, many Third World international lawyers, rather than pursuing the NIEO vision, sought to become experts in the powerful new legal

[33] The distinction between TWAIL I and TWAIL II scholars was made in Anghie and Chimni, *supra* note 7, at 77–105. This distinction was devised as a somewhat crude heuristic device; it illuminated the evolution of TWAIL scholarship in various ways but has subsequently and rightly been questioned and problematized. There is a new and important scholarship that focuses on the important work of TWAIL I scholars. See, e.g., Ozsu, 'Organizing Internationally: Georges Abi-Saab, the Congo Crisis and the Decolonization of the United Nations', 31(2) *European Journal of International Law* (*EJIL*) (2020) 601; Khan, 'International Law in the Aftermath of Disasters: Inheriting from Radhabinod Pal and Upendra Baxi', 37(11) *Third World Quarterly* (*TWQ*) (2016) 375.

[34] One of the last volumes to deal with the issues of the 'Third World' was F.E. Snyder and S. Sathirathai, *Third World Attitudes toward International Law: An Introduction* (1987). The effort to continue the Third World tradition in this changing environment is also found in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1992). The tone of this collection of essays is markedly different from the tone of Bedjaoui's classic, *Towards a New International Economic Order, supra* note 27. Another notable edited volume that contained some essays that conjectured on the impact of the emerging global order for the Third World project is R.S.J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994). See, in particular, in this volume Abi-Saab, 'International Law and the International Community: The Long Road to Universality', in Macdonald, *ibid.*, 31.

[35] Chimni, 'International Law Scholarship in Post-colonial India: Coping with Dualism', 23 *Leiden Journal of International Law* (*LJIL*) (2010) 42.

technologies, including human rights, investment and WTO law, that were so instrumental in creating the new liberal order. Their project, then, was to master these international legal technologies and apply them – with appropriate modification – to the major problems of their own societies, such as ongoing poverty, the corruption and human rights violations of the post-colonial states, the violence suffered by women and protracted ethnic conflicts. The causes of social injustice were to be found in the Third World itself, and a neo-liberal international law offered the tools of remedying the situation by furthering economic growth and prosperity and protecting human dignity. Human rights seemed to offer protection against dictatorship, discrimination and the oppression of minorities, and it is hardly a coincidence that many TWAIL scholars of this generation studied and wrote on human rights.[36]

A few works contested this general trend of liberal triumphalism by continuing to explore the same concerns that TWAIL I scholars had written about – neo-colonialism and the inequities of the international legal order. One such major work of dissident scholarship – whose significance became evident only in retrospect – was Chimni's work entitled *International Law and World Order*, which appeared in 1993 and outlined a critique of classic theories of international law, including the New Haven School and Realism, and presented the case for the continuing relevance of the Marxist tradition for understanding international law and relations.[37] It was a brave work, given the widely celebrated triumph of liberalism. Karin Mickelson revisited the Third World legacy and insisted on the distinctiveness and continuing validity and coherence of the Third World vision in the face of arguments that dismissed it. Critics of the NIEO claimed that Third World voices were merely 'rhetorical' and lacking in substance. Mickelson repudiated these attacks, eloquently and presciently arguing that 'Third World approaches to international law were not in fact rhetorical – that they were characterized as such in order to defuse the threat they posed to the [Western] hegemony of international law'.[38] Mickelson's article was significant, moreover, because it directly connected the Third World tradition with the 1997 Harvard conference. Dianne Otto also returned to the NIEO, drawing on the scholarly tradition of the subaltern studies movement to reveal how the emancipatory and inclusive rhetoric of international law concealed the varied ways in which international law excluded

[36] See, e.g., Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?', 41(2) *Harvard International Law Journal* (*HILJ*) (2000) 381; Tamale and Onyango, '"The Personal Is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism', 17(4) *Human Rights Quarterly* (1995) 691; Anghie, 'Human Rights and Cultural Identity: New Hope for Ethnic Peace', 33 *HILJ* (1992) 341; Mutua, 'The Ideology of Human Rights', 36 *Virginia Journal of International Law* (*VJIL*) (1996) 589; Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions', 41(2) *HILJ* (2000) 529; Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law', 5 *Buffalo Human Rights Law Review* (*BHRLR*) (1999) 107; Okafor, 'The Concept of Legitimate Governance in the Contemporary International System', 44(1) *Netherlands International Law Review* (1997) 33; O.C. Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (2000).

[37] See B.S. Chimni, *International Law and World Order* (2nd edn, 2017) (this book was revised significantly in its second edition to include an analysis of feminist and critical legal scholars).

[38] *Ibid.*, at 417; Mickelson, *supra* note 3.

many communities, the subaltern communities whose voices remained silenced.[39] In a different mode, Siba Grovogui explored the ongoing significance of race for international relations and international law at a time when the neo-liberal order had reinforced the conventional argument that decolonization was complete, that race and the civilizing mission that it supported and justified were unhappy features of the 19th century that had long been banished from the system.[40] Richard Falk, an ongoing inspiration for Third World scholars, as he had long been empathetic to their concerns and needs, wrote several works that critically examined how globalization furthered injustice.[41] Onuma Yasuaki continued his long-term project of outlining a vision of inter-civilizational international law.[42] In so doing, he followed a tradition that had been developed by earlier non-Western scholars, who argued that non-Western traditions and concepts of governance and justice could make important contributions to international law. These arguments, popular in the 1960s and 1970s, were now largely disregarded in the 1990s when scholarship on non-Western traditions largely viewed them not as enriching international law but, rather, as obstacles to achieving human rights because of how they lent themselves to 'cultural relativism'.

Chakravarthi Raghavan, a veteran commentator on trade matters, wrote an influential critique of the WTO, arguing that it effected the recolonization of the Third World.[43] Chimni pointed out how the proposed WTO would further impact Third World sovereignty in that 'what has always been considered sovereign economic space is now the subject of globalization; both the formulation and the implementation of economic policies are brought under international surveillance'.[44] Upendra Baxi, with his wide-ranging expertise in constitutional law and human rights and his deep engagement in different social causes, wrote powerful and original works on human rights based on the efforts of marginalized communities to use human rights to protect their dignity.[45] Baxi's detailed study of the Bhopal tragedy explored how multinational corporations could be implicated in large-scale human rights violations and the limitations of the law in providing the victims with remedies. This topic, of course, has become only more urgent in recent times.[46] Further, his incisive and prescient study of human rights, and, in particular, of how neo-liberalism was creating its own

[39] See Otto, 'Subalternity and International Law: The Problem of Global Community and the Incommensurability of Difference', 5 *Social and Legal Studies* (*SLS*) (1996) 337.

[40] S. Grovogui, *Sovereigns, Quasi Sovereigns and Africans: Race and Self-Determination in International Law* (1996).

[41] See R.A. Falk, *Explorations at the Edge of Time: The Prospects for World Order* (1992).

[42] Onuma, 'In Quest of Intercivilizational Human Rights: Universal vs. Relative Human Rights Viewed from an Asian Perspective', in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality* (1997) 43. Onuma's magnum opus on the topic is Y. Onuma, *A Transcivilizational Perspective on International Law* (2010).

[43] C. Raghavan, *Recolonization: GATT, the Uruguay Round and the Third World* (1990).

[44] See B.S. Chimni's sharp analysis of the negotiations leading to the creation of the World Trade Organization (WTO) and the implications for the Third World. Chimni, 'Political Economy of the Uruguay Round of Negotiations: A Perspective', 29 *International Studies* (1992) 135.

[45] U. Baxi, *Mambrino's Helmet? Human Rights for a Changing World* (1994).

[46] See Baxi, 'Mass Torts, Multinational Enterprise Liability and Private International Law', *Collected Courses of the Hague Academy* (2000) 276, at 297.

version of human rights, continues to resonate today, as he identified a major development that has now been the subject of further important scholarship.[47] Foreign investment law was a means of advancing globalization and increasing the power of corporations, and Sornarajah's pioneering work in this area explored the topic in the broader context of the fraught economic relations between developed and developing countries.[48] Sornarajah produced one of the first major texts on the field of foreign investment law in 1994 and sounded a number of warnings about the still nascent regime that turned out to be prescient.[49] His work was also especially important, as it continued, amidst all the developments in investment law in the 1990s that were celebrated and uncontested, to further the critical analysis of foreign investment law that had preoccupied an earlier generation of TWAIL scholars such as S.N. Guha Roy.[50] Sornarajah's work was distinctive and original precisely because it viewed the field of foreign investment from a perspective shaped by the sensibility and concerns of the NIEO.

This sensibility extended into the ICJ. In the *Nicaragua* case, the ICJ, presided over by the formidable Justice T.O. Elias, handed down a decision that outlined important principles on the use of force and intervention.[51] The decision was especially significant for Third World countries as the case arose because of the actions of the USA, a superpower, in a developing country, Nicaragua. As we have seen, in the 1990s, the Court decided a number of major cases including *Lockerbie*[52] and issued a significant advisory opinion in *Nuclear Weapons*.[53] The outcomes of these cases had important implications for developing states as they raised crucial issues such as whether UN Security Council decisions were subject to any sort of judicial review[54] and suggested that states could use nuclear weapons without violating international law. Justice Christopher Weeramantry's judicial opinions, many of them dissenting, reflected what might be termed a Third World sensibility in addressing the complex questions raised by these cases, even while persistently attempting, more broadly, to develop a jurisprudence that built on non-Western cultures and systems in deciding questions of international order and governance.

The system inaugurated in the 1990s confronted ongoing resistance as protests against neo-liberal globalization took place in many countries and efforts to include

47 Baxi, 'Voices of Suffering and the Future of Human Rights', 8 *Transnational Law and Contemporary Problems* (1998) 163; U. Baxi, *The Future of Human Rights* (2008); J. Whyte, *The Morals of the Market* (2019).

48 M. Sornarajah, *The International Law on Foreign Investment* (5th edn, 1994).

49 *Ibid.*

50 See Roy, 'Is the Law of State Responsibility for Injuries to Aliens a Part of Universal International Law?', 55 *AJIL* (1961) 863. For a classic work on the topic, see C.F. Amerasinghe, *State Responsibility for Injury to Aliens* (1967).

51 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, ICJ Reports (1986) 14.

52 See the *Lockerbie* case, *supra* note 17 (this case raised far-reaching issues about the power of the UN Security Council, which took on the form of a potentially imperial authority); see also M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts* (1995).

53 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226.

54 See Bedjaoui, *supra* note 52.

investment in the WTO system were challenged and failed. Overall, however, imperialism had ceased to matter as an analytic or political category at this time. The 'Battle for International Law'[55] that had been fought so vigorously in the 1970s had ended by the 1980s, with the Cold War taking centre stage, and structural adjustment policies authored by Bretton Woods becoming the norm in a large number of Third World states. Neo-liberalism and not the NIEO seemed to offer a clear and decisive path for development, progress and rights both in the Second and Third Worlds. Global justice was to be achieved not by the NIEO campaign for redistribution or global socialism but, rather, by the further extension of capitalism and the transformation and reform of the Third World state, both politically and economically.

In the midst of all this, some TWAIL scholars were eager to promote human rights in their own countries. Civil and political rights could be deployed against authoritarianism, and economic and social rights seemed to be a way of furthering economic justice. Nevertheless, these scholars were uncertain as to whether the orthodox versions of human rights advanced by Western states and NGOs could actually solve the many problems that they promised to.[56] The new trade and investment regimes and neo-liberal World Bank and IMF policies purported to bring about development, but the question remained as to whether this indeed would be achieved. Further, TWAIL scholars could not overlook how practices that were previously associated with intervention and imperialism had reproduced themselves and become acceptable in this supposedly 'new world order'. New arguments were produced to justify very old imperial practices of intervention. And disciplines that seemed to have been decisively critiqued years earlier, including 'law and development' had now returned, in new form, their questionable assumptions almost unchanged but now transformed into a major industry worth millions of dollars.[57]

It is in this context that TWAIL scholars faced a number of issues and challenges: first, using and developing international law, particularly human rights law, to protect against the violence of the Third World state; second, analysing and understanding how the new world order of neo-liberal globalization affected the Third World and, third, exploring the legacies of the NIEO, what it stood for, why it did not succeed and what enduring questions it posed about international law. Put another way, the question was: how should the Third World project be rethought and advanced given this conjunction of events? Further, what could be learned from the pioneering efforts of TWAIL I scholars? The broad question that united the different generations of TWAIL

[55] For this impressive collection of essays, see J. Bernstorff and P. Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019).

[56] See Gassama, 'A World Made of Violence and Misery: Human Rights as a Failed Project of Liberal Internationalism', 37 *Brooklyn Journal of International Law* (2012) 408.

[57] Trubek and Galanter, 'Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin Law Review* (1974) 1062 (famously points to these issues). For his later account of the 1990s, see Trubek, 'The "Rule of Law" in Development Assistance: Past, Present, and Future', in D. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 74. For a perceptive analysis, see Rittich, 'Theorizing International Law and Development', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 820.

scholars was: how can international law be used to further the interests of the people of the Third World? This in turn connected with another question: how can international law be written and understood from the perspective of the Third World?

These questions, of course, were complex as international law had been complicit in colonizing the people of the Third World. Developing countries – the so-called 'new states' when they emerged in the 1960s – were optimistic that they could change the international system. Scholars such as Anand and Elias, while condemning international law for justifying colonialism, saw this fact as arising from an aberration, the misapplication of an international law whose proper purpose was the promotion of international peace and justice and the achievement of all the goals mentioned in the UN Charter in its moving preamble.[58] TWAIL scholars had hoped that the profound political shifts caused by decolonization would give rise to a non-imperial world, that international law would reflect changes in political systems particularly because the 'new states' – the former colonial territories – would now make up the majority of the members of the UN. This was not to be.[59] The defeat of the NIEO, while attributable to many complex causes, including vehement political campaigns launched by the West and the oil and debt crises of the 1970s and 1980s, also suggested that this particular Third World vision of international law as being amenable to a change that would eradicate its colonial dimensions was questionable. It raised the broader question: how was the relationship between imperialism and international law to be understood? Could it be that imperialism was far more entrenched in the system than TWAIL I scholars had envisaged? Further, it was evident by now that the post-colonial state, while trying to use its sovereignty as a bulwark against imperialism, was itself inflicting massive violence on its own population using instruments of colonial rule. The 'prevention-of-terrorism'–style legislation wielded by the post-colonial states against their own people were usually based on legislation originally devised by the colonial powers to suppress native protests against colonial rule.[60] The question for TWAIL scholars then became that of finding a new vocabulary, a new set of analytic tools with which to understand this constellation of political and intellectual developments.

It is perhaps a paradox that at precisely this time, even as the liberal order was expanding and consolidating itself, that theorizing about international law had become more probing, widespread, plural and acute. Major works by David Kennedy,[61] Martti Koskenniemi,[62] Nathaniel Berman,[63] Dan Danielson and Karen Engle,[64] Ileana

[58] For a broad characterization of TWAIL scholarship, see Anghie *et al.*, *supra* note 7; Anghie and Chimni, *supra* note 7. It should be added that these characterizations, while useful, have been refined and contested by later work.

[59] While these scholars were arguing for a change that they hoped would take place and were summoning all their intellectual resources to make the case for change, they were profoundly aware of the difficulties they confronted.

[60] N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003).

[61] D. Kennedy, *International Legal Structures* (1987).

[62] M. Koskenniemi, *From Apology to Utopia* (1989) (this book was reprinted in 2006).

[63] Berman, '"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law', 106 *Harvard Law Review* (*HLR*) (1992–1993) 1793.

[64] D. Danielsen and K. Engle (eds), *After Identity: A Reader in Law and Culture* (1995).

Porras,[65] Lama Abu-Odeh,[66] Christine Chinkin and Hilary Charlesworth[67] and others had expanded the range of ways to interrogate and understand international law. Prior to this, international law theorizing consisted principally of classic positivist concerns to identify the proper law using the relevant techniques; refuting the crass and incessant argument forcefully made by Hans Morgenthau that it was politics and not law that mattered and the efforts of the New Haven School to reconceptualize law as a process. The new scholarship transformed this landscape. It was a heady and exuberant time as the 'New Approaches to International Law' (NAIL) movement adapted and applied critical tools from continental philosophy, feminism and critical legal studies to the exploration of international law. TWAIL scholars were deeply encouraged by this drive towards rethinking international law,[68] even at a time when it seemed that international law had never been so focused on a single direction, animated by an all-encompassing vision of liberal order. Critical race theory (CRT),[69] the work of Derrick Bell,[70] Patricia Williams,[71] Kimberlé Crenshaw[72] and Cheryl Harris,[73] was another source of inspiration even if it was not at this stage directly focused on the international arena. Race has been central to the operations and justifications of imperialism. Within the international arena, however, race had been understood in broad and somewhat obvious terms. This understanding shaped the international Convention on the Elimination of All Forms of Racial Discrimination, which prohibited explicit discrimination.[74] However, CRT scholarship had brilliantly demonstrated how racism could be reproduced by the law in an ostensibly neutral, non-racial setting, and many of the insights of CRT were valuable to TWAIL scholars who sought to understand the impact of racism on the development of international law.[75]

[65] See Porras, 'On Terrorism: Reflections on Violence and the Outlaw', *Utah Law Review (ULR)* (1994) 119.

[66] Abu-Odeh. 'Post-Colonial Feminism and the Veil: Considering the Differences', 26 *New England Law Review* (1992) 1527; Abu-Odeh, 'Comparatively Speaking: The Honor of the East and the Passion of the West', 2 *ULR* (1997) 287.

[67] Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law', 85(4) *AJIL* (1991) 613.

[68] TWAIL scholarship was distinctive in its focus on imperialism and the theoretical concerns of an earlier generation of TWAIL scholars. For a detailed and comprehensive analysis of the relationship between what might be broadly termed NAIL and TWAIL scholarship, see Chimni, *supra* note 37, chs 5, 7.

[69] See generally K. Crenshaw (ed.), *Critical Race Theory: The Key Writings That Formed the Movement* (1995).

[70] D. Bell, *Face at the Bottom of the Well* (1993).

[71] P. Williams, *The Alchemy of Race and Rights* (1991).

[72] K. Crenshaw, 'Race Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law', 101 *HLR* (1988) 1331.

[73] Harris, 'Whiteness as Property', 106(8) *HLR* (1993) 1709.

[74] Convention on the Elimination of All Forms of Discrimination against Racial Discrimination 1965, 660 UNTS 195. For an assessment of this vision of racial discrimination, see Bradley, 'Human Rights Racism', 32 *Harvard Human Rights Journal* (*HHRJ*) (2019) 1.

[75] Ruth Gordon organized a conference devoted to the theme of TWAIL and critical race theory (CRT). A collection of articles based emerging from the conference are found in volume 45, issue 5, of the *Villanova Law Review*. This same theme of the relationship between CRT and TWAIL and what they might learn from each other is the subject of a path-breaking special issue of the *University of California Los Angeles Law Review*. See Achiume and Asla Bali, 'Race and Empire: Legal Theory within, through and across National Borders', 67 *University of California Los Angeles Law Review* (*UCLALR*) (2021) 1386; Achiume and Carbado, 'Critical Race Theory Meets Third World Approaches to International Law', 67 *UCLALR* (2021) 1462.

Some TWAIL scholars were part of this community, pursuing different and diverse and mutually supportive projects that sought to critically explore and challenge the apparently inexorable march to the 'end of history'. This critical energy and excitement, and the support David Kennedy[76] generously extended to many TWAIL scholars, were crucial for the TWAIL movement. The turn to theory by TWAIL scholars was perhaps also a product of their particular circumstances. An earlier generation of TWAIL scholars had often served their governments in senior positions as ambassadors or ministers, and the NIEO was very much a reflection of their ambition to change the world through diplomacy and international institutions.[77] For the next generation of TWAIL II scholars, who lacked this status and, indeed, in many cases, were sceptical, if not hostile, towards the Third World state, holding such official positions was sometimes problematic. A different politics was called for, even if its shape and character were unclear at this stage. Since the prospects of changing the world through traditional diplomacy seemed limited, TWAIL II scholars were intent on interpreting it. TWAIL II scholars recognized that TWAIL I scholars, although attempting to reform international law in practical ways, had also raised profound theoretical questions about the nature and operation of international law. The task then was to identify these questions and explore them in the depth they warranted and, in doing so, to challenge the notion of 'theory' itself.

For TWAIL scholars of all generations, empire was the central concern, the key to understanding the impact of international law in the Third World. Imperialism, after all, played a defining role in creating the modern world, the enduring divisions crudely rendered as 'First World and 'Third World'. Thus, in seeking to develop an arsenal of critical tools with which to understand the character, operations, continuities and technologies of empire – all this in the context of the demise of the NIEO, the triumph of liberalism and the acceleration of globalization – TWAIL II writers drew eclectically on the writings of a wide variety of traditions and authors such as Mahatma Gandhi, Karl Marx, Frantz Fanon, Samir Amin and Immanuel Wallerstein, the dependency theorists, as well as post-colonial and subaltern studies scholars such as Edward Said and Gayatri Spivak, Partha Chatterjee, Dipesh Chakrabarty and Enrique Dussel.[78] Although these scholars did not focus on international law, their analyses of the character of imperialism and its ongoing effects of exclusion were inspirational.

Drawing on this scholarship, TWAIL tried to develop a new and different approach to the history of international law. Earlier, scholars such as C.H. Alexandrowicz and R.P. Anand, had turned to the history of international law seeking to better understand

[76] Kennedy created a remarkable graduate programme at Harvard and mentored and supervised many TWAIL and critical scholars, including Helena Alviar, Antony Anghie, James Gathii, Sylvia Kang'ara, Arnulf Becker Lorca, Vasuki Nesiah, Joel Ngugi, Celestine Nyamu, Liliana Obregon, Balakrishnan Rajagopal, Alvaro Santos Hani Sayed and Amr Shalakany. Duncan Kennedy and Henry Steiner were also important mentors to many of these students.

[77] Many notable TWAIL scholars, such as Bedjaoui, T.O. Elias and Jorge Castañeda, were senior diplomats or government officials.

[78] In this way, TWAIL scholarship connects with ongoing and broader efforts to decolonize knowledge to understand how apparently universal concepts of ontology and epistemology are based on European thinking.

the traditions of their own societies and how they had conceptualized key issues of governance and order. These scholars also relied on historical studies to argue that non-European states were no strangers to international law, as they too had developed principles relating, for instance, to the conduct of war and to the immunities of diplomats. The history of international law was a notoriously neglected field at this point in time.[79] Nevertheless, in rethinking the Third World legacy after the NIEO and amid the liberal triumph of the 1990s, TWAIL scholars found it imperative to examine, once again, the history of international law and the way in which that history served as the foundation, albeit unacknowledged, of a whole vision of international law and its governing theories and language, the analytic tools that shaped the way in which the discipline was explored and understood. Chakrabarty famously argued that Europe had to be provincialized,[80] and the post-colonial approach of viewing Europe itself as particular rather than universal offered one resource for developing a set of analytic tools that could better represent and understand the experience of the Third World. My own work has attempted to suggest how insights from post-colonial theory could illuminate the relationships between imperialism and international law.[81] A post-colonial reading of Vitoria, widely regarded as one of the founding fathers of international law, suggests how classic and foundational works of international law could be read in ways that revealed the centrality of imperialism for the making of international law, the doctrines used to conquer and dispossess non-European peoples and a structure of ideas and doctrines that had a continuing relevance in the reproduction of imperial relations.[82]

TWAIL scholars seeking to rethink international law developed a number of arguments that contested the assumptions underpinning the conventional view of the discipline.[83] First, the classic and conventional approach to international law treated imperialism as peripheral to the development of the discipline. The classic approach to international law presented, as its central problem, the question of 'how is order to be established among equal and sovereign states'. This question, posed most prominently by John Austin, was the foundation of the broader argument that has haunted international law since the emergence of positivist jurisprudence: is international law 'law', and in what sense can it be thought of as 'law'? Second, the traditional view held that international law was a product of European history, achievement and conflict. European events – most prominently, the Peace of Westphalia – created the doctrines, such as the sovereignty doctrine, that served as the foundation of the discipline. This vision of international law suggests that international law was fully formed in Europe and that it then extended in a stable and established form into the non-European

[79] See S.C. Neff, *Justice among Nations: A History of International Law* (2014).

[80] D. Chakrabarty, *Provincializing Europe* (2000).

[81] A. Anghie, 'Creating the Nation State: Colonialism and the Making of International Law' (1995) (SJD dissertation on file at Harvard Law School (later revised and published as A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005)).

[82] Anghie, 'Francisco Vitoria and the Colonial Origins of International Law', 5(3) *Social and Legal Text* 321.

[83] I draw upon my own work in providing this sketch. See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

world through imperialism. According to this view, sovereignty was bestowed on the non-European world through decolonization, which was understood as a process that enabled these societies to emerge as equal and sovereign states. The success of decolonization then signalled the end of imperialism, which could now be dismissed as an unhappy aberration of the longer trend of international law towards ensuring progress, inclusion and justice.

TWAIL scholars focused on understanding the deeper structures of the discipline, the very ontology of international law, and approached the history and theory of international law from a very different set of perspectives. They argued that imperialism was central to international law. This was not only because imperialism was the means by which international law became universal, a single system of rules that governed societies in Africa and Asia, Europe and the Pacific. Rather, imperialism was foundational to the making of international law because it was in the colonial encounter that the basic doctrines of international law were forged. Sovereignty, understood in this critical way, was not created in Europe and then simply transferred, through European empires, to the non-European world. Rather, sovereignty was created and formulated in the imperial encounter and structured in such a way as to exclude, dispossess and disempower the non-European world. Sovereignty, rather than being a gift of 'civilization' bestowed generously on the non-European world by the West, was itself a crucial instrument of conquest. The classic question 'how can order be created among equal and sovereign states?' becomes a redundant question for the non-European world that, until relatively recently, was deemed to be lacking in sovereignty according to international law. For TWAIL scholars the issue was: How was it decided that non-European societies were lacking in sovereignty in the first place? History suggested that sovereignty was conceptualized in a way that rendered non-European societies as non-sovereign. For the TWAIL scholar, then, sovereignty needed to be studied as a mechanism of exclusion and international law needed to be reoriented. TWAIL scholars advocated for an alternative ontology, an alternative theoretical framework to understand these developments.

The 'civilizing mission' was central to the imperial project, an explicit driving force of 19th-century imperialism. The basic intellectual structure of the mission consisted of a constellation of related ideas whereby a certain entity was characterized as 'barbaric', 'helpless', immature, savage, violent or unproductive. In each case, European intervention was required in order to transform and even protect this aberrant entity. New techniques of law, governance and administration were required to effect this transformation. Conquest and dispossession were thus justified because the non-European entity was inferior or less than human and thus lacking sovereignty and rights. The project of transformation is never complete, however, as the non-European entity, because of its resistance or because of its posited inherently savage nature, proves itself to be incapable of change. More sophisticated techniques are thus called for; the endless process of transformation being accompanied by the endless process of dispossession in the global South for accumulation in the global North. This structure might be termed 'the dynamic of difference'. It is a structure

that is reproduced in very different vocabularies and doctrines over time, and an important scholarly task, then, is to explore the constructions and operations of the dynamic in a specific context.

Classic studies have been made of the 'standard of civilization' in international law, many of them pointing to its continuation in many forms.[84] For TWAIL scholars, the 'civilizing mission' has an almost ontological character. It is not only a historical phenomenon, a concept that was at its height in the 19th century but was then discarded and rendered irrelevant by decolonization, but also a fundamental and enduring feature of international law. The classic paradigm of equal and sovereign states would suggest that international law, in the absence of an overarching sovereign, is made through the consent – the agreement – of equal and sovereign states. The paradigm of civilization, however, suggests that international law is made and that new doctrines are formulated through the efforts of international law – again driven by the West – to transform the inferior non-European peoples while simultaneously dispossessing them. It is precisely because international law has subordinated the non-sovereign, non-European world that it is able to exercise an extraordinary authority over that world and devise and impose on it new practices that would not be juridically possible in another equal and sovereign state. In this way, crucially, it is the Third World that is the crucible, the arena in which important doctrines of international law, including sovereignty, are fashioned. International law cannot be understood by focusing exclusively on the West. The whole geography and character of international law becomes reconfigured if seen in this way. An approach produced by revisiting and rethinking concepts such as political economy, sovereignty, universality, civilization and race through a study of imperialism reveals both the constitutive and enduring effects of the phenomenon, while suggesting promising new lines of research.

Needless to say, the West's concerted and implacable political opposition to the NIEO was the main and primary reason for its failure. For TWAIL scholars, a further question remained, however, as to how international legal doctrines, including sovereignty and sources, could be deployed at a jurisprudential level to attack the NIEO. TWAIL II scholars, then, by rethinking the history of international law and its formation, provided at least one rough thesis for explaining, however partially, the failure of the NIEO. Broadly, if imperialism is constitutive of international law, the TWAIL I belief that it could be readily excised from international law proper became problematic. This analytical departure differed from conventional histories as well as from the TWAIL understanding that seemed to have animated the NIEO: the belief, or to be fair, the hope – the political aspiration – to change the system. Another way of putting it would be to rely on realist arguments. Power may indeed shape everything, as realists would assert. But power, historically, is expressed through ideas as well as through

[84] See G. Gong, *The Standard of 'Civilization' in International Society* (1984); Fisch, 'Internationalizing Civilisation by Dissolving International Society: The Status of Non-European Territories in Nineteenth-Century International Law', in M.H. Geyer and J. Paulmann (eds), *The Mechanics of Internationalism* (2001) 235. For an authoritative overview of the literature that explores the concept and the important contributions of Grewe, Gong and Fisch, see Obregon, 'The Civilized and the Uncivilized', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 917.

force, and, as such, the story of the civilizing mission is one of the most enduring and highly elaborated stories through which power and conquest are justified.

The political economy of imperialism was, inevitably, an enduring concern for TWAIL scholars of both the NIEO era and the 1990s, which entailed a close study both of the relationship between imperialism and capitalism and the relationship between international law and capitalism. As Bedjaoui put it, '[t]raditional international law is derived from the laws of the capitalist economy and the liberal political system'.[85] Capitalism had adapted to produce neo-colonialism, the continuation of imperial economic relations in a supposedly post-imperial world. Understandably, then, the NIEO campaign was precisely an effort to identify the legal structures and trade, investment and finance regimes that supported neo-colonialism and then to reform them in order to create a fairer international system. The study of neo-colonial economic relations was, then, an ongoing preoccupation of TWAIL scholars, connecting both generations.

Equally importantly, the concept of the 'Third World' itself was expanded and complicated. By the 1990s, the violence inflicted by the Third World state on its own people had become an unmistakeable and tragically common occurrence. TWAIL scholars shifted their attention, then, to the plight of the people within the Third World and how international law, particularly international human rights law, could protect them. TWAIL I scholars had focused principally on the Third World state as the foundation of their analysis. The sovereign and newly independent state was the key to resistance against an unjust order, a means of transforming the system. TWAIL II scholars, however, were also concerned about how different communities within the Third World state – peasants, workers, Indigenous peoples, minorities – were affected both by the Third World state itself and by international law and how they could potentially use international law for their own purposes in these encounters. Thus, Balakrishnan Rajagopal explores 'the lived experience of ordinary people with international law when they encounter international institutions, frame their demands in international legal terms, and network for influencing international or domestic policy'.[86] TWAIL II scholars were in this sense preoccupied by the question of how the most disadvantaged and marginalized could represent and assert themselves through international law.

TWAIL II scholars were also inspired by feminist scholarship, and, in this respect too, they focused on a new set of concerns that had not been explored by earlier TWAIL scholarship. The pioneering work of international law scholars Charlesworth and Chinkin had powerfully demonstrated that international law was a masculine creation, that women had little role to play in its making and that international law was indifferent, if not hostile, to the concerns of women. Prominent feminist scholars such as Spivak had analysed in compelling detail the different ways in which women's voices had been silenced and excluded from history. This work resonated with TWAIL

[85] Bedjaoui, *supra* note 27, at 49.

[86] B. Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (2003), at xiv.

scholars not only because they wanted to understand and explore how international law, including an ostensibly universal human rights system, failed to protect women but also because feminism provided important analytic tools for revealing how such exclusions were achieved. Politically and methodologically, both TWAIL and feminism contested international law and its effects of excluding or silencing large sections of the world's population.

At the same time, a TWAIL feminism had to deal with complex and distinctive challenges for, as Vasuki Nesiah has put it, 'Third World feminisms pursue political agendas interpolated by the cracks and fissures of post-colonial nationhood and internationalized feminisms'.[87] TWAIL feminism had to formulate a perspective that contended with local nationalisms and their impact on women while also departing from a homogenizing Western feminism, all this in an effort to understand what might be termed, in however qualified and problematic a way, the situated and contextualized struggles of women in the Third World. Nesiah incisively outlined a model of a TWAIL feminist perspective when examining the plight of factory workers in Sri Lanka. She explores how the exploitation of these women is an integral part of an imperial political economy. At the same time, she points out that the contradictions of global capitalism that produce and shape these struggles may be overlooked by a feminist legal scholarship in America even as it has attempted to engage with and alleviate the plight of these women.[88] Seeking to overcome these occlusions in American feminism, Nesiah argues for what she terms a '[f]eminist [i]nternationality', which she describes as a 'shorthand for a transnational political alliance of women whose differences are acknowledged'.[89] Written in 1993, this work is exemplary in making links between traditional TWAIL concerns of political economy and the operations of multinational corporations with the struggles of women in the Third World and how those struggles can be illuminated and supported by a TWAIL feminism. Most importantly, the work demonstrates further how TWAIL concerns about imperialism and the operations of international law would be inadequate without a TWAIL feminist analysis.[90]

## 3 TWAIL Scholarship: A Thematic Overview

Turning now from the 1990s and TWAIL II scholars' critical engagement with their TWAIL I inheritance amidst their challenge to the 'new world order', I attempt to sketch a broader thematic overview of TWAIL scholarship, its concerns and central arguments and the powerful case made from numerous perspectives in various fields

[87] See Nesiah, 'The Ground beneath Her Feet: "Third World" Feminisms', in Anghie *et al.*, *supra* note 7, 133.

[88] Nesiah, 'Towards a Feminist Internationality: A Critique of U.S. Feminist Scholarship', 16 *Harvard Women's Law Journal* (1993) 189.

[89] *Ibid.*, 191, n. 9.

[90] Vasuki Nesiah has produced a number of important works that demonstrate and develop feminist perspectives on a variety of issues. See Nesiah, 'Decolonial CIL: TWAIL l, Feminism, and an Insurgent Jurisprudence', 112 *AJIL Unbound* 313, at 318; Nesiah, 'Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice', 15(3) *Columbia Journal on Gender and the Law* (2006) 799.

that the formal end of colonialism did not end colonial relations, that imperialism continues in and through international law and that we must rethink Western accounts of history and reclaim Third World histories if we are to deepen our understanding of international law.

## A *Introduction*

TWAIL scholarship has proliferated. James Gathii has estimated that, since 1997, TWAIL scholars – those who have adopted TWAIL approaches or explicitly written on TWAIL themes – have produced more than 400 articles, books and book chapters.[91] It is hardly possible to give a full account of the wide-ranging and varying works in subject matter, scale and tone of TWAIL scholarship.[92] It is not for nothing that TWAIL has adopted and emphasized the term 'approaches'. In this section, I attempt to provide a broad thematic overview of TWAIL scholarship, its intellectual concerns and the methodological and analytical tools and innovations that TWAIL scholars have developed over the last decades in exploring these concerns. The central TWAIL concern to understand international law through the 'lived experiences' of the Third World, continues to animate much TWAIL scholarship. TWAIL scholarship also continues a long-standing project of exploring the ways in which non-European traditions and systems of governance could contribute to the making and enrichment of international law. Equally importantly, TWAIL scholarship has intersected with important work, beyond the specific field of international law, that rethinks the position of the global South in philosophical and ethical terms, contesting European epistemologies and ontologies.[93] The history of international law is now a dynamic and expanding area of interest not only to international lawyers but also to historians and intellectual historians. This interest in the history of international law has been largely driven by an interest in the relationship between empire and international law, which has been a central preoccupation of TWAIL scholars.[94] Broadly, TWAIL scholarship has ranged from close doctrinally oriented

[91] See figures in Gathii, 'Agenda of TWAIL', *supra* note 7.

[92] Gathii, 'Promise of International Law', *supra* note 7 (see, in particular, the bibliography of TWAIL scholarship).

[93] Thus, TWAIL is part of a broader project of 'rethinking the world'. See the work of B. de Sousa Santos, *Towards a New Legal Common Sense, Law, Globalization and Emancipation* (3rd edn, 2020); B. de Sousa Santos, *The End of the Cognitive Empire* (2018); J. Comaroff and J.L. Comaroff, *Theory from the South: Or, How Euro-America Is Evolving toward Africa* (2012); S. Grovogui, *Beyond Eurocentrism and Anarchy: Memories of International Order and Institutions* (2006).

[94] A historical approach to international law has long been a part of the TWAIL tradition. See, e.g., C.H. Alexandrowicz, D. Armitage and J. Pitts (eds), *The Law of Nations in Global History* (2017); R.P. Anand, *New States and International Law* (1972); Anghie, '"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case', 34(2) *HILJ* (1993) 445; Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', 5(3) *SLS* (1996) 321; Grovogui, *supra* note 38; Gathii, 'International Law and Eurocentricity', 9 *EJIL* (1998) 184; Landauer, 'The Polish Rider: CH Alexandrowicz and the Reorientation of International Law, Part 1', 7(3) *London Review of International Law* (*LRIL*) (2019) 3.

studies to historical, philosophical and sociological work. I explore how TWAIL questions[95] and TWAIL preoccupations have been given focus and shape and how its concerns have been added to, contested and extended.

International law is rapidly expanding and evolving, proliferating and fragmenting into different areas of specialization. TWAIL scholars, then, have the task of keeping abreast with these developments and studying how these different international legal regimes have affected the peoples of the Third World and the potential of those legal regimes to advance Third World interests. How did foreign investment,[96] trade rules,[97] intellectual property rules,[98] transitional justice[99] and truth and reconciliation commissions affect peoples of the Third World? How did developments in the broad areas of human rights law affect migrants[100] and refugees?[101] How did activists in Africa reshape human rights in their campaigns?[102] How could human rights be used to enhance the protection of women?[103] How could international environmental law be used by the people in developing countries to protect against the many environmental

[95] Fakhri, 'Introduction: Questioning TWAIL's Agenda', 14 *Oregon Review of International Law* (*ORIL*) (2012) 1.

[96] See M. Sornarajah, *Resistance and Change in the International Law of Foreign Investment* (2015); Odumosu, 'Locating Third World Resistance in the International Law on Foreign Investment', 9(4) *International Community Law Review* (2007) 427.

[97] Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security and Developing Countries', 27 *Columbia Journal of Environmental Law* (2002) 43; Chimni, 'The World Trade Organization, Democracy and Development: A View from the South', 40 *Journal of World Trade* (2006) 5; Gathii, 'International Justice and the Trading Regime', 19 *Emory International Law Review* (2005) 1407; Lewis, 'Transnational Dimensions of Racial Identity: Reflecting on Race, the Global Economy and the Human Rights Movement at 60', 24 *Maryland Journal of International Law* (*MJIL*) (2009) 296.

[98] See Aoki, '"Free Seeds, Not Free Beer": Participatory Plant Breeding, OpenSource Seeds, and Acknowledging User Innovation in Agriculture', 77 *Fordham Law Review* (2009) 2275; Aoki, '(Intellectual) Property and Sovereignty: Notes towards a Cultural Geography of Authorship', 48(5) *Stanford Law Review* (*SLR*) (1996) 1293; Titilayo Adebola, 'Africa and Intellectual Property Rights for Plant Varieties', in *Oxford Bibliographies in International Law* (2020), available at https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0210.xml?rskey=0vxfnk&result=2; Adebola, 'Examining Plant Variety Protection in Nigeria: Realities Obligations and Prospects', 22(1) *Journal of World Intellectual Property* 36; I. Mgbeoji, *Global Biopiracy: Patents, Plants and Indigenous Knowledge* (2006); Aginam, 'Right to the Highest Attainable Standard of Health: Trade Agreements and the Right to Health in Africa', 15 *African Yearbook of International Law* (2007) 223; Aginam, '"Predatory Globalization": The WTO Agreement on Trade in Services and Public Health in Africa', 104 *PAMASIL* (2010) 139.

[99] Nesiah, 'Theories of Transitional Justice: Cashing in the Blue Chips', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 779.

[100] Mahmud, 'Migration, Identity and the Colonial Encounter', 76 *Oregon Law Review* (1997) 663; Ramji-Nogales, 'Undocumented Migrants and the Failures of Universal Individualism', 477 *Vanderbilt Journal of Transnational Law* (2014) 36.

[101] See Chimni, 'The Geopolitics of Refugee Studies: A View from the South', 11(4) *Journal of Refugee Studies* (1998) 350; Woldemariam *et al.*, 'Forced Human Displacement, the Third World and International Law: A TWAIL Perspective', 20 *Melbourne Journal of International Law* (*MJIL*) (2019) 1.

[102] Okafor, 'What Should Organized Human Rights Activism in Africa Become? Contributory Insights from a Comparison of NGOs and Labor-Led Movements in Nigeria', 16 *BHRLR* (2010) 113; O.C. Okafor, *The African Human Rights System: Activist Forces and International Institutions* (2007).

[103] Andrews, 'Women's Human Rights and the Conversation across Cultures', 67 *Albany Law Review* (2003) 609.

threats that they face?[104] The implications of the international criminal law regime for global justice and developing countries was another subject of extensive TWAIL scholarship.[105] A further body of scholarship outlines all the developments and innovations taking place outside the usual centres of international law – Washington, New York, London and Geneva. This is the theme of Gathii's Grotius lecture, which explores how, for instance, the East African Court of Justice and the African Court on Human and Peoples' Rights are developing an innovative and vibrant jurisprudence.[106] Similarly, the Inter-American Court of Human Rights has produced an important and pioneering jurisprudence.[107]

In pursuing these inquiries, TWAIL scholars, of course, did not work in intellectual isolation. In developing their arguments, they drew upon and complemented the work of both traditional and critical scholarship. Equally importantly, TWAIL scholarship became increasingly accepted and engaged with by a broader audience of scholars who did not necessarily identify as TWAIL but who welcomed and recognized the value of the insights that TWAIL scholars provided through their work in all these different areas of international law.

## B *Colonial Continuities*

TWAIL scholars have been united and consistent in arguing that colonialism continued even after official 'decolonization'. In this respect, they contested the powerful idea that colonialism was a thing of the past. Kwame Nkrumah famously warned, even as decolonization was commencing, that colonialism could be replaced by neo-colonialism and that political domination could be succeeded by economic domination in an ostensibly post-colonial world.[108] Formal empire had been replaced by neo-colonialism, which bore certain resemblances to informal imperialism. In a famous article on the topic, the eminent British historians John Gallagher and Ronald Robinson outlined the characteristics of informal empire and its relationship with imperialism proper, as it were, arguing that:

> [i]mperialism, perhaps, may be defined as a sufficient political function of the process of integrating new regions into the expanding economy; its character is largely decided by the various

[104] See Atapattu and Gonzalez, 'The North-South Divide in International Environmental Law: Framing the Issues' in S. Alam *et al.* (eds), *International Environmental Law and the Global South* (2015) 1; Gonzalez, 'Environmental Justice, Human Rights and the Global South', 13 *Santa Clara Journal of International Law* (2015) 151; Dehm, 'Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective', 33(3) *WYAJ* (2016) 129; Natarajan, 'TWAIL and the Environment', in A. Phillippopoulos-Mihalopoulos and V. Brooks (eds), *Research Methods in Environmental Law* (2017) 207.

[105] Kiyani, 'Third World Approaches to International Criminal Law', 109 *AJIL* (2015) 255.

[106] As Gathii puts it, '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'. Gathii, 'Promise of International Law', *supra* note 7, at 3.

[107] Shelton, 'The Jurisprudence of the Inter-American Court of Human Rights', 10 *American University International Law Review* (1996) 333.

[108] K. Nkrumah, *Neo-colonialism: The Last Stage of Imperialism* (1987).

> and changing relationships between the political and economic elements of expansion in any particular region and time. … It is only when the polities of these new regions fail to provide satisfactory conditions for the commercial or strategic integration and when their relative weakness allows, that power is used imperialistically to adjust those conditions.[109]

Gallagher and Robinson noted in a matter of fact way a crucial feature of informal empire: '[T]he most common political technique of British expansion was the treaty of free trade and friendship made with or imposed on a weaker state.'[110] Political economy was not the only realm in which colonialism transformed and reproduced itself. Colonial structures and modes of thinking persisted in several forms. Fanon, in his eloquent indictment of colonialism, explored the many and complex ways in which racial thinking, foundational to colonialism, had metastasized, metamorphosized and persisted as well as how non-European peoples continued to be dismissed as inferior and savage.[111] Colonial structures of thought were often re-presented in new vocabularies that nevertheless reinforced hierarchy and inequality. Colonial continuities could be found in the ways in which certain concepts, such as 'universality', were consistently used to further advance a Western vision of the world.[112]

Gathii's efforts to 'identify the extent to which the legacy of colonial disempowerment has continued in the relationship between war and commerce in international law' was emblematic of this sort of project of tracing colonial continuities.[113] TWAIL scholars argued that many legal innovations had colonial origins and that they were devised by imperial powers to manage and exploit colonial territories. Thus, one way of revealing colonial continuities was to trace the ways in which these legal technologies were reconstructed to achieve the same effects in a supposedly post-colonial world. Scholars drew comparisons, for instance, between older ideas of colonial protectorates[114] and capitulations regimes[115] and modern foreign investment regimes that empowered corporations to escape the local jurisdiction and to sue states in international tribunals.

Development was famously proclaimed as a major US policy by Harry Truman in 1949 in his inauguration. The development project was heralded as a novel approach to transforming the world and ensuring global welfare. As such, it was embraced by the newly independent countries themselves as they strove for the economic growth that was essential for their populations. However, through their historical research on the operations of the Mandate System of the League of Nations, established in 1919, TWAIL scholars revealed aspects of the pre-history of this massive initiative and,

[109] Gallagher and Robinson, 'The Imperialism of Free Trade', 6(1) *Economic History Review* (1953) 1, at 5–6.
[110] *Ibid.*, at 11.
[111] F. Fanon, *The Wretched of the Earth* (1961).
[112] For a searching study of how broader structures of Eurocentric thinking have shaped international relations, see Grovogui, *supra* note 90; S. Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (2011).
[113] J. Gathii, *War, Commerce and International Law* (2010), at xxxi.
[114] Singh, 'Of International Law, Semi-colonial Thailand, and Imperial Ghosts', 9(1) *Asian Journal of International Law* (*Asian JIL*) (2019) 46.
[115] These connections are traced in D.S. Margolies *et al.*, *The Extraterritoriality of Law: History, Theory, Politics* (2019).

further, the connections between development and a much older and explicit form of imperialism.[116] Both the ideology and legal technologies of the ostensibly novel project of development borrowed from, and indeed refined, those older imperial technologies. Sundhya Pahuja's important work illustrated how the development project could become a new mechanism for imperial rule and how it deployed the idea of universality in order to do so.[117] The Third World was to be transformed for its own good in order to promote higher rates of growth and the well-being of its people. Up to now, however, in the era dominated by the development project, wealth continues to be transferred from the Third World to the First World.[118]

TWAIL scholars showed, then, at a number of different levels – conceptual, doctrinal, institutional – how colonial hierarchies were reproduced and how colonial relations, which basically facilitated the transfer of wealth from the poor countries to the rich countries, were reinforced. Doctrinal developments, often presented as radically innovative responses to 'new challenges',[119] invariably appealed to an entrenched and storied constellation of ideas relating to universal values, cosmopolitanism and 'humanity'. Each of these terms has a deep and complex genealogy in Western political thought. TWAIL scholars have shown how terms such as 'universal' and legal regimes based on appeals to the 'common good' and 'humanity' have been deployed to disadvantage peoples in the Third World[120] and how these discourses continue to operate in contemporary international relations in this exclusionary way.[121] Rajshree Chandra makes this point in her recent study of the potential effects of principles of international environmental law, such as concepts of 'common concern of mankind' in relation to global public goods. She explores how the Convention on Biological Diversity,[122] the UN Programme on Reducing Emissions from Deforestation and Forest Degradation and intellectual property regimes have the unintended consequence of often 'displacing Indigenous Peoples from their customary habitats and livelihoods'. As she argues, an earlier ethic of local solidarity is undermined: 'The ethic of cosmopolitanism – "common heritage", "common concern", "common risks", universally optimal solutions – displaces the older ethic of "local-common". Aiding and abetting this displacement are the discursive practices of environmentalism and innovation that do not just alter the architecture of common property and public goods but concomitantly marginalise and disenfranchise local and Indigenous communities.'[123] Chandra explores how the larger concepts and principles of 'humanity' and

[116] See A. Anghie, *Imperialism Sovereignty, and the Making of International Law* (2005), ch. 3.
[117] Pahuja, *supra* note 112.
[118] J. Hickel, *The Divide: Global Inequality from Conquest to Free Markets* (2017).
[119] Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective', 43(1–2) *Osgoode Hall Law Journal* (*OHLJ*) (2005) 171.
[120] As Kapur puts it, '[m]odernity posits a set of claims to universal truth about equality, citizenship, and representation in international law. Yet these universal concepts have continuously been exposed as resting on exclusions, as in the context of slavery, apartheid, Empire and gender discrimination'. Kapur, 'Travel Plans: Border Crossings and the Rights of Transnational Migrants', 18 *HHRJ* (2005) 108.
[121] See Eslava and Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law', 3(1) *TLD* (2013) 103, n. 5.
[122] Convention on Biological Diversity 1992, 1760 UNTS 79.
[123] Chandra, 'The "Moral Economy" of Cosmopolitan Commons', 1 *TWAIL Review* (*TWAILR*) (2020) 51, at 73.

cosmopolitan invocations of 'common concern' contained in certain legal regimes – in this case, international environmental law – create new structures of management and control that further the ethic of the market rather than the Indigenous ethic of subsistence. The article is equally important for its study of the rights of Indigenous peoples and the impact of large-scale development programmes on those rights.

TWAIL scholars have studied the violence of the Third World state itself, exploring the plight of communities that have been neglected by traditional international law and earlier TWAIL work that identified the 'Third World' with the Third World state itself. In his pioneering work, Rajagopal demonstrated how international law could be rethought if viewed from the perspective of new social movements,[124] movements formed by groups such as squatters, peasants, workers and women who are very often the victims of development projects that have caused massive displacements and environmental harm. Luis Eslava has studied the plight of people deemed 'illegal' by Colombia's development projects.[125] Ratna Kapur's work examines the complex interaction between international human rights law, migrants' rights and women's rights, suggesting how human rights protect a particular identity and not others. In her work on transnational migrants, for instance, Kapur seeks to show how 'law produces exclusions and contributes to the construction of the transnational migrant subject's subaltern location'.[126] These works have been attentive to the 'small voices of history', including the voices of peasants, women and religious and sexual minorities.[127] Through this scholarship, the idea of the 'Third World' was contested and expanded, extended beyond the state to focus instead on different actors and how they have been affected by international law, resisting its workings or trying to reformulate international law for their own purposes.

The TWAIL study of how hierarchical relations could be sustained and reproduced also focused on historical events and what they revealed about imperial concepts and legal technologies. Thus, Prabhakar Singh's study of 'semi-colonial Thailand' explores how competing versions of empire manifested in Siam's struggles with European colonial powers, on the one hand, and Japan's own imperial ambitions to obtain extra-territorial rights against Siam, on the other.[128] Similarly, Ali Hammoudi's study of Oman outlines another version of semi-colonialism, this time effected not through

[124] Rajagopal, 'The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India', 18 *LJIL* (2005) 345.

[125] Eslava, 'Decentralization of Development and Nation-Building Today: Reconstructing Colombia from the Margins of Bogotá', 2(1) *Law and Development Review* (*LDR*) (2009) 283; L. Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (2015).

[126] See Kapur, *supra* note 120, at 110; see also R. Kapur, *Gender, Alterity, and Human Rights: Freedom in a Fish Bowl* (2018).

[127] See Guha, 'The Small Voice of History', in S. Amin and D. Chakrabarty (eds), *Subaltern Studies*, vol. 9 (1996) 1. For a critique of TWAIL's own shortcomings and failures to address the plight of marginalized communities, see Burra, 'TWAIL's Others: A Caste Critique of TWAILERS and Their Field of Analysis', 33(3) *WYAJ* (2016) 111.

[128] Japan had a different approach to empire. As Prasenjit Duara argues, the new imperialists – Japan, the Soviet Union and the USA – 'often created or maintained legally sovereign nation-states with political and economic structures that resembled their own'. Singh, *supra* note 109, citing Duara.

extraterritoriality[129] but, rather, by means of the protectorate. Hammoudi's aim is to identify the 'informal mechanisms of imperial domination and how they endure'.[130] The works by Singh and Hammoudi add to the growing literature on semi-colonialism, the different legal techniques used to create it in varying locations and the ways in which these techniques could be adapted to further neo-colonialism.

While vocabularies of cosmopolitanism and humanity have continued to shape mainstream international legal thinking, TWAIL scholars have developed an array of alternative concepts and concerns in order to better understand colonial relations and their impact on different communities in the Third World. Race is among the most important of these, and TWAIL scholars, drawing also on important works of CRT, have tried to rethink and understand the ongoing effects of race in international law and relations – this in a period when race had diminished as a subject of scholarly interest.[131] In short, TWAIL brought a new arena into the study of international law. Further, it constructed an alternative analytic framework and a different conceptual vocabulary for analysing the discipline. Through this alternative framework – one that focused on race or semi-sovereignty, for instance – otherwise disparate experiences like those in Siam and Oman could be studied together, and it is through the resulting comparison and contrast that different aspects of the workings of imperialism, both past and present, might be understood.

## C *Capitalism, Imperialism and Political Economy*

Imperialism and capitalism are intimately connected. Marx himself, in the *Communist Manifesto*, pointed to the central role that imperialism played in the emergence of modern capitalism and the bourgeoisie: 'The discovery of America, the rounding of the Cape opened up fresh ground for the rising bourgeoisie. The East-Indian and Chinese markets, the colonization of America, trade with the colonies, the increase in the means of exchange and in commodities generally, gave to commerce, to navigation, to industry, an impulse never before known.'[132] Rosa Luxemburg and Vladimir Lenin wrote classic works on this theme. Major critics of empire such as Rodney[133] and the dependency theorists used the basic Marxist framework as a beginning point for their analysis, pioneering arguments that the West, through imperialism, underdeveloped the Third World. Eric Williams illuminated another dimension of the relationship between capitalism and imperialism in his trail-blazing thesis that the slave

[129] See Hammoudi, 'The International Law of Informal Empire and the "Question of Oman"', 1 *TWAILR* (2020) 121.

[130] *Ibid.*, at 6.

[131] The recent revival of interest in race and international law should not obscure the neglect of the topic. For earlier studies of race that connected TWAIL and CRT, see 'Symposium: Critical Race Theory and International Law: Convergence and Divergence', 45(5) *Villanova Law Review* (2000) 847. A few major works, such as Siba Grovogui's pioneering work, attempted to insist on the ongoing importance of race. See Grovogui, *supra* note 40.

[132] K. Marx and F. Engels, *The Communist Manifesto* (2008), at 10; see also Neocleous, 'International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization', 23(4) *EJIL* (2012) 941.

[133] W. Rodney, *How Europe Underdeveloped Africa* (1972).

trade was crucial for the industrialization of Great Britain.[134] TWAIL scholars were deeply influenced by these critiques of capitalism and its imperial role. Bedjaoui criticized international law precisely because it 'derived from the laws of the capitalist economy'[135] and was hence a 'plutocratic law allowing these [the "civilized" states] to exploit weaker peoples'.[136] He was completely clear-sighted when, in 1979, he outlined the challenge that followed from this observation: 'But now the task of the law will be prospective and above all it will be more complex. Its object is now twofold for it must also help in its own transformation and contribute to eliminating that part of it which is resistant to change.'[137] Law had to enact its own transformation. Was it possible for international law to do this, to transcend its founding connections with capitalism and imperialism?

For TWAIL scholars, the intensifying globalization that defined the 1990s and that integrated all societies into a neo-liberal economic system[138] could be compared with imperialism at its height in the 19th century when non-European states were all inserted, almost invariably through some form of coercion, into imperial trading networks and economies.[139] European empires imposed capitalism on their colonies in an especially stark and brutal way. One Dutch colonial expert was driven to say of the capitalist economy established by the Dutch in Indonesia: 'There is materialism, rationalism and individualism and a concentration on economic ends far more complete and absolute than in homogeneous western lands; a total absorption in the exchange and market; a capitalist structure, with the business concern as subject, far more typical of capitalism than one can imagine in the so-called "capitalist" countries.'[140] The crucial point, then, is that it is in studying how colonial powers furthered capitalism within these territories that we might get a sense of how imperial law constructed and facilitated a system of political economy devised broadly to extract wealth from the people and territories of the colony. In a similar vein, TWAIL scholarship, with its focus on how contemporary international law furthers neo-liberal policies in developing countries, illuminates how neo-liberal international law came into being and, equally importantly, what impact this law has had on the communities, social structures and political systems it regulates.

Neo-liberal international law creates inequalities and social dislocation not only in the developing countries but also in the West itself. As such, a TWAIL analysis is relevant globally for this important reason to understand not only the Third World but also the First World itself. This is one of the major arguments developed in *The Misery of International Law*, a superb work that explores the global impact of neo-liberal international law.[141] The authors, John Linarelli, Margot Salomon and Sornarajah, have

[134] E. Williams, *Capitalism and Slavery* (1944).
[135] Bedjaoui, *supra* note 27, at 49.
[136] *Ibid.*, at 50.
[137] *Ibid.*, at 110.
[138] Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15(1) *EJIL* (2004) 1.
[139] It is no real surprise that scholars of globalization look to the 19th century as an important precedent.
[140] J.H. Boeke, cited in Anghie, *supra* note 81, at 173.
[141] J. Linarelli, M. Salmon and M. Sornarajah, *The Misery of International Law* (2018).

brilliantly analysed how international economic law and the regimes of trade, finance and investment continue to favour the powerful and so intensify injustice, showing, for instance, how Greece – the foundation of Western civilization that serves as the origin of the division between the North and the South – has been subjected to structural adjustment programmes and disciplines that were originally applied to the Third World.

Chimni's work, unsurprisingly given his Marxist orientation, has focused over many decades on exploring the relationships between international law, capitalism and imperialism in a time of globalization. His major article entitled 'International Institutions Today: An Imperial Global State in the Making', identifies many of the major issues that TWAIL scholars have grappled with in trying to understand the character and impact of neo-liberal international law in a time of globalization.[142] He traces how globalization furthered imperialism by reproducing itself through international institutions as well as a variety of legal regimes. More critically, however, Chimni argues that human rights and environmental regimes that might be seen as protecting human welfare against the adverse effects of globalization are ineffective in doing so because they were themselves founded in ways that basically accepted the capitalist market system. Pointing out that the character of both imperialism and capitalism is continuously changing, taking new social, economic and political formations, Chimni argues that 'the task is to explore in detail the meaning and features of the new imperial social and political formation and the ways in which it is shaping international law and institutions'.[143] For Chimni, it was crucial to understand not only the First World–Third World divide but also, equally importantly, the rich-poor divide. In order to do this, he focuses on what he termed the 'transnational capitalist class', comprised broadly of the elites of both the First and Third Worlds and their role in the making of international law that disadvantaged the poor in both the First and Third Worlds. For Chimni, international law is an important resource in the resistance by subordinated communities against their own immiseration. This contrasts with China Miéville's Marxist analysis of international law, which led him to conclude that international law was unredeemable, that it was so much a part of the unjust order that it could not bring about any change.[144]

International trade law and foreign investment law are the regimes of international law that most profoundly constructed and furthered a particular version of capitalism. Sornarajah's ongoing and pioneering work on foreign investment law demonstrated how this regime has continuously expanded its reach and, in so doing, imbued corporations with extraordinary power.[145] Sornarajah's work is compelling because its careful analysis of key principles such as 'fair and equitable treatment' shows how they have evolved to the disadvantage of Third World countries. Donatella Alessandrini's historical approach shows how a particular concept of development

[142] Chimni, *supra* note 138.
[143] Chimni, 'Capitalism, Imperialism and International Law in the Twenty-First Century', 14 *ORIL* (2012) 17, at 20.
[144] C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2004).
[145] For his major overview of the field, see M. Sornarajah, *supra* note 96.

has influenced the formation of the WTO,[146] while Celine Tan's scholarship focuses on how the ideology of development shaped the making of economic and finance regimes.[147] These works were alert to colonial history and, by carefully analysing the origins and evolution of international economic regimes, demonstrated how particular visions of development and the international law regimes supporting it became part of the system of globalization and operated in ways that furthered inequality.

TWAIL scholars studied the impact of globalization on the developing world in a number of different modes. Jeanne Woods and Hope Lewis produced an important volume on international human rights law, assessing how economic and social rights could protect against the damaging aspects of globalization.[148] Lewis also insisted on the continuing importance of race to an understanding of these developments.[149] Broadly then, a TWAIL perspective on the study of human rights, globalization, trade and foreign investment emerged through this body of scholarship. The sensibility again explored neo-colonialism in its many guises and indeed extended the critiques of international law that had been so powerfully articulated by an earlier generation of TWAIL scholars, such as Bedjaoui and the dependency theorists.[150]

The last decade further witnessed a deeper engagement with political economy and capitalism.[151] Chimni elaborated on his Marxist vision of international law, proffering it as essentially the TWAIL vision of international law.[152] TWAIL scholars have been continuously rethinking and expanding some of the crucial debates and vocabularies relating to imperialism and capitalism by tracing their connections with doctrinal areas beyond the explicitly economic. Rose Parfitt's work, for instance, studies the operations of capitalism by focusing on statehood and legal personality. Focusing on the key principle of the sovereign equality of states, she argues that, whatever the official criteria of statehood, non-European states must in effect adopt a capitalist system in the hope of being recognized as 'sovereign'. Parfitt's analysis is based on her theory of international legal reproduction, one by which dominant states seek to reproduce themselves in less powerful states that are ostensibly sovereign, demanding that these less powerful states engage in the hopeless task of meeting the standards they prescribe. She outlines how, '[h]aving been constituted on a conditional basis, the rights and duties of international law's subjects *remain* conditional, leaving them vulnerable to being disciplined at a later date if, and to the extent that, they renege on their conditions of constitution'.[153] Decolonization, then, is a perpetually unfinished process

[146] D. Alessandrini, *Developing Countries and the Multilateral Trade Regime* (2010).

[147] Tan, 'Beyond the "Moments" of Law and Development: Critical Reflections on the Contributions and Estrangements of Law and Development Scholarship in a Globalized Economy', 12(2) *LDR* (2019) 285.

[148] J. Woods and H. Lewis, *Human Rights and the Global Marketplace: Economic, Social and Cultural Dimensions* (2005).

[149] Lewis, 'Transnational Dimensions of Racial Identity: Reflecting on Race, the Global Economy, and the Human Rights Movement at 60', 24 *MJIL* (2009) 296.

[150] See A.G. Frank, *Capitalism and Underdevelopment in Latin America* (1967).

[151] See Neocleous, *supra* note 132.

[152] Chimni, *supra* note 37.

[153] R. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (2019), at 13 (emphasis added).

since the goal of achieving sovereignty is contingent, and ever receding, beyond the powers of the non-European state as it tries to comply with the endless demands of an expanding capitalism.

The ongoing significance of race for international law and international relations has been emphasized by TWAIL scholars such as Tayyab Mahmud.[154] The standard of civilization has operated in many complex ways.[155] The connections between the standard of civilization, race and capitalism have now been revealed in important and illuminating work. Robert Knox has written extensively on the connections between race and capitalism. He examines, for instance, the UN intervention in Haiti that followed the overthrow of Jean-Bertrand Aristide. His historical study illustrates how practices of exploitation and extraction were inextricably linked with ideas of racial superiority that were deployed and elaborated by European scholars from the 17th century onwards to denigrate the Haitians as irredeemably inferior. Consequently, they were stripped of the usual protections granted to labourers and could be worked to extremes. Later, once Haiti became nominally independent following the successful and unprecedented slave revolt against France, a new type of racial hierarchy was formulated in which imperial states characterized the Haitians as inferior and unable to govern themselves; consequently, it was thus natural and appropriate for the USA to invade in order to establish a proper system of governance. Knox outlines how we might understand imperialism through the prisms of both Marxism and race. Economic motivations and imperatives might have driven the occupation of Haiti, but these forces were facilitated and justified by a sophisticated and flexible vocabulary of racial discrimination that justified US, and, even earlier, European, domination and exploitation of Haiti and Haitians.[156]

Ntina Tzouvala's incisive work reveals further dimensions on the standard of civilization and its connections with political economy, demonstrating how it was intimately connected to racial capitalism. Treating the standard of civilization as an argumentative structure rather than as a doctrine, Tzouvala demonstrates how this structure reproduces relations of capitalism with its tendency for 'unlimited expansion combined with its tendency constantly to create and re-create unequal development'.[157] Importantly, Tzouvala's work explores the many dimensions of this theme by studying it in a number of different contexts, ranging from the *South West Africa* cases to the recent efforts to establish the doctrine of 'unable or unwilling' as a part of binding international law.[158]

[154] See Mahmud, 'Colonialism and Modern Constructions of Race: A Preliminary Inquiry', 53 *University of Miami Law Review* (1999) 1219.

[155] On the protean character of the standard of civilization, see Obregon, *supra* note 84; A.B. Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2015).

[156] See Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism', 4(1) *LRIL* (2016) 81; see generally Knox, 'Marxist Approaches to International Law', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 306.

[157] N. Tzouvala, *Capitalism as Civilization: A History of International Law* (2020), at 219.

[158] *Ibid.*, at 42.

In these different works, a new generation of scholars has begun to explore the crucial topic of racial capitalism, a phenomenon identified by South African scholars studying the operations of apartheid, and brilliantly explored by Cedric Robinson in his pioneering work *Black Marxism* as a rejoinder to the more conventional Marxist theories, which, he argued, ignored the realities of race and its shaping historical importance. For Robinson, following in many respects the work of W.E.B. Du Bois, race shaped consciousness itself: 'Racialism insinuated not only medieval, feudal and capitalist social structures, forms of property and modes of production, but as well, the very values and traditions of consciousness through which the peoples of those ages came to understand their worlds and their experiences.'[159] Importantly, this new scholarship, drawing on a number of bodies of scholarship including CRT and TWAIL, focuses on the specific concept of race – rather than broader concepts of 'ethnicity' or 'civilization' – in order to better understand its unique role not only in shaping political economy and capitalism but also in the making and unmaking of the modern world. This scholarship illuminates new understandings of the ongoing and shifting nature of racism and its effects.[160] The study of racial capitalism offers new ways of understanding not only political economy but also connections between different fields of international law, as Nesiah demonstrates in her argument that a celebratory focus on international criminal tribunals and their role in protecting humanity against the evils of Nazism and slavery serve to obscure the operations of racial capitalism and the ways in which it furthers a normalized violence that international criminal law and tribunals exclude from their vision.[161]

## D *Many Locations, Multiple Empires*

Versions of imperial practices and empire exist in a bewildering number of forms and locations. In this section, I sketch out the different and contrasting circumstances in which questions of imperialism arise and require scrutiny and analysis. This entails a study of several issues including the workings of the post-colonial state, the rise of China, and what might be termed 'Fourth World Approaches to International Law', an approach that focuses on the struggles of Indigenous peoples for their rights and their land.

The violence of the post-colonial state has been an ongoing concern for TWAIL scholars. Indeed, that violence could be seen as another form of colonial continuity, the dictatorial leaders of the post-colonial state exercising, and indeed expanding on, the powers developed by the colonial state. In many developing countries, the post-colonial state became the vehicle by which particular ethnic groups fought to expand their power over minorities. Some form of what might be termed 'ethnic

[159] C. Robinson, *Black Marxism, The Making of the Black Radical Tradition* (2000), at 66.

[160] See, e.g., Achiume and Bali, *supra* note 75; Achiueme and Carbado, 'Critical Race Theory Meets Third World Approaches to International Law', 67 *UCLALR* (2021) 1462. This special issue contains a number of valuable essays on race and international law that will surely be the foundation of important new research.

[161] See Nesiah, '"A Mad and Melancholy Record": The Crisis of International Law', 11(2) *Notre Dame Journal of International and Comparative Law* (*NDJICL*) (2021) 232.

violence' had of course existed in societies well before the advent of the Europeans. Colonial powers, however, had often instantiated a system of ethnic politics in their colonies – the classic strategy of 'divide and rule', which involved simplifying and sometimes creating ethnic identities and thereby exacerbating ethnic tensions.

This ethnic politics could not be readily managed and contained by the liberal democratic constitutions that European powers often virtuously bequeathed to their colonies upon independence. Ethnic politics in this way was built into the politics of the post-colonial state. Post-colonial elites were quick to realize that they could attain power by exacerbating racial and ethnic divides within their own countries. This ethnic politics, of course, also had an economic dimension. The colonial state had sought to establish order and stability, a rule of law that was compatible with the extraction and exploitation of the resources of the colony and that could deal with local violence by recourse to emergency rule. Post-colonial elites, corrupt and authoritarian, seized on the same apparatus, then, to enrich themselves and to expand their power by targeting other ethnic groups as economic rivals and threats to the continuing prosperity and well-being of their own majority ethnic group, invariably identified as the state itself. Tribal and Indigenous peoples in Asia and Africa who had suffered under colonial rule experienced the same hardships and immiseration as a result of development programmes administered by the post-colonial state.

The ongoing violence of the post-colonial state took on many forms and dimensions. TWAIL scholars continued to study how human rights could be used to prevent ethnic conflict. Mohammed Shahabuddin, for instance, has produced a significant body of scholarship on the relationship between colonialism, race and contemporary ethnic conflict. His work is important in connecting ideas of race and ethnicity that had structured colonialism with ethnic and racial practices within post-colonial states. Indeed, his analysis of ethnic conflict is all the more relevant because of the rise of nationalism everywhere – and not just in non-European states that were the subject of earlier theorizing on ethnic conflict. Shahabuddin's work ranges from ethnic conflict in the Balkans[162] to the atrocities committed against the Rohingya in Myanmar.[163] These works are especially illuminating because Shahabuddin, rather than presenting the issue of ethnic conflict as a specialized and marginal subject within international law, instead explores the way in which ethnic conflict has shaped the making of international law itself. The minority treaty regimes of the League of Nations, for instance, which were designed to protect ethnic minorities, embodied a novel model of qualified sovereign statehood. Ethnic conflict has been studied in several different modes. The history of Sri Lanka since independence has been driven by ethnic politics, directed principally against estate workers and the Tamil minority. Thamil Ananthavinayagan's book is a detailed account of how contemporary human rights institutions and issues of accountability might protect minority rights and address all the issues raised by the

[162] See M. Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (2016).

[163] Shahabuddin, 'Post-colonial Boundaries, International Law and the Making of the Rohingya Crisis in Myanmar', 9(2) *Asian JIL* (2019) 334; M. Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (2021).

conflict in Sri Lanka, while Kalana Senaratne's work explores the potentials of 'internal self-determination' to address such conflicts.[164]

The post-colonial state, through the new systems of political economy shaped by globalization, reproduced hierarchy and inequality in other ways. Eslava's work, for instance, has shown how post-colonial states have now constructed the arenas of 'local government' as a novel and promising site to achieve the ever elusive goal of development and how this site itself, one that is directly connected with the intimate and everyday lives of people, becomes internationalized. Eslava traces this expansion of international law beyond traditional boundaries 'into new forms of administration, jurisdictional spaces, social spheres, multiple normative bodies, and indeed, into the very material elements that constitute the world'.[165] Various hierarchies are created and reinforced, demarcated both spatially by 'legal' and 'illegal' neighbourhoods and by norms of citizenship of this new metropolis. Eslava adopts an ethnographic approach in order to study the international law of the everyday and unremarkable, and, in so doing, he illuminates its impact on material and subjective elements – on economy, space, identity. Rather than the international law of crisis, wars, famines and disasters, Eslava's work is pioneering in its focus on a quotidian international law that has a profound impact on the lives of people. And in studying how people negotiate and resist this version of international law, Eslava adds new dimensions and techniques to the concern of TWAIL to understand international law from the lived experiences of people of the Third World. Further, and equally significantly, he shows how policies based on this conjunction of the 'local' and 'development' that are marketed by development experts as revolutionary and novel in fact replicate in many ways a much older technology developed by Frederick Lugard[166] at the beginning of the 20th century as a form of colonial administration that extended into the most intimate spaces of native life in an effort to transform the native into an economic actor within a colonial economy. Further, Eslava points out that this focus on the local serves the dual purpose of placing the responsibility for development – and its failure – on a particular set of actors – the municipality and not the national state – while deflecting attention from the ways in which international power structures of governance undermine efforts to achieve development based on human well-being.[167]

Given the TWAIL focus on empire and its persistence, the rise of China has raised new issues for many TWAIL scholars. Wilhelm Grewe argued in his expansive and masterly work that international law is fundamentally shaped by the great powers,[168] and, inevitably, China's emergence has been studied principally in terms of great

[164] T.V. Ananthavinayagan, *Sri Lanka, Human Rights and the United Nations: A Scrutiny into the International Human Rights Engagement with a Third World State* (2019); K. Senaratne, *Internal Self-Determination in International Law: History, Theory and Practice* (2021).

[165] Eslava, *Local Space, Global Life*, *supra* note 125, at 35.

[166] F. Lugard, *The Dual Mandate in British Tropical Africa* (1965).

[167] *Ibid.*, at 295 ('[t]he different ways in which the development project has tried').

[168] W. Grewe, *The Epochs of International Law* (2000).

power politics by both Chinese[169] and Western scholars.[170] What is unique in modern international law, however, is that this great power is from Asia and has a very ancient history and complex cosmology and political theory, one in which China is the centre of the world. The Confucian order, which plays such an important role in this system, is based on hierarchical relations. China is also distinctive because of its commitment to a state-led model of development, sometimes labelled the 'Beijing Consensus', which is an alternative, if not a challenge, to the 'Washington Consensus', which has dominated since the 1980s.[171] China has embraced the Bandung model of strong sovereignty and proclaims it does not interfere with the sovereignty of other countries, unlike Western powers that criticize the human rights records of developing states. All these factors have led to another major debate on whether China presents a threat to the 'liberal order' and the system of international law that supports it or whether China will continue its rise through the existing system of international law.[172]

A TWAIL perspective, and there could of course be many TWAIL perspectives, on all these developments is distinctive for several reasons. China has a dual character:[173] it has been a champion of the Third World that is also a great power. China, although never formally colonized, suffered significantly at the hands of imperial powers, being subjected, for instance, to the Opium Wars and the Treaty of Nanking of 1842 and all that these events signified. Chinese scholars such as Wellington Koo,[174] Wang Tieya[175] and Xue Hanqin[176] have written eloquently on China's efforts to grapple with international law and use it as a means of liberating the country from Western domination, symbolized most powerfully by the unequal treaties into which it was compelled to enter. These and other works have explored with depth and insight concerns that were shared by many colonized Asian states. They are a rich contribution to the Third World tradition. Further, China, since at least the time of its participation in the San Francisco Conference in 1945, has been a strong advocate for decolonization as a goal of the United Nations. Zhou En Lai attended the Bandung Conference, further

[169] Congyan, 'New Great Powers and International Law in the 21st Century', 24 *EJIL* (2013) 755; C. Congyan, *The Rise of China and International Law* (2019).

[170] See J. Ikenberry and G. Allison, *Destined for War: Can America and China Escape Thucydides's Trap?* (2017). Thucydides set out to write a history that would last for all time, and he appears to have succeeded in no small part because Western international relations scholars have invariably used his paradigm to explain a wide range of events extending from the Cold War to the rise of China.

[171] C. Weitseng and Fu Hualing (eds), *The Beijing Consensus? How China Has Changed the Western Ideas of Law and Development* (2017).

[172] Sornarajah and Wang, 'China, India, and International Law: A Justice Based Vision between the Romantic and Realist Perceptions', 9(2) *Asian JIL* (2019) 217.

[173] See *ibid.* (with specific reference to China-India relations, and whether these two countries that were leaders of the Third World can retain an idealist vision in their foreign policies).

[174] W. Koo, *The Status of Aliens in China* (1912).

[175] See the Hague lectures. Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', 221 *Receuil des course de l'Academie du Droit International* (*RCADI*) (1995) 195.

[176] See the Hague lectures. Xue Hanqin, *Chinese Perspectives on International Law: History, Culture and International law* (2018). For an ambitious attempt to reconceptualize international law, see Sienho Yee, *Towards an International Law of Co-progressiveness* (2004). It is appreciated, further, that the *Chinese Journal of International Law*, under Yee's editorship, expeditiously published one of the first articles on TWAIL, co-authored by myself and B.S.Chimni. See *supra* note 7.

consolidating China's status as an important champion of the Third World,[177] consistently asserting and developing the principles of peaceful co-existence that constituted the Bandung model of sovereignty. China has often supported classic principles of international law that powerful Western states were seeking to amend or violate, for instance, attempting to resist the disastrous US-led war in Iraq.

At the same time, however, the expansion of China into all parts of the world has raised concerns in Asia, Africa and Latin America. The Belt and Road Initiative (BRI) has attracted particular attention. This is hardly surprising as the BRI is an extraordinarily ambitious project, encompassing more than 70 countries and more than 25 per cent of world trade.[178] Through the BRI, China seeks to further cosmopolitanism and the well-being of humanity by building 'a community of common destiny for mankind' or a 'community of shared future for mankind',[179] a goal that was codified in the Constitution. China adamantly asserts that, even while constructing the BRI, it adheres to its respect for the sovereignty of the countries with which it deals, not seeking to spread its own ideology or democracy or the rule of law but, rather, working with the consent of its partner countries. Based on a close study of the BRI, Wang Jiangyu makes the persuasive argument that China's policies are furthered within the rules of the current world order.[180] The literature on the BRI is immense and interdisciplinary and what follows are my inexpert observations on the topic. The question then arises: What is the relationship between being a great power and imperialism? Is it possible to be a great power without being an imperial power? Historically, it is difficult to think of a great power that has not been imperial. It is precisely a country's control over foreign lands and people by whatever means that earns the accolade of 'greatness'. Chinese history suggests, further, that China has always seen itself as an empire. China's recent history, like that of many countries such as the USA and the United Kingdom (UK), and, indeed, Russia, might be viewed as an instance in which entities that imagine themselves as empires and that are driven by that vision pursue their goals through the vehicle of the sovereign state. Great powers might be seen as empires operating through the modalities of the classic sovereign nation state in a world in which all states are ostensibly equal. In China's case, the vision of order has been shaped by the idea of hierarchy as embodied in the tributary system. Notably,

[177] For an account of Zhou Enlai's efforts at Bandung to strengthen Third World solidarity, see Chen Yifeng, 'Bandung, China and the Making of World Order in East Asia', in Eslava, Fakhri and Nesiah, *Bandung, Global History and International Law* (2017 177.

[178] For an excellent overview see Jiangyu Wang, 'The Belt and Road Initiative, International Order, and International Law: A Game Changer in Power Politics, or in International Rule-Making?' unpublished working paper *NUS Law Working Paper* 2019/005 (on file with the author). See also Yun Zhao (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (2018). For a study of the possible political implications of the BRI for recipient countries, see Ginsburg, 'The BRI, Non-Interference and Democracy', 62 *Harvard International Law Journal* (2021) 40.

[179] Wang, *supra* note 178, at 8.

[180] See *ibid.*; Wang, 'China's Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations, and Law', 14 *Global Trade and Customs Journal* (2019) 222; see also Wang, 'Dispute Settlement in the Belt and Road Initiative: Progress, Issues, and Future Research Agenda', 8 *Chinese Journal of Comparative Law* (2020) 4.

under this system, China did not, at least in principle, interfere in the internal relations of a tributary country.[181] Arguably, then, hierarchy is combined with some respect for sovereignty in this complex system. However, China faces the challenge of meeting the needs of a large and growing population that aspires to improve its living standards. It seems inevitable that more resources will be needed. It is hardly surprising, then, that China is expanding into all parts of the world.

In some developing countries, China has been criticized as a new imperial power. Sri Lanka is increasingly indebted to China, which has provided loans for some projects that served the interests of (duly elected) local politicians, but that have led to large losses. Subsequently, Sri Lanka has leased the port of Hambantota to Chinese companies for 99 years, a development that has often been cited as an example of Chinese 'debt diplomacy' in practice. Hambantota is an extremely strategic port given its proximity to one of the busiest sea lanes in the world, connecting Europe and the Middle East with Southeast and East Asia. Chinese companies further constructed a new 'port city' in Colombo, investing some US $1.4 billion in the project.

Whether Hambantota can be seen as an example of the Chinese 'debt trap' remains a controversial and debatable issue, one that is hard to resolve without further information – information that is not readily available – about the precise terms of the agreements and the factors that led to the arrangement.[182] Western states criticize China for 'debt diplomacy' but ironically, 'debt diplomacy' is a long-standing practice that has been developed and, indeed, perfected by the great Western powers. It is striking, for instance, that the king of Ceylon relinquished control over the country's maritime provinces – and, thus, its key ports – to the Dutch East India company, which claimed the territories and ports as compensation for the debts the king had failed to pay the company for ridding the island of the Portuguese.[183] It is notable that China is establishing institutions – the Asian Infrastructure and Investment Bank – that parallel in some respects institutions such as the World Bank and the IMF that TWAIL scholars have analysed in detail as enabling the great powers to continue to shape the economies of countries in various ways and, very often, to perpetuate ongoing debt. The broad point to be made here is that the technologies of imperialism are technologies that can be wielded by very different actors. As we have seen, TWAIL scholars have argued that the modern foreign investment regime

[181] See Kang, 'International Order in Historical East Asia: Tribute and Hierarchy beyond Sinocentrism and Eurocentrism', 74(1) *IO* (2019) 65; Zhu Yuan Yi, 'Suzerainty, Semi-sovereignty, and International Legal Hierarchies on China's Borderlands', 10(2) *Asian JIL* (2020) 293. For another account of the relationship between the tributary system and hierarchy, see Yuan-Kang Wang, 'Explaining the Tribute System: Power, Confucianism, and War in Medieval East Asia', 13(2) *Journal of East Asian Studies* (2013) 207.

[182] For an influential argument that it represents the Chinese debt trap, see Abi-Habib, 'How China Got Sri Lanka to Cough Up a Port', *New York Times* (25 June 2018). For a more complex account of the Hambantota matter, see Carrai, 'China's Malleable Sovereignty along the Belt and Road Initiative: The Case of the 99 Year Chinese Lease of Hambantota Port', 51 *New York University Journal of International Law and Politics* (*NYUJILP*) (2019) 1061.

[183] The same Dutch East India company that was advised by Grotius. See K.M. de Silva, *A History of Sri Lanka* (2nd edn, 2008), at 120.

is a neo-colonial technology. It is extremely ironic, then, that it is the West itself that now seeks to reform the foreign investment regime it had so ingeniously established, overcoming Third World concerns and protests. The West's concerns about the extraordinary protections granted to foreign investors is surely connected with this reversal of roles, as the West now finds itself the recipient of foreign investments from China.

Western states that criticize China now often focus on policies and technologies that they had practised, developed and refined earlier in the course of their own imperial expansion. For instance, Chinese state-owned enterprises (SOEs) are viewed as threats to the national security of host countries and challenges to classic investment law that appear to operate on the assumption that corporations have a specific identity and form. Broadly, the argument is that corporations are 'economic' actors and that SOEs are in a sense 'political actors' masquerading as economic actors or using economic means to further the political ends of the state with which the corporation is affiliated.[184] Seen from a historical perspective, we might see this as a very old phenomenon: after all, even if the analogy is a crude one, the Dutch East India Company and the British East India Company were created through royal charters and the principal vehicle of imperial expansion.

The basic point, then, is that, as far as TWAIL scholars are concerned, rising great powers do not have to depart from existing international law in order to pursue their ambitions. TWAIL scholars broadly argue, after all, that the current world order – the neo-liberal order – is built on inequality and facilitates a version of neo-colonialism. This version allows poor countries to maintain the façade of sovereignty even as they relinquish their resources and economic assets to foreign powers. China, then, may have its own unique approach to international law, but it does not have to change international law in any significant way in order to further its interests.[185] It is surely a temptation for any state capable of doing so to use whatever legal technologies are available to further its national interests.

This perspective then, provides a distinctive approach to understanding the emergence of China and, indeed, other aspirant great powers from the Third World itself: it is not wedded to the romanticism of the 'liberal order', nor does it participate in the traditional USA-versus-China debate or framework. The broad issue, rather, is understanding the role of China, as a 'New Great Power' which has made

[184] There is a large literature on this topic. See McLaughlin, 'State Owned Enterprises and Threats to National Security under Investment Treaties', 19 *CJIL* (2020) 283; Chaisse, 'Untangling the Triangle: Issues for State Controlled Entities in Trade Investment and Competition Law,' in J. Chaisse and Lin Tsi Yu (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (2016) 240.

[185] This is not to say that China does not have its own methods of enhancing its power. See, e.g., Shaffer and Gao, 'A New Chinese Economic Law Order?', 23 *Journal of International Economic Law* (2020) 607. This article gives a detailed account of China's efforts to establish and promote its own standards, its distinctive approach to creating trade networks and dispute settlement, all as part of a larger programme of creating a 'Sino-centric economic order'. While these are important differences, they remain broadly within the system of existing international law. The question of state-led development does create tensions with a neo-liberal order premised on a particular idea of the corporation and its role within the WTO and the investment regimes.

anti-colonialism such a central part of its policy, in potentially shaping a different global order. And this will involve a study of the impact of China on developing countries, for better and worse, and the role of law as part of the larger politics that structures that relationship. There is a massive and growing scholarship on this broad topic. Scholars located in Asia, Africa and Latin America are able to track Chinese operations within their own countries, exploring how those operations suggest, from the ground level, the specifics of Chinese strategy and legal principles and techniques. Dilini Pathirana's work on China in Sri Lanka, for instance, explores how China relies on commercial diplomacy rather than law in its dealing with the country.[186] She suggests that asymmetrical bargaining power might lead to uneven outcomes.[187] Muhammad Azeem, provides an account of Chinese investment in Pakistan, following the formation of the China-Pakistan Economic Corridor (CPEC).[188] This study adopts a `bottom up' approach, which focuses on the situation of workers in Pakistan. His work points to some of the political implications of these arrangements and their impact on labour rights.[189] China has invested billions in developing countries, and assessing the impact, the costs and benefits of the BRI on each country is a very difficult task. It is telling that the number of BRI countries continues to increase. It remains the case that China is in a unique position, given its power and unprecedented achievement in lifting millions out of poverty – adopting policies very different from neo-liberal orthodoxies – to shape a different and fairer global system. This remains to be seen.

While seeking to understand the many and varied forms of imperialism, TWAIL scholarship has been principally driven by a specific understanding of imperialism as the encounter between Europe and the non-European world that shaped modern international law. It is clear, however, that settler colonialism is a distinctive form of empire, and TWAIL scholars have not focused closely on the plight of Indigenous peoples,[190] who have suffered and resisted a massive violence that has been sustained over many centuries and that has threatened their very existence.[191] The role of international law in settler colonialism has been studied in powerful detail in the work of Robert Williams[192] and Irene Watson.[193] The struggles of Indigenous peoples throughout the world have given rise to what Hiroshi Fukurai terms 'Fourth World

[186] Eg. Pathirana, 'The Paradox of Chinese Investments in Sri Lanka: Between Investment Treaty Protection and Commercial Diplomacy', 10(2) *Asian JIL* (2020) 375.

[187] *Ibid.*, at 408.

[188] Azeem, 'Theoretical Challenges to TWAIL with the Rise of China: Labour Conditions and Resistance under Chinese Investment in Pakistan', 20(2) *ORIL* (2019) 395.

[189] *Ibid.*, at 427.

[190] See Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World', 14 *ORIL* (2012) 131; Ngugi, 'The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa', 20 *WILJ* (2002) 297.

[191] See N. Estes, *Our History Is the Future* (2019); A. Simpson, *Mohawk Interruptus* (2014); Wolfe, 'Settler Colonialism and the Elimination of the Native', 8(4) *Journal of Genocide Research* (2006) 387.

[192] R. Williams Jr., *The American Indian in Western Legal Thought* (1992).

[193] I. Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (2015).

Approaches to International Law'.[194] A study of the colonial experience of Indigenous peoples is all the more important because it is the post-colonial states themselves – the states that fought for their independence from colonialism, that proclaimed the end of racism and that demanded equality – that are now inflicting further violence in turn on Indigenous peoples.[195] The urgent task arises of recognizing, and exploring, the world views of these peoples and their understandings of community, justice and governance. These vital bodies of knowledge have been historically suppressed, dismissed and, indeed, destroyed. A recently published volume, edited by Sujith Xavier, Beverly Jacobs, Valerie Waboose, Jeffrey Hewitt and Amar Bhatia, that explores the important theme of the relationship between different forms of imperialism as part of a larger and more ambitious project of decolonization, points to the urgent task of recovering Indigenous knowledge 'We want to turn to non-Western sites of knowledge production, beyond the pale of citing to and regurgitating outdated Western canons … we are interested in thinking beyond law, beyond Western institutions of governance and surveillance and beyond Western notions of knowledge.'[196]

TWAIL explores, then, the many forms of imperialism, the different sites in which they might be located and the different impacts that they might have. Complex questions arise about the ways in which different forms of imperialism interact and relate to each other – developing countries may be objects of neo-colonialism, for instance but, at the same time, adopt and apply colonial practices to minorities and Indigenous peoples. The question of how different forms of imperialism overlap, reproduce and possibly reinforce each other, with victims of colonialism aspiring themselves to become colonial masters, needs exploration.[197] Further, imperialism, even if it adapts and manifests itself in many different forms, offers only a partial approach to the broader question of how power works and how inequality and subordination are effected.

## E *TWAIL and History*

For reasons discussed earlier, history has always been important to TWAIL scholars, although their approach to the writing of history and their reasons for doing so have changed over the years. TWAIL has had to improvise a set of analytic tools in order to explore the issues that matter to them. They have turned to history not because they sought

[194] Fukurai, 'Fourth World Approaches to International Law (FWAIL) and Asia's Indigenous Struggles and Quests for Recognition under International Law', 5 *Asian Journal of Law and Society* (2018) 231, at 231. Hiroshi Fukurai proposes a number of themes that are central to FWAIL, and that both complement and depart from TWAIL in their emphasis and focus. See also Natarajan, 'Decolonization in Third and Fourth Worlds: Synergy, Solidarity and Sustainability through International Law', in S. Xavier *et al.* (eds), *Decolonizing Law: Indigenous, Third World and Settler Perspectives* (2021) 60.

[195] As Benedict Kingsbury points out, many Asian states do not even want to acknowledge the existence of Indigenous peoples in their territories. See Kingsbury, '"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy', 92(3) *AJIL* (1998) 414.

[196] Xavier *et al.*, *supra* note 194.

[197] I have tried to elaborate on this question in the context of international law in Anghie, 'Race, Self-Determination and Australian Empire', 19(2) *MJIL* (2018) 423.

to be historians but, rather, to understand the ways in which history shaped a particular approach to international law and how this approach precluded any inquiry into imperialism and its impact on the making of international law.[198] They were also dissatisfied by works that dealt with imperialism but presented it in an unrecognizably etiolated way.

A few central themes have shaped the TWAIL approach to history. First, TWAIL works have attempted to study incidents – cases – that involve the Third World or that have affected Third World peoples and to identify their broader significance for the discipline of international law itself. Second, TWAIL studies have focused on the way in which international law has played a role in the transfer of wealth and resources from the Third World to the First World. Third, TWAIL scholarship studies how these technologies of expropriation have adapted and evolved over time and continue to operate in a supposedly post-imperial world. Fourth, TWAIL scholars have sought to illustrate how a focus on the Third World would challenge conventional histories of international law more broadly and in particular fields and doctrines within international law. Fifth, TWAIL scholars have approached history with a view to recovering alternative ideas of justice and governance originating in the non-European world, ideas that have often been ignored or belittled. Broadly then, TWAIL scholars, by turning to history, have innovated in various ways to explore TWAIL themes – how imperial power operates, how inequalities are entrenched, how accounts of the origins of particular doctrines or regimes illuminate the workings of the biases that they then produce.[199]

I discuss below important TWAIL scholarship that illustrates different facets of how TWAIL scholars have engaged with history. Michael Fakhri's historically oriented work offers a novel perspective and scale by focusing on sugar to tell a much larger story about the evolution of the international trading regime. Colonial powers used their territories principally to extract raw materials and produce commodities such as sugar. Once these territories achieved independence, they inherited this colonially constructed economy, and their efforts to reform international trade law were driven by the need to change this system.[200] Fakhri's analysis of trade in a single commodity over time presents a rich alternative view of an international trade regime and, thereby, new insights into the large themes of sovereignty, empire, revolution, relations between the 'centre' and the 'periphery' and contested understandings of the concept of 'free trade'. It outlines what might be termed a Third World approach to trade, economy and society, one that has animated the work of the UN Conference on Trade and Development (UNCTAD). It shows how this work has differed from the General Agreement on Tariffs and Trade (GATT) and how the GATT's version

[198] Obregon, 'Peripheral Histories of International Law', 15 *Annual Review of Law and Social Sciences* (*ARLSS*) (2019) 437.

[199] The TWAIL approach to history has generated something of a debate about method. For an excellent overview of the issues involved, see A. Orford, *International Law and the Politics of History* (2021). I am especially appreciative of Orford's efforts to engage sympathetically with the TWAIL project and my own work. For a comprehensive and illuminating overview of the turn to history' see I. de la Rasilla, *International Law and History: Modern Interfaces* (2021).

[200] M. Fakhri, *Sugar and the Making of International Trade Law* (2014).

prevailed.[201] Fakhri thus challenges traditional narratives and histories that underlie established bodies of law such as international trade law and the law of international institutions.[202] He does this by focusing on the themes of commodities, dependency, the UNCTAD initiative and the Third World's struggles to create a system of international commodity agreements. Like Eslava's work on development policies in Colombia, new relationships are limned and new insights provided on the battles that led to the creation of the international trading regime.

Similarly, the work of scholars such as Usha Natarajan, Manuel Jiménez Fonseca and Ileana Porras rewrite the history of international environmental law, using broadly similar techniques. The traditional history of international environmental law begins with the 1972 Stockholm Conference. Natarajan and Kishan Khoday,[203] Porras[204] and Fonseca,[205] in different ways, return to much earlier times such as the 16th century, the period when nature was conceptualized as a commodity to be expropriated and exploited as part of a system of political economy that survived only through endless expansion. This system was facilitated and promoted by the idea of trade as being providentially ordained, as Porras argues in a study of a very early instance of the complex relationship between trade and the environment. It is with respect to the lands of non-European peoples that much of this thinking about property, ownership and nature took place, as Fonseca argues in his reading of Vitoria's vision of nature. The challenging question that they raise is whether it is possible for all the most sophisticated techniques of international environmental law to negate this primordial nexus and the system it reproduces. These works compel not only a rethinking of the history of international environmental law but also a new system of relationships and a fresh perspective on the complex connections among nature, economy and property.

International institutions have profoundly shaped the modern world of international law. Guy Fiti Sinclair's work offers us a new understanding of the history of international institutions. Focusing on the relationship between institutions and empire, he argues that one of the principal purposes of international institutions – and, indeed, their innovations and expansion of powers – was the management of the Third World.[206] The work and significance of these institutions are seen in a new

[201] For a wide-ranging exploration of aspects of this method, see J. Hohmann and D. Joyce (eds), *International Law's Objects* (2018).

[202] Indeed, even accounts that do not explicitly seek to advance a TWAIL vision but focus instead on the origins of certain disciplines reveal what might be termed 'colonial origins'. See Jan Klabbers and his account of the beginnings of the law of international institutions in the work of Paul Reinsch, who was a specialist in international institutions. Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', 25(3) *EJIL* (2014) 645.

[203] Natarajan and Khoday, 'Locating Nature: Making and Unmaking International Law', 27(3) *LJIL* (2014) 573.

[204] Porras, 'Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations', 27(3) *LJIL* (2014) 641.

[205] Fonseca, 'Jus gentium and the Transformation of Latin American Nature: One More Reading of Vitoria?', in M. Koskenniemi, W. Rech and M.J. Fonseca (eds), *International Law and Empire: Historical Explorations* (2017) 123.

[206] G. Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017).

way because of this focus on imperialism. A different aspect of Third World governance is illustrated by John Reynolds' work on emergency, which shows how it was in the non-European world that different dimensions of emergency rule evolved and expanded.[207] Emergency has now become such a prominent part of modern life that we are said to be living in a state of 'permanent emergency'. Diverging from the highly influential work of Giorgio Agamben,[208] Reynolds studies the characteristics of emergency rule, a founding element of colonial governance, in locations varying from Kenya, to Cyprus, to Palestine and Australia. Reynolds illuminates the colonial origins of emergency law, as well as the intimate relationship between race and emergency. Race again serves the purpose of rendering certain communities as inherently savage, their violence containable only through a departure from the 'rule of law' and the application of the rule of emergency. Like Nasser Hussain's classic,[209] Reynolds' book could well be termed a 'global history of emergency rule', and it serves the crucial purpose, again, of making non-European peoples and locations and experiences central to the story of this formidable technology of violence and management. The TWAIL focus on history thus calls for a global history of the world,[210] one that is sensitive to the many connections between the First and Third Worlds and the constitutive significance of the non-European world to the creation of Europe itself.[211] For TWAIL scholars studying the relationship between imperialism and international law, history has always been global.

The question of how imperialism has featured and been understood in the disciplines of history, political theory, intellectual history and international relations is a large one. As I have argued, imperialism was ignored as a topic of any major importance for international law after the collapse of the NIEO. TWAIL scholarship into imperialism, and all the insights that have been generated by the argument that imperialism is integral to the very identity of international law, is a major reason why imperialism has become so central to an understanding both of the history of international law[212] and of current events. It is not only international law, of course, that has suffered from this myopia. Jennifer Pitts makes the striking argument, for instance, that 'political theory has come slowly and late to the study of Empire, relative to other disciplines'.[213] This situation seems anomalous for at least two reasons. First, political thinkers often presented their theories as universal, true of all societies including those outside Europe. Second, many of the great political theorists – John Locke, Grotius, J.S. Mill, to name only a few – dealt directly with colonial issues. In *Mare Liberum*, Grotius was also

[207] See J. Reynolds, *Empire, Emergency and International Law* (2017).

[208] G. Agamben, *State of Exception* (2005).

[209] N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003).

[210] For an insightful overview, see Obregón, 'Peripheral Histories of International Law', 15 *ARLSS* (2019) 437.

[211] Chakrabarty, *supra* note 80.

[212] For an account of the connections between TWAIL work and the historical scholarship of Martti Koskenniemi, for instance, see Chimni, *supra* note 37, ch. 4.

[213] Pitts, 'Theory of Empire and Imperialism', 13 *Annual Review of Political Science* (2010) 211, at 212. For an illuminating study see J. Tully, *Public Philosophy in a New Key: Volume II Imperialism and Civic Freedom* (2008).

responding to immediate problems arising from colonial expansion and not only to some imagined Other. These examples further illustrate the basic post-colonial argument discussed above that Western categories of thought – Western disciplines – were profoundly shaped by the colonial encounter.

TWAIL approaches to history are driven by the effort to explore TWAIL concerns, and traditions such as Marxism and post-colonialism have offered important tools with which to accomplish this exploration. These traditions generate their own vision of what might be termed 'global history', which follows from one of the basic premises of both traditions: that there would be no 'West' as we know it without imperialism. The question then arises of how these different disciplines – 'global history', international relations, intellectual history, political theory – address the challenges of imperialism and, more particularly, the adequacy of their engagement with an issue that arguably shaped the very foundation of their disciplines. The project of decolonizing knowledge that is now so inescapable and so obviously needed has finally propelled into the debate a whole series of issues that TWAIL and other forms of Southern scholarship have been asserting for many years.

## F *The Third World Tradition: Restoration and Rethinking*

One of the major goals of TWAIL scholarship is to understand better the Third World tradition, the ideas, projects, scholars, events and struggles that created and shaped this tradition. In many cases, this involves returning to works and events that have been long neglected or writings that have been peremptorily dismissed. This project of restoration and rethinking is a difficult and very incomplete one, but it is an imperative of justice to recover these works, to study, critically assess and recognize their importance to an understanding of both the Third World tradition and international law more generally.

Some of the major features of this aspect of TWAIL scholarship may be identified and assessed through the recent volume of essays on Bandung.[214] The Bandung Conference, in contrast to the great conferences that had ostensibly shaped international law – Westphalia, Vienna and Paris – was held in Asia and attended by Asian and African states that represented a very large proportion of the world's population. The volume, consisting of 38 essays, is a landmark in TWAIL scholarship. While turning to an event that has been largely neglected in the history of international law, the volume also suggests the rich developments that have taken place in TWAIL scholarship since the 1990s. The Bandung Conference was the first time that formerly colonized peoples of the world from Asia and Africa met together to formulate a common agenda. The radical nature of this moment must be appreciated. European imperialism had been a driving force of world order and international relations since the 16th century. The 29 states at Bandung faced several formidable challenges: developing a common position amid daunting diversity; creating an alternative, anti-colonial

[214] L. Eslava, M. Fakhri and V. Nesiah (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (2017).

vision in the midst of great power rivalries; and assisting colonized peoples fighting for their independence. The Bandung states believed that the UN did not fully represent the aspirations of the newly independent states, particularly their goal of ending colonialism. They felt excluded by the UN and concerned by the fact that the new global institution entrenched inequalities within it, most explicitly in the UN Security Council. It was in this large setting that the Bandung states formulated their vision of a fairer, post-colonial, global order, which was presented in the Bandung communique,[215] and which outlined a far-reaching vision of sovereignty and principles dealing with the peaceful settlement of disputes, economic cooperation to enhance trade and investment, human rights and self-determination and nuclear disarmament. This was the Third World proclaiming a new global order.[216] For Third World countries and peoples, Bandung was an epoch-making event at that time.[217]

The Bandung volume captures the efforts of TWAIL scholars to recuperate the past. Almost before it took place, the Bandung Conference was belittled and dismissed.[218] The coverage at the time was sporadic, and, given the control of news channels and publications by the Western powers, it was inevitably through the lens of these powers that these efforts to challenge the West were viewed. Perceptive contemporaneous accounts of Bandung, many by people who participated in the proceedings, and others by observers,[219] served as an important record of the background to Bandung and what transpired there. But, over the years, Bandung, like the NIEO, has receded in significance, and scholarly interest for international lawyers, as the ambitions of the conference to reconstruct the international order began to appear futile and misplaced in retrospect. One legacy of Bandung survived in the repeated affirmation of Third World states of the importance of Pancasila, the principles of peaceful co-existence. These principles, which also strongly affirm the primacy of sovereignty, continue to resonate with Third World countries and, indeed, form the basis of their engagement with the international system. This is despite all the arguments to the effect that, in a globalized and interdependent world, sovereignty is redundant.[220]

As we have seen, China continues to assert the importance of Bandung, and Indonesia commemorated the anniversaries of Bandung by hosting widely attended events in 2005 and 2015. The legacies of Bandung continue in these ways in ongoing efforts to promote South-South cooperation. The concerns and ambitions of the conference to remake the world, however, lapsed into obscurity over time, and,

[215] For a reproduction of the Communique, see, 'Final Communique of the Asian-African Conference', Bandung, 18–24 April 1955, 11 *Interventions: Journal of Postcolonial Studies* (2009) 94.

[216] For an important study of other Third World states and anti-colonial scholars' intent on what might be termed 'world making', see A. Getachew, *World Making after Empire: The Rise and Fall of Self-Determination* (2019).

[217] See M. Fakhri and K. Reynolds, *The Bandung Conference* (2017).

[218] See Acharya, 'Studying the Bandung Conference from a Global IR Perspective', 70(4) *Australian Journal of International Affairs* (2016) 342, at 343.

[219] G.H. Jansen, *Afro-Asia and Non-alignment* (1966). Richard Wright's rich and vivid account of Bandung is found in R. Wright, *The Color Curtain: A Report on the Bandung Conference* (1956).

[220] See, e.g., Wondam, 'The 60th Anniversary of the Bandung Conference and Asia', 17 *Inter-Asia Cultural Studies* (2016) 148.

indeed, Bandung, partly perhaps because of its heavy emphasis on sovereignty, became associated with authoritarianism and the failure of the Third World project. The larger vision of Bandung diminished, although a few scholars[221] have valiantly attempted to point to the enduring and global significance of Bandung.[222] International law scholars in general, even those interested in the Third World, only had a vague sense, largely unexplored, that Bandung had led to the Non-Aligned Movement, the Group of 77 and the NIEO. But given that these initiatives themselves were repudiated, Bandung and its legacy receded.

The Bandung volume is crucial, then, because it is a further stage in TWAIL's engagement with history in order to produce a unique global history,[223] one that focuses on the central effort to create a united anti-colonial world. Bandung might be contrasted with the UN and its own particular vision of universal order. Bandung did not reject the UN, but, unlike the UN, it made anti-colonialism a central and powerful theme.[224] The Bandung volume, then, addresses the question that the editors pose after surveying the extant literature: 'But what does it mean to situate Bandung or place these other accounts within international legal history?'[225] Among other things, in a move now well established in the TWAIL repertoire, we may see Bandung as an alternative to Westphalia, a different 'origin' story.[226] Bandung and the Third World are brought out of history and into history, and the volume can be taken to explore the responsibilities that follow from this transition.

The volume, while analysing the many themes discussed in Bandung, including human rights, self-determination, race, development and nuclear weapons, saw these in a broader context of global order: '[W]e are less interested here in chronicling Bandung as an event; we are more interested in how the "global histories of Bandung" are narrated, how the postcolonial condition is emplotted, and how the intellectual and political stakes of the synergies and tensions in those multiple and varied histories shaped, or could shape, the orientation of the dominant world order.'[227] The volume, then, seeks to place this event in the centre of global history and to engage with the unprecedented effort of Asian and African peoples to articulate their vision of global order. In keeping with this global perspective, among the major achievements of this

[221] See the following works of Amitav Acharya. Acharya, 'Who Are the Norm Makers? The Asian-African Conference in Bandung and the Evolution of Norms', 20(3) *Global Governance* (2014) 405; A. Acharya and S.S. Tan (eds), *The Legacy of the 1955 Asian-African Conference for International Order* (2008).

[222] For more recent important works that place Bandung in the larger trajectory of the Third World project and decolonization, see V. Prashad, *The Darker Nations: A People's History of the Third World* (2007). The 50th anniversary of Bandung in 2005 prompted important reassessments. See, e.g., C. Lee, *Making a World after Empire: The Bandung Moment and Its Political Afterlives* (2019); V. Prashad, *The Darker Nations* (2019), at 31; P. Mishra, *From the Ruins of Empire: The Revolt against the West and the Remaking of Asia* (2012).

[223] See Eslava, Fakhri and Nesiah, 'The Spirit of Bandung', in Eslava, Fakhri and Nesiah, *supra* note 214, 3.

[224] See the work of Mark Mazower for the argument that the UN sought to preserve colonial relations in a world heading clearly towards decolonization. M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009).

[225] Eslava, Fakhri and Nesiah, 'The Spirit of Bandung', *supra* note 214, at 14.

[226] *Ibid.*, at 15.

[227] *Ibid.*, at 12.

volume is its exploration of the ramifications of Bandung for agents and countries that had not been previously associated with Bandung. How did Bandung, as an event, myth, sensibility, set of principles, ethos and contradiction, impinge on the emergence of Bangladesh as a sovereign state in 1971?[228] How did Bandung author a 'new version of Third World modernity through an alliance of African-Asian nations'?[229] Nasser was a major figure at Bandung and, indeed, campaigned to hold the next conference in Egypt, which never occurred. His Bandung-inspired development projects, however, affected women adversely. Mai Taha powerfully argues that the 'Bandung moment' in Egypt 'failed to challenge the underlying root causes of women's exploitation; in fact, it relied on this exploitation to sustain its postcolonial and modern moment'.[230]

The Bandung states succeeded in their campaign against colonialism, overcoming the ambiguities of the United Nations Charter to establish the principle of self-determination for colonized peoples. These states, and the many Third World scholars who took up the cause against colonialism further asserted and consolidated the sovereignty of the 'new states'. While recognizing the achievements and significance of Bandung, however, the volume also details its ironies and tragedies. Even as sovereignty was being confirmed and celebrated, communities that had lived in the newly independent states were being simultaneously further marginalized. Tribal peoples have suffered particularly as a result of development projects. Indeed, the newly independent states later discussed the problem of tribal peoples using language that completely reproduced the civilizing mission that those states had been so adamant in condemning.[231] Many of the chapters in the book examine the interlocking and intersecting nature of colonialism through a careful study of how forms of internal colonialism were being reproduced by the post-colonial state, even as it was fighting in the realm of international law to assert its own sovereignty and independence.[232] The collective achievements of this volume are many: it offers a model and a superb demonstration of the different ways and registers in which TWAIL histories could be written and how connections could be made, as Bandung resonated through time and space. But, among its greatest achievements is the act of recovery: the effort to excavate, engage with and understand the Third World project, with all its aspirations, tensions, ambitions and inadequacies. The Bandung volume can be seen as an act of restoration as the essays seek to give this conference the recognition, dignity and intellectual seriousness that it warrants.

[228] Cyra Akila Choudhury, 'From Bandung 1955 to Bangladesh 1971: Postcolonial Self-Determination, and Third Worldist Failures in South Asia', in Eslava, Fakhri and Nesiah, *supra* note 214, 322 at 322.

[229] Taha, 'Reimagining Bandung for Women at Work in Egypt', in Eslava, Fakhri and Nesiah, *supra* note 214, 337.

[230] *Ibid.*, at 354.

[231] See Abraham, 'From Bandung to NAM: Non-alignment and Indian Foreign Policy, 1947–1965', 46(2) *Commonwealth and Comparative Politics* (2008) 195, at 201.

[232] See, e.g., Gassama, 'Bandung 1955', in Eslava, Fakhri and Nesiah, *supra* note 214, 126; a similar argument haunts Feyissa, 'Non-European Imperialism and the Europeanisation of Law: Complexities of Legal Codification in Imperial Ethiopia', 1 *TWAILR* (2020) 152.

Returning to Bandung through this volume also serves as a benchmark. It is a means of comparing 'imperialism then and imperialism now'.[233] Further, Bandung first articulated a range of issues that preoccupied developing states for many years and that continue to be TWAIL concerns: sovereignty, self-determination,[234] development, human rights, trade and peace. The final communique mentioned tensions in the Middle East and declared its support for 'the Arab people of Palestine',[235] a further ongoing issue that TWAIL scholars have continued to write about, drawing on the framework of settler colonialism to understand Israel's occupation and expansion further into Palestinian territory and all the human rights violations that this process entails.[236] Race was a major preoccupation of the Bandung states, as it had been to all Asian and African peoples at least since 19th-century sciences of racism had consigned them to permanent inferiority. The Bandung treatment of race, however, has implications not only for the West but also for the Bandung states themselves. For the Bandung states, human rights were not only a means of advancing self-determination but also of protecting against and ending racism. The communique expressly 'deplored the policies and practices of racial segregation and discrimination', a condemnation directed against the West and, in particular, South Africa where racism was entrenched as apartheid, ironically after the creation of the UN Charter.

Most importantly, however, the Bandung states made a pledge to their own peoples: the conference pointedly 're-affirmed the determination of Asian-African peoples to eradicate every trace of racialism that might exist in their own countries; and pledged to use its full moral influence to guard against the danger of falling victims to the same evil in their struggle to eradicate it'.[237] What this clearly indicates is that the participating states recognized that racism existed within their own countries and that this needed to be acknowledged and addressed. It is especially poignant that they foresaw and warned against 'the danger of falling victims to the same evil in their struggle to eradicate it', a version of the danger of the slave only seeking to become the master but keeping the system intact. It is clear that many of the states that so solemnly made this declaration have failed. And that ethnic tensions and conflict have been an ongoing feature of the histories of so many of the Asian and African countries at Bandung, including Sri Lanka, Indonesia, Myanmar and India. Taken at its best, however, the Bandung project continues to be relevant: the Bandung emphasis on disarmament, the abolition of nuclear weapons, and the creation of global peace in the midst of super-power rivalries is more compelling than ever.

[233] Chimni, 'Anti-Imperialism', in Eslava, Fakhri and Nesiah, *supra* note 214, 35.

[234] On further efforts to use self-determination as a means of creating a new global order, see A. Getachew, *Worldmaking after Empire* (2019).

[235] Final Communiqué of the Asian-African Conference of Bandung, 24 April 1955, s. E. On the cautious approach taken to Palestine by the Bandung states, see Samour, 'Palestine at Bandung: the Longwinded Start of a Reimagined International Law', in Eslava, Fakhri and Nesiah, *supra* note 214, at 595.

[236] For an important historical and legal analysis of the Palestine-Israel conflict, see V. Kattan, *From Coexistence to Conquest* (2009); see also Dugard and Reynolds, 'Apartheid, International Law and the Occupied Palestinian Territories', 24(3) *EJIL* (2013) 867; N. Erakat, *Justice for Some* (2019).

[237] Final Communiqué, *supra* note 235, at 6, s. C-2.

The broad project of recovery takes place at a number of different levels. TWAIL scholars and their colleagues have attempted to recuperate Third World efforts to change international law and relations by revisiting the NIEO, the battle for international law that took place in the 1970s and the construction of institutions and centres of knowledge such as UNCTAD that formulated credible alternatives to world trade. Histories have now been written in the vein of broad movements, of conferences and of particular doctrinal areas such as state succession and acquired rights.[238] These works are detailed studies of specific areas of law, but they have a broader significance because of the matrix of issues relating to race, decolonization, unequal economic relations and empire that bind together all these many varied projects. These histories have identified new themes and concerns and formulated new conceptual and analytic tools with which to explore them. These developments have unified and facilitated a new sort of 'global scholarship', bringing together experiences and histories that would otherwise be viewed in narrowly regional or local terms. In other words, works that would be seen as individual or disparate might be seen as part of a growing and vibrant body of scholarship, just as Bandung generated varied responses and reactions that are all given shape and richness by being considered in a broader context.

At a more micro level, TWAIL scholars have focused on major figures in the Third World tradition and what they have worked on and sought to accomplish. The work of scholars such as Alejandro Álvarez, Elias,[239] Doudou Thiam and Mbaye,[240] Abi-Saab,[241] Weeramantry[242] and Sornarajah[243] have been approached in this way. The scholarship focuses not only on the contributions that these scholars and jurists have made to international law and the ways in which they have sought to give Third World actors voice and personality within international legal frameworks[244] but also to understand their ambitions, their visions of politics and their relationship with international law.[245] The effort here, in particular, is to understand these scholars within their own terms, and their works and careers assume a different significance when viewed as part of the TWAIL tradition rather than being assimilated, in however distinguished a manner, into the more familiar frameworks of the orthodox system of international law. These studies have been revealing for the differences they have exposed within

[238] See M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007).

[239] See Gathii, 'A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias', 21 *LJIL* (2008) 317; Lim, 'Neither Sheep nor Peacocks: T.O. Elias and Postcolonial International Law', 21 *LJIL* (2008) 295.

[240] See Gathii, 'Africa and the Radical Origins of the Right to Development', 1 *TWAILR* (2020) 28, at 50.

[241] Ozsu, 'Georges Abi-Saab, the Congo Crisis and the Decolonization of the United Nations', 31(2) *EJIL* (2020) 601.

[242] Anghie 'C. G. Weeramantry at the International Court of Justice', 14(4) *LJIL* (2001) 829.

[243] See C.L. Lim (ed.), *Alternative Visions of the International Law on 'Foreign Investment': Essays in Honour of Muthucumaraswamy Sornarajah* (2016).

[244] See, e.g., *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 83, Separate Opinion of Vice-President Ammoun.

[245] See, e.g., Abi-Saab, 'The Third World Intellectual in Praxis: Confrontation, Participation, or Operation behind Enemy Lines', 37(11) *TWQ* (2016) 1957; Sornarajah, 'On Fighting for Global Justice: The Role of a Third World International Lawyer', 37(11) *TWQ* (2016) 1972.

the broader Third World tradition itself.[246] At the same time, in his penetrating study of TWAIL traditions, Adil Hasan Khan points to the broader common and underlying existential dilemmas that many of these scholars have faced.[247]

At a more basic level, the extraordinary intellectual courage and independence of many Third World scholars must be appreciated. What did it take for Eric Williams, as a graduate student at Oxford in the 1930s, bereft of squadrons of highly qualified research assistants, to doggedly pursue his fundamental interest in the economics of slavery and his intuition that slavery and capitalism were inextricably linked? Williams' argument profoundly challenged conventional histories of the time that furthered the view that British humanitarianism led to the abolition of slavery.[248] Williams had the sheer resilience and brilliance to translate his own, lived experience as a native of Trinidad into scholarship that went against the mainstream histories produced by scholars who were far more powerful in every way. Williams' thesis has been questioned, contested and refined, but his work began a debate that resonates to the present and should be recognized as such.[249]

## G *Conclusion*

As the editors of the *TWAIL Review* argued in the inaugural volume of the journal, 'TWAIL draws attention to how injustice is enabled and structured through law and its institutions, not only in local and domestic arenas but transnationally and globally'.[250] These are large claims. Indeed, the aims of TWAIL – to give voice to the unheard and suppressed, to develop an anti-colonial international law, to expose the ongoing effects of imperialism – could seem like clichés and slogans on their own. It is the rich scholarship that I have attempted to present above that gives these aspirations detail, substance and content. What is important is that, despite very different Third World approaches, they are connected with each other as part of a TWAIL set of concerns and ideas. They have been enriched by the conversation and the tradition that is TWAIL. In this section, I have focused largely on scholars who explicitly present

[246] See, e.g., James Gathii's study of the different approaches of two distinguished African scholars, Kéba Mbaye and Elias. Gathii, 'Africa and the Radical Origins of the Right to Development', 1 *TWAILR* (2020) 28.

[247] Khan, 'International lawyers in the Aftermath of Disasters: Inheriting from Radhabinod Pal and Upendra Baxi', 37(11) *TWQ* (2016) 2061.

[248] On the many challenges he faced at Oxford, see E. Williams, *Inward Hunger: The Education of a Prime Minister* (1969), especially ch. 4, 'A Colonial at Oxford'.

[249] Neptune, 'Throwin' Scholarly Shade: Eric Williams in the New Histories of Capitalism and Slavery', 39(2) *Journal of the Early Republic* (2019) 299 (for a critical view of some of the ways in which Williams' work has been drawn upon in contemporary works on slavery). Neptune makes the argument that Williams' work has been obfuscated in modern scholarship and that '[t]he obfuscation of Williams' study might be understood best in relation to a wider professional interest in maintaining the privileged project(ion) of history writing in the North Atlantic. This province has imagined itself as the hub of historiographical innovation since the start of the Cold War, as the capital site of original knowledge production of the world's past. *Capitalism and Slavery*, it should be clear, deeply threatens this avant-garde image of the intellectual economy of the West'. *Ibid.*, at 326.

[250] TWAILR Editorial Collective, '*Third World Approaches to International Law Review*: A Journal for a Community', 1 *TWAILR* (2020) 7.

themselves as TWAIL scholars, whose work engages directly with TWAIL scholarship or who have influenced TWAIL scholarship. A complex overlap exists between TWAIL scholars and scholars who do not identify as TWAIL scholars, but who, like TWAIL scholars, are alert to some of the exclusions and inadequacies of international legal regimes. One does not have to be a TWAIL scholar to note the problems of the foreign investment regime or the empirical claim that the whole international criminal law apparatus has focused and expanded through its application to the developing world, while violence inflicted by the West on communities in other parts of the world are beyond scrutiny.

One of the major achievements of TWAIL is that its analytic tools – its perspectives and concerns – have all now filtered through to mainstream international lawyers and are informing the work of these scholars in ways that are difficult to quantify but which are still significant. Indeed, mainstream scholars who were similarly concerned about the justice of international law have been open to TWAIL scholarship, have engaged with TWAIL work and have acknowledged and explicitly used TWAIL methodologies and analytic tools in their own work. One does not have to be from the Third World to be a 'TWAIL scholar'. After all, as I have argued, TWAIL offers a different vision of Europe and the West itself. Further, major journals based in the West such as the *European Journal of International Law*[251] and the *Leiden Journal of International Law* have published TWAIL work and, indeed, actively sought to promote it.[252] The *London Review of International Law* since its beginning has been a haven for important TWAIL and critical scholarship. These different forms of support were crucial to the emergence and success of TWAIL, and, happily, they contrasted with other responses to TWAIL scholarship that were less welcoming.[253]

## 4 The Continued Relevance of the First World–Third World Dichotomy

Having sought to provide a broad thematic overview of TWAIL scholarship, its recurring themes and central arguments, I move now in this section to address a question that has vexed TWAIL since its beginning: what is the analytic value of the term 'Third World' and the dichotomy it assumes between the Third World and First World?

[251] Many TWAIL works have been published in the *EJIL*. See, e.g., Gathii, 'International Law and Eurocentricity', 9(1) *EJIL* (1998) 184.

[252] See, e.g., the *Leiden Journal of International Law*'s 'Periphery Series', which featured articles on Alvarez and Elias as well as a series of 'India and International Law', 23(1) *LJIL* (2013).

[253] Although not dealing with international law, Richard Delgado's article on how some established scholars might respond to critical work by a range of responses including ignoring it, dismissing it or condescending to it is still illuminating. See Delgado, 'The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later', 140 *University of Pennsylvania Law Review* (1992) 1349.

## A *Introduction*

The terms 'First' and 'Third World' were first formulated by a French scholar, Alfred Sauvy, in the 1950s. He coined 'Third World' as a way of identifying states that belonged to neither the capitalist nor socialist blocs of countries in the Cold War. They have always been a convenient but partial and inadequate account of the complex ways in which to understand the relations created by imperialism and its aftermath. The very term 'Third World Approaches to International Law' suggests a dichotomy between First and Third Worlds that has been crucial to TWAIL scholarship. The significance of this dichotomy has been questioned in recent times for many reasons. The emergence of BRICS (Brazil, Russia, India, China and South Africa), for instance, was seen as heralding a major change for international law, disrupting this basic division. And it is clear that many states, including South Korea and Singapore, for instance, have made the transition from 'Third World' to 'First World'. Further, many commentators, including, most notably, Robert Zoellick, have declared that such terminology is outdated.[254] The basic division between First and Third Worlds might appear to be anachronistic and redundant in the present. Here then, I try to explore this issue of whether the First World–Third World dichotomy continues to have any relevance to contemporary international law and international relations marked by the putative end of the 'liberal order', the global pandemic, US-China tensions and the resurgence of nationalism globally.

My broad argument here is that the First World–Third World dichotomy continues to have important explanatory power. In the first place, the term 'Third World' has always had multiple meanings. While it broadly refers to the countries that became independent sovereign states after decolonization, its significance has changed depending on the particular phenomenon being studied, and TWAIL scholars have gone to great lengths to outline how they have chosen to interpret this term for the purposes of their own scholarship.[255] Particularly, the term 'Third World' has been extended and reinterpreted to refer not only to the so-called 'Third World' states but also, more intimately, to the struggles and experiences of the most marginalized peoples of the Third World and, indeed, the First World itself. Further, whatever the changing geopolitical realities, the term 'Third World' retains a certain power because it suggests 'an alternative "epistemology" or system of knowledge'.[256] As Vijay Prashad points out further, '[t]he Third World was not a place. It was a project'.[257] I try to elaborate on this point by suggesting how the First World–Third World dichotomy has shaped the making of important international regimes and how it continues to play a useful

[254] R. Zoellick, *The End of the Third World?: Modernizing Multilateralism for a Multipolar World* (2010), available at https://openknowledge.worldbank.org/handle/10986/29639.

[255] See Mickelson, *supra* note 3; Rajagopal, 'Locating the Third World in Cultural Geography', 15 *TWLS* (1999) 1 (who in their scholarship outline the particular ways in which they use terms such as 'Third World', 'developing states' and so on); see also Pahuja, *supra* note 112, at 261–262.

[256] See R. Young, *Postcolonialism: A Very Short History* (2003), at 18. For an important examination of what the 'global South' stands for, see Grovogui, 'A Revolution Nonetheless: The Global South in International Relations', 5(1) *The Global South* (2011) 175.

[257] V. Prashad, *The Darker Nations: A People's History of the Third World* (2007).

analytic role in understanding international law and relations through a survey of some major areas of international law, including international economic law, the use of force, human rights and the law of migration.

Any 'survey' of the sort I attempt here will necessarily be superficial and incomplete. The topics I have chosen are more a product of my own interests rather than any attempt to be systematic and exhaustive. I hope in these ways to convey some sense of the continuing relevance of the concept of the 'Third World' in the areas I have discussed below and how different understandings of the term 'Third World' complement each other and illustrate different dimensions of international law and its relationship with the Third World.

## B *International Economic Law*

Developing states, the vast majority of which were colonies in 1944 when the Bretton Woods conference took place, played little part in the creation of the World Bank and the IMF, institutions that were instrumental in creating the post–World War II global financial and economic systems. Developing states, however, participated in various ways in the Uruguay Round of negotiations (1986–1994)[258] that led to the formation of the WTO. Further, they hesitantly entered into the many investment treaties – bilateral and otherwise – on which the international investment law regime was founded.[259] With the 'Washington Consensus', dominant, developing countries were persuaded that participation in these regimes was necessary to achieve economic growth, and, thus, they adopted the prescribed neo-liberal policies as key to development.[260]

My basic argument is that the First World–Third World divide – by now, more commonly termed the North-South divide – was a key factor in the formation of trade and investment regimes and that, in each case, the Third World and its specific concerns were defeated or disregarded. As we have seen in the case of the WTO, for instance, intellectual property and services regimes were established under the auspices of the WTO in the Uruguay Rounds despite strong, but ultimately unsuccessful, opposition by the developing countries. In effect, new areas of economic activity – areas in which the North had a massive advantage but that had not been traditionally associated with the GATT regime – were now incorporated into the WTO regime and afforded many of the benefits that followed.[261] By contrast, Third World concerns about commodity price stability, a key aspect of the NIEO, had been defeated along with the NIEO. One

[258] See Preeg, 'The Uruguay Round Negotiations and the Creation of the WTO', in M. Daunton, A. Narlikar and R. Stern (eds), *The Oxford Handbook on The World Trade Organization* (2012) 122.

[259] For a comprehensive account and assessment of the investment regime, see J. Alvarez, *The Public International Law Regime Governing International Investment* (2011), at 16.

[260] See Birdsall, De La Torre and Valencia Caicedo, 'The Washington Consensus: Assessing a "Damaged Brand"', in J. Ocampo and J. Ros (eds), *The Oxford Handbook of Latin American Economics* (2011) 79.

[261] This is not to say, of course, that trade in services was the same as trade in goods. However, the inclusion of services and intellectual property in the regime, albeit in unique ways, furthered the trade in services and expanded intellectual property protection in important ways.

Third World concern that survived in the WTO era was the generalized system of preferences, championed by Gamani Corea in his time as director of UNCTAD.[262]

The failure of the Uruguay Round of negotiations to address developing country concerns was explicitly recognized; it was the promise of the optimistically labelled 2001 Doha Development Round that this omission would be remedied. Needless to say, this never occurred, and the credibility of the WTO regime has suffered ever since, as rich countries demanded more concessions in addition to those that they had already obtained from the Uruguay Round in return for meeting the demands of developing countries. This in a situation where the South had already made concessions and were, in effect, in credit. The consensus-based system of the WTO appeared to prevent certain countries – the great powers – from being granted special privileges of the sort enjoyed by the permanent members of the UN Security Council. But this did not prevent the North from shaping the essential architecture and operations of the WTO. While developing states such as China and India have won notable victories in the WTO system, it does not detract from the essential point that the WTO in its very framework has favoured the North and entrenched its particular vision of trade. It is of course ironic, given this situation, that the USA under President Donald Trump paralyzed the system by blocking the appointment of members of the Appellate body[263] at precisely the time when developing states, especially China, had become adept enough to use it successfully for their own purposes.

The foreign investment regime, similarly, is based explicitly on the North-South, developing and developed country divide, broadly reflecting the division between capital exporting and importing countries, as the major purpose of the regime was to protect investors from the North in their activities in the South. It is now commonplace and universally recognized that the investment regime is highly problematic and further entrenches the divisions between the North and South. It was understood from the outset that the treaties were structured in ways that inherently favoured foreign investors.[264] The terms of the treaties themselves provide extensive protections to investors. They allow corporations to bring actions against states but do not allow states to bring actions against corporations.[265] Efforts by states to enforce their domestic law against corporations, or even pass legislation to protect the environment or human rights, could trigger investor-state disputes that would propel the whole matter to the system of arbitration that structurally favours the corporation. The

[262] Toye, 'Assessing the G77: 50 Years after UNCTAD and 40 Years after the NIEO', 35(10) *TWQ* (2014) 1759.

[263] K. Johnson, *How Trump May Finally Kill the WTO*, 9 December 2019, available at https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/.

[264] For an analysis of all the issues discussed here, see Sornarajah, *supra* note 48.

[265] The counter-argument is that a state can bring action against foreign corporations in their domestic systems; the complication, of course, is that those actions might be interpreted as violations of the bilateral investment treaty in place and so trigger precisely an international dispute within the system, one in which national law will be subordinate to the international law, represented by the treaty with its terms that are extremely favourable to the investor and as interpreted and applied by the tribunal. For an important study of the relationship between the foreign investment regime and the constitutional order, see D. Schneiderman, *Constitutionalizing Economic Globalization* (2008).

ongoing operations of the regime have now revealed further problems: arbitrators have expanded enormously the protections enjoyed by investors through questionable interpretations of key terms, the jurisprudence is inconsistent and contradictory, and a particularly narrow group of arbitrators has dominated the field and driven developments in this important area. Recognizing these problems and their impact on the legitimacy of the regime, the EU and the UN Commission on International Trade Law, among other bodies, have sought to reform the system. As discussed above, in many cases, these concerns are in no small way prompted not only by foreign investor claims brought against Western states, but by the emergence of China and the potential use by China of foreign investment laws to further their own economic expansion. Many Western governments have cited security concerns as a ground for denying China access to their economies,[266] even while their own corporations control crucial sectors such as water, food, medicine and power in developing countries.

## C *Law on the Use of Force*

The North-South divide is also broadly evident in efforts of the North – efforts by countries such as the USA and the UK – to shape the fundamental laws of war in ways that further their own vision and interests. The NATO intervention in Kosovo, for instance, demonstrated to Chinkin how 'the West continues to script international law, even while it ignores the constitutional safeguards of the international order'.[267] The 2003 war in Iraq – and the war on terror more generally – initially generated a large literature pointing to how these sweeping initiatives reproduced imperial relations. The return of the British to Iraq following the wars against Saddam Hussein led one Iraqi to comment: 'It's the British again. They have been bombing my family for over eighty years now. Four generations have lived and died with these unwanted visitors from Britain who come to pour explosives on us from the skies.'[268] Equally importantly, a new paradigm for the use of force was systematically developed by the West and its allies, prompted by the 9/11 attacks and the accompanying focus on non-state actors. Most notably, the Bush doctrine asserted that it was permissible to use force not only against immediate threats, as was arguably permitted by existing international law, but also against 'emerging threats'. This view called for a shift from the concept of 'imminence' to 'pre-emption'. The argument was that pre-emptive measures could be taken against emerging, rather than immediate, threats. This controversial set of ideas that would have gravely undermined the existing law on the use of force was resisted and opposed by many international law scholars. The dangers of the doctrine,

[266] E.g., Australia, Canada and the USA. A. Connolly, *Risks from Chinese Takeovers Mean Canada Needs Tougher Investment Rules: Experts*, 8 June 2020, available at https://globalnews.ca/news/7040029/canada-foreign-takeovers-china/; 'Australia Blocks Chinese Buyout of Builder over Security Concerns: Media', *Reuters* (12 January 2021), available at www.reuters.com/article/australia-investment-law-idUSL1N2JN07C; J. Green, 'Stop China's Predatory Investments before the US Becomes Its Next Victim', *Defense News* (17 April 2020), available at www.defensenews.com/opinion/commentary/2020/04/17/stop-chinas-predatory-investments-before-the-us-becomes-its-next-victim/.

[267] Chinkin, 'Kosovo: A "Good" or "Bad" War, Editorial Comment', 93(4) *AJIL* (1999) 841.

[268] R. Young, *Postcolonialism: A Very Short Introduction* (2003), at 34.

which relied on effective and accurate intelligence about the potential or emerging threats that could then be targeted, were vividly demonstrated by the war in Iraq. While justified in numerous ways, one of the most prominent and public arguments made in support of the war was that Saddam Hussein posed an immediate threat to the people of the USA and the UK. Famously, Tony Blair declared that Hussein could deploy weapons of mass destruction in 45 minutes, and these could be used to hit British targets.[269] Throughout his campaign for war, Blair also invoked a humanitarian argument, proclaiming that the people of Iraq would be the beneficiaries of the invasion. The absence of weapons of mass destruction and the disastrous intelligence failure that led to an illegal war, starkly revealed the many dangers of pre-emption.

The doctrine of pre-emption was undermined by this failure and appeared to have been discarded. Remarkably, however, these same ideas persisted and were reproduced and promoted by precisely those Western countries that had committed this extraordinary error. The question of when a state could use force continued to be a topic of scholarly and diplomatic concern, and discussion focused on the concept of 'imminence' on the grounds that international law permitted a state to use force against an 'imminent threat'. Sir Daniel Bethlehem made a central contribution to the debate in his notable article published in one of the most prestigious venues in international law scholarship, the *American Journal of International Law.*[270] Bethlehem closely analyses the term 'imminent', arguing that 'what constitutes an "imminent" armed attack will develop to meet new circumstances and new threats'.[271] The question, of course, was who is to give content and meaning to this term in the light of 'new circumstances'. Bethlehem provides an elaborate and multifaceted test of imminence in his 'Principle 8'. What has to be considered is 'the nature and immediacy of the threat'. Further, '[t]he absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defence'.[272] Bethlehem himself acknowledges that 'some of the principles will undoubtedly prove controversial'[273] and that he 'offers them up for debate'.[274] At the same time, he asserts that the principles he outlines are based on ongoing discussions in various foreign ministries. The principles are unique, he says, because they represent a synthesis, deriving from a special and neglected arena of state practice – the discussions between lawyers and those engaged in actual operations – as such, 'they carry particular weight, being material both to the crystallization and development of customary international law and to the interpretation of treaties'.[275]

[269] See 'Timeline: The 45-minute Claim', *BBC News* (13 October 2004), available at http://news.bbc.co.uk/2/hi/uk_news/politics/3466005.stm.

[270] Bethlehem, 'Self-Defense against an Imminent or Actual Attack by Nonstate Actors', 106 *AJIL* (2017) 770, at 772.

[271] *Ibid.*, at 772.

[272] *Ibid.*, at 776.

[273] *Ibid.*, at 773.

[274] *Ibid.*, at 774.

[275] *Ibid.*, at 770.

Commentators on these developments, point out, however, that Bethlehem's view of imminence in fact extends significantly the circumstances in which force may be used.[276] In effect, although presented in the language of 'imminence' rather than the discredited language of 'pre-emption', the Bethlehem principles go far towards enabling the pre-emptive use of force by permitting the use of force even if there is uncertainty as to the place of the attack or the precise nature of the attack.[277] Arguably then, the Bethlehem version of the use of force was not so much a departure from the Bush doctrine of pre-emption but, rather, a refinement of it.[278] Nevertheless, his principles were swiftly taken up. In 2016, the legal advisor of the USA, Brian Egan, delivered a speech at the American Society of International Law that approvingly cited the Bethlehem principles.[279] Bethlehem's version of 'imminence' was also endorsed by Jeremy Wright, attorney general of the UK, speaking in 2017 at the International Institute for Strategy Studies in London.[280] In his speech, Wright refers to a meeting of the 'quintet' of attorneys general in Washington in 2016: the attorneys general of the USA, Canada, Australia, New Zealand and the UK who endorsed this vision of imminence. Wright presents this as 'working with our international partners to advance the security of our nation and of others, within a legal framework'. Shortly after this, the attorney general of Australia at the time, George Brandis, directly cited Wright and Bethlehem, claiming that the 'Bethlehem principles' by now have 'acquired near to doctrinal status'.[281] The debate is complex and ongoing, but the simple point from a TWAIL perspective is that a few powerful states have taken upon themselves the task of changing fundamental principles of the laws of war.[282] Kattan, in his detailed study, shows how certain powerful governments have coordinated a campaign through which Bethlehem's principles were being swiftly and repeatedly cited as doctrine.[283]

[276] See Kattan, 'Furthering the War on Terrorism' through International Law: How the United States and the United Kingdom Resurrected the Bush Doctrine on Using Preventive Military Force to Combat Terrorism', 5 *Journal on the Use of Force and International Law* (2017) 97.

[277] *Ibid.*, at 101.

[278] *Ibid.*, at 100; see also J. Goldsmith, 'Obama Has Officially Adopted Bush's Iraq Doctrine', *Time* (6 April 2016), available at https://time.com/4283865/obama-adopted-bushs-iraq-doctrine/.

[279] M. Lederman, 'ASIL Speech by State Legal Adviser Egan on International Law and the Use of Force Against ISIL', *Just Security* (4 April 2016), available at www.justsecurity.org/30377/asil-speech-state-legal-adviser-international-law-basis-for-limits-on-force-isil/ (for the speech itself, see the link included there). Jack Goldsmith argued that this speech indicated that the Bush pre-emption doctrine had been adopted by the Obama administration. Goldsmith, *supra* note 278. Bethlehem disagreed and responded, understandably, as his principles were central to Egan's argument. D. Bethlehem, 'Not by Any Other Name: A Response to Jack Goldsmith on Obama's Imminence', *Law Fare Blog* (7 April 2016), available at www.lawfareblog.com/not-any-other-name-response-jack-goldsmith-obamas-imminence. Goldsmith remained unconvinced. For an overview of the debate, see Kattan, *supra* note 276, at 98–99.

[280] J. Wright, 'The Modern Law of Self-Defence', *EJIL: Talk!* (11 January 2017), available at www.ejiltalk.org/the-modern-law-of-self-defence/.

[281] G. Brandis, 'The Right of Self-Defence against Imminent Armed Attack in International Law', *EJIL: Talk!* (25 May 2017), available at www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/.

[282] I examine an earlier version of this phenomenon. Anghie, 'Imperialism', *supra* note 81.

[283] Bethlehem, *supra* note 270, at 773. Kattan, *supra* note 276.

Another key element to transform the laws of war is the 'unable or unwilling' doctrine that is used to justify, in the name of self-defence, the use of force against a state that is deemed to be 'unable or unwilling' to take action against non-state actors within its own territory.[284] Such a doctrine, of course, massively extends the grounds on which force may be used against a state. Article 51 of the UN Charter, after all, indicates that self-defence is legal only when a state is subject to an 'armed attack'. As the doctrine of 'unable or unwilling' is formulated, elaborated and extended, it is surely worth remembering that the USA bombed Laos more heavily than the Allies bombed Germany and this without any war being declared between the two countries. The only justification was some version of the argument that, as Laos was 'unable or unwilling' to prevent use of its territory for pursuing military actions against the USA, it was permissible for the USA to bomb Laos.[285] Here, the past is hardly the past: the fragments of those bombs continue to kill Laotians.[286] This episode also suggests that the broad idea of 'unable or unwilling' has clear North-South dimensions, enabling and justifying violence against the South.

Bethlehem again played a vital role in this debate. His Principle 12, which stated in part that '[t]he requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is unable to effectively restrain the armed activities of the non-state actors'.[287] This too is a controversial proposition – as Dire Tladi points out, 'the effect of principle 12 is precisely to be 'enabling of the use of force beyond what the Charter permits'.[288] The debate on the legal status of 'unable and unwilling' continues. As Jutta Brunnée and Stephen Toope point out in their detailed analysis of these developments, '[a] few important actors are actively promoting the unwilling or unable trigger for self-defence

[284] See Deeks, '"Unwilling or Unable: Toward a Normative Framework"', 52 *VJIL* (2012) 483. For an illuminating overview of the literature from a TWAIL perspective, see Tzouvala, *supra* note 157, at 187–209.

[285] According to Channapha Khamvongsa and Elaine Russell, the US military undertook one bombing mission every eight minutes, 24 hours a day, for nine years. See Khamvongsa and Russell, 'Legacies of War: Cluster Bombs in Laos', 41(2) *Critical Asian Studies* (2009) 281. By Nicole Barrett's account, '[b]y the end of the bombing in 1973, the U.S. had dropped 1.9 million metric tons of bombs, which is equal to ten tons per square mile or a half a ton of bombs for every citizen of Laos, making Laos the most heavily bombed nation per capita in history'. See Barrett, 'Holding Individual Leaders Responsible for Violations of Customary International Law: The US Bombardment of Cambodia and Laos', 32 *Columbia Human Rights Law Review* (2001) 429, at 434. It is for these reasons that Laos has been called '[t]he most heavily bombed country in history'. 'A new library sheds light on the US 'secret war' in Laos' available at https://edition.cnn.com/2022/06/14/us/laos-secret-war-library-legacies-of-war-cec/index.html. See also, 'Laos: Barack Obama regrets "biggest bombing in history"', https://www.bbc.com/news/world-asia-37286520?zephr-modal-register.

[286] P. Convery, 'US Bombs Continue to Kill in Laos 50 Years after Vietnam War', *Aljazeera* (21 November 2018), available at www.aljazeera.com/features/2018/11/21/us-bombs-continue-to-kill-in-laos-50-years-after-vietnam-war.

[287] Bethlehem, *supra* note 270, at 776.

[288] See, e.g., Tladi, 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12', 107(3) *AJIL* (2017) 570, at 576. For a further important critique of the doctrine, see Ahmed, 'Defending Weak States against the "Unwilling or Unable Doctrine of Self-Defense"', 9 *Journal of International Law and International Relations* (2013) 1, at 18.

against non-State actors'.[289] And this is achieved in part through 'a curious interplay amongst State officials, former officials writing in their personal capacity, and some academic commentators, whereby a small group tries to expand its influence by constantly cross-referencing each other'.[290] The 'unable and unwilling' doctrine is a crucial element of the larger legal framework that justifies drone operations. Again, it is powerful Western states, inspired by the work of Israeli lawyers, who have driven this initiative.[291]

The basic point to make here is that a sophisticated and expert group of Western lawyers, over the years, has developed a new version of the use of force. The legality of this vision has been continuously contested. It is clear, however, that this expansive vision of violence – one that combines a broader vision of 'imminence', of 'unable and unwilling' and of permissible drone attacks – will be used to justify violence against the people of the Third World. International law has traditionally limited the use of force in a number of ways: temporally, by distinguishing between states of war and peace and devising different rules for each; spatially, by requiring states to conduct war within the territories of the warring states; and using Article 51 of the UN Charter, by justifying self-defence only in the event of an 'armed attack'. Each of these principles has been challenged by Western-driven efforts to transform the laws of war – efforts that would enable an endless war that might be conducted anywhere, without territorial limit, and triggered by the perception of a threat even if the source of the threat is unclear or not identified. The idea of 'security' – the idea of what constitutes a 'threat' – is significantly expanded. This idea in turn expands the notion of justifiable self-defence, and, as self-defence is an 'inherent right', it is exercised at the discretion of the state perceiving itself to be threatened. That discretion is now immense, even if it is to be exercised, as the advocates put it, with proportionality in the name of 'good faith and on the basis of sound evidence' and similar principles.

For TWAIL scholars, again, these efforts to establish a new system for the use of force raises a number of issues. History would suggest that the postulated doctrines of pre-emption and 'unable and unwilling' would inevitably justify violence directed at people in the global South, the 'unable or unwilling test' being yet another means of stripping a Third World state of its sovereign rights at the discretion of the West, as Tzouvala argues.[292] Further, it provides yet another example of Chimni's argument about the way in which customary international law has been made and how it is that Western countries have presented their own state practice as creating customary international law for all[293] – in this case, the actions of five countries, presenting themselves as creating customary international law – making it clear that, even if it is not

[289] Brunnée and Toope, 'Self-Defence against Non-State Actors', 95 *International Law Studies* (2019) 467.
[290] *Ibid.*
[291] M. Gunneflo, *Targeted Killing: A Legal and Political History* (2016).
[292] See Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures,' 109 *AJIL Unbound* (2017) 266.
[293] Chimni, 'Customary International Law: A Third World Perspective', 112(1) *AJIL* (2018) 1.

a universally binding law, it is the law by which they see themselves being bound.[294] These states simultaneously proclaim that they are law-abiding states and always have been; that the people of the UK, for instance, 'rightly pride ourselves on being advocates for, and acting within, a rules based approach'.[295] It is an approach, however, in which a few states make the rules for themselves. It is surely significant, furthermore, that none of these articles – by Wright, Brandis or Bethlehem – engage with, or, in some cases, even mention, the UN study done on the law of self-defence and pre-emption – namely, the UN High Level Panel on Threats Challenges and Change, chaired by Anand Panyarachun of Thailand[296] – which addressed many of the issues relating to imminence and pre-emption.

Viewed more historically – and perhaps less doctrinally – these articles reflect a certain set of ideas – a structure of rhetoric – that is evident from a much earlier time. The authors advocating this controversial view of the laws of war continuously invoke ideas of proportionality and reasonableness and, in doing so, echo the sentiment of another, distant, jurist: '[I]t is essential for a just war that an exceedingly careful examination be made of the justice and causes of the war.'[297] These words were written by Vitoria, exploring the issue of making war on the Indians. It is a model of how extraordinary violence based on the same fundamental principle of 'whatever is required for the defence of the state is permissible' can be combined with calls for moderation, reason and forbearance – that the Indians may be despoiled of their goods and reduced to captivity, 'yet withal with observance of proportion'.[298]

This view of the use of force is based on the argument that '[t]here is little intersection between the academic debate and the operational realities', the hard calls that have to be made by 'governments and the military who are required to make decisions in the face of significant terrorist threats emanating from abroad'.[299] Based on this view and the invocation of 'operational realities' that academics removed from the urgencies and anguish of life and death decisions were incapable of fully appreciating, a formidable intellectual apparatus has constructed this world of endless war and of drone killings that are almost routine, normalized and unaccountable.[300] Many of these developments – the significant expansion of executive authority to wage war – took place in an Obama administration that presented itself as less bellicose than

[294] For a survey of state responses to the 'unable or unwilling' doctrine, see E. Chachko and A. Deeks, *Which States Support the 'Unwilling and Unable' Test?*, 10 October 2016, available at www.lawfareblog.com/which-states-support-unwilling-and-unable-test.

[295] See the list of notifications lodged by states with the UN Security Council in relation to the exercise of their right of self-defence against ISIS. Wright, *supra* note 280, Annex 1. It is worth noting that they are predominantly by Western states.

[296] UN General Assembly, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004.

[297] F. de Vitoria, *De Indis sive de Iure Belli hispanorum in Barbaros* (1539), at 173.

[298] *Ibid.*, at 155.

[299] Bethlehem, *supra* note 270, at 773.

[300] For important accounts of how this occurred, see Gunneflo, *supra* note 291.

its predecessor and determined to avoid earlier mistakes.[301] Reality continued to be a governing theme, justifying these interpretations of the law as 'the credibility of the law depends ultimately upon its ability to address effectively the realities of contemporary threats'.[302] There is another 'reality', another universe, that perhaps should be taken into account in these debates about the character of modern war. It is estimated that more than 7,000 drone strikes took place in Afghanistan in 2019. The number of people killed in these strikes has been estimated as ranging from 411 to more than 4,000.[303] Indeed, getting information about these operations has proven to be difficult.[304] NGOs have noted with concern that statistics are not widely available.[305] The virtues of accountability and transparency, and the systems that ensure them, have been ignored. The larger point is that disastrous and costly wars launched by the West and now continued in new forms are taking an immense toll on the people in the South. And efforts to continue and prosecute these wars is leading to grave uncertainty about the laws of war and who is authorized to make them.

In their recent, important and widely praised work on the history of the law of war, Oona Hathaway and Scott Shapiro provide a sweeping and compelling account of the law of war from the times of Grotius to the present. They argue that the Islamic state, inspired by Sayyid Qutb, offered a vision of international relations that justified new and extensive, 'breathtakingly encompassing' representations of the enemy and the violence that could be legally inflicted on it.[306] But, in this wide-ranging book about war, perhaps because of the line of argument it follows, little is presented about the endless war waged by the USA and its allies and the new versions of self-defence and the use of force that have justified this campaign but that depart fundamentally from the law of the UN Charter. The 'war on terror' is singular because there is no likelihood or even pretence of it ever being concluded. Drone attacks supported by complex and elaborate arguments continue and have indeed been normalized.[307]

[301] For my analysis of the ambiguities of President Barack Obama's Nobel Peace Prize–winning speech, see Anghie, 'International Law in a Time of Change', 26(5) *American University Law Review* (2011) 1315. Here, I also contrast Obama's visions of war and peace in his speech with Martin Luther King's views.

[302] Bethlehem, *supra* note 270, at 773. The names of the advisers cited are Harold Koh, John Brennan, Jeh Johnsen, Eric Holder and Stephen Preston. *Ibid.*, at 770.

[303] Data obtained from the Bureau of Investigative Journalism, *Drone Strikes in Afghanistan* (2019–2020), available at www.thebureauinvestigates.com/projects/drone-war/afghanistan. This uncertainty seems to be part of a general confusion about the whole intervention of Afghanistan.

[304] For an overview of the dilemmas created by increasing recourse to drones, see Report of the Special Rapporteur on Extrajudicial and Summary Killing; A. Callamard, *Use of Armed Drones for Targeted Killings*, Doc. A/HRC/44/38, 15 August 2020.

[305] In 2019, President Donald Trump revoked an order by Obama that all drone attacks be reported. 'Trump Revokes Obama Rule on Reporting Drone Strike Deaths', *BBC News* (7 March 2019), available at www.bbc.com/news/world-us-canada-47480207.

[306] O. Hathaway and S. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017), at 409.

[307] The literature is extensive. For important works on the legal frameworks for drone strikes, see, e.g., Koh, 'Keynote Address: The Obama Administration and International Law', 104 *PAMASIL* (2010) 104; Brooks, 'Drones and the International Rule of Law', 28 *Journal of Ethics and International Affairs* (2014) 83. For an opposing view, see Gunneflo, *supra* note 291.

What we see here, then, is a set of practices and developments that are entirely familiar to TWAIL scholars: efforts by major Western states to transform the law to suit their own vision of international relations and to present their state practice and scholarly opinions as decisive. The atrocities and violence committed by Daesh or the regimes in any number of countries, extending from Syria, to Ethiopia, to Myanmar are recognized and denounced, as they must surely be, as clear violations of some of the most fundamental principles of international humanitarian and human rights law. International lawyers should be rightly concerned about identifying and addressing these violations. But we should also be concerned about expanding the realm of violence in the name of international law, allowing force to be used with new and sophisticated justifications. A further danger of this expansion of legalized violence is that it could easily be used by authoritarian Third World states to justify their own forms of violence.[308] And even the smallest Third World state can proudly present itself as the equal of the most powerful states by deploying this new weapon against its 'internal enemies', the terrorist threats within that allegedly endanger security.

## D *International Environmental Law*

The same broad arguments about the ongoing significance of the North-South divide may be made about international environmental law. The division between the First and Third Worlds, global North and global South and developed and developing countries continues to haunt environmental negotiations. Imperial powers became wealthy by appropriating and exhausting the natural resources of their colonies.[309] Now it is the poorer countries that are most badly affected by environmental problems such as climate change for which the rich countries are principally responsible. Leaders of developing countries have thus argued that the rich countries owe the poorer countries an 'enormous and "unpaid carbon" debt that is an element of a broader ecological debt owed by developed countries to developing countries'.[310] This situation of course has led to a whole series of claims and exhaustive negotiations on vital issues ranging from biodiversity to climate change. The doctrine of 'common but differentiated' responsibilities was designed to acknowledge this history in a doctrinal form, one by which developed countries that had already caused environmental damage were given specific targets for reducing pollution, while developing countries recognized their obligations to protect the environment more broadly. This idea, which was the centrepiece of the Kyoto Protocol, was amended drastically in the Paris Agreement.[311]

[308] This is happening increasingly. See Callamard, *supra* note 304, para. 7. Non-state actors are also arming themselves with drones. *Ibid.*, para. 9.

[309] For a rewriting of the history of international environmental law that focuses on the commodification of nature and its assimilation into an expanding political economy, see Porras, *supra* note 204; Fonseca, *supra* note 205; Natarajan and Khoday, *supra* note 203.

[310] See Mickelson, 'Beyond a Politics of the Possible? South-North Relations and Climate Justice', 10(9) *MJIL* (2009) 411.

[311] For a detailed explanation of the 'common but differentiated responsibilities' regime, see Castro, 'Common but Differentiated Responsibilities beyond the Nation State: How Is Differential Treatment Addressed in Transnational Climate Governance Initiatives?', 5(2) *Transnational Environmental Law* (2016) 379.

The First World–Third World environmental debate, raising issues about international justice, debt, reparations, political economy and global governance, is in many ways reminiscent of the debates on the NIEO. Again, however, powerful and reasonable calls by the Third World for a fairer international environmental regime have been opposed and dismissed as 'politically unrealistic'.[312]

TWAIL scholars such as Mickelson, Natarajan, Julia Dehm, Carmen Gonzalez and Sumudu Atapattu have examined the different dimensions of the environmental crisis in depth, pointing, among other things, to the complex and variegated effects of environmental harm, effects that both illuminate the importance of First World–Third World categories while also moving beyond these to suggest the differences between Third World countries and the divisions within them.[313] This approach produces a complex picture of differing scales and intersecting forms of domination. Many Third World states themselves pursue aggressive development policies that cause environmental devastation that particularly affect communities such as tribal and Indigenous peoples. However, it should also be noted that several Third World states have made significant advances in environmental protection and have been globally pioneering in creating specialized environmental tribunals and developing a progressive environmental jurisprudence, among other things.

The North-South lens, then, cannot account for the many complex ways in which specific groups are impacted by climate change. The poorest in rich countries are most especially vulnerable to climate change because there is a 'South in the North'. A more refined analysis is needed to illuminate how vulnerabilities are powerfully shaped by race, gender and class.[314] Nevertheless, as Mickelson argues, the North-South lens needs to be rethought rather than rejected:

> Perhaps it is time to rethink the North-South divide by re-embracing it because we now recognize that long-standing demands for global justice are no longer abstract or theoretical. Rather, they are concrete, real and quantifiable. We cannot ignore either historical disparities in contributions to greenhouse gas concentrations or present-day inequalities in per capita emissions. Both result in unequal contributions to a problem, the effects of which will be felt throughout the international community and are likely to have particularly tragic consequences among the world's most vulnerable and marginalised populations. *A genuine engagement with inequality with regards to both responsibility and vulnerability might lead to a different way of approaching climate change. However, this would require a fundamental change of approach.*[315]

The Third World no longer possesses the unity that it forged at the time of the NIEO. Third World states are divided for several reasons, including different economic situations and environmental resources. Nevertheless, the law itself is broadly structured around the North-South divide. And it may be recalled that at crucial moments such

[312] See Mickelson, *supra* note 310; Natarajan, 'Environmental Justice in the Global South', in S. Atapattu, C. Gonzalez and S. Seck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (2021) 39; Natarajan, 'Climate Justice', in M. Valverde *et al.* (eds), *Routledge Handbook of Law and Society* (2021) 102.

[313] Atapattu and Gonzalez, *supra* note 104.

[314] *Ibid.*

[315] Mickelson, *supra* note 310, at 412 (emphasis added).

as the Doha Round of negotiations, Third World states have developed coherent and united positions, which is why these positions were vehemently and continuously opposed by developed countries.

## E *International Criminal Law*

In the field of international criminal law, of course, the argument that an ostensibly universal regime seems to apply only to countries in the Third World – and those countries that are expeditiously categorized in this way – is now commonplace. Whether it is the NATO bombing of Serbia or the war in Iraq or Afghanistan, Western states and their forces have evaded any effective scrutiny of their actions. One does not have to be a TWAIL scholar to notice these anomalies. However, the important work of Reynolds and Sujith Xavier[316] and Asad Kiyani[317] on the selectivity of international criminal justice demonstrates how this bias is far from random or aberrant but part of a systemic manifestation of biases that may be traced back to colonial times and to the basic view that the North provides justice and order for the violent and unruly South.[318] Importantly, Reynolds and Xavier also focus on issues of political economy and structural violence in order to provide a richer account of the factors that contribute to the situations that international criminal law attempts to address. Economic stresses have historically led to increased racism and ethnic violence. As Anne Orford points out, crimes against humanity and genocide may have roots in socio-economic tensions, massive economic disruptions that are becoming more frequent in a globalized world and that are sometimes triggered by structural adjustment programmes prescribed by international actors such as financial institutions.[319]

Beyond the immediate controversies about the biases in international criminal law, TWAIL scholars and their colleagues have explored a number of other dimensions of the great project of international criminal law. Nesiah, for instance, studies the history of international criminal law to show how it could become a way of overlooking everyday violence of racial capitalism.[320] Michelle Burgis Kasthala critically examines the evolving work of transitional justice and special tribunals, created invariably to try atrocities in the Third World, and the complex ways in which they impact the societies to which they seek to deliver justice.[321] And Cheah Wui Ling and Moritz Vormbaum complicate what might be termed the 'Western narrative' of international criminal

[316] Reynolds and Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice', 14(4) *Journal of International Criminal Justice* (*JICL*) (2016) 959. Commendably and distinctively, Australia is investigating possible war crimes committed in Afghanistan as a result of the findings of the wide-ranging Brereton report.

[317] Kiyani, 'International Crime and the Politics of Criminal Theory', 48 *NYUJILP* (2015) 129, at 200.

[318] Reynolds and Xavier, *supra* note 316.

[319] Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', 38 *HILJ* (1997) 443.

[320] See Nesiah, 'A Mad and Melancholy Record: The Crisis of International Law Histories', 11(2) *NDJICL* (2021) 232.

[321] Burgis-Kasthala and Saouli, 'The Politics of Normative Intervention and the Special Tribunal for Lebanon', 16 *Journal of Intervention and Statebuilding* (2022) 89; Burgis-Kasthala, 'Assembling Atrocity Archives for Syria: Assessing the Work of the CIJA and the IIIM', 19(5) *JICL* (2021) 1193.

law that focuses on Nuremberg as the founding paradigm of the initiative, by exploring the operations and jurisprudence of British war crimes tribunals in Asia.[322] TWAIL scholars in this area have also engaged in what I have called 'restoration and rethinking' to study in more detail the landmark dissenting opinion of Radhabinod Pal at the Military Tribunal of the Far East, which was established to try Japanese war crimes committed during World War II, and what that reveals about the project of international criminal law.[323]

## F *International Migration*

The migration crisis has similar and inescapable First World–Third World, North-South dimensions.[324] It is the countries of the South, such as Uganda, Bangladesh and Jordan, that host vast numbers of refugees. And it is difficult not to see the refugee flows, at least in some cases, being directly attributable to the actions of Western states – such as in Libya, where efforts, ostensibly to liberate the Libyans from the tyranny of Muammar Gaddafi, have left behind a state of chaos, one in which there are reports of a return to the slave trade. Chantal Thomas points to a further dimension of the North-South dynamic by analysing how US initiatives – the war on drugs, the promotion of free trade agreements – have created economic hardships and insecurity that have intensified refugee flows to the USA.[325] Despite these connections, as Chimni points out, recent developments in refugee law and the creation of new strategies and categories are attempts to curtail refugee movement to the North.[326] Reynolds argues bluntly: 'The European Union's external border regime is a manifestation of continuing imperialism. It reinforces particular imaginaries of Europe's wealth as somehow innate (rather than plundered and extorted) and of Europeanness as whiteness – euphemistically packaged as a 'European Way of Life' to be protected.'[327] TWAIL scholars point to the imperial dimensions of these phenomena, which are readily dismissed or overlooked by a North that is more preoccupied, as in the *Sale* case,[328] to craft regimes that separate themselves from the chaos in which their actions are often implicated.

Discernible here is a further version of a basic theme – the externalization of violence – the system by which the North assumes the freedom to intervene militarily,

[322] Cheah and Vormbaum, 'British War Crimes Tribunals in Europe and Asia, 1945–1949: A Comparative Study', 31(3) *LJIL* (2018) 669.

[323] See, e.g,, Khan, 'Inheriting a Tragic Ethos: Learning from Radhabinod Pal', 110 *AJIL Unbound* (2016) 25; Xavier, 'Locating and Situating Justice Pal: TWAIL, International Criminal Tribunals, and Judicial Powers', 12(2) *Asian JIL* (2022) 392.

[324] For an overview of current developments in migration law, see Ramji-Nogales and Spiro, 'Introduction to Symposium on Framing Global Migration Law', 111 *AJIL Unbound* (2017) 1.

[325] Thomas, 'Transnational Migration, Globalization and Governance: Theorizing a Crisis', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 882.

[326] Chimni, *supra* note 101.

[327] Reynolds, 'Symposium on COVID-19, Global Mobility and International Law: Fortress Europe, Global Migration and the Global Pandemic', 114 *AJIL* (2020) 342. As Reynolds argues, this involves 'treating Black Europeans and all migrants from the colonized world, as equal participants in European society' (quoting Adom Getachew).

[328] *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (US 1993).

financially and environmentally in the South while seeking to escape the consequences that follow, the desperate refugees seeking to escape their homes now rendered uninhabitable due to war, poverty or environmental devastation. Tendayi Achiume's deeply considered and powerfully presented argument of migration as decolonization seems entirely persuasive in this context.[329] TWAIL scholarship is multilayered, and, while TWAIL scholars write about current developments, they also explore the historical dimensions of this large issue. Under the emerging European international law of the 16th century, it was entirely legal for Europeans to travel anywhere they wished. Vitoria and Grotius wrote extensively and elaborately of what might broadly be termed 'the right to travel'. For Grotius, this right to travel was essential for self-preservation, a self-preservation understood in economic terms.

Once imperialism had reached its zenith, however, European international lawyers consolidated and entrenched imperial European sovereignty by emphasizing sacrosanct borders. Within this framework, travel was possible through and within the networks of empire as 'subjects' of the empire could to some extent travel within its territories. Imperial imperatives, of course, were the driving force of the slave trade, enforced migration of the most brutal sort by which 6 million Africans were transported to the new world, their labour needed for mines and plantations. The populations of territories were radically transformed in the interests of furthering imperial wealth and commerce. By the 19th century, slaves were often replaced by indentured labourers. Indians, for example, were sent to work in the Caribbean, Fiji, Africa and other parts of the British Empire. While these workers were not technically slaves, they had to survive in a plantation system that reproduced many of the technologies of slavery. Indeed, as Kris Manjapra has shown, slave owners who were paid compensation for the loss of their slaves used these funds to establish plantations that were ostensibly departures from slavery but that reproduced the logic and control of slavery.[330] Given these histories, it is ironic that now desperate people seeking to escape their misery are termed 'economic migrants' and, as such, denied refugee status.[331] The refugee definition itself is based, as is so much else of international law, on European experience: the refugee crisis caused by World War II, a definition that was reproduced in the Protocol of 1967.[332]

## G *Nuclear Non-Proliferation*

Since at least the time of Bandung, developing countries have been concerned about nuclear destruction. Indeed, even earlier, in his great speech at the Asian Conference of 1947, Gandhi explicitly associated the West and its civilization with nuclear weapons and their potential to destroy the world.[333] More recently, the ongoing efforts of the

[329] Achiume, 'Migration as Decolonization', 71(6) *SLR* (2019) 1509.
[330] K. Manjapra, *Colonialism in Global Perspective* (2020).
[331] See Achiume, *supra* note 329.
[332] Protocol Relating to the Status of Refugees, GA Res. 2198 (XXI), 31 January 1967.
[333] 'Gandhi's Speech', Inter-Asian Relations Conference, Delhi, India, 2 April 1947, available at www.nonviolent-resistance.info/exhibitions/eng/gandhi/pg40.htm.

developing countries to create a fair regime to manage nuclear weapons and nuclear disarmament has also been marked by the First World–Third World divide, manifested in this case by a closely corresponding divide between nuclear and non-nuclear powers, a division that has been given legal form by the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),[334] which in effect stipulated 'common and differentiated responsibilities' but in a way that significantly curtailed the rights of Third World states. Once again, many Third World states, acting in good faith and trying to do their part to create a more peaceful world order, signed the NPT, undertaking not to develop nuclear weapons. They did so on the understanding that the nuclear states would in due course engage in negotiations leading to disarmament and the eventual abolition of nuclear weapons. This has not occurred. Article VI of the NPT requires nuclear states to engage in good faith negotiations with a view to ending the arms race and disarming, but they have made little effort to do so. Instead, nuclear states continue to expand their arsenals of nuclear weapons. It is especially concerning that the ICJ, in a split decision reminiscent of another famous case, *South West Africa*, avoided deciding a case brought by the Marshall Islands seeking to assess whether states such as the UK were complying with their obligations under the NPT.[335]

China and India, both proclaiming themselves to be leaders of the Third World, are nuclear powers, demonstrating again that the North-South, First World–Third World division is not by any means decisive. However, the manner in which the *Marshall Islands v UK* case was decided, with all the judges who were nationals of countries with nuclear weapons finding that the court had no jurisdiction, further reinforced the sense that the international legal system was operated by the powerful for the powerful. And the fact that the Court dismissed the Marshall Islands' application by departing from its own jurisprudence on the question of when a 'dispute' could be said to exist between parties, only furthered this impression. A close and objective reading of this case, with no explicit TWAIL analysis, will reveal the biases undermining international law and the way in which it is administered. Worse, the Court's decision validates the position of countries such as India and Pakistan that refused to sign the NPT on the basis that it was a form of 'nuclear apartheid'.[336] The non-nuclear signatory states appear somewhat naïve and foolish in their willingness to sign a treaty that was supposed to further the cause of world peace and disarmament because nuclear states continue to develop nuclear weapons. The recent landmark treaty abolishing nuclear weapons[337] – furthered here by both developed and developing states – will have little effect on nuclear powers that have adamantly resisted the formation of the treaty and its terms.

[334] Treaty on the Non-Proliferation of Nuclear Weapons 1968, 729 UNTS 161.

[335] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment, 5 October 2016, ICJ Reports (2016) 833.

[336] J. Singh, 'Against Nuclear Apartheid', *Foreign Affairs*, September/October 1998, available at www.foreignaffairs.com/articles/asia/1998-09-01/against-nuclear-apartheid.

[337] Treaty on the Prohibition of Nuclear Weapons, Doc. A/CONF.229/2017/8 (2017).

## H *Human Rights*

The First World–Third World divide takes on a particularly complex form in the field of human rights. Third World countries, and, indeed, several TWAIL scholars, have enthusiastically embraced human rights, despite their Western origins, as a means initially of fighting imperialism and racism and then, more recently, as a way of resisting dictatorship.[338] Several TWAIL scholars have commenced their careers focusing on international human rights law, and their work has contributed to important debates that illustrate the workings and manifestations of the First World–Third World division in that field. Some themes and debates may be broadly identified, and, in this section, I outline some of the varying responses of TWAIL scholars to human rights. I also focus on the writings of TWAIL scholars who are special rapporteurs and independent experts in the UN human rights system and whose work offers important insights into current TWAIL efforts to rethink and reformulate international law.

First, as discussed earlier, TWAIL scholars were drawn to human rights as a means of protecting against the depredations of the post-colonial state. Thus, TWAIL scholars explored how initiatives such as 'good governance' could make authoritarian leaders of developing countries more accountable.[339] As part of this project, TWAIL scholars have sought to amend and adapt human rights law to make it more effective and more sensitive to the realities of those societies and the particular harms suffered by minorities and women. Further, they have explored how people in the Third World have innovated to develop and expand human rights in ways that would protect human dignity more widely conceived and, broadly, to enhance the application and effectiveness of human rights. The jurisprudence of bodies such as the African Court of Human and Peoples' Rights and the Inter-American Court of Human Rights is vital in this regard.[340] Second, TWAIL scholars have analysed the Eurocentric character of international human rights law. They have argued that the 'universal human being' posited as the foundation of international human rights law is a human being that is essentially European, white and male.[341] Third, TWAIL scholars have argued that human rights may replicate forms of colonialism – that human rights expand their reach through narratives based on colonial assumptions – ideas, for instance, that citizens of the Third World have to be 'saved' by the champions of international human rights law.[342] Such approaches could justify intervention and often obscure the possible complicity of the West in these violations and legitimize interventions that are

[338] For a rich collection of essays dealing with different aspects of this large theme, see J.M. Barreto, *Human Rights from a Third World Perspective: Critique, History and International Law* (2013).

[339] See, e.g., E.K. Quashigah and O.C. Okafor, *Legitimate Governance in Africa* (1999).

[340] See, e.g., U. Baxi, *The Future of Human Rights* (2012); O.C. Okafor, *The African System of Human Rights, Activist Forces and International Institutions* (2007); B. Rajagopal, *International Law from Below* (2009).

[341] See, e.g., R. Kapur, *On Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2019); M. Mutua, *Human Rights, a Political and Cultural Critique* (2002).

[342] For the classic article on this, see Mutua, 'Savages, Victims and Saviors', 42 *HILJ* (2002) 201.

often violent and could themselves be destructive of human rights.[343] Fourth, TWAIL scholars – and this has been a long tradition – have explored affinities between human rights and the teachings of various religious and cultural traditions that have shaped non-Western societies, further arguing that international human rights law is not exclusively Western, that these non-Western societies had their own concepts of good governance and dignity and that these could enrich human rights and add to their legitimacy and reach.[344] Fifth, TWAIL scholars have studied the complex relationship between human rights and political economy. The argument here is that human rights, while they have been crucial for the protection of the person, have also supported, or at least been ineffectual against, a particular system of political economy – the regimes of international trade and investment law – that in turn have had an enormous impact on the everyday lives of people in the Third World. TWAIL scholars have focused especially on globalization in this regard, showing how human rights are implicated in a system of political economy that has caused ongoing immiseration and environmental damage.

For TWAIL scholars, these inquiries were not abstract; they were prompted by observing what was happening in their own societies, as neo-liberal economic policies extended into the developing world, and human rights offered only limited ways of mitigating the social and economic impacts of such policies. The stronger version of this argument asserts not only that human rights are ineffectual but also that they actually support such a system of neo-liberalism. Fundamental insights of the complicity of human rights and neo-liberalism were laid out at least two decades ago by scholars such as Baxi[345] and Chimni.[346] More recently, a number of works have further enriched this exploration on the relationship between human rights and neo-liberalism.[347] Finally, unsurprisingly, TWAIL scholars have taken a historical approach to human rights, studying the way in which developing countries have supported human rights and attempted to articulate and expand their own vision of human rights. The Bandung communique, for instance, endorsed the Universal Declaration on Human Rights (UDHR).[348] Later, developing countries drove the initiative to achieve racial equality and formulated new rights – most notably, the right to development.[349]

TWAIL scholars also continue to work on several crucial human rights issues as UN special rapporteurs and independent experts. Achiume has authored several

[343] For a superb study of the issue of the unrecognized ways in which the West intervenes in the Third World, see Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', 38 *HILJ* (1997) 443; A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003).

[344] See, e.g., C.G. Weeramantry, *Universalising Interntional Law* (2004); Clark, 'Universalizing International Law', 99 *AJIL* (2005) 298.

[345] See the sources by Baxi in notes 45–47 above.

[346] Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *EJIL* (2004) 1.

[347] See, e.g., J. Whyte, *The Morals of the Market Human Rights and the Rise of Neolibralism* (2019).

[348] Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.

[349] See Bedjaoui, 'The Right to Development', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 1177.

important reports on contemporary forms of racism.[350] Rajagopal's work on the human right to adequate housing is especially urgent in the midst of the pandemic.[351] Fakhri in his work as special rapporteur of the right to food has been formulating a concept of the right to food that focuses on human dignity rather than on the imperatives of the current trade and financial regime.[352] Fakhri also points to another crucial concept that could serve as an important foundation for a different normative order, the concept of solidarity.[353] Indeed, the independent expert on the right to solidarity, Obiora Okafor, is developing this concept further, emphasizing why international solidarity is important in dealing with current crises relating to migration, climate change and health.[354]

The term 'solidarity' has always been associated with the Third World, but, in more recent times, it has appeared frequently in statements and declarations that urge global solidarity to meet the challenges of the pandemic. The notion of solidarity affirms and expands on the idea that the protection of all human rights, whether economic and social or civil and political, depends on the creation of conditions that enable and support those rights.[355] Many aspects of international law impinge upon the creation of those 'conditions' and a vision of human rights that focuses only on the rights owed by a state to individuals within its territory or jurisdiction could be inadequate to promote the needed conditions. For instance, if the right to health is central to the management of the pandemic – and surely it is for countries that have universally available health care are managing the pandemic much better even if they are in other respects poor countries – then it is important to ensure that states are able to afford to fund health care. This observation in turn suggests that international financial organizations and other such actors should be sensitive to these matters when devising debt relief strategies as the imposition of austerity will inevitably affect the availability of health care.

Okafor further outlines how solidarity offers an alternative approach to the phenomenon of vaccine apartheid as rich countries acquire the bulk of vaccines available.[356]

[350] See, e.g., UN Human Rights Committee Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/76/434, 22 October 2021.

[351] See B. Rajagopal, 'Opinion: The Pandemic Shows Why We Need to Treat Housing as a Right', *Washington Post* (7 May 2020).

[352] See M. Fakhri, The Right to Food in the Context of International Trade Law and Policy, UN Doc. A/75/219, 22 July 2020.

[353] As Fakhri puts it, '[s]tates are obliged to work collectively, and in solidarity, to ensure that the international system guarantees everyone's human rights'. *Ibid.*, at 6.

[354] See, e.g., O.C. Okafor, Report of Independent Expert on Human Rights and International Solidarity, UN Doc. A/76/150, 19 July 2021.

[355] See the International Covenant on Economic, Social and Cultural Rights1966, 993 UNTS 3, which, in the preamble, affirms that freedom from fear and want 'can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights'.

[356] See UN Human Rights Office of the High Commissioner, 'UN Expert Says Global Coordination and More Equitable Sharing of COVID-19 Vaccines Key to Recovery', available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26683&LangID=E; UN Human Rights Office of the High Commissioner, 'Independent Expert on Human Rights and International Solidarity', available at www.ohchr.org/EN/Issues/Solidarity/Pages/IESolidarityIndex.aspx.

The right to solidarity has been opposed by many Western states. However, given all the new forms of interdependence, vulnerability and inequality both revealed and created by the pandemic, it is surely the case that a new approach is needed to think about global order, human rights and the effective protection of human dignity. Similarly, the right to development, dismissed in the aftermath of the NIEO, continues to be rethought as a draft convention on the topic was presented to the UN General Assembly in 2020.[357] These initiatives offer new ways of thinking about compelling global issues. The works of Rajagopal, Fakhri, Achiume and Okafor continue to develop a TWAIL approach to human rights.[358] While sensitive to its biases and inadequacies, they do not reject human rights. Rather, they seek new ways of making the promise of human rights a reality. They are implementing a TWAIL vision of human rights, seeking to expand and adapt rights to deal with new threats to human dignity, especially in the socio-economic realm. Further, this vision of rights makes the real experiences of those most affected a foundation of their analysis – the 'lived Third World experience' – however crudely formulated and understood. Significantly, all these scholars have focused on developing a vision of human rights that could effectively protect human rights against neo-liberal globalization, which has only intensified since the 1990s, leading to the further financialization of food, water, energy and other resources essential for human well-being. The trend has resulted in the diminution of the state and the prevalence and normalization of insecurity in multiple ways.

Broadly then, since the 1990s, TWAIL scholars have explored the question of how human dignity might be preserved in a neo-liberal world. The efforts of the special rapporteurs and independent experts continue this tradition. It is yet another effort, like their predecessors of TWAIL I, to establish an ambitious legal framework that would further the well-being of people in the Third World as well as everywhere. I would argue that the future of human rights depends in important respects on these efforts as one of the major issues confronting human rights is how it can respond to all the economic forces that further human misery. Authoritarian and racist politics are now spreading everywhere, and the protection of civil and political rights is more important than ever. However, human rights will fail unless they can also address the challenges of the current economic structure, a structure that creates many of the social tensions and fractures that foster racism and ethnic conflict.

## 5 The Colonial Origins of Human Rights: The Sovereign Alien

Having discussed the issue of human rights, and the complex and continuing question of their place in a neo-liberal world, I introduce a more explicitly personal note, as the preceding overviews of TWAIL scholarship and the continued analytical value of

[357] See UN General Assembly, Draft Convention on the Right to Development, with Commentaries, UN Doc. A/HRC/WG.2/21/2/Add.i, 8 May 2020.

[358] See T. Achiume, The Impact of Nationalist Populism on Racial Equality: Report, Doc. A/73/305, 6 August 2018; T. Achiume, Global extractivism and racial equality, Doc. A/HRC/41/54, 14 May 2019.

the First World–Third World dichotomy now give way to my own current reflections and research on the origins of human rights and the Third World reparations campaign. These are my efforts to further explore topics with which TWAIL scholars have been preoccupied.

## A *Protecting Human Dignity: The Individual in International Law*

The protection of human dignity might be considered the ultimate goal of international law, and it is for this reason that the human rights revolution was welcomed as a major advance in international law. A theme that has preoccupied human rights law, but that has long predated it, is the issue of the position of the individual in international law. Questions related to this broad issue explore the relationship between the sovereign and the individual and the eclipse of the individual within the classic system of international law that was based on the sovereign. More recent debates focus on the nature of the individual that human rights seek to protect. In this section, I sketch out another approach to the individual and human rights that uses TWAIL methodology, as it were. The basic argument here is that a version of human rights that was devised to protect a specific type of individual was created in the colonial encounter – that is, particular understandings of 'human rights' were given form and expression in the colonial encounter and that it was in this encounter that these rights were developed and connected to, and related to, various other areas of international law, including trade, sovereignty and property. My broad argument here is that international law vested the European individual with a broad set of rights in the colonial encounter, and the system of rights so created continues to shape international law. Indeed, I argue that it constitutes, albeit largely unrecognized, a separate trajectory of human rights from that which is usually studied within international human rights law.

## B *The Rights of Aliens: A Historical Approach*

An introduction to this particular theme, which might be broadly termed 'the rights of European aliens', is suggested by an analysis of two passages authored by 19th-century jurists. The first, a famous passage from Justice Horace Gray, states: 'It is an accepted maxim of international law, that every sovereign state has the power, as inherent in its sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'[359] This statement, made in 1892, affirms a fundamental tenet of positivist 19th-century international law – the essential right of the sovereign over its own territory – a right that is especially emphasized by the sovereign's prerogative to exclude and manage aliens. The alien – in this specific case, a Japanese woman, Nishimura Ekiu – is seen as potentially threatening the existence, the 'self-preservation', of the state.

A somewhat different idea of the relationship between the alien and sovereignty is presented by another prominent jurist, John Westlake, Whewell professor of

[359] *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892).

international law at the University of Cambridge, only two years later in 1894: 'When people of European race come into contact with African tribes the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes. … Can the natives furnish such a government or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it.'[360] Westlake refers to 'government' rather than sovereignty. Under international law, proper government is an essential element of statehood and sovereignty, and a society ruled by a government that fails to meet appropriate standards – 'the standards of civilization', in Westlake's parlance – could not be properly sovereign. His argument appears to be that, for a government to be 'civilized', it had to basically enable people of 'European race' to live the complex lives to which they were 'accustomed in their home'. And if such a government could not be furnished, then, it followed that the government in question could not be regarded as the government of a sovereign state. There is a great deal to unpack in this passage about the complex connections amongst race, civilization, government and sovereignty.

For my purposes, however, what is compelling about Westlake's statement is his argument, in effect, that it is the rights of European aliens that define sovereignty; that an entity could be regarded as sovereign only to the extent that it protects the rights of such aliens. This paradigm of the sovereignty-alien relationship is striking: it completely reverses the relationship posited by Gray. In Gray's statement of international law, the sovereign has absolute rights over aliens and their entry; in Westlake's statement, an entity is only sovereign if it protects the rights of aliens. It is an entity's capacity to protect the rights of aliens that determines the validity or otherwise of government and, hence, sovereignty. It is also noteworthy that Westlake's paradigm transforms the native of the non-European state into an 'alien' within her own territory insofar as that native would ostensibly be ruled, according to Westlake, by a system of governance that takes the European as the standard.

This inquiry, then, is driven by the issues that arise from these contrasting visions of the relationship between the sovereign and the alien. I seek to explore the origins, character and structure of the jurisprudence that Westlake so confidently asserts – the rights possessed by these extraordinary aliens, people of 'European race'. What are the origins of this formidable personality? More specifically, if this alien could be said to possess 'rights', where do these rights derive from and what happened to this particular tradition of rights, so emphatically and assuredly presented (it is hard to overlook the tone of Westlake's statement)? What is the importance, if any, of this tradition of rights in the system of modern, familiar human rights as embodied and extended in the UDHR?

One version of the origins of the rights of European aliens asserted by Westlake may be traced to the beginnings of modern international law – namely, the writings of

[360] J. Westlake, *Chapters in the Principles of International Law* (1894), at 51. Westlake's emphasis on race is hard to overlook. See Gevers, '"Unwhitening the World": Rethinking Race and International Law', *67 UCLALR* (2021) 1652.

Francisco de Vitoria. In developing his argument as to how the Spanish could exercise sovereignty over the Indians of the New World, Vitoria articulated concepts of 'natural society' and 'fellowship', stressing that '[i]t was permissible from the beginning of the world (when everything was in common) for anyone to set forth and travel wheresoever he would'. Vitoria elaborates that this right to travel – to enter foreign lands – was based on concepts of hospitality[361] and trade, together with the right to preach the gospel throughout the world. Vitoria very broadly pronounced that '[t]he Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them'.[362]

The consequences of these basic propositions were considerable. It meant that any violation of this right to travel and trade could trigger, eventually, a war against the Indians.[363] Much of this discourse is shaped by considerations of humanity, fellowship, the duties and sentiments arising from the idea that there is a larger 'global society' of which all human beings are a part. Connected with this framework relating to the rights of travel and 'abode' is a specific and far-reaching set of doctrines relating to property, personality and political economy.[364] My inquiry is driven specifically by an exploration of the relationship between the rights of aliens and political economy, and it seeks to contrast that inquiry with alternative approaches to the rights of aliens that are based on concepts of hospitality.[365]

The importance of the right to trade and travel, and the further elaboration of a system of political economy based on these ideas, is to be found in Grotius' landmark work, written in justification of the Dutch East India Company's claims to a Portuguese treasure ship, the *Santa Caterina*, captured by Dutch vessels in 1603.[366] Grotius, explicitly referring to and building on Vitoria's arguments, affirmed and expanded the 'right to trade' as a universal natural right.[367] Having established the foundation of

[361] This is the focus of Vincent Chetail's illuminating analysis of hospitality. Chetail, 'Sovereignty and Migration in the Doctrines of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel', 27(4) *EJIL* (2017) 901.

[362] F. de Vitoria, *De Indis et De Jure Belli Relectiones* (1548), at 151 para 386.

[363] *Ibid.*

[364] In this regard, I depart from the valuable work of Chetail, on hospitality, and Koskenniemi and Bohrer on political economy. See Koskennimi, 'Empire and International Law: The Real Spanish Contribution', 61 *University of Toronto Law Journal* (2011) 1; Ashley J. Bohrer, 'Just Wars of Accumulation: The Salamanca School, Race and Colonial Capitalism', 59 *Race and Class* (2017) 20. Unlike Chetail, I detail the right to travel in relation to political economy and hospitality (the latter giving rise to what we might term the rights of refugees); unlike Koskenniemi and Bohrer, here, I approach Vitoria by focusing on his place in the trajectory on the rights of aliens specifically.

[365] These are related to ideas of neighbourliness. See Vitoria, *supra* note 362 at 152. Vitoria cites Augustine: 'Therefore they may not keep them away from our country without cause: When it is said "Love thy neighbour"; it is clear that every man is our neighbour.' See St. Augustine, *De Doctrina Christana* (397). Other ideas are connected with 'righteousness and charity'.

[366] For a superb account of this incident and the legal issues it raises that I have drawn upon, see Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' *De Iure Praedae* – the Law of Prize and Booty, or "How to Distinguish Merchants from Pirates"', 31 *Brooklyn Journal of International Law* (2006) 741.

[367] For valuable studies of Grotius and natural rights, see R. Tuck, *The Rights of War and Peace* (1999); Pagden, 'Human Rights, Natural Rights and Europe's Imperial Legacy', 3(2) *Political Theory* (2003) 171.

universal natural rights, Grotius then proceeded to elaborate on the content of these rights. The most fundamental of these rights had to do with self-preservation, and a central aspect of this right of self-preservation was the right to trade: '[I]t is lawful for any nation to go to any other and trade with it.'[368] The whole scheme of nature as created by God affirms the validity of this principle, for Grotius. He points out how different peoples excel at different arts, thus ensuring that people interact with each other.

Grotius argues that interdependence is inherent in this scheme and that friendship is furthered through mutual wants and needs. Since trade is integral to society and friendship, any impingement on trade violates 'nature herself'. The existence of the ocean and the winds that facilitate travel are evidence of this larger plan. Given all this, the Portuguese would be violating natural law in preventing trade with countries over which they were sovereign. How much worse then, claims Grotius, that the Portuguese are preventing trade with the Asian states over which they have no sovereignty and which are themselves willing to trade. This offence against natural law by the Portuguese justified the Dutch in resorting to war and, as such, in capturing the Portuguese vessel, the *Santa Caterina*, and its treasures.

What is also notable about Grotius' jurisprudence is his development of a particular sort of legal personality as well as the rights associated with that personality. Vitoria had argued that excluding people from travelling could be just grounds for war. While relying on Vitoria, Grotius addresses a number of crucial issues that had been left relatively unexplored by Vitoria. These had to do with the rights of an individual – a private actor – to wage war: 'The examples afforded by all living creatures show that force privately exercised for the defence and safe-guarding of one's own body is justly employed. Furthermore, such force is also just when the purpose is the defence or recovery of one's property; nor is it less so when employed for the collection of debts.'[369] War is a public act, one of the crucially exclusive prerogatives of the sovereign. In civil society, the individual surrenders his right to go to war, as it were, to the sovereign. However, the natural right of self-defence that every person possesses can be exercised by an individual in a 'state of nature', a state where sovereign protection is absent and wanting. For Grotius, as for many theorists of the time, the non-European world was such a state of nature.[370] The Dutch vessel, fighting for its rights in the seas of Southeast Asia, far beyond the reach and protection of the nascent Dutch republic, was operating in a state of nature. Significantly, then, Grotius articulated and elaborated on natural rights in their most expansive and elaborate form, vividly imagined, because the extra-European world was the location of this state of nature.[371] Grotius further elaborates upon Vitoria in developing arguments for self-preservation understood principally in economic terms and elaborating a corresponding set of

[368] H. Grotius, *The Freedom of the Sea* (2004), ch. 1.

[369] H. Grotius, *Commentary on the Law of Prize and Booty* (2006), ch. VII.

[370] Kingsbury and Straumann, 'The State of Nature and Commercial Sociability', 31 *Grotiana* (2010) 22.

[371] There is something of a paradox here. That is, non-European sovereignty is recognized (as it is in Vitoria), and, yet, the non-European arena is seen as a state of nature in which individual subjective rights might be vindicated. Complex issues arise here about the evolving Dutch approaches to imperialism.

natural rights. It is striking that an individual can go to war to recover property or collect unpaid debts. The protection of property is central to self-preservation.[372] What is significant here is the emphasis on economic self-preservation and economic injury as giving rise to self-defence. The world of natural rights that Grotius outlines in these texts, his major works prior to the *Rights of War and Peace*, are rights that connect self-preservation – the right to life, as it were – to a particular system of political economy and not only in relation to physical preservation, bodily integrity, the right to be free of torture and so on.

## C *The Corporate Alien*

When adumbrating this particular vision of rights, Grotius is speaking of the rights of the person, while, in effect, what he is advancing are the rights of a corporation, the corporation that commissioned him to write an opinion on all the issues accompanying the capture of the *Santa Caterina*. From the outset, then, the rights of the person and the corporation are conflated. Grotius argues that the Dutch East India Company has the right to go to war because the rights of the company are in effect the rights of a person or group of persons: '[N]o one will maintain that the East India Company is excluded from the exercise of that privilege [to go to war] since whatever is right for single individuals is likewise right for a number of individuals acting as a group.'[373] In many ways, the company – a trading entity created for the purpose of making profit – is a perfect embodiment of a particular type of economic actor, and Grotius constructs a universe of rights that furthers the rights of man as a particular type of economic actor. Further, this specific actor – the corporation – is capable of taking on a number of different forms. What we see in *The Free Sea* and *The Law of Prize and Booty* is a complex jurisprudence in which the corporation is attributed with a number of different legal personalities – sometimes as a person, sometimes as an agent of the sovereign state and, at other times, in effect, as sovereign itself.[374] The great trading companies – the Dutch and British East India Companies – acted, of course, as sovereigns in governing many parts of India and Southeast Asia, including Indonesia.[375] A trading company that acts as sovereign approaches governance, then, principally as a necessary means by which it might continue its singular operation of making a profit. The corporation, particularly in Asia in the 19th century, was the principal vehicle by which European colonialism and international law expanded into

[372] One can see here the legal underpinnings of what Sven Beckert has aptly termed 'war capitalism'. S. Beckert, *Empire of Cotton: A Global History* (2014).

[373] Grotius, *supra* note 369, at 302. On the elusive and shifting character of corporate personality, see Stapelbroek, 'Trade, Chartered Companies, and Mercantile Associations', in A. Peters and B. Fassbender (eds), *The Oxford Handbook of International Law* (2012) 338.

[374] On a valuable study of this elusive and shifting character of corporate personality, see Stapelbroek, *supra* note 373. For an insightful study, see Barreto, 'Cerebrus: Rethinking Grotius and the Westphalian System', in M. Koskenniemi, W. Rech and M. Jiménez Fonseca (eds), *International Law and Empire: Historical Explanations* (2017) 150.

[375] See, e.g., P. Stern, *The Company State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (2007); J.A. Phillips and J.C. Sharman, *Outsourcing Empire: How Company States Made the Modern World* (2020).

that region. While we might see the corporation as a proxy for the sovereign, it may be possible to view the sovereign as a proxy for the corporation. The interests of the East India Company were a major factor leading to the Opium Wars, but the official Treaty of Nanking was entered into between the sovereign states of the UK and China. Significantly, the person entering into the treaty as plenipotentiary for the UK is Sir Henry Pottinger of the East India Company.[376] In a further iteration, the corporation, which could assume the form of the individual or the sovereign, disappears completely from visibility within the international legal system, even if it is the spectral actor whose interests shape the making of international law.[377]

By the beginning of the 20th century, the corporation recedes as an explicit actor in the world of international law because of events such as the Indian mutiny that prompted the British government to assume control over India rather than leave it in the hands of the East India Company.[378] It is roughly at this time that we see the explicit emergence of a new body of law through which the corporation inserts its presence in the international system – the law relating to the rights of aliens, which in turn is the law that profoundly shapes the law of state responsibility. Both these bodies of law emerged in the early 20th century, much of it prompted by disputes between US investors and Latin American governments. Latin American scholars such as Carlos Calvo and Luis Drago attempted to use international law to protect against intervention in Latin American countries by European states and the USA, which resorted to bombardment and gunboat diplomacy in their efforts to protect their investors.[379]

The 'rights of aliens' become a body of law that appeared to be devised to protect individual human beings in foreign countries. This is why 'the rights of aliens' are seen as an important development in the evolution of international human rights law: the human person was given some sort of recognition and protection by international law. Edwin Borchard's classic book might be seen as the embodiment and expression of the factors that shaped this body of law.[380] What is clear, however, is that as soon as the law of aliens took shape – and the topic was taken up by the Institut de Droit and the League of Nations, both of which began ambitious projects to clarify and codify the law – corporations were included among the entities classified as aliens and thus capable of enjoying protection under international law. As a consequence, we have one body of law, the law relating to the rights of aliens, which encompasses two

[376] Treaty of Nanking (1842), preamble.

[377] For outstanding recent studies of the relationship between international law and the corporation, see K. Miles, *The Origins of International Investment Law: Empire, the Environment and the Safeguarding of Capital* (2013); G. Baars, *The Corporation, Law and Capitalism* (2019); D. Lustig, *Veiled Power: International Law and the Private Corporation 1886–1981* (2020) (traces the ways in which the corporation continued to shape international law despite having retreated from international legal prominence).

[378] J. Darwin, *The Empire Project* (2009), at 180–183.

[379] On the Latin American and Mexican experience, see Vecoso, 'Resisting Intervention through Sovereign Debt: A Redescription of the Drago Doctrine', 1 *TWAILR* (2020) 74. K. Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment against Revolution* (2021).

[380] See E. Borchard, *Diplomatic Protection of Citizens Abroad and Change to the Law of International Claims* (1927). For a valuable recent work on this topic, see C. Casey, *Nationals Abroad: Globalization, Individual Rights, and the Making of Modern International Law* (2020).

very different types of actors. This body of law applies, on the one hand, to the most abject and vulnerable people, such as indebted and undocumented migrant workers, and stateless persons and, on the other, to increasingly powerful actors, foreign investors and especially foreign investors who are corporations.

The protection of aliens was an essential element in the development of the law of state responsibility. Newly independent states seeking to nationalize foreign enterprises that had control over their natural resources were confronted with the argument that they were violating the rights of alien corporations and hence incurred state responsibility. It is hardly coincidental, then, that the international law of state responsibility – a law that constrained sovereign states – became such an important topic of international law at precisely the time when decolonization was unfolding. It was a time when Third World states were radically challenging the established economic order and the interests of colonial powers who were intent on maintaining their economic advantages despite decolonization. The international law of state responsibility – and related areas such as state succession and acquired rights – was therefore one of the principal areas in which the West and the Third World came into conflict. Guha Roy's classic article in the *American Journal of International Law* outlined the stakes involved and the position of the Third World.[381]

A very distinguished group of lawyers including Sir Elihu Lauterpacht and Sir Hartley Shawcross set about the task of constructing an international system that would protect foreign investments. This extraordinary project – advanced through many different forums and institutions, including the World Bank and ad hoc tribunals such as the Iran-US Claims Tribunal as well as through the regime of bilateral investment treaties – transformed international law. The current system of investor-state arbitration has emerged from these developments. In effect, the system elevates the corporation to sovereign status. Thanks to investment treaties, corporations are no longer dependent on the support of the state and can now, on their own initiative, commence claims against signatory governments under international law. And the grounds on which corporations might claim compensation have been ever increasing. As we have seen, it is these tribunals that have been continuously expanding the concept of property itself through their findings on what constitutes a 'foreign investment'. In all these different ways, wealth is in a sense created in order to be transferred as all manner of activities and rights are transformed into an investment protected by bilateral investment treaties.[382] This 'sovereign alien' had emerged again not in a universe of natural law but, rather, in a universe created by thousands of treaties, all

[381] Roy, 'Is the Law of State Responsibility of States for Injuries to Aliens a Part of Universal International Law?', 55 *AJIL* (1961) 863.

[382] An important and complex issue arises here as to whether arbitration tribunals recognize as 'investments' rights that would not usually be regarded as 'property'. That is, do arbitration tribunals create rights and 'property' rather than simply enforcing existing property rights? The ability to enforce a property right through international arbitration rather than through the national court system alone gives the right in question a very different and powerful character. See Anghie, 'Deutsche Bank v Democratic Socialist Republic of Sri Lanka, "All That Is Solid Melts into Air"', 30(2) *Foreign Investment Law Journal* (2015) 356.

basically supported by the ideology that corporate protection was essential to development and human welfare. Sovereigns themselves acceded to this idea, often creating legal regimes that enhanced private power and furthered corporate interests.

## D *The Two Traditions of Rights*

The set of rights enjoyed by the European alien in the non-European world as developed in the natural law jurisprudence of Vitoria and Grotius is uniquely based on a complex relationship between trade, property, personality and self-preservation. The right to travel anywhere was a crucial element of these rights. What is notable is that these rights are very different from the rights claimed within the classic genealogy of human rights that focuses exclusively on Western experience and that are studied as the natural rights predecessors of the UDHR. The rights in the UDHR, no doubt profoundly shaped by the natural law tradition, are largely conceptualized as protection against the tyrannical and arbitrary sovereign or state.[383] This is the great theme connecting the French Revolution and the US Revolution. Property is certainly a concern of all these revolutions. Many of these classic rights were protected by 19th-century jurisprudence relating to the rights of aliens. As Gerrit Gong points out, the rights of aliens by the time of the 19th century were a crucial part of the 'standard of civilization' that the non-European society had to meet if it was to become properly sovereign. It is unsurprising, then, that the 'standard of civilization' encompassed, according to Gong, 'guarantees of basic rights of liberty, dignity, property'. Importantly, however, this list of rights crucially also includes 'freedom of travel and commerce, especially for foreigners' and, further, 'a domestic system of courts, codes and published laws which guarantee legal justice for foreigners and nationals alike'.[384] Thus, the rights of aliens encompassed both classic rights relating to the protection of the person as well as the right to trade and travel. In effect, the natural rights of Grotius and Vitoria to travel and trade were now protected by the positivist international law of the 19th century, an international law powerfully imposed and enforced by imperial powers. The Treaty of Nanking might be read as an embodiment of the way in which the 'natural rights' of aliens – rights to commerce and trade – are now precisely the rights entrenched through the instruments of positivist law, a treaty that the Chinese were compelled to sign after a war. It is surely significant, further, that under the very first article of this deeply unequal treaty, China and the UK undertook to protect each other's citizens, 'who shall enjoy full security and protection for the persons and property within the Dominions of the other'.[385] Persons and property are inseparable. And connecting with this past, a version of the basic principle endures in bilateral investment treaties, many of which include a provision referring to 'the full protection and security' of the

[383] See Pagden, 'Human Rights, Natural Rights and Europe's Imperial Legacy', 3(2) *Political Theory* (2003) 171.

[384] See Obregon, 'The Civilized and the Uncivilized', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of International Law* (2012) 918, citing G. Gong, *The Standard of 'Civilization' in International Society* (1984), at 936, nn. 86, 87.

[385] Treaty of Nanking, *supra* note 376, Art. 1.

foreign investor, although the investor is now, overwhelmingly, a corporation rather than an individual.

The basic rights of aliens encompassed the international legal protection of the person against state violence. It is understandable, therefore, that accounts of the historical background of international human rights law should see the rights of aliens, together with the minority treaty system of the League of Nations and the abolition of the slave trade, as a precursor to international human rights.[386] However, the right to travel and the right to engage in commerce through travel are not included in the UDHR. The right to self-preservation – the crucial right for Grotius – is intimately tied to trade, travel, property and political economy. And the system of international law he then proceeds to outline is one that recognizes, expands and protects such rights, even to the extent that war is justified to protect economic interests. International human rights law as it emerged most immediately in the post-UN period was not animated by such a vision. Indeed, notably, the right to property, although mentioned in the UDHR, is not outlined in the International Covenant on Civil and Political Rights, and trade and travel are dealt with in only a limited way.[387] The UDHR's protection of the rights of aliens is limited in its range, and the scheme reinforces the sovereign state that is under no obligation to recognize the rights of persons outside its 'territory and jurisdiction'.[388] It is in many respects in keeping with Justice Gray's vision of sovereignty that the UDHR seeks to establish the rights of aliens. What is striking, however, is that both Grotius and Gray invoke some version of self-preservation to justify entirely different versions of the 'right to travel'.

Given this brief outline, it seems that several inquiries might be useful. I have argued that international law has both constructed and been constructed by the entity I would call 'the sovereign alien' because the rights it enjoys may be traced back to the sovereign rights of persons in a state of nature and, further, because the protection of its rights becomes the test of whether an entity claiming to be the territorial sovereign should be properly recognized as such. In this sense, it is the 'sovereign alien' that rivals – indeed, that creates – the official sovereign. This alien is very different from the vision of what might be termed the 'helpless, abject alien' – the alien as migrant worker, refugee, stateless person – that has animated much of the scholarship on migration. The powerful work of Hannah Arendt, of course, has made the predicament of this alien vivid and inescapable.[389] It is this version of the alien that has inspired powerful and probing studies of migration and refugees.[390] I contrast this with the 'sovereign alien', an entity that acquires extraordinary rights precisely because it lacks the benefit of sovereign protection because it is, in this sense, 'stateless'. It is because the vessels of the Dutch company in 1603 cannot call upon the emerging sovereign

[386] See, e.g., H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (2000), at 81.

[387] International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

[388] See D. Weissbrodt, *Human Rights of Non-citizens* (2008).

[389] For her famous conceptualization of the 'right to have rights', see H. Arendt, *The Origins of Totalitarianism* (1951), ch. 9.

[390] See, e.g., S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (2004).

Dutch republic to protect their rights that powerful private rights, surrendered to the sovereign in a properly constituted civil order, revert again to the company. The most significant of these rights is the right to go to war, which is the ultimate manifestation of sovereignty.

The question, then, is how do we understand the construction, and the subsequent history, of this particular type of alien and the different bodies of international law, including human rights and foreign investment law that protect and expand the rights of this entity? What will also be revealed is the dual trajectory of two traditions of 'natural rights', which overlap and which are nevertheless distinct: the natural rights to free speech, proper trial and so on that are embodied in the UDHR and the natural rights tradition that I have attempted to trace here, which includes the right to travel and the interconnected rights of property and self-preservation. My argument is that it is in the colonial encounter – in the theorization of the rights of Europeans in the non-European world – that we might identify this other tradition of rights and, thus, at least commence a study of how these two traditions relate to, contrast, overlap and intersect with each other.

It is in the international law relating to corporations, in particular, that this theme may be usefully analysed as corporations adroitly shift from one international legal regime to another to expand their property rights. In some cases, these corporations claim to be 'human' and claim human rights. Corporations have asserted human rights both in international and domestic systems.[391] In other cases, it is through a different structure and body of law – through foreign investment law – that these rights are protected. In certain cases, these two traditions clash, such as when corporate rights may conflict with human rights.[392] Tracing the trajectories of these two traditions of rights – how they emerged, developed and intersected – offers another approach to understanding the entire debate on corporations and human rights and whether corporations have human rights obligations. This inquiry may also illuminate the jurisprudence developed by arbitral tribunals when confronted by the defence that the state, which has allegedly violated bilateral investment treaties due to measures it has taken, has adopted those measures to protect the human rights of its people. The task is to understand the existence, the origins and the continuity of these alien natural rights; the manner in which international law, in various ways and through various doctrines, has expanded these rights; the entities that bear these rights and the technologies that they have created to protect themselves against competing regimes, including 'human rights'. Broadly, the project is to understand the origins and

[391] For important studies of this large theme, see Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights', 7(3) *Human Rights Law Review* (2007) 511; A. Winkler, *We the Corporation FN-US Cases About This-Citizens United* (2018); see also Kulick, 'Corporate Human Rights?', 32 *EJIL* (2021) 537; Acharya, 'Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?', 54 *Boston College Law Review* (2013) 937.

[392] This situation arises, for instance, when a state passes regulations designed to protect human rights but, in doing so, affects the corporation's profitability, potentially giving rise to investment claims. See, e.g., Crow and Lorenzoni, 'International Corporate Obligations, Human Rights and the Urbaser Standard: Breaking New Ground', 35 *Boston University International Law Journal* (2018) 87.

ramifications for the world of these divergent, and yet connected, regimes. As we have seen, modern refugee law has been powerfully shaped by European experience and, in particular, World War II. Under this system, people seeking asylum who are deemed 'economic migrants' can be denied refugee status. However, the 'economic migrant', the migrant battling for economic survival and self-preservation, is – at the risk of anachronism – very close to the individual to whom Grotius provides natural rights – the rights to trade in order to survive – the person who can assert these rights by entering non-European territories unimpeded. Economic self-preservation is an imperative, and the only way in which most persons can engage in the world of commerce in the contemporary world is by selling their labour. The migrant worker is an embodiment of this phenomenon in a globalized world. The rights of the corporation and the rights of the migrant worker, then, represent two aspects of the world of commerce. And it is through studying the rights of aliens that the divergent trajectories and histories of these two entities might be traced, furthering our understanding of the operations of capitalism, imperialism, race and international law. And the question arises not only 'whether corporations have human rights?' but also 'how can a human being acquire the rights of a corporation?'

## 6 The Third World and the Reparations Campaign

### A *Introduction*

One of the major contemporary issues that has generated a new scrutiny of the legacies of imperialism – much as the Iraq War revived the topic of imperialism and international relations in the 2000s – is the issue of slavery, race and reparations and the efforts to understand in its fullest form the meaning and significance of race and its impact on the international order. In this section, I outline some of the features of the campaign for reparations, including the legal issues that such a campaign must confront. The challenges to such a campaign are formidable, and this is, I would argue, no coincidence as an imperial international law ensures as part of its operations that it cannot be subject to scrutiny: conquest creates structures and inequalities that must remain unquestioned. Justice Marshall was emphatic in this regard: 'The title by conquest is acquired and maintained by force. The conqueror prescribes its limits.'[393] Here, I develop a further argument – namely, that this campaign for reparations must be seen in conjunction with another and much more successful campaign for reparations, one that was initiated by the West itself. I argue that there are two systems of law dealing with reparations. The first is the 'Third World system', which is still nascent and uncertain and beset by numerous legal obstacles. The second system, which is less recognized, is what I would call the 'Western law of reparations', one that is already in place, established and operating with great effect and consequence. It is the reparations continuously being paid not by the First World to the Third World but, rather, by the Third World to the First World. The 'Western law of reparations' also

[393] *Johnson v. McIntosh*, 21 US 543, para. 589 (1823).

has a defensive dimension, one that blocks and denies Third World claims for reparations. It is in this way that the two systems are connected. I sketch these arguments and suggest that what is needed is an appreciation of the Western system that ensures an ongoing transfer of wealth from the Third World. The Third World campaign for reparations should be directed not only at exploring compensation but also in making visible the unequal structures of international law that continue to place Third World people at a disadvantage and reforming those structures.

## B *Race, Slavery and Reparations*

The campaign for reparations is inherently connected to a long history of slavery and racism. The study of race and its relationship with the international system has a long and rich tradition. The first Pan-African Congress, organized by a West Indian barrister, Henry Sylvester-Williams, and attended by William Du Bois, took place in London in 1900. The proceedings were dominated by questions of slavery, colonialism and demands for the respect for the territorial integrity of Abyssinia, Liberia and Haiti. It is at this congress that Du Bois famously proclaimed that '[t]he problem of the twentieth century is the problem of the color line', the problem of race determining access to 'the opportunities and privileges of modern civilization'.[394] In warning against a system in which 'the black world is to be exploited and ravished and degraded', Du Bois made his appeal to 'the Great Powers of the civilized world, trusting in the wide spirit of humanity and deep sense of justice and of our age'. Du Bois, like many others after him, appealed to the ideals of justice and humanity that Western states proclaimed they were furthering through the civilizing mission. Du Bois eloquently praised 'the American Negro' for 'the great work he has accomplished in a generation toward raising millions of human beings from slavery to manhood'.[395] What is especially poignant, however, is Du Bois' simultaneous recognition of the complete devastation suffered by black people, the depredations inflicted by civilization, while appealing to its ideals. Notably, Du Bois speaks of the plight not only of blacks but also of the 'brown and yellow myriads elsewhere'.[396] Du Bois' speech was prescient in identifying race, slavery and colonialism as central to the international system and the efforts to understand the consequences of this situation for the global order that continue. His work raises the question: what would a history of international law written from the vantage point of the slave, which takes the practice of slavery as its ontology and epistemology, reveal about the character of international law, its promises and potentials, elisions and exclusions?[397]

[394] W.E.B Du Bois, 'To the Nations of the World', Closing address, First Pan-African Convention, London, 1900.

[395] *Ibid.*

[396] *Ibid.*

[397] For important efforts along these lines, see H. Richardson III, *The Origins of African-American Interests in International Law* (2008); Grovogui, 'To the Orphaned, Dispossessed and Illegitimate Children: Human Rights beyond Republican and Liberal Traditions', 18 *Indiana Journal of Global Legal Studies* (2011) 41; see Li, 'Genres of Universalism: Reading Race into International Law with Help from Sylvia Wynter', 67 *UCLALR* (2021) 1686.

Du Bois' concerns endure. Slavery and atrocities committed during colonial rule have given rise to several campaigns for reparations.[398] These claims for reparations for slavery, colonial exploitation and human rights violations have been made in many different jurisdictions and under varying systems of law.[399] Equally importantly, the question of reparations has been taken up within the UN itself. As already touched on above, the special rapporteur on 'contemporary forms of racism', Achiume, presented the UN General Assembly with a wide-ranging report that explores the 'human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism'.[400] The report explores 'contemporary racially discriminatory effects of structures of inequality and subordination resulting from failures to redress the racism of slavery and colonialism'.[401] These campaigns for reparations provide an important and focused means of exploring the ongoing effects of imperialism. Within the contemporary landscape of international law, amidst all the interest in R2P, foreign investment law, cyber attacks and so on, the claim for reparations is in many ways the most direct and explicit way of addressing imperialism and its aftermath.

## C *Reparations, Property and Dispossession*

Any discussion of reparations must commence from a basic premise. As scholars have surely established now beyond any question, the development of international law was driven by efforts to render the world in terms of 'property', to expand property rights and to protect such rights.[402] As I have already pointed out, scholars such as Vitoria and Grotius wrote extensively on property issues: on how property is acquired,

[398] See, for instance, the long-running Herrero efforts seeking reparations for the genocide they had suffered under German colonial rule. See European Centre for Constitutional and Human Rights, 'Colonial Repercussions: Germany and Namibia', available at www.ecchr.eu/en/case/colonial-repercussions-germany-and-namibia/; see, e.g., H. Aidi, 'Forgotten Genocide: Namibia's Quest for Reparations', *Aljazeera* (7 August 2015), available at www.aljazeera.com/opinions/2015/8/7/forgotten-genocide-namibias-quest-for-reparations; 'Descendants of Namibia Genocide Victims Seek Reparations in New York', *The Guardian* (16 March 2017), available at www.theguardian.com/world/2017/mar/16/namibia-genocide-reparations-case-germany-new-york; E. Larkin, 'Genocide Descendants Halted from Seeking Reparations from Germany', *Courthouse News* (24 September 2004), available at www.courthousenews.com/genocide-descendants-halted-from-seeking-reparations-from-germany/; 'What Is The CARICOM Reparations Commission', available at https://caricomreparations.org/about-us/.

[399] See *Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyingi, Jane Muthoni Mara and Susan Ngondi v. Foreign and Commonwealth Office*, [2011] EWHC 1913 QB (UK); see, e.g., D. Boffey, 'Hague Court Orders Dutch State to Pay Out over Colonial Massacres', *The Guardian* (27 March 2020), available at www.theguardian.com/world/2020/mar/27/hague-court-orders-dutch-state-to-pay-out-over-colonial-massacres. The *Chagos* case raises interesting questions about the sort of remedy available to a people for dispossession. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 2.

[400] GA Special Rapporteur Tendayi Achiume, 'Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance', UN General Assembly, UN Doc. A/74/321, 21 August 2019.

[401] *Ibid.*

[402] See A. Fitzmaurice, *Sovereignty, Property and Empire* (2014). This has been a key theme of Martti Koskenniemi's work. See, e.g., Koskenniemi, 'Sovereignty, Property and Empire: Early Modern English Contexts', 18(2) *Theoretical Inquiries in Law* (2017) 355.

on what rights are connected with property, on what measures can be taken to protect property, on the distinction between common property and private property and so on.[403] Vitoria even asserts that the natives could own property, and yet, 'just war' waged by Europeans could give them legitimate title to native lands. In later jurisprudence, Indigenous peoples were deemed to have only imperfect rights over property as they failed to cultivate the soil; thus, their lands could be taken over by European settlers. In other cases, the existence of Native peoples was not even acknowledged, the land they occupied thus being transformed into *terra nullius*.[404] These doctrines legitimized settler colonialism.

In short, from a TWAIL perspective, what is astonishing is that the ingenious expansion of property rights through international law, and through the expansion of private property rights, was simultaneous with the dispossession of entire peoples of their lands, their territories, their very persons. The relationship is almost asymptotic, the property rights of European entities expanding as the non-European peoples were deprived of their lands and means of existence. The racialized dynamic is at its most literal in the practice of slavery, which turned black people into slaves.[405] This dynamic of expansion and retraction, of inclusion and exclusion, is a feature – a fundamental characteristic – of international law that is in many respects ongoing as the management of global commons, outer space and other such arenas is conceptualized principally through the lens of property.[406] Any discussion of reparations must begin by engaging with the process by which the world was transformed into property and by confronting the historical fact of the unprecedented dispossession that followed. Indeed, the phenomenon of dispossession created by imperial international law seems to be so overwhelming that, to many, it cannot be addressed by legal means but must simply be accepted as a given of the international order.

A study of the history of developing states and their claims for reparations is revealing. The theme of reparations haunts much of the scholarship produced by TWAIL I scholars. But it is not an explicit theme even in a work as powerful and far-reaching as Bedjaoui's *Towards a New International Economic Order*. The Bandung communique makes no mention of reparations. Even the NIEO Declaration, which makes numerous references to 'the remaining vestiges of alien and colonial domination', quite remarkably, given its reputation as a manifestation of the Third World at its most strident, makes no general reference to reparations – either directly or even

[403] See Vitoria, *supra* note 362.

[404] These are the various doctrines, authored by scholars such as Emer de Vattel, that justified settler colonialism. See R. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990); I. Watson, *Aboriginal Peoples, Colonialism and International Law* (2015).

[405] As Brenna Bhandar puts it in her superb study of property and racial capitalism, '[t]he brutal rendering of black lives as objects of economic commerce produced a racial regime of ownership whose legacies remain very much alive'. B. Bhandar, *Colonial Lives of Property: Law Land and Racial Regimes of Ownership* (2018), at 6.

[406] See 'Special Issue: New Space through an African Lens', 9(1) *New Space* (2021).

conceptually.[407] The claim for the NIEO is based instead, broadly, on assertions about interdependence and equity, on the need to 'correct inequalities and redress existing injustice'.[408] Reparations are not mentioned as a remedy for that injustice.[409] What is remarkable and interesting, then, is that the developing states, at least within the official legal instruments that constitute the NIEO, did not explicitly raise the issue of reparations. The calls for a NIEO were more focused on remedying ongoing inequalities, and the legal doctrines that supported them, even in a supposedly post-imperial world. It is almost as though the Third World, concerned about the hostility that their vision of world order and the NIEO would have provoked, had decided in the interests of diplomacy to mute any claims for reparations.

In more recent times, the Durban 2001 World Conference against Racism revisited the theme of continuing racism in all its forms and called for action against racism at both the national and international levels. It declared that 'slavery and the slave trade are crimes against humanity and should have always been so',[410] and, importantly, it points to the enduring effects of colonialism.[411] It is surely both startling and revealing that the one prominent area of international law in which reparations became a crucial topic was in debates initiated by the West about acquired rights and state succession. Western multinational corporations argued that their acquired rights had been breached, that they were being 'expropriated' and were therefore entitled to compensation.[412] These foreign corporations whose concessionary rights had been nationalized by newly independent states proclaimed themselves to be victims of the predatory Third World state that had violated the sacrosanct principle of unjust enrichment, a principle now presented as a 'general principle of international law'. This bold claim was made with complete assurance and appropriate measures of righteous outrage by corporations that had benefited enormously from the colonial patronage that they had enjoyed prior to decolonization. Opposing this view, the Jamaican scholar Norman Girvan pointed out that nationalization could be more properly seen instead

[407] See UN General Assembly, Declaration on the Establishment of a New International Economic Order, Doc. A/RES/3201(S-VI), 1 May 1974. Provision 4(f) refers to the right of territories under foreign occupation to 'restitution and full compensation' for the exploitation of the resources of their territories.

[408] *Ibid.*, at 3.

[409] I have not had the chance to look into the extent to which reparations featured in discussions among developing countries in various international law forums and institutions. I believe that the Asian-African Legal Consultative Organization took up this matter in the 1960s and 1970s.

[410] See Durban Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 8 September 2001, at 7, para. 13, available at https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf.

[411] *Ibid.*, s. 13 points to the ongoing effects of colonialism and how they have contributed to 'lasting social and economic inequalities in many parts of the world today'.

[412] These topics were debated intensely in the International Law Commission (ILC) and beyond. Bedjaoui and D.P. O'Connell were major protagonists. See Craven, 'Colonial Fragments: Decolonization, Concessions and Acquired Rights', in J. von Bernstorff and P. Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019) 101. For a detailed account of the battles in the ILC and, in particular, the responses to Bedjaoui's repudiation of the idea of acquired rights surviving independence of the new states, see Brunner, 'Acquired Rights and State Succession: The Rise and Fall of the Third World in the International Law Commission', in von Bernstorff and Dann, *ibid.*, 124.

as 'expropriating the expropriators'.[413] The ensuing heated debates about acquired rights, unjust enrichment and nationalization revealed many of the strategies and principles that featured in the ongoing battles surrounding the Third World's claim to 'permanent sovereignty over natural resources'. Considering these debates now, what is most astonishing is that foreign corporations that had exploited the resources of colonial territories under the patronage of colonial governments then seized the initiative to claim reparations for the wrongs they claimed they had suffered upon nationalization.

Once again, an imperial international law lent these arguments some measure of support. The classic case standing for the proposition that an illegal act gives rise to a claim for reparations is the *Chorzow Factory* case.[414] Indeed, this case is cited in Achiume's report.[415] It is surely telling that it is a very specific entity – a corporation – that is the origin, the centre and, in many ways, the foundation of the paradigm of the law of reparations since at least that time. From a historical perspective, it is hardly a surprise that the *Chorzow Factory* case involved a corporation, that the decisive event that created the universal rules of reparations, the classic formulation that every wrong must be redressed, is based on the issue of expropriation. My argument, then, is that the whole current discourse of reparations – what might be viewed as the tentatively emerging Third World law of reparations – cannot be seen in isolation from what might be termed the established Western law of reparations, a body of law that takes *Chorzow Factory* as its starting point. It is the corporation – as alien – that is instrumental in creating that body of law we know as 'state responsibility', even if later the focus of the law of state responsibility shifted to the so-called 'secondary rules'. The *Chorzow Factory* case is illuminating, both for the law of reparations and the earlier inquiry I sketched on the related topic of the rights of aliens. It suggests that the international law providing for the right of an alien to claim compensation has a longer and more developed history than international human rights law that provides compensation for rights violations.

A stark contrast now becomes apparent. While the Third World deployed the language of reparations in their political campaigns, they never developed a jurisprudence of reparations, a tribunal and a set of institutions to further the judicialization of the project of reparations. This contrasted with what might be termed the Western 'imperial' campaign for reparations that was developed through tribunals and supported by the most outstanding scholars and practitioners of the time that were directed towards expanding a body of law supporting the rights of aliens, in general, and of corporations, more particularly, through a number of mechanisms such as

[413] See Girvan, 'Corporate Imperialism: Conflict and Expropriation: Transnational Corporations and Economic Nationalism', 8 *Journal of International Economics* (1976) 472.

[414] *Factory at Chorzow (Germany v. Poland)*, 1927 PCIJ Series A, No. 9.

[415] The principle is 'reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'. Achiume, *supra* note 400, at 12–23, para. 31. Reparations is a broad concept and may take different forms, and here I use the term compensation to refer to the financial aspect of reparations.

the American-Mexican Claims Commission.[416] These were the foundations of what became international investment law.

Here, the TWAIL argument is that origins matter, that the 'colonial origins' of the law of state responsibility are instructive in revealing what sorts of actions count as wrongs, who is able to claim and which interests are taken into consideration. All these primordial and fundamental questions continue to shape the evolution of the law. What we see in the development of the international law of foreign investment since then is a consolidation and expansion of the mechanisms by which corporations have strengthened their capacity to make and enforce claims. This has been achieved through a complex structure of laws, institutions and doctrines ranging from bilateral investment treaties, to the ICSID system, to the New York Convention as well as through a jurisprudence expanding the meaning of crucial terms such as 'investment' and a number of related concepts.[417] Several issues arise here. A law of reparations shaped to compensate corporations is now accepted as logical, coherent, inevitable and, indeed, indispensable to furthering growth and development. This body of law both embodies and extends the neo-liberal vision of the world that is now so dominant. By contrast, efforts to provide reparations for slavery or colonial exploitation are criticized as aberrant and destructive, threatening entire social and economic structures with endless claims and no end in sight. The reparations project has inevitably been criticized and dismissed as impractical and disruptive, radically challenging the system of existing international law. In response, however, it is worth noting that the foreign investment regime itself, which furthers reparations for corporations, was itself radical. International law had to be transformed in astonishing ways in order to enable, for instance, corporations, through investment agreements, to acquire the personality allowing them to sue a sovereign state under international law on its own volition and not through the mechanism of diplomatic protection. It is in the work of scholars such as Sornarajah, in writings produced over more than three decades, that the changes can be traced. It is notable, however, that Ian Brownlie and Derek Bowett, professors, respectively, at Oxford and Cambridge and often on opposite sides in international legal litigation, both expressed amazement at some of the arguments made on behalf of corporations; these arguments are now so commonplace as to be unremarked on.[418] It is this system that has led to developing countries being subject to massive awards amounting to billions of dollars that often wipe out health, education and welfare budgets.[419]

[416] See, e.g., *Neer Claim* (1926), reprinted in UNRIAA, vol. 4, 60; A.H. Feller, *The Mexican Claims Commission 1923–1934* (1935).

[417] Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 38.

[418] See Brownlie, 'Legal Status of Natural Resources in International Law', 162 *RCADI* (1979) 245, at 309; Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach', 59 *British Yearbook of International Law* (1988) 49. For an insightful account of how the foreign investment regime expanded, see N.M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (2021).

[419] See Paparinskis, 'A Case against Crippling Compensation in International Law of State Responsibility', 83(6) *Modern Law Review* (*MLR*) (2020) 1246. For the impact of the regime on Indigenous peoples, see S. Puig, *At the Margins of Globalization: Indigenous Peoples and International Economic Law* (2021).

Many legal obstacles confront the claims for reparations for colonialism and slavery. The basic international legal principle of 'intertemporal law' holds that the legality of an action must be assessed according to the law in operation at the time. Given that colonialism and conquest and slavery were legal under the law of the 19th century, it is argued that no remedies are available for any exploitation that took place during this period when colonialism was at its height. The problem, of course, is that the law of the period was itself constructed by imperial powers to enhance their own interests. That is, the law of reparations, the law that outlines the grounds of compensation, is itself imperial law. It is an imperial law that denies certain communities reparations while enhancing the ability of other actors such as corporations to claim such reparations. As Achiume points out, 'international legal doctrine has a longer history of justifying and enabling colonial domination than it does of guaranteeing equal rights to all human beings'.[420] The complication, then, is how a discipline that reproduces colonial relations may be used to remedy those same problems. As many scholars point out, corporations have rarely been held liable under international law for human rights violations or, indeed, for other damaging actions affecting the rights of states. Such contrasts raise very starkly the question of the relationship between the corporation, the individual and the slave and the different entitlements of each of these entities. How are these different legal personalities constructed? How is legal personality related to entitlements and claims?

For all these reasons, claiming reparations for colonial exploitation faces many challenges if pursued under the current law. By contrast, imperial powers, on the other hand, unilaterally established and enforced their own grounds for claiming reparations. Thus, the UK simply inserted a clause on reparations in the Treaty of Nanking. The British implacably asserted that the Chinese were required to pay reparations for the costs of the war they had provoked the British into fighting. As Xue Hanqin points out, the reparations in question were more than the cost of the Alaska purchase.[421]

## D *Haiti and 'Colonial' Reparations*

The moments that shaped the law are important because they are moments in which particular interests, identities and visions of the world compete with each other, and one version prevails. There is perhaps something to be learned by studying the emergence of principles that are then posited as universal from the specific contests that produced them, the interests that prevailed and endured in the authoritative principles that follow. If, as I have suggested by drawing on TWAIL, studying the law that is generated by particular cases provides crucial insights into the character, nature and development of that law, then it is also instructive to study another famous episode in the history of reparations. The slaves of Haiti, having defeated Napoleon's army and liberated themselves, then had to pay reparations to France for engaging in the effrontery of winning their freedom. The fledgling state of Haiti was compelled to pay

[420] Achiume, *supra* note 400, at 4-23–5-23.

[421] X. Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (2012).

compensation for the losses suffered by French slave owners because of the successful Haitian revolution.[422] Slavery was overcome, but it was succeeded by debt, a debt that lasted until the 1940s.[423]

As Liliana Obregon points out in her powerful article, Haiti had to borrow from French banks to pay the French government, thus giving rise to what became known as Haiti's 'double debt'.[424] The Haitian experience is in many respects archetypal of Third World sovereignty: independence is accompanied by a crippling debt, the status of colony being replaced by the status of dependent debtor, client state. Obregon observes that Haiti ultimately paid 166 million French francs to settle the original debt of 60 million French francs.[425] As she points out, 'Haitians never asked or received compensation for the millions of people who were enslaved, for those who died as a consequence of enslavement or for their 300 years of free labour'.[426] The USA, fearful that a successful slave revolt could inspire further slave revolts within its own borders, was equally determined to suppress Haiti. Crippled in all these different ways, Haiti was then presented as an example of a failed state – a people incapable of ruling themselves – which is an idea that persists to the present.[427]

In many ways, the Haitian experience might be seen as emblematic. The Third World must pay reparations for the great offence of winning its freedom, and this payment has been the norm, required by existing legal systems.[428] Many developing countries were born into debt, the acquisition of sovereignty being accompanied by the obligations to pay the debts that had been incurred by their colonial masters. When referring to the financial burden facing developing countries on independence, Bedjaoui noted that '[p]art of this burden results from the unjustified assumption of the debts of the colonizing States, imposed by them on the newly formed States when they acceded to independence'.[429] Writing in 1979 and pointing already to the enormous difficulties facing developing countries in servicing this debt, Bedjaoui further noted that '[t]he more and more unbearable indebtedness of these countries has become a

[422] 'When France Extorted Haiti: The Greatest Heist in History', *The Conversation* (9 July 2021), available at https://theconversation.com/when-france-extorted-haiti-the-greatest-heist-in-history-137949.

[423] For powerful studies of this episode, see Obregon, 'Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt', 31 *LJIL* (2018) 597; see also Nesiah, 'A Double Take on Debt: Reparations Claims and Regimes of Visibility in a Politics of Refusal', 59 *OHLJ* (forthcoming).

[424] Obregon, *supra* note 423, at 612.

[425] *Ibid.*, at 613.

[426] *Ibid.*, at 614.

[427] See Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism', 4 *LRIL* (2016) 81. Similarly, British slave owners were compensated for the losses they suffered upon emancipation. For a superb study of the long-term consequences, see Manjapra, 'Necrospeculation: Postemancipation Finance and Black Redress', 37 *Social Text* (2019) 29.

[428] See P. Penet and J. Flores Zendejas (eds), *Sovereign Debt Diplomacies: Rethinking Sovereign Debt from Colonial Empires to Hegemony* (2021) (for a study of the continuities between colonial times and the present). On the related and important topic of odious debt, see O. Lienau, *Rethinking Sovereign Debt, Politics, Reputation and Legitimacy in Modern Finance* (2014).

[429] See Bedjaoui, *supra* note 27, at 41.

structural phenomenon'.[430] The Third World debt situation for many countries has been further exacerbated over time.

The corruption and incompetence of many developing country leaders in this mess must not be overlooked, although it must be noted that many of these elites are part of a predatory transnational network that exacerbates national indebtedness through their corruption and so in effect invite further neo-liberal takeovers. But the system of international law and global finance also contributes to ensuring that the South continues to pay reparations to the North for committing the wrong of being colonized. Even the basic figures relating to debt suggest the massive transfer of resources that has taken place. For instance, to provide but a few figures: the original debt of developing countries in 1980 was US $618 billion; the total external debt of developing countries in 2007 was US $3.3 trillion; the total amount paid in debt servicing by developing countries is US $7.7 trillion.[431] It is commonplace to attack the campaign for reparations by arguing that the payment of reparations will disrupt the entire social order. I would argue, however, that these alternative, imperial reparations are already in place and, indeed, are disrupting the social order for the peoples of Asia, Africa and elsewhere who are burdened with endless and unpayable debt and suffer ongoing misery as a result. This version of debt seems normalized compared with the focus on Chinese 'debt diplomacy'. Reparations indeed have an extraordinary social and human cost, but these are experienced most intensely in the poor world.

Financial compensation, of course, is not the only aim of the reparations project. But what the reparations project may lead to at the very least is a systematic exploration of colonialism and the effects of colonialism and, even more importantly, an understanding of how these effects are ongoing, how the technologies of colonialism continue in a neo-liberal world to create inequality and hardship. The call for reparations and the inquiry it generates is as much symbolic as material. International law relates to history, philosophy and all the other disciplines in constructing and reinforcing particular ideas about the world, its actors and its processes; the reparations project can point to alternative experiences and histories, reveal injustices neglected or obscured in these current histories and, in this way, create a foundation for alternative visions.

Here I have been only able to sketch out how the foreign investment and debt regimes are part of a much more complex system of what I term 'Western reparations'. Third World campaigns for reparations and debt cancellation are surely crucial to alleviate the suffering of people in the Third World. And yet, without a reform of the system of Western reparations, such campaigns, even if successful, may be only limited in their effects, as the underlying structures and regimes by which wealth is transferred from the Third World to the First World may remain intact.

[430] *Ibid.*

[431] See M.B. Steger, *Globalization: A Very Short Introduction* (2020), at 42. The statistics are based on various sources including the World Bank. For the classic work on this theme, see S. George, *A Fate Worse Than Debt* (1990); see also J. Hickel, D. Sullivan and H. Zoomkawala, 'Rich Countries Drained $152tn from the Global South since 1960', *Aljazeera* (6 May 2021), available at www.aljazeera.com/opinions/2021/5/6/rich-countries-drained-152tn-from-the-global-south-since-1960; see also J. Hickel, *The Divide: Global Inequality from Conquest to Free Markets* (2007).

## 7 Global Governance and the Relevance of TWAIL to the First World

Rounding out the general overviews in sections 3 and 4, and my own personal reflections in sections 5 and 6, I turn now in this final section to TWAIL's significance for current debates over the character of international governance and order. In doing so, I seek also to make explicit a theme that runs latently through the previous sections – namely, that TWAIL is not just for the Third World but also of universal significance, that many of the legal technologies developed to dispossess the Third World are now being redeployed in the First World and that TWAIL scholarship can contribute to ongoing efforts to create global solidarities between the poor in both the North and South, exposing the inadequacies in the international order that create suffering around the world. TWAIL may in this way contribute to the attainment of global justice.

In a speech delivered in 2020, the distinguished speaker offers a powerful overview of a world afflicted by coronavirus and all it revealed about the character of the global order. He stated: 'Inequality defines our times' and, further, that '[d]iscrimination, abuse, and lack of justice define inequality for many, particularly indigenous people, migrants, refugees, and minorities of all kinds.' He pointed out that colonialism – slavery, dispossession – created inequality and that this continues: 'The legacy of colonialism still reverberates. We see this in economic and social injustice, the rise of hate crimes, and xenophobia; the persistence of institutionalized racism and white supremacy.' He suggests how the reverberations of colonialism continue in the trade system: 'Economies that were colonized are at greater risk of getting locked into the production of raw materials and low-tech goods – a new form of colonialism.' He pointed out that global governance continues to be shaped by the North, exercised through the UN Security Council and the Bretton Woods institutions. This view of the world was presented not by some radical but, rather, by the UN Secretary-General António Guterres in his Nelson Mandela speech.[432] It is telling that Guterres' account of a world besieged by coronavirus leads him to examine how inequalities are both revealed by the virus and all that follows and, further, how these inequalities, rather than being remedied, are exacerbated. It is surely striking that Guterres raises issues that are entirely familiar to TWAIL scholars and that have been the subject of their ongoing scholarship. But perhaps this speech offers one clue as to why TWAIL has not only survived (despite the scepticism of some who were present in 1997) but continues to thrive. Dissatisfied with mainstream accounts, TWAIL, building on the foundational work of earlier generations of scholars, has outlined a vision of the world that corresponds to the intuitions felt by many, particularly perhaps, but not only, people living in the Third World. It has developed the concepts, the intellectual vocabularies

[432] António Guterres, UN General Secretary, 'Inequality Defines Our Time': UN Chief António Guterres' Hard-hitting 2020 Nelson Mandela Annual Lecture, 18 July 2020, available at www.un.org/sg/en/content/sg/statement/2020-07-18/secretary-generals-nelson-mandela-lecture-%E2%80%9Ctackling-the-inequality-pandemic-new-social-contract-for-new-era%E2%80%9D-delivered.

and the systems of thinking that have enabled international law scholars to pursue these intuitions.

The world, then, is facing the ongoing crisis of the pandemic. And it might be appropriate, in concluding this retrospective, to consider TWAIL approaches to the COVID-19 crisis and what this might suggest about TWAIL and its trajectory. TWAIL scholars have formulated a rich and distinctive set of responses to the question of how international law should respond to this crisis. One approach to the pandemic is to commence again the task of institution building, treaty formulation, a new and better version of the International Health Regulations and a reformed World Health Organization (WHO). This project would call for the clarification of human rights law, trade law and all the other many areas of international law that have been implicated by the pandemic. These are surely valuable projects. However, as Francisco José Quintana and Justina Uriburu argue, what might be needed is a much more searching and expansive idea of the crisis, one that encompasses global governance itself.[433] TWAIL scholars, then, have taken a different approach, one based on the idea that the pandemic revealed the international order to be startlingly and deeply unequal and racialized.[434] The pandemic is furthering inequality and hardship – both between and within states – at least in part because current systems of global governance, which are themselves dominated by the global North, will play a large role in managing the crisis and, hence, the outcomes. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), waiver provisions notwithstanding, has inhibited the availability of desperately needed vaccines.[435] The World Bank and the IMF, both created and controlled by the global North, will seek to assist with the financial crises that all developing states are experiencing, but, as a far-reaching UNCTAD report points out, these relief programmes may only exacerbate the massive debt burdens experienced by these developing states.[436]

[433] See Quintana and Uriburu, 'Modest International Law: COVID-19, International Legal Responses and Depoliticization', 114(4) *AJIL* (2020) 687.

[434] For TWAIL views on the pandemic, see 'TWAIL-related Commentary on the Coronavirus Pandemic', *TWAILR*, 13 May 2020, available at https://twailr.com/twail-related-commentary-on-the-coronavirus-pandemic. This is a very rich and varied set of views dealing with a wide range of issues. But perhaps a linking thread is to approach the pandemic through a set of themes familiar to TWAIL, relating to inequality, race and the structures of global governance. See, e.g., Sen, 'Critical Thinking in Times of Crisis: International Law, Critical Education and COVID-19', *Socio Legal Review* (12 April 2020), available at www.sociolegalreview.com/post/critical-thinking-in-times-of-crisis-international-law-critical-education-and-covid-19; Vanni, 'On Intellectual Property Rights, Access to Medicine and Vaccine Imperialism', 32 *TWAILR: Reflections* (2021), available at https://twailr.com/on-intellectual-property-rights-access-to-medicines-and-vaccine-imperialism/. On the racial dimensions of global public health initiatives and inequalities, see Sirleaf, 'Racial Valuation of Diseases', 67 *UCLALR* (2021) 1820; Sirleaf, 'Disposable Lives: COVID-19 Vaccines, and the Uprising', 121 *Columbia Law Review Forum* (2021) 71.

[435] Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.

[436] See UN Conference on Trade and Development, From the Great Lockdown to the Great Meltdown: Developing Country Debt in the Time of COVID 19 (2020).

Charlesworth famously argued that international law might be viewed as a discipline generated by crises.[437] TWAIL scholarship has written illuminatingly on the various crises that have afflicted the international system: the war on terror, the global financial crisis, the pandemic, environmental harm. But perhaps its most significant contribution to international law is its analysis of the structural crises that have been integrated into the everyday operations of international law to the extent that they are regarded as the normal and natural, even if they produce misery for many and lead to the destruction of the environment and, with it, life as we know it on Earth.[438] While the reform of the WHO, for instance, may be desirable and helpful, the larger point that Guterres makes is that the pandemic reveals a crisis – a long-term crisis – in global governance. It is this structural crisis on which TWAIL scholars have focused. They argue that inequalities will be exacerbated precisely because powerful institutions and states that are in many ways responsible for those inequalities in the first place will shape the response to the pandemic and other such crises. While human rights regimes, for instance, may not play an effective role in protecting human dignity amidst this catastrophe, the intellectual property regime established through TRIPS, a regime that was basically authored by pharmaceutical companies,[439] will determine the crucial issue of the distribution of vaccines. The pandemic has most profoundly affected those who are already the most vulnerable. For all the reasons I have outlined above, I would argue that TWAIL offers important perspectives and analytic tools for understanding the pandemic and the many challenges it raises.[440] More broadly, TWAIL is now a tradition that has outlined a set of concerns, perspectives and analytic tools, all based on the question of the impact of the crisis on Third World peoples, that may be applied to the crises of the future as well.

These challenges are being taken up by a new generation of scholars whose work has extended and deepened and rethought TWAIL concerns and scholarship. All this has been supported and enabled by new institutional initiatives. The *TWAIL Review* has already published innovative and thoughtful work dealing with a range of topics.[441] The Afronomics project has created a forum that has featured superb work on crucial topics such as investment, trade, human rights and debt, the bulk of which is authored by more junior African scholars.[442] While focused on events in Africa, it is global in its reach and significance. The implications of TWAIL scholarship for the teaching of international law, which has always been a TWAIL concern, is now its

[437] Hilary Charlesworth's influential argument about crises and international law continues to be illuminating. See Charlesworth, 'International Law: A Discipline of Crisis', 65(3) *MLR* (2002) 377.

[438] J. Linarelli, M.E. Salmon and M. Sornarajah, *The Misery of International Law* (2018).

[439] P. Drahos and J. Braithwait, *Global Business Regulation* (2000).

[440] For TWAIL views on the pandemic, see 'TWAIL-related Commentary', *supra* note 434; Sen, *supra* note 434.

[441] The *TWAIL Review*, available at https://twailr.com/.

[442] See 'About', *Afronomics*, available at www.afronomicslaw.org/about.

own project with its extensive and vibrant literature that spans several continents.[443] It is in all these arenas – institutional and intellectual – that TWAIL work is continuing and a new generation of TWAIL scholars is defining and pursuing its own mission.

TWAIL, needless to say, is an ongoing project. It must engage more deeply with crucial areas of international law relating to Indigenous peoples and the broader phenomenon of settler colonialism,[444] to labour law tracing the connections from slavery to the present,[445] to consequential debates about marine genetic resources beyond national jurisdiction and the global commons more broadly.[446] There is far more work to be done on the connections between TWAIL and feminism and TWAIL feminism,[447] and it is somewhat ironic that the law of the sea, one of the major arenas of Third World campaigns to change international law, has been somewhat neglected by succeeding generations of TWAIL scholars.[448] Equally importantly, further research must be done on the basic foundations of international law, including the law of sources.[449] The world is being transformed by artificial intelligence, blockchain, cryptocurrencies, financialization, digitalization, advances in genetics and genomics, and these technologies are transforming every aspect of life and areas of international law ranging

[443] See, e.g., the list of articles at *Afronomics Law*, available at www.afronomicslaw.org/search/node?keys=TRILA; On developments in Latin America, see Alvarado *et al.*, 'Rethinking International Legal Education in Latin America: Reflections towards a Global Dialogue', 1 *TWAILR: Reflections* (2019), available at https://twailr.com/rethinking-international-legal-education-in-latin-america-reflections-toward-a-global-dialogue. On Africa, see Babatunde Fagbayibo's wide-ranging work. Fagbayibo, 'The Future of International Legal Scholarship in Africa: The Trilogy of Agency, Interdisciplinarity and Functionality', *TWAILR*, 3 November 2021, available at https://twailr.com/the-future-of-international-legal-scholarship-in-africa-the-trilogy-of-agency-interdisciplinarity-and-functionality/; see more broadly Attar, 'Must International Law Remain Eurocentric', 11 *Asian JIL* (2021) 176.

[444] See S. James Anaya, *Indigenous Peoples in International Law* (2nd edn, 2004); S. Xavier, B. Jacobs *et al.* (eds), *Decolonizing Law; Indigenous Peoples and the Law* (2021); N.T. Saito, *Settler Colonialism, Race and the Law* (2020).

[445] 'Decolonizing Labour Law: A Conversation with Professor Adelle Blackett', *TWAILR*, 24 January 2021, available at https://twailr.com/decolonizing-labour-law-a-conversation-with-professor-adelle-blackett/; A. Smith, 'Migration, Development and Security within Racialised Global Capitalism: Refusing the Balance Game', in U. Natarajan *et al.* (eds), *Third World Approaches to International Law: On Praxis and the Intellectual* (2018) 177.

[446] See draft text on marine biodiversity in areas beyond national jurisdiction. UN General Assembly, Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, UN Doc. A/RES/69/292, 19 June 2015.

[447] See A. Wing (ed.), *Critical Race Feminism* (2nd edn, 2003); R. Kapur, *Gender, Alterity and Human Rights* (2018); R. Sen, *Teaching International Law in Asia: The Predicated Pedagogue*, 24 September 2020, available at www.afronomicslaw.org/2020/09/24/teaching-international-law-in-asia-the-predicated-pedagogue.

[448] For an important body of critical work on the law of the sea and the concepts that establish that law and that draw on the earlier Third World efforts, see Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', 30 *EJIL* (2019) 573; Ranganathan, 'Decolonization and International Law: Putting the Ocean on the Map', 23 *Journal of the History of International Law* (2020) 161; Ranganathan, 'The Common Heritage of Mankind: Annotations on a Battle', in J. von Bernstorff and P. Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019) 35.

[449] See Chimni, *supra* note 293; Heller, 'Specially Affected States and the Formation of Custom', 112 *AJIL* (2018) 191.

from the use of force to development policy.[450] Will technology transform power relations, or will technology itself be driven by existing power relations in a way that will simply compound inequalities or create new inequalities? Or all of the above? TWAIL scholarship will have to deal with these issues. There are many more issues, then, that TWAIL needs to address, and, no doubt, as the complexities of international relations unfold, new methods and analytic tools must be devised for these purposes.

I have tried in this article to point to the pioneering work being done by younger generations of TWAIL scholars. To put it simplistically, TWAIL I focused on what might be termed classic European imperialism of the 19th century as its object of concern and analysis. TWAIL II, while relying upon and extending this analysis, also subjected the post-colonial state itself to critical scrutiny because it engaged in its own forms of oppression. The younger generations of TWAIL scholars have explored multiple other forms of imperialism – semi-colonialism, settler colonialism, slavery, non-European versions of imperialism. Their work, as I have tried to suggest, deepens our understanding of international crises – whether COVID-19 or the environment – of the singular importance of race and gender, of the different arenas in which imperialism extends its reach, of the relationship between slavery, settler colonialism, imperialism and racial capitalism. And, yet, as these younger scholars show, these are distinctive experiences that generate their own histories and epistemologies. It is by writing new histories, developing the analytic tools to render these experiences and drawing on new theories or other disciplines to do so that TWAIL is being continuously expanded, contested, refined and enriched by these younger generations. I will leave it to those scholars to define for themselves how they would wish to position their work in relation to the TWAIL tradition that I have outlined here, perhaps dispensing with the metaphor of generation completely or perhaps commencing their own traditions and schools and dispensing with the term 'TWAIL' itself.

This new work can take place alongside much more traditional inquiries into questions such as the contributions that non-Western traditions might make to international law and visions of international justice. This tradition, of course, extends back to TWAIL I scholars such as Weeramantry and Yasuaki. Nesrine Badawi's recent work on Islamic jurisprudence and the regulation of armed conflict points to the ongoing importance of this exploration of non-Western traditions.[451] This cumulative and expanding approach to problems of global governance is surely one of the strengths of TWAIL.

TWAIL like many approaches to international law and order may be characterized not only by its political concerns and methodologies but also by its tensions and contradictions, gaps and omissions. For instance, since its beginnings, TWAIL has grappled with the question of whether international law, which is so profoundly

[450] For insightful explorations of the connections between international law and these developments, see Kingsbury, 'Infrastructure and Infrareg: On Rousing the International Law "Wizard of Is"', 2 *Cambridge International Law Journal* (2019) 171; Johns, 'Data Detection, and the Redistribution of the Sensible in International Law', 111 *AJIL* (2017) 57; Johns, 'Centers and Peripheries in a World of Blockchain: An Introduction to the Symposium', 115 *AJIL* (2021) 404.

[451] N. Badawi, *Isalamic Jurisprudence and the Regulation of Armed Conflict* (2019).

shaped by imperialism, can indeed be used to undo its effects.[452] And this debate points to a larger and inescapable issue. The overwhelming question remains of whether TWAIL scholarship is changing international law. Today, as I have suggested in my discussion of the use of force, and environmental law, powerful states and actors that benefit from this unjust international order are implacably opposed to the changes that TWAIL II scholars, like their predecessors who fought for the NIEO, are proposing. Transformation in the international legal order is still driven principally by states. Thus, complicating matters, for the reasons I have outlined here, TWAIL II scholars are sceptical of the state itself. TWAIL, then, has to grapple with the tensions involved in critiquing the Third World state in some circumstances, while also supporting the Third World state in others. It is conducting a dual battle: against the authoritarian and nationalist Third World state, on the one hand, and against an imperial international system, on the other. Negotiating and developing a position against these two monoliths in efforts to create a decolonized and just international system is a complex, exhausting and ongoing task. Further, while plurality might be one of the key attributes of TWAIL, this might be seen as a flaw, signifying an absence of a focused and directed approach to international law and its transformation. Decolonization is one of the principal goals of TWAIL. But even this may be too broadly defined for some, given questions about what decolonization entails and how it is to be achieved. Perhaps, however, the most important tensions and contradictions cannot be so much overcome or resolved as lived out, with all the dissatisfactions and exhilarations accompanying that incomplete condition. As noted in an earlier account of TWAIL, the classic approach to international law – how law is established among equal and sovereign states – creates its own tensions and dilemmas. The question, then, is which contradictions are most productive and which contradictions do we choose to live out? Without contraries, there is no progression.

The TWAIL emphasis on empire can easily appear exaggerated or overdone. No single theory, concept or set of approaches can explain the convulsions of the world. But it is worth noting that empire has been the most enduring and ancient form of rule in human history.[453] Great powers, historically, have always adopted the outlook – the policies of empire – even if these were pursued through the institution of the nation state in one manifestation or another, formal or informal. Empires did not cease to exist with the emergence of the sovereign state. Indeed, as I have argued, we might see developing countries themselves, even if lacking power in the external realm, seeking to assert themselves as empires, imperial over their minorities while professing themselves to be open, tolerant and accommodating. Needless to say, empires in Asia and elsewhere long preceded modern imperialism.[454] TWAIL does not disregard this reality

[452] For a classic study of this problem, see M. Bedjaoui, *International law: Achievements and Prospects* (1991); Bedjaoui, *supra* note 27, at 110. Many searching and important critiques of TWAIL are based on this issue. See Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law', 27(2) *Canadian Journal of Law and Jurisprudence* (2015) 383.

[453] See J. Darwin, *Unfinished Empire: The Global Expansion of Britain* (2013).

[454] See Anghie, 'Asia in the History and Theory of International Law', in S. Chesterman, H. Owada and B. Saul, *The Oxford Handbook of International Law in Asia and the Pacific* (2019) 68.

but focuses on European empire because it is that historic phenomenon that was so important to the creation of international law and the contemporary order. And, yet, these other versions of empire still exist and may be revived, threatening all manner of violence. We live in a world, then, where empire is present in various guises and potentialities, recessed deeply in the past even as it shapes the present, taking new forms and shaping the future too.

The question remains whether it is possible to develop what might be termed a 'Third World cosmopolitanism'. The simple point is that the cosmopolitan goal of global justice cannot be achieved without providing justice to the peoples of the Third World. And the TWAIL argument is that this in turn cannot be achieved without engaging deeply with the views of the Third World as to their own condition and its causes. Simply extending and adapting the cosmopolitan discourses of the West, of individualism and human rights and of expanding the 'duties to assist' will not be enough.[455] The 'Third World' experience, further, has been produced through regimes that, as I have argued, create and further disadvantage people not only in the Third World but also in the West itself. The investment regime that TWAIL scholars have critiqued so extensively is now being used by China as it expands into Europe: the tables are being turned. It is surely ironic that European governments are suddenly concerned about being subject to the biases of a regime they were so instrumental in creating. Thinkers such as Edmund Burke and the liberal critics of empire were concerned that tyranny practised abroad in the course of imperial expansion and rule could easily return to the metropolis itself.[456] Some version of this process has taken place. TWAIL scholars have argued that international law has supported and sustained a system that causes inequality and immiseration in the Third World and so continues imperial practices. It is surely now clear, however, that international law creates divisions and impoverishment not only in the Third World, which has been the focus of TWAIL scholars, but also in the 'First World'.

A 'Third World' has always existed within the 'First World', racial minorities and Indigenous peoples, for instance, have suffered from discrimination and exploitation. It is hardly surprising then that black activists from the time of the creation of the UN, campaigned at the international level for human rights and provided immense support for liberation movements everywhere. But the last few decades have witnessed the broad intensification of inequality and social dislocation within a much broader population in the North itself. The lives of people in the North are becoming increasingly insecure, uncertain and precarious. As Saskia Sassen points out, workers in the North experience a form of expulsion as their life worlds are transformed as employment vanishes or becomes insecure.[457] Philip Alston, former special rapporteur on

[455] For a powerful critique of John Rawls' extraordinarily influential 'Theory of Justice' – and subsequent works – see C. Mills, *Black Rights/White Wrongs: A Critique of Racial Liberalism* (2017).

[456] Fitzmaurice, 'Liberalism and Empire in Nineteenth-Century International Law', 117 *American Historical Review* (2012) 122.

[457] S. Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (2014).

extreme poverty and human rights, has written an extensive report on the plight of the poor in the UK.[458]

Socio-economic hardship has been accompanied, inevitably, by the rise of racism and ultra-nationalism and the many problems they generate. Immiseration, then, is spreading, and international law, now deeply embedded in national systems in various ways, is hardly innocent in creating this system. Third World concerns are no longer confined to the Third World. Each country, of course, has its own unique circumstances and history. And, yet, TWAIL provides important analytic tools to grasp how international law might further injustice not only in the Third World but also globally. The technologies of international law may have initially developed through their application and refinement in the Third World, but, as we have seen, they are also increasingly applied in the First World. It is in this sense that it can be claimed that it is TWAIL that is 'universal'. Here, the title 'Third World Approaches' might mislead as to the range of its importance. TWAIL offers important insights into the workings of neo-liberal capitalism. And this is important because, whatever the ideological and philosophical self-representation of the West, the system of political economy that it has put in place – a system of capitalism that cannot survive without endless growth and that has been so successful that it has been adopted, in however modified a form, by China – will surely result in environmental devastation and global destruction. The crucial question, then, is whether people both in the North and the South understand their common interests and develop a politics and a system of governance that can advance them.

Alternatives, then, must be explored. The Third World experience and history, religions and traditions, offer rich and compelling visions of society and freedom. Needless to say, these must also be critically studied even as they are drawn upon. And these alternative visions cannot replicate the suppressions and domination of the paradigm they seek to replace. The nationalist turn in many developing countries is fundamentalist in its efforts to return to some 'purer past' and generates its own forms of violence. As Said puts it, such alternatives must at all costs avoid the risks of being 'as exclusivist, as limited, as provincial, and discriminatory in its suppressions and repressions as the master discourses of colonialism and elitism'.[459] Nor should the search for alternatives be a repudiation of all things 'Western'. The idea of 'equality' that is central to the Western political tradition, however imperfectly understood and implemented, is surely crucial to the pursuit of justice. The idea of equality is not a prominent feature of traditional Asian political systems, which have often been based on hierarchy such as caste. These traditions, then, while they offer rich and important alternative visions of society and order must be subject to scrutiny and critique. Thinkers such as Gandhi, while engaged in anti-colonial struggle, always saw

[458] See UN General Assembly, Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, UN Doc. A/HRC/41/39/Add.1, 14 September 2018.

[459] See Said, 'Foreword', in R. Guha and G. Chakravorty Spivak (eds), *Selected Subaltern Studies* (1988) i. at viii.

their goal as creating a fairer world order for everyone.[460] The construction of a 'Third World cosmopolitanism', then, is not a contradiction in terms. It is an attempt to envision a world that enhances human dignity for all. That is the task that continues to animate TWAIL scholars and their allies.

## 8 Towards a Conclusion

One way of assessing TWAIL's trajectory is to return to the vision statement of 1997 and the ambitions stated there. The statement pointed to the need to 'democratize international law' and to the importance of contesting 'international law's privileging of European and North American voices by providing institutional and imaginative opportunities for participation from the third world'; it further urged that 'we need to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples'.[461] It seems almost presumptuous for a small and, with a few exceptions, largely unknown group of scholars, many of them graduate students, to make such assertions, proclaim such ambitions. But some 25 years later, it could be argued that TWAIL has made remarkable progress in achieving these aims, in democratizing scholarship and in critiquing mainstream ideas by formulating a different vision of the world and the role of international law in making it. TWAIL work may have initially appeared obscure and exotic, but it is now an important, if not unavoidable, part of international law scholarship. The claims that imperialism is central to the making of international law and that the effects of imperialism continue to shape the present may have appeared radical in 1997, but they are now commonplace, if not trite, observations, only the beginning point of a deeper analysis. Nor have these basic claims been seriously or effectively challenged. If these claims are now so commonplace, of course, the question might arise: how were they overlooked all this time, what does this omission or myopia tell us about mainstream international law and the many prestigious institutions that propagate it?

It is difficult to assess what might be termed the 'secondary' impact of TWAIL. That is, TWAIL has opened a broad range of rich conversations that have unfolded in a number of different arenas. TWAIL concerns and themes are now the subject of wide-ranging scholarship that, for instance, revisits many Third World projects such as the NIEO.[462] More broadly, TWAIL has hopefully made it easier for scholars working on the broad themes relating to the Third World – minorities and historically marginalized communities, race and political economy, imperialism and international law – to be treated with the seriousness they deserve. This scholarship should be seen as part of a larger and ongoing conversation about crucial issues of global justice and governance rather than particular, localized concerns. The Third World is a site of knowledge

[460] See Chimni, 'The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi's Hind Swaraj or Indian Home Rule', 23 *EJIL* (2012) 1159.

[461] The vision statement is reproduced in Gathii, *supra* note 1, at 31–32.

[462] See, e.g., *Humanity*, vol. 6, no. 1.

in every sense. It is especially important, then, for TWAIL to provide the encouragement and support for young scholars in the Third World to make their voices heard in the international arena. However, TWAIL scholars, whatever they have achieved, cannot be, and are far from, complacent. The tasks they have set themselves are indeed ever more challenging.

The question of how TWAIL has assumed this position cannot be easily answered. TWAIL lacked the resources to hold the regular conferences that are so often essential to the consolidation and expansion of any intellectual movement, especially one that has such fragile beginnings and radical ambitions. Moreover, TWAIL has never adopted any form of 'organization' (many people have asked how they might 'join' TWAIL). TWAIL lacks any governance structure, officers and agenda. TWAIL was and remains a decentralized network of scholars. Perhaps Guterres' speech offers one clue as to why TWAIL has not only survived but also continues to exist and thrive. TWAIL, dissatisfied with mainstream accounts, has outlined a vision of the world that resonates not only with Third World scholars and scholars seeking to decolonize knowledge but also with international lawyers more broadly. TWAIL has developed the concepts, the intellectual vocabularies, the systems of thinking that illuminate fundamental and yet previously overlooked dimensions of how international law works. Perhaps, then, TWAIL, precisely because it has lacked resources and an organizational structure has had to establish itself purely through the production of ideas that, for want of a better word, made sense and, in seeking to interpret the world anew, has contributed in some way to changing it.