

2020

## Cross-Fertilization of Westphalian Approaches to International Law: Third World Studies and a New Era of International Law Scholarship

Fozia Nazir Lone

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

---

### Recommended Citation

Fozia N. Lone, *Cross-Fertilization of Westphalian Approaches to International Law: Third World Studies and a New Era of International Law Scholarship*, 34 Emory Int'l L. Rev. 955 (2020).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol34/iss4/2>

This Article is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact [law-scholarly-commons@emory.edu](mailto:law-scholarly-commons@emory.edu).

# **CROSS-FERTILIZATION OF WESTPHALIAN APPROACHES TO INTERNATIONAL LAW: THIRD WORLD STUDIES AND A NEW ERA OF INTERNATIONAL LAW SCHOLARSHIP**

*Fozia Nazir Lone\**

## ABSTRACT

*The positivist normative content of Western international law was developed among powerful Western states and later extended to non-Western states. Within this contextual framework, it is argued that Third World Approaches to International Law (TWAIL) scholars, in their criticism of international law as a colonial product, extended it beyond the classical approaches adopted by the nineteenth-century positivist scholars. Critical Legal Studies (CLS) scholars provided a conceptual foundation for TWAIL to demystify the enigma of colonialism, showing it to be foundational to international law rather than its byproduct.*

*This Article explores the possibility of creating new legal paradigms in the changing global context and looks at what it means for Chinese and Indian leaders and scholars to have a TWAIL attitude. In this process, emphasis is placed on the importance of scholars adopting a multidisciplinary approach to fully understand international law in general, as well as to appreciate new Asian paradigms.*

---

\* Associate Professor, School of Law, City University of Hong Kong. The work described in this paper was partially supported by a grant from the Research Grants Council of the Hong Kong Special Administrative Region, China [Project No. (RGC Ref. No 11609417) CityU 9042601].

INTRODUCTION: PERIPHERAL POSITIONING OF TWAIL SCHOLARSHIP WITHIN THE FRAMEWORK OF THE POSITIVIST TRADITION OF INTERNATIONAL LAW .....	957
I. UNEARTHING TWAIL SCHOLARSHIP .....	964
A. <i>A Brief History</i> .....	964
B. <i>TWAIL Perceptions</i> .....	967
II. CROSS-FERTILIZATION OF WESTPHALIAN AND EASTPHALIAN APPROACHES TO INTERNATIONAL LAW – TWAIL V. CLS .....	972
III. THE RISING ASIAN THIRD WORLD STATES AND THE EMERGENCE OF NEW TWAIL-INSPIRED PARADIGMS IN THE DISCIPLINE OF INTERNATIONAL LAW .....	979
A. <i>A Brief Overview of Chinese and Indian Views on International             Law</i> .....	979
B. <i>A Journey to Find a Desert Oasis: Euphoria, Fears, and             Limitations</i> .....	983
TENTATIVE CONCLUSIONS – A CALL FOR ADOPTING A MULTIDISCIPLINARY APPROACH .....	991

INTRODUCTION: PERIPHERAL POSITIONING OF TWAIL SCHOLARSHIP WITHIN  
THE FRAMEWORK OF THE POSITIVIST TRADITION OF INTERNATIONAL LAW

International law, as established by international legal theory, has evolved over the centuries through the efforts of various scholars, who adopted varied methodologies to analyze its substance and efficacy. The various international law approaches, such as the classical approach (naturalism, positivism, and the Grotian school), the international relations approach (realism, liberalism, etc.), and social sciences methods (New Haven School, Critical Legal Studies, Feminist Legal Theory, Third World Studies, etc.), have given rise to a fair amount of legal scholarship.<sup>1</sup> Hence, the task of understanding international law remains tied to divergent schools of thought, various approaches, and different methodologies.

Many of the unresolved controversies of international law are rooted in the classical positivist approach to normative content of doctrines such as sovereignty, territory, independence, jurisdiction, self-determination, etc. In this discourse, colonialism was seen to be a consequence of the interaction between a European sovereign and a non-European entity, where the former was exercising its sovereignty, which the latter was deemed not to possess.<sup>2</sup> Under this positivist jurisprudence, sovereignty gave legal competence and absolute rights to a European state, making it independent.

For Third World Approaches to International Law (TWAIL) scholars (also referred to as TWAIL-ers), the historical and theoretical indifference of this positivist approach towards non-European entities needed examination. It questions these normative premises of the discipline and highlights the need to look at geopolitical explanations for the current situations faced by post-colonial states, with locally beneficial solutions, rather than leaving the burden of applying a standardized international law with the states themselves.<sup>3</sup> The state sovereignty doctrine remains central to the existence of international law and “international law governs relations between independent states,” and

---

<sup>1</sup> See e.g., BHUPINDER S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 232–34 (1993); Antony Anghie & Bhupinder S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77, 100 (2003). See generally HAROLD DWIGHT LASSWELL & MYRES SMITH MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

<sup>2</sup> See KOSKENNIEMI, *supra* note 1, at 101.

<sup>3</sup> Kwadwo Appiagyei-Atua, *Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review*, 8 AFR. J. OF LEGAL STUD. 209, 232–34 (2015).

“restrictions upon such independence cannot therefore be presumed.”<sup>4</sup> Sovereignty provides legitimacy to states and facilitates the creation of international rules based upon their own sovereign will.<sup>5</sup> Before the Second World War, international law was a European creation and was meant only to regulate relations between European states. Within this framework, scholarly dialectical discussions took place to elaborate the content of statehood and sovereignty beyond European states.<sup>6</sup> Indeed, the classical positivists did not consider non-European civilizations and societies in the Americas, Africa, and Asia worthy of membership in the Westphalian system; which then justified conquering and colonizing the Third World.

The idea of sovereignty appeared in the works of Grotius, Vitoria, and Gentili,<sup>7</sup> whose legal interpretations gave rise to a secular narrative on natural law.<sup>8</sup> Grotius argued that natural law retained validity even without religion, and that states are bound by moral rules. They believed that these narratives are instrumental in understanding the general foundations of international law.<sup>9</sup> On the other hand positivist scholars, such as Oppenheim, argued that the source of sovereignty was the state, and promoted ideas such as international society and the balance of power to generate the required conditions for creating international law that supported the European states.<sup>10</sup> The positivist narrative

<sup>4</sup> S.S. *Lotus* (Fr. v. Turk.), Judgment 1927 P.C.I.J. (ser. A) No. 10, at ¶ 44 (Sept. 7).

<sup>5</sup> *Id.* at ¶¶ 46–47 (stating that Europe and America created restrictions on international law).

<sup>6</sup> See e.g., EDWIN DE WITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 129 (1920); FRANCIS HARRY HINSLEY, *POWER AND THE PURSUIT OF PEACE: THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES* (1967). See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Dent ed. 1984) (1689); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., Penguin 1968) (1762).

<sup>7</sup> See generally HUGO GROTIUS, *DE IMPERIO SUMMARUM POTESTATUM CIRCA SACRA* (ON THE POWER OF SOVEREIGNS CONCERNING RELIGIOUS AFFAIRS) (1647); LASSA FRANCIS LAWRENCE OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 58, 109 (1905); HAMILTON VREELAND, HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW 109 (1917); *Johnson v. M’Intosh*, 21 U.S. 543 (1823) (considering Vattel and Vitoria on Law of Nations); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 277 (Richard Henry Dana Jr. & George Grafton Wilson eds., The Clarendon Press 1936) (1836) (mentioning Grotius and Gentili); Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 EUR. J. INT’L L., 901, 910 (2016) (mentioning Vitoria’s opinion on international law in light of state sovereignty).

<sup>8</sup> GROTIUS, *supra* note 7; Marco Barducci, *The Anglo-Dutch Context for the Writing and Reception of Hugo Grotius’s De Imperio Summarum Potestatum Circa Sacra, 1617–1659*, 34 GROTIANA 138, 155 (2013); Charles W. A. Prior, *The Highest Powers: Grotius and the Internationalization of Church and State*, 34 GROTIANA 91, 92 (2013); OPPENHEIM, *supra* note 7; Stanley Hoffmann, *International Systems and International Law*, 14 WORLD POL. 205, 215 (1961); VREELAND, *supra* note 7; WHEATON, *supra* note 7.

<sup>9</sup> VREELAND, *supra* note 7; J. D. van der Vyver, *Statehood in International Law*, 5 EMORY INT’L REV. 9, 65 (1991); W. VAN BUNGE, *THE DICTIONARY OF SEVENTEENTH AND EIGHTEENTH-CENTURY DUTCH PHILOSOPHERS* (2003) (Hugo Grotius); GROTIUS, *supra* note 7.

<sup>10</sup> Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power*

created European state-centered international law and Asian and African states remained outside of it; as such, within this narrative, there was no formal legal framework to regulate their relations.<sup>11</sup> The legal imagination of positivist theorists therefore legitimized the conquest of the non-Western world as morally acceptable.<sup>12</sup> Over the last few decades, international scholarship has moved on from understanding the question of states' obedience within international law towards policy-oriented approaches that criticize contemporary rules and outline the conditions for derivations rather than to manage international problems.<sup>13</sup> Academics have remained preoccupied, in every generation of international scholarship, in determining the creation of order among sovereign states.<sup>14</sup> Kennedy notes, "Most historians who treat primitive texts do so in a way which both presupposes and proves the continuity of the discipline of international law—reaffirming in the process that the project for international law scholars is and always was to construct a social order among autonomous sovereigns."<sup>15</sup>

TWAIL began to develop within this sovereignty-oriented framework, and after the UN accelerated the decolonization process. The TWAIL scholars took a critical attitude towards prevailing international orthodoxies while still remaining a part of the development of international law. Buchanan clearly emphasizes the challenge TWAIL places on the traditionally-constructed idea of sovereignty and its approach to social movements and people coming together to find greater agency.<sup>16</sup> TWAIL scholars have also focused on the history and theory of international law as well as written on human rights law, use of force, trade law, investment law, etc. While discussing these themes they have argued that the persistent feature of international law is the continuance of imperial policies by powerful states that seeks to transform the internal character of various Third World societies.<sup>17</sup>

---

and *Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 402–03 (2002).

<sup>11</sup> OPPENHEIM, *supra* note 7, at 89.

<sup>12</sup> B.V.A. RÖLING, INTERNATIONAL LAW IN AN EXPANDED WORLD 29 (1960).

<sup>13</sup> See generally ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); PIETER HENDRIK KOOLJMAN, THE DOCTRINE OF THE LEGAL EQUALITY OF STATES: AN INQUIRY INTO THE FOUNDATION OF INTERNATIONAL LAW (1964); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZERS OF NATIONS (2002); A NORMATIVE APPROACH TO WAR: PEACE, WAR AND JUSTICE IN HUGO GROTIUS (A.W. Sythoff & Yasuaki Onuma, eds. 1993); STEPHEN EDELSTON TOULMIN, COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY (1990).

<sup>14</sup> LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 34 (2d ed. 1987).

<sup>15</sup> David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1, 11 (1986).

<sup>16</sup> Ruth Buchanan, *Writing Resistance into International Law*, 10 INT'L COMMUNITY L. REV. 445, 447 (2008).

<sup>17</sup> Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD Q. 739, 751 (2006).

In revisiting international law concepts, TWAIL scholarship has made the colonial encounter between Europeans and non-European states its central theme, which goes beyond examining the involvement of the Third World in the creation of international law. As such, TWAIL offers a democratic approach that lets scholars explore deeper questions about how justice can be achieved in the contemporary international legal order.<sup>18</sup> By taking this approach, TWAIL scholarship reformulates the acceptance of colonial encounters within international law as a fundamental feature, and challenges the mainstream positivist indulgence that treats the colonial legacy within the discipline of international law as a closed chapter that theoretically ended with decolonization.<sup>19</sup>

The TWAIL approach to international law has been criticized and described as insufficient because it doesn't challenge international law radically enough since it "ultimately operates according to the very disciplinary logic it seeks to overcome."<sup>20</sup> Some deeper critiques include those of Bonilla, who challenges constitutionalism on the basis that legal systems in the Global South are considered as reproducing that of the Global North and that the Global South has been dismissed and considered backwards.<sup>21</sup> This approach of challenging whether the norms that the Global North apply to their countries should apply to persons in the Global South allows for a degree of exploration, but it is worth bearing in mind Parmar's caution: that exploring such ideas should coincide with emphasizing the need to understand and challenge the sources of human suffering.<sup>22</sup> It may therefore be important to distinguish critiques of power structures with critiques that are used to justify deprivation of rights.<sup>23</sup> This Article explores this aspect in Part III.

This Article also explores how CLS scholars supplied a clear narrative to TWAIL academia to decipher the paradox of colonization, by illustrating it to be bases of international law, rather than its consequence. For instance, Carty critiqued work of Craven, who focuses on disengaging the discipline of international law from colonialism by concentrating on the codification process

---

<sup>18</sup> Mohsen al Attar & Vernon Tava, *TWAIL Pedagogy – Legal Education for Emancipation*, Vol. XV, THE PALESTINE Y.B. OF INT'L L. 7, 10 (2009).

<sup>19</sup> ANGHIE, *supra* note 13, at 740; see James Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. R. 1013 (2007).

<sup>20</sup> John D. Haskell, *TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law*, 27(2) CANADIAN J.L. & JURIS. 383, 383 (2014).

<sup>21</sup> Sujith Xavier, *Learning from Below: Theorising Global Governance Through Ethnographies and Critical Reflections from the Global South*, 33 WINDSOR Y.B. ACCESS JUST. 229, 236 (2016).

<sup>22</sup> Pooja Parmar, *TWAIL: An Epistemological Inquiry*, 10 INT'L COMM. L. REV. 363, 370 (2008).

<sup>23</sup> *Id.*

during state succession in relation to the disintegration of the former Soviet Union, Yugoslavia, and Czechoslovakia.<sup>24</sup> Carty aptly argues that Craven bypasses concrete post-colonial or anti-colonial doctrine as well as rebuffs engaging with the contention of Koskenniemi, Anghie, and Berman, that international law is still permeated with the colonial heritage.<sup>25</sup> In fact, CLS scholars such as Carty, Kennedy, and Koskenniemi have critiqued the creation of a legal order among sovereign states as such, signify the importance of the nineteenth century approach to international law.<sup>26</sup> Therefore, both CLS and TWAIL scholars have bridged the classical approaches to international law with social science methods and contributed to the development of legal scholarship by linking the dichotomy between the understandings of European and non-European states and, as such, extended the meaning of sovereign states. However, this expansion brought with it new rules and also laid the foundations for many contemporary nation-state struggles in which many third-world states remain embroiled such as Kashmir, Western Sahara, and Palestine.

For instance, after the World Wars, new comparative rules about sovereignty and title to territory reshaped significantly. For example, the rule of the “effective control of a state” is now included to determine title to a territory. Likewise, where more than one state claims sovereignty over a territory, it is decided by the superior claim, as in *Eastern Greenland* case.<sup>27</sup> The *Palmas* case accepted that a “peaceful and continuous display of a State authority” is an important feature to claim the title to a territory and, therefore, sovereignty.<sup>28</sup> However, these extended interpretations and principles remained largely applicable where a dispute related to the title of a colonial territory that existed between European sovereignties. As such, it did not capture the complicated nuances of the state practices of non-European states.

After the Second World War, state sovereignty was further developed and included the idea that any disruption to the title of the sovereign state by

---

<sup>24</sup> MATTHEW CRAVEN, *THE DECOLONIZATION OF INTERNATIONAL LAW – STATE SUCCESSION AND THE LAW OF TREATIES* 15 (2007).

<sup>25</sup> Anthony Carty, *International Law and the Spirit of Anti-Colonialism: Europe Fights Back*, 74 *MOD. L. REV.* 135, 149 (2011) (book review). In developing his argument Carty quotes the following works: KOSKENNIEMI, *supra* note 12; ANGHIE, *supra* note 13; N. BERMAN, *PASSIONS ET AMBIVALENCES, LE COLONIALISME, LE NATIONALISME ET LE DROIT INTERNATIONAL* (2008).

<sup>26</sup> ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS ON LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS* (1986); KOSKENNIEMI, *supra* note 13; David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 *QUINNIPIAC L. REV.* 99, 122 (1997) (mentioning Koskenniemi and Carty); Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law* 8 *EUR. J. INT'L L.* 215 (1997).

<sup>27</sup> *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (1933), at 98.

<sup>28</sup> *Island of Palmas* (Neth. v. U.S.), 2 *R.I.A.A.* 829, 838–39, 867 (Perm. Ct. Arb. 1928).

annexation or war was contrary to the goals of the UN Charter 1945 (UNC). The concepts of state sovereignty and the inviolability of territorial integrity became essential principles of the UNC peacemaking charter.<sup>29</sup> Under Article 43 of The Hague Regulations, occupation did not confer sovereignty on the occupant, and this is now recognized as expressing customary international law,<sup>30</sup> which is also reflected in the Fourth Geneva Convention 1949.<sup>31</sup> However, with the exception of the Israeli occupation after the 1967 war, the law of occupation has rarely been consulted in the post-WWII period.<sup>32</sup> The concept of sovereignty was reformulated within international law when it was accepted that sovereignty rested with the people under the principle of self-determination.<sup>33</sup> Historically, the principle of popular sovereignty was used to shift sovereignty from the ruler to the “people,” thereby passing individual allegiance from the monarch to the state.<sup>34</sup> The American, French and Bolshevik revolutions significantly shaped the modern understanding of the self-determination of peoples by focusing on popular sovereignty.<sup>35</sup> After the First World War and the Paris Peace Conference of 1919,<sup>36</sup> the principle of the right to self-determination gained a more authoritative status beyond its previous political standing.<sup>37</sup> Revolutionary momentum and developments in areas of political thought entrenched the idea that modern sovereignty resides in the people and not in the government.<sup>38</sup> For the principle of self-determination, it is arguable that political subjectivity created normative law.

---

<sup>29</sup> U.N. Charter art. 1, ¶ 1.

<sup>30</sup> See INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 64–65 (1947).

<sup>31</sup> Geneva Convention for the Protection of Civilian Persons in Time of War §3, art. 47, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>32</sup> Gregory H. Fox, *Eyel Benvenisti, The International Law of Occupation*, 24 EUR. J. INT’L L. 449, 456 (2013) (book review).

<sup>33</sup> See Mohsen al Attar & Rebekah Thompson, *How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination*, 3 TRADE L. & DEV. 65, 82 (2011), (discussing TWAIL and self-determination).

<sup>34</sup> Aleksandar Pavokovic, *The Break-up of Yugoslavia and International Law by Peter Radan*, 3 MELB. J. INT’L L. 200, 203 (2002) (book review).

<sup>35</sup> T.M. Frank, *Post-Modern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3, 6–7 (Catherine Brolmann et al. eds., 1993); B. WELLS, UNITED NATIONS DECISIONS ON SELF-DETERMINATION 1, 14 (1963).

<sup>36</sup> *The Paris Peace Conference and the Treaty of Versailles*, U.S. DEP’T ST., <https://2001-2009.state.gov/r/pa/ho/time/wwi/89875.htm> (last visited May 23, 2020).

<sup>37</sup> See generally Fozia Nazir Lone, *The Creation Story of Kashmiri People: The Right to Self-Determination*, 21 DENNING L.J. 1, 13 (2009).

<sup>38</sup> EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 29 (Princeton University Press, eds., 1993).

The colonial roots of the sovereignty doctrine are not cured by its later extension to former colonial subjects. In the recent past, in the post-colonial era, there have been numerous violations of the territorial integrity of mainly non-European states, such as the invasions of Iraq and Afghanistan, the persistent involvement of the West in the ongoing Middle East unrest, and constant unlawful drone attacks in Pakistan, Afghanistan, and so forth. These violations of territorial integrity in Eastern nations cannot be justified by the UNC principles of self-defense alone. The post-9/11 “war on terror,” including the responsibility to protect doctrine, clearly proves the interplay of politics and law, whereby powerful Western nations disguised their preferred values as universal standards.<sup>39</sup> In fact, accepting such subjective phraseology of “war on terror” and “responsibility to protect” is rather problematic as they end up legitimizing human rights violations, anarchy, and chaos in the modern world.

In the post-9/11 era, international law is embroiled in breaches of territorial integrity and violations of human rights. Positivist scholars are still engaged in creating a new type of legal scholarship that legitimizes such violations, while struggling to keep their discourses completely legal. In their presentational positivism, these scholars seem to ignore the concerns of opposing camps and do not outline conditions for their own derivations. This was clarified to large extent by the damning Chilcot report,<sup>40</sup> which resulted in deep distrust in the British political elite.<sup>41</sup> International positivist scholars played a role in the current decay of international law by justifying violations of UNC principles. This undermined public confidence in international law and has caused deep rifts within the international governance community. Non-traditional international law scholars must make sense of this political artifice by considering subjective variables of politics/history in their critical narratives.

Expanding on the reflection and key questions raised in the first section above, this Article has three further parts. Part I reexamines the history and perceptions of TWAIL-ers on key modern questions that are raised by the colonial origins of international law’s normative rules. Part II delves into the discourse of the TWAIL movement and its links with other schools of thought—

---

<sup>39</sup> See U.N. Charter, art. 51; War Powers Resolution, 50 U.S.C. § 1541 (1973); Annalise Lekas, *ISIS: The Largest Threat to World Peace Trending Now*, 30 EMORY INT’L L. REV. 313, 316 (2015).

<sup>40</sup> *The Report of the Iraq inquiry*, IRAQ INQUIRY (July 6, 2016), <http://www.iraqinquiry.org.uk/the-report/>.

<sup>41</sup> See, e.g., Griff Witte, *9 out of 10 Experts Agree: Britain Doesn’t Trust the Experts on Brexit*, WASH. POST, (June 21, 2016), [https://www.washingtonpost.com/world/europe/9-out-of-10-experts-agree-britain-doesnt-trust-the-experts-on-brexite/2016/06/21/2ccc134a-34a6-11e6-ab9d-1da2b0f24f93\\_story.html](https://www.washingtonpost.com/world/europe/9-out-of-10-experts-agree-britain-doesnt-trust-the-experts-on-brexite/2016/06/21/2ccc134a-34a6-11e6-ab9d-1da2b0f24f93_story.html); Angeliue Chrisafis, et al., *Sacré Blair! Europe Reacts to Chilcot Report into Iraq War*, GUARDIAN (July 7, 2016), <https://www.theguardian.com/uk-news/2016/jul/07/sacre-blair-europe-reacts-to-chilcot-report-into-iraq-war>.

especially CLS—that question the fundamental premises underlying the construction of Western international law (later expanded to non-Western states). It also supplies an exploration of the disparities and contentions within and between related schools of thought questioning the fundamental premises of international law. Part III takes a critical look at the challenges and legal paradigms raised by China and India as rising Third World powers. In taking a critical approach to both traditional notions and modern re-interpretations of international law, the article demonstrate the constructive input of TWAIL scholarship in its emphasis of the plight of people of the Third World. In its concluding remarks this Article calls for taking a multidisciplinary approach to understand alternate critical perspectives on international law.

### I. UNEARTHING TWAIL SCHOLARSHIP

To begin to understand TWAIL, this Part addresses the following key questions: (1) Who are TWAIL-ers and what do they have to do with the “Third World”?; (2) What is the origin of TWAIL-ers?; (3) What shapes their perspectives on international law and what analytical tools do they use? Answers to these questions are addressed below, with a brief history followed by a deeper exploration of TWAIL perceptions. The concept of the Third World<sup>42</sup> is associated with and was conceived as a rhetorical reaction to the bipolar world among those who adopted a practice of “non-alignment” to the West (First World) or the Communism (Second World). These nations were mostly prior colonies. The term Third World remains synonymous with countries that are poor and non-industrialized but could also include oil-rich countries. In that respect, the Third World includes most of the globe’s states and their peoples, with their divergent histories, cultural practices and large populations.<sup>43</sup> While the Third World is rather divergent in their domestic practices internationally, their colonial past unites them.

#### A. *A Brief History*

TWAIL originated from a 1996 group of Harvard Law School graduate students who studied the European and non-European roles within international law.<sup>44</sup> Several TWAIL conferences have been held since then, the most recent

---

<sup>42</sup> Leslie Wolf-Phillips, *Why ‘Third World’?: Origin, Definition and Usage*, 9 THIRD WORLD Q., 1311, 1313 (1987).

<sup>43</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 120 (Columbia University Press, 2nd ed. 1979).

<sup>44</sup> Anghie, *supra* note 17, at 3; Gathii, *supra* note 19; James T. Gathii, *How American Support for Freedom of Commerce Legitimized King Leopold’s Territorial Ambitions in the Congo*, 37 STUD. TRANSAT’L

at the American University in Cairo in February of 2015.<sup>45</sup> TWAIL scholarship is focused on the European and non-European colonial encounters within international law<sup>46</sup> and covers almost all areas of international law, such as trade, human rights, investment, international criminal law etc., through those lenses. In fact, TWAIL-ers emphasize that colonialism directed global practice within the discipline of international law, which legitimized and encouraged the domination of Third World people by Western powers.<sup>47</sup> Building on the idea of praxis and the views of Paulo Freire in particular, TWAIL scholars emphasize solidarity with oppressed groups and how that should inform legal analysis of entrenched inequalities.<sup>48</sup>

Emblematically, the Bandung Conference of 1955, organized by the newly independent Asian and African States,<sup>49</sup> may be seen as the origin of a TWAIL-type of approach to international law, creating an alliance of Third World states against the bipolar world. At the Bandung Conference, a “non-alignment movement” was launched which marked the normative beginnings of Asian-African cooperation, asserting their own interests and claims both in and upon international society. They advocated outright rejection of colonialism and neo-colonial practices, emphasising anti-colonial self-determination.<sup>50</sup> In the conference’s historic closing speech, the Prime Minister of India, Jawaharlal Nehru, opposed aggression and stated there is no friendship when nations are not equal, when one has to obey another and when one only dominates another.<sup>51</sup>

The Conference agreed and declared that colonialism was atrocious in all of its manifestations, and adopted a “Ten point declaration” to promote peace and cooperation, which broadly included respect for human rights, sovereignty, and territorial integrity; recognition of the equality of all nations; non-intervention; non-aggression; the settlement of disputes by peaceful means; the promotion of

---

LEGAL POL’Y 97 (2005); Usha Natarajan et al., *Introduction: TWAIL - On Praxis and the Intellectual*, 37, 11 *THIRD WORLD Q.* 1946, 1946 (2016).

<sup>45</sup> *Third World Approaches to International Law Conference*, INT’L L. OBSERVER (Feb. 24, 2015), <http://www.internationallawobserver.eu/wp-content/uploads/2014/04/TWAIL-Cairo-2015-Call-for-Papers.pdf>.

<sup>46</sup> Anghie, *supra* note 17, at 3; Gathii, *supra* note 19, at 1016.

<sup>47</sup> J. T. Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography*, 3 *TRADE L. & DEV.* 26, 34, 38 (2011).

<sup>48</sup> Natarajan, et al., *supra* note 44, at 11.

<sup>49</sup> The Bandung Conference was organized by Egypt, Indonesia, Burma, Ceylon (Sri Lanka), India and Pakistan at Bandung (Indonesia) from April 18–24, 1955. *Bandung Conference*, BRITANNICA, <https://www.britannica.com/event/Bandung-Conference> (last visited Mar. 26, 2020).

<sup>50</sup> ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 44 (1995).

<sup>51</sup> Prime Minister Nehru, Speech to Bandung Conference Political Committee (1955) transcript available at <http://www.fordham.edu/halsall/mod/1955nehru-bandung2.html>.

mutual interests; and cooperation.<sup>52</sup> These principles are synonymous with “the Five Principles of Peaceful Coexistence” that were first proclaimed by China and India in 1954: mutual respect for each other’s territorial integrity and sovereignty; mutual non-aggression; mutual non-interference in each other’s internal affairs; equality and mutual benefit; and peaceful co-existence.<sup>53</sup> In 1967, these Five Principles also laid the foundation for the Association of Southeast Asian Nations (ASEAN), and they continue to shape international relations among these nations, and their relations with the Middle East and Africa.<sup>54</sup> The current cooperation and unity among Asian and African countries was evident in the 2015 Bandung Conference<sup>55</sup> in which delegates from 109 Asian and African countries, 16 observer countries, and 25 international organizations were invited to participate. This event commemorated its 60th Anniversary under the theme “*Strengthening South-South Cooperation to Promote World Peace and Prosperity*.”<sup>56</sup> Three outcome documents of the 2015 Conference include the Bandung Message, a document on reinvigorating NAASP (New Asia-African Strategic Partnership), and a declaration regarding Asian and African nations’ support to Palestine. This demonstrates that Asian and African states continue to adhere strictly to the principle of sovereignty in all its manifestations, whereas certain Western states, on the contrary, seem to accept breaches of sovereignty under the notion of progressive liberalization.

Some would divide TWAIL scholarship into two generations. The second generation of TWAIL, beginning in the late 1990s, could be said to have gone beyond an examination of the decolonization process.<sup>57</sup> Describing TWAIL I as being state-centric, Badaru considers the main contribution of TWAIL II as being a people-centric approach, offering a critique on whether human rights as commonly understood meet the needs of people in the Third World.<sup>58</sup> Khosla is among scholars who find the distinction between phases of TWAIL useful, pointing out the emphasis on the World Bank and IMF in what is known as TWAIL II, and recommending TWAIL III to deal with the new issues raised

---

<sup>52</sup> Final Communique of the Asian-African Conference of Bandung (Apr. 24, 1955).

<sup>53</sup> The Sino-Indian Trade Agreement over Tibetan Border, India-China, Apr. 29, 1954, 299 U.N.T.S. 4307; *see also* Sung Won Kim et al., *Eastphalia Rising? Asian Influence and the Fate of Human Security*, 26(2) WORLD POL’Y J. 53, 58 (2009); Sung Won Kim, *Human Security with an Asian Face?* 17(1) IND. J. GLOBAL LEGAL STUD. 83, 84 (2010).

<sup>54</sup> Won Kim et al, *supra* note 53.

<sup>55</sup> *About: Asian-African Conference Commemoration*, ASIAN-AFRICAN CONF. COMMEMORATION, <http://www.aacc2015.id/?p=about> (last visited Dec. 13, 2019).

<sup>56</sup> *Id.*

<sup>57</sup> George R. B. Galindo, *Splitting TWAIL*, 33 WINDSOR Y.B. ACCESS JUST. 37, 40 (2016).

<sup>58</sup> Opeoluwa Adetoro Badaru, *Examining the Utility of Third World Approaches to International Law for International Human Rights Law*, 10 INT’L COMMUNITY L. REV. 379, 381 (2008).

after 9/11 and the Iraq War.<sup>59</sup> However, while this division has merits, this study will resist the periodization, in line with Mickelson, who considers that engagement with previous narratives is part of the emphasis on taking in diverse viewpoints that makes TWAIL unique,<sup>60</sup> and Galindo's concerns on unnecessary divisiveness<sup>61</sup> that deflects from the key concern of understanding the needs of peoples in the Third World. In essence, Galindo finds that anachronistic approaches impose values and views on persons that did not hold them, and that one should distinguish between understanding the beliefs present in the times when approaches were developed with the interpretation or judgment of them.<sup>62</sup>

### B. TWAIL Perceptions

As Asian and African states are diverse in terms of geography, politics, and socio-cultural matters, TWAIL is not a centralised network or doctrine.<sup>63</sup> TWAIL scholarship offers analytical tools but is not a systematic methodology so much as it is a 'political project' with the aim of furthering the rights of people in the Third World.<sup>64</sup> Anghie considers the "tensions or contradictions" in TWAIL approaches as a source of potential empowerment, resisting the dismissal of challenging narratives.<sup>65</sup>

There is no single definition of what the Third World is; scholars have raised varying perspectives that separate it from the Cold War context, emphasizing economic disparities and colonialism, or challenging geographical boundaries, or conceiving of the Third World as a political coalition. Khosla recommends Rajgopal's definition, as it encompasses poverty and dysfunctional legal and political systems as well as issues like limited technological resources.<sup>66</sup>

TWAIL scholars have had to negotiate the line between useful distinctions between North and South or even the concept of the Third World and the trap of essentialisation as opposed to maintaining a deconstructionist approach.<sup>67</sup> Scholars who are geographically located in the Third World as well as outside it

---

<sup>59</sup> Madhav Khosla, *The TWAIL Discourse: The Emergence of a New Phase*, 9 INT'L COMMUNITY L. REV. 291, 293 (2007).

<sup>60</sup> Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 INT'L COMMUNITY L. REV. 355, 361 (2008).

<sup>61</sup> Galindo, *supra* note 57, at 40.

<sup>62</sup> *Id.* at 46.

<sup>63</sup> R. P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55, 56 (1966).

<sup>64</sup> Antony Anghie, *TWAIL: Past and Future*, 10 INT'L COMMUNITY L. REV. 479, 480 (2008).

<sup>65</sup> *Id.* at 481.

<sup>66</sup> Khosla, *supra* note 59, at 293.

<sup>67</sup> Natarajan et. al, *supra* note 44, at 1953.

have contributed to TWAIL scholarship by advocating and opposing various practices relating to power hierarchies and how they work.<sup>68</sup> TWAIL-ers have not generated any single authoritative text but have instead developed a vibrant continuing debate about colonial history, sovereignty, and its relation to the Third World, power, economy, society, identity and what these mean for international law.<sup>69</sup> Further, TWAIL scholarship often interprets capitalism, imperialism, and international law as being interrelated.<sup>70</sup> Anghie argues that for many people in the Third World imperialism “has never ceased to be a major governing principle of the international system, and the only novelty of current development lies in the fact that it has re-asserted itself in such an explicit form that it has become unavoidably central to any analysis of contemporary international relations.”<sup>71</sup> Hence, TWAIL perceptions are grounded in a general critique of the past and continuing colonial/imperial foundations of international law.<sup>72</sup> The three main objectives of TWAIL are:

*first to understand, deconstruct, and unpack the issues of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions . . . . Second . . . to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy and politics to eradicate the conditions of underdevelopment in the Third World.*<sup>73</sup>

TWAIL-ers also consider possibilities for egalitarian transformation in the fields of public international law and economic and trade law,<sup>74</sup> as well as remaining committed to democratic values within and between the Third World and developed countries.<sup>75</sup> In doing so, they recognize the importance of the preservation of human rights such as women’s rights, but believe that enforcing

---

<sup>68</sup> B. Alakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, THIRD WORLD LEGAL STUD. 1, 2 (1998–1999).

<sup>69</sup> Gathii, *supra* note 47, at 26.

<sup>70</sup> Michael Fakhri, *Introduction - Questioning TWAIL’s Agenda*, 14 OR. REV. INT’L L. 1, 2 (2012); B. S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, 14 OR. REV. INT’L L. 17 (2012).

<sup>71</sup> ANGHIE, *supra* note 13, at 273, 274.

<sup>72</sup> Jayan Nayar, *Between Hope and Despair: The Iraq War and International Law Futures?*, in THE IRAQ WAR AND INTERNATIONAL LAW 329, 336 (Phil Shiner & Andrew Williams eds., 2008).

<sup>73</sup> Makau W. Mutua, *What is TWAIL?*, 94 PROC. ASIL ANN. MEETING 31, 31 (2000).

<sup>74</sup> Khosla, *supra* note 59, at 293.

<sup>75</sup> Gathii, *supra* note 47, at 28.

such rights require alternative strategies.<sup>76</sup> Chimni,<sup>77</sup> however, believes that “even international human rights discourse is being manipulated to further and legitimize neo-liberal goals.”<sup>78</sup>

Okafor considers that TWAIL has a rigorous method of logical reasoning and creates testable propositions.<sup>79</sup> In taking an epistemological inquiry into TWAIL, Parmar delves into the complicated issue of the “historical present” and resistance from people in Third World countries.<sup>80</sup> She recalls Foucault’s emphasis on “constant checking,” and the process of conceptualization as ongoing.<sup>81</sup> In essence, TWAIL scholars must be mindful of narratives that have been excluded, and must self-reflect on what they may be inadvertently omitting from their perspectives.<sup>82</sup>

TWAIL scholars generally reject the universal character of the international legal system since it emerged solely from the European tradition.<sup>83</sup> This attitude was adopted mainly because the third-world was included in the Western system as the “object rather than the subject”<sup>84</sup> of international law and this remained the case, despite that they belonged to advanced ancient civilizations, such as India, China, Egypt, and Assyria. Their ancient values were thought to have no connection to the rules of international law.<sup>85</sup>

Challenging conventional narratives, some Asian scholars protested that it was incorrect to suggest that Europe was the sole originator of international law.<sup>86</sup> In this context, one of the first generation TWAIL-ers, Anand, argued that

<sup>76</sup> Mosope Fagbongbe, *The Future of Women’s Rights from a TWAIL Perspective*, 10 INT’L COMMUNITY L. REV. 409 (2008).

<sup>77</sup> Anghie & Chimni, *supra* note 1, 77; B. S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT’L L. 1 (2004); ANTONY ANGHIE, *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALISATION* (Karen Mickelson & Obiora Okafor eds., 2003); B. S. Chimni, *International Law Scholarship in Post-colonial India: Coping with Dualism*, 23 LEIDEN J. INT’L L., 23 (2010) [hereinafter Chimni, *Coping with Dualism*].

<sup>78</sup> B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMMUNITY L. REV. 3, 3 (2006).

<sup>79</sup> Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both*, 10 INT’L COMMUNITY L. REV. 371, 374 (2008).

<sup>80</sup> Parmar, *supra* note 22, at 364.

<sup>81</sup> *Id.*

<sup>82</sup> Ibironke T. Odumosu, *Challenges for the (Present)/Future of Third World Approaches to International Law*, 10 INT’L COMMUNITY L. REV. 467, 475 (2008).

<sup>83</sup> Mutua, *supra* note 73, at 39; Anghie & Chimni, *supra* note 1, at 84.

<sup>84</sup> RÖLING, *supra* note 12, at 47.

<sup>85</sup> See 1 J.H.W. Verzijl, *Western European Influence on the Foundation of International Law*, in *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 435, 443 (M. Bos ed., 1968).

<sup>86</sup> PRAMATHANATH BANDYOPADHYAY, *INTERNATIONAL LAW AND CUSTOM IN ANCIENT INDIA* (1920); Fozia Nazir Lone, *Counter Piracy in the Indian Subcontinent: The Indian Perspective*, in *PIRACY IN*

unlike the situation in America, and a large part of Africa, European Christian powers had to deal with a well-established family of nations extending all over Asia. Hence, they established diplomatic relations and entered into treaties with some Asian rulers based on a reciprocal acknowledgment of sovereignty.<sup>87</sup> This position was accepted by classical scholars of international law such as Grotius, Wolff, Vattel, and others.<sup>88</sup>

Anand explained how India as a colonized nation played a significant role in both the First and the Second World Wars by fighting alongside the Great Powers.<sup>89</sup> However, notwithstanding India's contributions, it played no role in the formation of the UNC, which demonstrates how Asian nations were exploited, marginalized, and excluded from the process of creating mainstream and conventional international law during the colonial period. India's status from 1919 to 1947, when it was accepted as an independent state, was described as "an anomalous international person."<sup>90</sup> By contrast, the Indian princely states, under the paramountcy of the British crown, were seen as vassal states with no international personality.<sup>91</sup> Kashmir, one such princely state, earned its international personality soon after it refused to join the dominions of India and Pakistan upon their decolonization. Nonetheless, Kashmir was annexed in 1947 at the cost of thousands of lives and has awaited a political solution for the last 72 years.<sup>92</sup> This demonstrates the contradictions of international law, which only created a partial and incomprehensive doctrine of self-determination of peoples and respect for human lives.

After marginal Asian states were exploited, nineteenth century positivism began to question their legal personality, referring to them as candidates competing for international personality.<sup>93</sup> Suddenly, the writers of the nineteenth

---

COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW 129 (Charles Norchi & Gwenaelle Proutiere-Moulion eds., 2012); Fozia Nazir Lone, *Edict in Pre-Colonial India: An Analysis from the New Haven Perspective*, 5 BEIJING L. REV. 90 (2014).

<sup>87</sup> Anand, *supra* note 63, at 58.

<sup>88</sup> Charles-Henry Alexandrowicz-Alexander, *Grotius and India*, 3 INDIAN Y.B. INT'L AFF. 113, 120 (1954).

<sup>89</sup> R.P. Anand, *The Formation of International Organisations and India: A Historical Study*, 23 LEIDEN J. INT'L L. 5, 20 (2010).

<sup>90</sup> *Id.* at 8.

<sup>91</sup> T.T. Poulse, *India as an Anomalous International Person (1919-1947)*, 44 BRIT. Y.B. INT'L L. 201, 202 (1970).

<sup>92</sup> Fozia Nazir Lone, *Restoration of Historical Title and the Kashmir Question: An International Legal Appraisal* (2008) (unpublished Ph.D. dissertation, University of Aberdeen) (on file with author).

<sup>93</sup> Charles-Henry Alexandrowicz, *Mogul Sovereignty and the Law of Nations*, in THE LAW OF NATIONS IN GLOBAL HISTORY 1, 63 (David Armitage & Jennifer Pitts eds., 2017); Charles-Henry Alexandrowicz, *Some Problems of the History of the Law of Nations in Asia*, in THE LAW OF NATIONS IN GLOBAL HISTORY 1, 79 (David Armitage & Jennifer Pitts eds., 2017); RAM PRAKASH ANAND, INTERNATIONAL LAW AND THE

century asserted that the territory of Asian states, just as America and most of Africa, were *terra nullius* and, as a matter of fact, international law only applied between “the civilized and Christian people of Europe or to those of European origin.”<sup>94</sup> Georges Abi-Saab, an Egyptian professor,<sup>95</sup> argues that treaties concluded with the colonial powers were based on completely unequal relations and were “used to sanctify subjugation and exploitation of the smaller and weaker States.”<sup>96</sup> Abi-Saab, who is perceived as a key founder of TWAIL, served as a judge ad hoc for the International Court of Justice in a case concerning the Frontier Dispute<sup>97</sup> and a case concerning the Continental Shelf.<sup>98</sup> In the latter case, the court regarded the 1910 convention and the existence of a de facto line as important determinants for the delimitation of the continental shelf.<sup>99</sup>

It is established that positivist scholars shaped international law in ways that engaged Western nations’ interests. As Anghie argues, approaches to international law were traditionally rooted in a Westphalian understanding of sovereignty,<sup>100</sup> which provided for equality among Western states but did not extend the same status to the non-Western world, which was considered to be “uncivilised and hence non-sovereign.”<sup>101</sup> David Kennedy argues that this has always been the case and that some of the conflicts inherent in this approach can be seen in the work of the sixteenth-century Spanish jurist and theologian, Francisco de Vitoria.<sup>102</sup> Vitoria, in his initial writings, engaged with the creation of order and relations between the Spanish and the Native Americans (referred to as Indians). Anghie argues that for Vitoria the problem of Spanish-Indian relations was neither an issue of creating order among sovereign states nor about deciding their competing sovereign claims, but rather about substantively determining whether Indians were sovereign in the first place, and about how to

---

DEVELOPING COUNTRIES: CONFRONTATION OR COOPERATION? (1987).

<sup>94</sup> WHEATON, *supra* note 7, at 17–18; C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* 70–74 (1958).

<sup>95</sup> Winner of the 2013 Hague Prize (for his distinguished career) and some-time judge at the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (Appeals Chambers). *See, e.g.*, *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, Separate Opinion of Judge Abi-Saab on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. & POL. 919 (1999).

<sup>96</sup> Georges M. Abi-Saab, *The Newly Independent States and the Ruler of International Law: An Outline*, 8 HOW. L.J. 95, 108 (1962).

<sup>97</sup> *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. Rep. 554 (December 22).

<sup>98</sup> *Continental Shelf (Tunis./Libyan Arab Jamahiriya)*, Judgment, 1982 I.C.J. Rep. 18 (February 24).

<sup>99</sup> *Id.* at ¶ 102.

<sup>100</sup> Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L. J. 1 (1999).

<sup>101</sup> ANGHIE, *supra* note 13.

<sup>102</sup> Kennedy, *supra* note 15.

create order among civilizations belonging to two different cultural systems. Vitoria resolved this problem by focusing on the cultural practices<sup>103</sup> of these states by introducing the idea of the universal law of *jus gentium* whose rules according to him were determined by *reason*.<sup>104</sup> With this line of argument, Vitoria legitimized conquest by the Spanish under the illusion of moral progressiveness<sup>105</sup> and asserted that Indians failed to comply with existing universal standards. Seen through his prism of universality, Vitoria concluded that Indians failed to progress and remained backward, barbaric, and uncivilized, and hence sanctions could be imposed on them.<sup>106</sup>

TWAIL-ers believe that international law can still be a tool of oppression and that the decolonization processes are partly illusory.<sup>107</sup> This process was, as Anghie argues, essentially a civilizing process and a vehicle of imperialism. The Mandate System of the League of Nations was created to guarantee colonial development, and political sovereignty was set up in a way that was completely consistent with economic subordination.<sup>108</sup> At times, TWAIL-ers have been criticized as being nihilist. Major critics have been David P. Fidler<sup>109</sup> and Jose Alvarez.<sup>110</sup> Their criticism is mainly based on the assertion that TWAIL-ers offer no positive strategies for future action. In making this charge, Alvarez takes as an example the genocide in Sudan, questioning whether TWAIL-ers would ask the Security Council to take action.<sup>111</sup>

## II. CROSS-FERTILIZATION OF WESTPHALIAN AND EASTPHALIAN APPROACHES TO INTERNATIONAL LAW – TWAIL V. CLS

With the emergence of new methods to understand positivist international law, there has been a significant divergence in contemporary scholarship from the mainstream approach. There has also been cross-fertilization among the emerging ideas and conceptions, either directly or indirectly. One can reasonably

---

<sup>103</sup> Antony Anghie, *Francisco De Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 322 (1996); see also, ANGHIE, *supra* note 13, at ch. 1.

<sup>104</sup> FRANCISCUS DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* 151 (The Carnegie Institute 1917) (1557).

<sup>105</sup> ROBERT A WILLIAMS, JR. *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1993).

<sup>106</sup> Anghie, *supra* note 103, at 332–33.

<sup>107</sup> Mutua, *supra* note 73, at 34; Gathii, *supra* note 19, at 1039–40.

<sup>108</sup> Anghie, *supra* note 17, at 746–47.

<sup>109</sup> See David P. Fidler, *Revolt Against or From Within the West?: TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE J. INT'L L. 29 (2003); Gathii, *supra* note 47, at 43.

<sup>110</sup> Jose Alvarez, *My Summer Vacation Part III: Revisiting TWAIL in Paris* OPINIOJURIS (Sept. 28, 2010), <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/>.

<sup>111</sup> *Id.*

assume that such symbiosis of ideas even took place in the foundational philosophies. For instance, Hugo Grotius, predominantly a naturalist, attracted followers such as Wolff and Vattel, who in turn changed and profoundly refined his ideas. This led to the development of the Grotian School, which combined elements of both naturalism and positivism. In this process of the transfer of ideas, scholars did not abandon their method but rather accepted certain new notions, thereby imagining, reimagining, and developing new international legal scholarship. It is this dialectical process that identified and challenged biases, esoteric ideologies, and conceptual errors within the mainstream international law and reshaped law in new and meaningful ways.

It is the contention of this Article that the scholarly cross-fertilization from CLS in fact facilitated TWAIL's critique of international law as a legal order. Tracing this lineage is a descriptive historical exercise. A comfortable starting point is the 1980s movement called New Approaches to International Law (NAIL),<sup>112</sup> which began at Harvard Law School under the leadership of Professor David Kennedy,<sup>113</sup> a prominent CLS scholar himself. NAIL was a critical alternative to mainstream international law scholarship.<sup>114</sup> The influence of Kennedy's pioneering methodology of NAIL when he was a teacher and JSD supervisor of contemporary TWAIL scholars, such as Anghie,<sup>115</sup> must have been enormous. During the time the TWAIL initiative started, Kennedy was the Faculty Director of the Graduate Program at Harvard.<sup>116</sup> Later, a newly formed TWAIL initiative procured funding for their March 1997 conference from the graduate program, which was run by Kennedy.<sup>117</sup>

At a methodological level, CLS's influence can be found in TWAIL's critique of public international law, which: (1) similarly challenges power and radicalized hierarchies of international norms and institutions; and (2) additionally and separately contends the past and continuing colonial and imperial foundations of international law.<sup>118</sup> This assists the objective of

---

<sup>112</sup> See generally David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L. J. 417 (1994).

<sup>113</sup> Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 CAN. J. L. & JURIS. 475, 475 (2007).

<sup>114</sup> DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); DAVID KENNEDY, *NEW APPROACHES TO INTERNATIONAL LAW – THE EUROPEAN AND THE AMERICAN EXPERIENCES* (David Kennedy & Jose Maria Beneyto eds., Springer 2012). See generally KOSKENNIEMI, *supra* note 1.

<sup>115</sup> Anthony Anghie, *Creating the Nation State: Colonialism and the Making of International Law* (1995) (unpublished S.J.D. dissertation, Harvard University).

<sup>116</sup> David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000); David Kennedy, *The Disciplines of International Law*, 12 LEIDEN J. INT'L L. 9 (1999).

<sup>117</sup> Gathii, *supra* note 47, at 28.

<sup>118</sup> ANGHIE, *supra* note 13, at 273–74; NAYAR, *supra* note 72, at 336.

“understand[ing], deconstruct[ing], and unpack[ing] the uses of international law.”<sup>119</sup>

CLS, a U.S. legal theory movement from the 1970s inspired by the work of German social theorists of the Frankfurt School,<sup>120</sup> has a wide-ranging disciplinary lineage that includes legal realism, post-structuralism theories, and Marxism.<sup>121</sup> It is a “so-called post-modern approach to international law”<sup>122</sup> and a criticism of liberalism. CLS cautions against the indeterminacy of liberal legal concepts and the tendency to cloak political choices in pseudo-objective legal narratives.<sup>123</sup>

Later, many CLS scholars branched out into NAIL and focused on the critical deconstruction of the modern liberalist foundations of international law. Nigel Purvis described NAIL “as part of a broader movement in contemporary legal theory commonly known as Critical Legal Studies (CLS) or critical jurisprudence.”<sup>124</sup> However, David Kennedy and Marti Koskenniemi carefully differentiate NAIL from CLS.<sup>125</sup> TWAIL scholars advance their critique in the post-modernist narrative of CLS. As such, many perceive TWAIL as a continuance or side-shoot of NAIL. In terms of substance, TWAIL-ers such as Anghie, Abu-Odeh, and Nesiah have been cited as NAIL scholars.<sup>126</sup>

The CLS scholars’ comprehensive collection of methodological tools, exploration of historical failings, and the legal imagination of international law provided a conceptual foundation for TWAIL to reinterpret the paradox of continued imperialism and colonialism as a foundational notion of international law rather than its byproduct.

The main aim of CLS scholars is to deconstruct and destabilize central positivist empirical claims and demonstrate the falsity of the law versus violence dichotomy,<sup>127</sup> which also brings to light the international community’s lack of

---

<sup>119</sup> Mutua, *supra* note 73, at 31.

<sup>120</sup> David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 216–48 (1985–1986).

<sup>121</sup> Jason Beckett, *Critical International Legal Theory*, OXFORD BIBLIOGRAPHIES (Apr. 24, 2012), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0007.xml>.

<sup>122</sup> Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT’L L. 66, 66 (1991).

<sup>123</sup> CARTY, *supra* note 26.

<sup>124</sup> Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT’L L. J. 81, 89 (1991).

<sup>125</sup> Kennedy, *supra* note 116, at 489–90; Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT’L L. 351, 351–52 (1999).

<sup>126</sup> KENNEDY, *supra* note 114, at 421–52.

<sup>127</sup> See generally CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* (2003).

moral accountability for its actions and how they choose to hide behind self-created technical claims of neutrality, determinacy, and objectivity. Kennedy argues that the foundational contradiction of modern liberal thought is its legal indeterminacy and the use of law to legitimize oppression.<sup>128</sup> In that respect “the law” is part of “the problem” and not a solution. TWAIL-ers such as Anghie and Chimni,<sup>129</sup> drawing on this model, accept that such problems have been caused by the legal indeterminacy of international law.<sup>130</sup> They also agree that:

[M]any of the insights that CLS [has] developed have been important and useful to TWAIL scholarship. Almost inevitably, given that the Third World has often been subordinated by international law, TWAIL has several elements in common with CLS and feminism, both of which in different ways have attempted to question the power structures embedded in law.<sup>131</sup>

However, both Anghie and Chimni remain unwilling to depart from international law despite the injustices it has inflicted on the Third World, and trust in the transformative potential of law that can constrain power.<sup>132</sup>

To develop a critique on international law, TWAIL scholars<sup>133</sup> have relied on the works of CLS scholars such as Koskenniemi,<sup>134</sup> Carty,<sup>135</sup> and Kennedy.<sup>136</sup> These CLS scholars have established that the nineteenth century lawyers, who generated indeterminate and incomplete descriptions of doctrines, including those of sovereignty, territorial jurisdiction, and self-determination, did not create these doctrines and normative rules accidentally. These were deliberate attempts to keep the structure of legal argument “objective”<sup>137</sup> by concealing power, politics,<sup>138</sup> or other ideologies under a carpet of illusion, when in reality these underlying considerations guided the law.

---

<sup>128</sup> Kennedy, *supra* note 116, at 335; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. R. 205, 209–11 (1979).

<sup>129</sup> Anghie & Chimni, *supra* note 1, at 100–01.

<sup>130</sup> Koskenniemi, *supra* note 125, at 354.

<sup>131</sup> TWAIL have drawn from the classic CLS works. *See, e.g.*, Anghie & Chimni, *supra* note 1, at 100–01.

<sup>132</sup> Anghie & Chimni, *supra* note 1, at 100–01.

<sup>133</sup> ANGHIE, *supra* note 13, at 34.

<sup>134</sup> *See generally* KOSKENNIEMI, *supra* note 1.

<sup>135</sup> CARTY, *supra* note 26, at 46–60.

<sup>136</sup> *See generally* Kennedy, *supra* note 15.

<sup>137</sup> KOSKENNIEMI, *supra* note 1.

<sup>138</sup> Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990).

Koskenniemi has argued that international law, even though it has a high degree of coherence, is also substantively indeterminable.<sup>139</sup> He illustrated the contradiction of state sovereignty by comparing Carl Schmitt's and Hans Kelsen's analysis on the relationship between law and power within the state. Schmitt concludes that power is normative but external to the formation of law, whereas Kelsen suggests that legal order precedes factual power. These two positions on sovereignty are contradictory.<sup>140</sup> For Kelsen, sovereignty determined the sphere of validity of a state's internal competences, and it could only be allocated to certain entities. For him, as well as Hart, the creation or extinction of a state was not merely a factual question, but also one that was determined by law.<sup>141</sup> However, this theory cannot protect the presumed competence/independence of states, nor guarantee a right to self-determination. In connection to this, Carty explains that this kind of state competence was merely formal and spatial in nature, and considerations such as population and territory were "objects" of such competence. In that framework, self-determination was a positive rule of law under which the state must accept modifications of their territorial jurisdiction.<sup>142</sup>

Under international law, all subjectivity (such as power, authority, culture) is translated into some kind of natural law code, such as legal logic.<sup>143</sup> As Koskenniemi explains, under positivism non-European entities lacked state competence because their subjective essences were not same as that of European states.<sup>144</sup> So, for them the decision was not political, but rather a matter of the absence of shared legal morality with non-European entities.

From this perspective, it is understandable that TWAIL-ers had to stand against the illusive Western code of international law and then, within this framework, had to determine the competence of non-European states (which was an impossible mission). As discussed, the idea of sovereignty and its extension to non-Western states was not precisely an objective enterprise, but to a certain extent it was a textual, historical, and political façade. As such, TWAIL-ers have criticized the criteria involved in the decolonization process as subjective and

---

<sup>139</sup> KOSKENNIEMI, *supra* note 1; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (showing Duncan Kennedy in early engagements with arguments such as the radical indeterminacy and structured oppression of law has suggested that this is the by-products of blind spots and biases, which left intellectuals working within them more inclined to the *status quo*); Kennedy, *supra* note 116.

<sup>140</sup> KOSKENNIEMI, *supra* note 1, at 226–27.

<sup>141</sup> *Id.* at 227.

<sup>142</sup> CARTY, *supra* note 26, at 47.

<sup>143</sup> KOSKENNIEMI, *supra* note 1, at 231.

<sup>144</sup> *Id.* at 232.

exploitative. The process ignored the civilizational value system of Third World peoples.

Edward Said, who refined Sartre's work on post-colonial thought, argued that European specialists constructed a façade of the "Orient" which was an inaccurate and exaggerated image of "the East" as barbaric and inferior.<sup>145</sup> This artificial belief was then exported to the Orient itself, which legitimized European intervention to civilize the "uncivilized" East. In this connection, Said, in *Culture and Imperialism*, broadened his post-colonial thought, asserting that even though the empire ended after the Second World War, imperialism has continued to exert a significant cultural impact on the East.<sup>146</sup> Likewise, Gong argues that in an era of a culturally plural international community, there are difficulties in setting common norms for international behavior because the family of nations traditionally adopted an essentially European "standard of civilization," and non-European nations are expected to conform to such standards mainly because they are considered to be of inferior status.<sup>147</sup> In fact, nations such as Turkey, China, Japan, and Siam had to adjust to join this elite club, while struggling to maintain their traditional values.<sup>148</sup>

The non-European states struggled to demonstrate their existence within the Hegelian concept of existence, since the construction of international law remained subservient to positivist objectivity.<sup>149</sup> Historically, there was no universally acceptable narrative about the existence of states; they were all postulates, and created theories that had a particular purpose. Within this framework, it was then possible to argue that each historical state (Asian and African) was therefore sovereign within its own right and values of civilization. It is therefore desirable to engage in a wide-ranging inquiry to understand non-European sovereignty because prior to the Second World War, the structure of international law was such that it only noticed the European state practice.<sup>150</sup>

From the contemporary standpoint, these international rules appear rather tainted with Western economic self-interest and politics. Koskenniemi articulates it well by stating that social conflicts were "solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, for reasons internal to the ideal itself,

---

<sup>145</sup> See generally EDWARD W. SAID, *ORIENTALISM* (2003).

<sup>146</sup> See generally EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1993).

<sup>147</sup> See G. W. GONG, *THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY* 6, 77, 78 (1984); Anand, *supra* note 89, at 20.

<sup>148</sup> *Id.* at 3-4.

<sup>149</sup> See generally Lone, *supra* note 92.

<sup>150</sup> See Anand, *supra* note 89, at 20; KOSKENNIEMI, *supra* note 1.

rely on essentially contested–political–principles to justify outcomes to international disputes.”<sup>151</sup> Clearly, no matter how international scholars may try to search for an objective basis for international law, they will always be confronted with political clichés that sometimes amount to “pseudo-objectivity.” The image of a language structure that is “neither scientific nor imagined that assumes historically conditioned discourse” as legal rules and tend to impose them “upon others as if it were a universally accepted legal discourse.”<sup>152</sup> Arguing on similar lines, Müllerson, writing about dispute resolution within international law, states that it depends on the “political will” of the international community.<sup>153</sup> This brings us back to the fundamental question of the supremacy of sovereignty, power, and politics, which appear to be synonymous terms, and which in fact have already guided Western international law.

As history reveals, the stronger states used the Western international code to justify their actions within international affairs and to retain an advantageous position to guard their self-interest. In his classical work, Koskenniemi critically describes this precise behavior of states within international law as “between apology and Utopia.”<sup>154</sup> He reviews the sources and concepts of international law, such as sovereignty and customs shows that international law is exposed to the divergent criticisms of being either an immaterial Utopia or an instrument to disguise state interest.<sup>155</sup> In another work, Koskenniemi reviews the shift from the nineteenth-century formalist international law to the pragmatic one and its relation to policy-oriented jurisprudence, which is associated with 1960s American liberal movements.<sup>156</sup> He also reviews the work of sovereignty-enthusiastic legal scholars such as Vitoria, Grotius, Lauterpacht, and others, who all seemed to support an official imperialism.<sup>157</sup> Carty describes modern international society as being based on the European state system of the eighteenth and nineteenth century, in which the history of coercion renders it Hobbesian in nature.<sup>158</sup> Within this context, Carty criticizes claims of

---

<sup>151</sup> Koskenniemi, *supra* note 138, at 7.

<sup>152</sup> See generally CARTY, *supra* note 26, at 129 (“The single tendency which, in my view, it is now most important to overcome is the flight to a pseudo-objectivity . . . . It should by now be accepted that the international law has no method of investigating State practice which is credible in scientific terms.”); see also Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT’L L. 66 (1991).

<sup>153</sup> REIN MÜLLERSON, *INTERNATIONAL LAW, RIGHTS AND POLITICS: DEVELOPMENTS IN EASTERN EUROPE AND THE CIS* (1994).

<sup>154</sup> See generally KOSKENNIEMI, *supra* note 1.

<sup>155</sup> *Id.*

<sup>156</sup> See KOSKENNIEMI, *supra* note 1, at 225–33.

<sup>157</sup> *Id.* at 95–106.

<sup>158</sup> See José Brunner, *Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham*, 8 THEORETICAL INQUIRIES L. 277, 286 (2007) (reasoning that similar to Carty, Brunner cites Hobbes’ approach in

international law's completeness by examining the inadequate doctrines of self-determination, territorial jurisdiction, and sovereign authority.<sup>159</sup> In fact during those times the dominant legal argument was that nation-states were not merely the subjects of an international legal order, but the only subjects of that ordered political perspective, which is aimed at creating an egalitarian society based on equality and devoid of secretive interests and class domination.<sup>160</sup>

It is argued that this CLS-TWAIL scholarly symbiosis has further extended the normative content of international law, enhancing new paradigms in the discipline of international law scholarship, which is essentially interdisciplinary in nature.

### III. THE RISING ASIAN THIRD WORLD STATES AND THE EMERGENCE OF NEW TWAIL-INSPIRED PARADIGMS IN THE DISCIPLINE OF INTERNATIONAL LAW

Until the nineteenth century, the doctrine of common interests in Europe was presumed to form the standard of civilization. Under this practice of progressive morality, with a civilizing mission, Europe imposed "unequal treaties" throughout Asia and Africa to draw non-European nations into the first global international system.<sup>161</sup> Over the years, TWAIL constructed an alternative normative legal edifice that advocated the eradication of the conditions of underdevelopment in the Third World.<sup>162</sup> For instance, Mutua, Anghie, and Chimni openly narrated socioeconomic and political disparities between the Third World and wealthy states through the South-North dichotomy.<sup>163</sup> In the post-9/11 era, Anghie has interpreted the war on terror within international law as an extension of this "civilizing mission" to the Third World.<sup>164</sup>

#### A. A Brief Overview of Chinese and Indian Views on International Law

Historically, China and India were subjected to imperialism and colonialism

---

arguing that reason can only be effective in governing internationally when it is accompanied by fear).

<sup>159</sup> David W. Kennedy, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, 81 AM. J. INT'L L. 451, 451 (1987).

<sup>160</sup> Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD JOURNAL LEGAL STUD., 1, 43 (1986); According to the CLS scholars, these States are entrenched in liberal legalism and the jurisprudence of legal positivism. See Judith Wagner DeCew, *Critical Legal Studies and Liberalism: Understanding the Similarities and Differences*, 18 PHILOSOPHY L. 41, 41 (1990).

<sup>161</sup> Stefan Kroll, *The Emergence and Transformation of International Order: International Law in China, 1860-1949* 37 ASIAN PERSPECTIVE, 31, 32 (Jan.-Mar. 2013); Ingrid Detter, *The Problem of Unequal Treaties* 15 INT'L & COM. L.Q. 1069, 1076 (1966).

<sup>162</sup> Mutua, *supra* note 73, at 31.

<sup>163</sup> *Id.*; Anghie & Chimni, *supra* note 1, at 82.

<sup>164</sup> Anghie, *supra* note 17, at 751.

and were perceived as objects of international law. As such, they missed the opportunity to participate in the development of international law.<sup>165</sup> However, with the economic rise of China and India, in the backdrop of the complex ongoing war on terror, clashes of Western civilizations with Islam,<sup>166</sup> and European economies declining,<sup>167</sup> rising Eastern nations earned themselves an opportunity to contribute new paradigms into the discipline of international law.

It is precisely this TWAIL narrative that in contemporary times can most aptly explain the state practices of the rising countries of China and India, which are seemingly in the process of advancing a new *opinio juris*, creating an alternative normative legal paradigm for international governance, and cooperating with and influencing (seemingly positively) the new world order, wherein they can fulfill their regional and global ambitions.<sup>168</sup> For instance, China's ambitious plan of "one belt and one road"<sup>169</sup> would strengthen her regional strategic position and connect her with Asia and the world.<sup>170</sup>

TWAIL can explain President Xi Jinping's adoption of a new slogan of "Socialist rule of law with Chinese characteristics,"<sup>171</sup> which is distinct from the Western vision of rule of law. Looking at indigenous legal systems and practices is not only about exposing the violence of colonial encounters, but of unearthing knowledge and perspectives on law, and challenging historical exclusions.<sup>172</sup> Likewise, TWAIL can also explain India's decision to not ratify the Non-Proliferation of Nuclear Weapons Treaty of 1968 and the Comprehensive Test

---

<sup>165</sup> HANQIN XUE, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW 211–12 (2012).

<sup>166</sup> Amber Haque, *Islamophobia in North America: Confronting the Menace*, in CONFRONTING ISLAMOPHOBIA IN EDUCATIONAL PRACTICE 1, 6 (Barry van Driel ed. 2004); Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22, 26 (1993); Bernard Lewis, *The Roots of Muslim Rage*, ATLANTIC, Sept. 1990, at 47, 49; Edward W. Said, *The Clash of Ignorance*, NATION (Oct. 4, 2001), <https://www.thenation.com/article/clash-ignorance/>.

<sup>167</sup> LARRY ELLIOTT & DAN ATKINSON, GOING SOUTH: WHY BRITAIN WILL HAVE A THIRD WORLD ECONOMY BY 2014 1–2 (2012).

<sup>168</sup> See generally NATHANIEL BERMAN, PASSION AND AMBIVALENCE: COLONIALISM, NATIONALISM AND INTERNATIONAL LAW 164 (2011).

<sup>169</sup> Claude Arpi, *Demchok and the New Silk Road: China's Double Standard*, INDIAN DEFENCE REV. (Apr. 4, 2015), <http://www.indiandefencereview.com/news/demchok-and-the-new-silk-road-chinas-double-standard/>.

<sup>170</sup> Press Tr. of India, *China Invites India to Join Its Ambitious Silk Road Projects*, NEW DELHI TELEVISION (Aug. 10, 2014), <http://www.ndtv.com/india-news/china-invites-india-to-join-its-ambitious-silk-road-projects-647474>.

<sup>171</sup> *China with Legal Characteristics*, ECONOMIST (Nov. 1, 2014), <http://www.economist.com/news/leaders/>; Tom Baxter, *China's Communist Party Plenum Focuses on Rule of Law, But Not as the West Sees It*, INT'L BUS. TIMES (Oct. 19, 2014), <http://www.ibtimes.com/chinas-communist-party-plenum-focuses-rule-law-not-west-sees-it-1707504>.

<sup>172</sup> Parmar, *supra* note 22, at 367.

Ban Treaty of 1996, as India sees these treaties as discriminatory towards states without nuclear weapons.

China's traditional attitude toward international law is inspired by the Chinese philosophy of Confucianism and can be explained by TWAIL. Two philosophical concepts established in China about three thousand years ago play a large role: *li* (rites) and *fa* (legalism).<sup>173</sup> Over the years, scholars have compared *li* and *fa* to the Western philosophies of naturalism and positivism.<sup>174</sup> Before the first Opium War (1840–1842), during which Imperial China started to lose its predominant position and was forced by Western powers to open its doors, the international *li* held by the Chinese was based on the idea that mankind should be governed by one ruler. This is clear in a Chinese proverb that says, “[t]here is only one sun in the sky and one sovereign over mankind.”<sup>175</sup> Hence, *li* order is hierarchical and emphasizes a Sinocentric world order resting on moral virtue rather than military power.<sup>176</sup> This paternalistic attitude over the weaker East Asian countries continues. After the foundation of the PRC in 1949, its approach to international law was influenced by pragmatism, seeking to pursue its development both internally and within the international order.<sup>177</sup> This is explained by a Chinese international law expert, Zhu Liru, who states:

[I]nternational law is one of the instruments for resolving international problems. If this instrument is useful to our country, to the socialist cause or to the cause of the peoples of the world, we will use it. However, if this instrument is disadvantageous to these causes, we will not use it and should create a new instrument to replace it.<sup>178</sup>

The writings of most distinguished international law jurists, such as Wang<sup>179</sup> and Xue (a judge at the International Court of Justice), clearly indicate that China strictly adheres to the state sovereignty principle.<sup>180</sup> To them, this principle means “the supreme power of the State to deal with its own internal and external affairs independently and autonomously” such that it is internally supreme and

---

<sup>173</sup> Junwu Pan, *Chinese Philosophy and International Law*, 1 ASIAN J. INT'L L. 233, 233–34 (2011).

<sup>174</sup> *Id.* 233; Jana Benická, *Fa[1]: Did its meaning change in Chinese philosophy? Some remarks on Fa in legalism and Confucianism*, 10 ASIAN & AFRICAN STUD. 44, 46, 52 (2001).

<sup>175</sup> Shao-chuan Leng, *Chinese Law*, in SOVEREIGNTY WITHIN THE LAW 242, 247 (Clarence Wilfred Jenks et al. eds., Oceana Publications 1965).

<sup>176</sup> Zhaojie Li, *Traditional Chinese World Order*, 1 CHINESE J. INT'L L. 20, 34 (2002).

<sup>177</sup> Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267, 271–73 (2000).

<sup>178</sup> Pan, *supra* note 173, at 238–39 (citing Zhu Liru, *Refuting Chen Tiquang's Absurd Theory of International Law*, RENMIN RIBAO [PEOPLE'S DAILY] (Sept. 18, 1957)).

<sup>179</sup> Zhaojie Li, *Teaching, Research, and the Dissemination of International Law in China: The Contribution of Wang Tieya*, 31 CAN. Y.B. INT'L L. 189, 213 (1993).

<sup>180</sup> XUE, *supra* note 165, at 71.

externally independent.<sup>181</sup> International law, therefore, has a limited role when it comes to the governance of states, as it is covered in the internal competence of a state. For Xue, the persistent Chinese stance on state sovereignty is based on the miserable experiences in its modern history. This is clear in the speech of the former Chinese Premier Wen Jiabao at the 63rd Session of the General Assembly in 2008, where he said that “[t]he Chinese people have learnt from their modern history of humiliation that when a country loses sovereignty, its people lose dignity and status. China is firm in upholding its hard-won sovereignty and territorial integrity and will never tolerate any external interference.”<sup>182</sup> This position is clearly reflected in Chinese international relations and its handling of its maritime disputes in the East China Sea and South China Sea,<sup>183</sup> as well as in the self-determination claims of Tibet<sup>184</sup> and Xinjiang.<sup>185</sup>

The Indian position on international law is also governed by its colonial victimization.<sup>186</sup> This is very similar to the Chinese position and, as such, both can be legitimately combined in this respect.<sup>187</sup> Both China and India remain committed to the Five Principles of Coexistence<sup>188</sup> and the “Ten Point Declaration” of the Bandung Conference of 1955, known as the “Bandung spirit.”<sup>189</sup> India does not tolerate any external interference into its pending disputes, such as Kashmir,<sup>190</sup> or its unresolved border disputes with Pakistan and China (Aksai Chin and the McMahon Line, respectively).<sup>191</sup> After India gained

---

<sup>181</sup> *Id.* at 69–71.

<sup>182</sup> H.E. Wen Jiabao, Premier of the State Council of the Peoples Republic of China, Statement at the General Debate of the 63rd Session of the U.N. General Assembly 3 (Sept. 24, 2008), <http://www.un.org/ga/63/generaldebate/pdf/china.en.pdf>.

<sup>183</sup> Anthony Carty & Fozia Nazir Lone, *Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes*, 19 ASIA PAC. L. REV. 93, 111 (2011).

<sup>184</sup> Barry Sautman, *Tibet’s Putative Statehood and International Law*, 9 CHINESE J. INT’L L. 127, 138 (2010).

<sup>185</sup> COLIN MACKERRAS, CHINA’S ETHNIC MINORITIES AND GLOBALISATION 157 (2003).

<sup>186</sup> Anand, *supra* note 63, at 56.

<sup>187</sup> Carty & Lone, *supra* note 183, at 98–99; Kim et al., *supra* note 54, at 56–57.

<sup>188</sup> See The Sino-Indian Trade Agreement over Tibetan Border, India-China, Apr. 29, 1954, 299 U.N.T.S. 4307; see also Kim et al., *supra* note 54, at 58.

<sup>189</sup> Muthucumaraswamy Sornarajah & Jianguy Wang, *China, India, and International Law: A Justice Based Vision Between the Romantic and Realist Perceptions*, 9 ASIAN J. INT’L L. 217, 230 (2019); Arif Dirlik, *The Bandung Legacy and the People’s Republic of China in the Perspective of Global Modernity* 16 INTER-ASIA CULTURAL STUDIES 615, 617 (2015); see generally Amitav Acharya, *Studying the Bandung Conference From a Global IR Perspective*, 70 AUSTRALIAN J. INT’L AFF., 342–57 (2016).

<sup>190</sup> Lone, *supra* note 86, at 91; *Kashmir Unrest: Separatists Fighting Pakistan’s ‘Proxy War’ in the Valley*, Says BJP, PRESS TR. INDIA (Sept. 6, 2016), <http://www.firstpost.com/india/kashmir-unrest-separatists-fighting-pakistan-proxy-war-in-the-valley-says-bjp-2993184.html>.

<sup>191</sup> See generally D. P. CHOUDHURY, THE NORTH-EAST FRONTIER OF INDIA 112–13 (1978).

independence, it protected its earned liberation and cultural unity,<sup>192</sup> as well as its pre-colonial traditional values.<sup>193</sup>

Indian scholars in post-colonial India began to look for traditional Indian narratives about international law. For instance, they contended that ancient Indian polity was based on the concept of the Hindu philosophy of *dharma*.<sup>194</sup> Indian scholars even contended that the concept of sovereignty was well established in *dharma*, and that such concept is “not complete unless it is external as well as internal; that is, unless the state can exercise its internal authority unobstructed by, and independently of, other states.”<sup>195</sup> In a way, this outlook is consistent with TWAIL. Overall, the latter’s emphasis is on developing pedagogically expansive approaches that allow for greater participation by the Third World.<sup>196</sup>

### *B. A Journey to Find a Desert Oasis: Euphoria, Fears, and Limitations*

History has witnessed the most glorious nations with the highest standards of living, economic and technical capability, education, and enlightenment exhibit the greatest capacity to create mutual destruction and war. The history of international law also demonstrates that European nations have often taken positions as moral arbiters based on European values, leading to the formulation of doctrines such as colonialism, sovereignty, and intervention. Such doctrines remain the precursors of ongoing controversies and clashes. This backdrop also suggests that the locus of European international law remains frozen in the romanticism of the nineteenth century and continues to pass off political choices as impersonal necessities.<sup>197</sup> Undoubtedly, in the face of the rise of the Third World and the diversity of actors, liberal legalism still chooses to identify, interpret, and apply all law as a product of necessity and not of choice, when in principle it is a “product not of necessity or expertise, but of choice.”<sup>198</sup>

One critical approach to international law is seen in the rise of China and India. This has been predicted by many scholars, who remain optimistic about the imminent supremacy of rising nations, which may arguably reorient

---

<sup>192</sup> JAWAHARLAL NEHRU, *THE UNITY OF INDIA: COLLECTED WRITINGS 1937–1940* 14–15 (1942).

<sup>193</sup> Chimni, *Coping with Dualism supra* note 77, at 28.

<sup>194</sup> Chimni, *supra* note 77, at 28; Carty & Lone, *supra* note 183, at 106–07.

<sup>195</sup> Benoy Kumar Sarkar, *Hindu Theory of International Relations*, 13 *Am. Pol. Sci. Rev.* 400, 400 (1919); *see also* Lone, *supra* note 87, at 93.

<sup>196</sup> Natarajan et. al, *supra* note 44, at 1946–47, 1949.

<sup>197</sup> *See generally* ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY* 20, 71 (Verso, 2001).

<sup>198</sup> *Id.* at 28.

international politics and law for good.<sup>199</sup> For instance, Jacques argues that although China's first steps toward global preeminence have been economic, eventually its political and cultural influence will be even greater and, ultimately, "China's impact on the world will be at least as great as that of the United States over the last century, probably far greater."<sup>200</sup> Emmott, on the other hand, emphasizes the triangular relationship between India, China, and Japan and observes that for the first time in its history Asia contains three powerful and assertive states at the same time, which gives rise to a new power game.<sup>201</sup> Likewise, Fravel argues that the rise of China as a great power seems imminent; questions that remain to be answered include whether its rise will be peaceful or violent and how it will re-orient international law.<sup>202</sup>

There also remain numerous speculations, challenges, limitations, and concerns regarding these rises in power. For instance, Kim, Fidler, and Ganguly examined the rise of China and India and speculated how it will change global affairs as ideas get interlocked with power, redefining peace, diplomacy, and war.<sup>203</sup> Speculation remains as to what extent other nations are prepared to accept new Asian paradigms, especially those with changes that have conflicting views on matters of human rights, human security, and invasions. Another point of conjecture is whether any new standard could formulate an adequate, lasting legal regime; how would such paradigms reshape relationships between Europe, China, and India, and how would they transform normative indeterminate European notions such as sovereignty, self-defense, intervention, self-determination, and human security? Could the emergence of Asian paradigms facilitate the rethinking of traditional approaches to international law? Could new Asian civilizational values pose a threat to world peace and human security when they seem to stand against the philosophy of Western liberalism and intervention? Would there be possibilities of any synergies of Westphalian and Chinese-Indian values in a new world order, which could fill the existing power vacuum, decide unresolved clashes, and reconfigure a common metric?

In attempting to answer these controversial questions in this transitional period, we are left with much speculation and many assumptions. Rising nations' power could increasingly be perceived as a threat, resulting in strategic rivalries and even war. A lesson can be learned from the power transitions in

---

<sup>199</sup> Xavier, *supra* note 21, at 233–34.

<sup>200</sup> MARTIN JACQUES, *WHEN CHINA RULES THE WORLD* 15 (2d ed. 2012).

<sup>201</sup> BILL EMMOTT, *RIVALS: HOW THE POWER STRUGGLE BETWEEN CHINA, INDIA AND JAPAN WILL SHAPE OUR NEXT DECADE 9–10* (2008).

<sup>202</sup> M. TAYLOR FRAVEL, *STRONG BORDERS, SECURE NATION 1* (2008).

<sup>203</sup> Kim et al., *supra* note 53, at 54.

late-nineteenth century Germany, as explained by Ikenberry.<sup>204</sup> He argues that by 1903 Germany had succeeded in surpassing the United Kingdom, both in economic and military power.<sup>205</sup> By this time, Germany's demands had increased and its dissatisfaction had intensified.<sup>206</sup> It was increasingly perceived as a threat to other powers in Europe, leading to competition and resulting in former enemies—France, Russia, and the United Kingdom—confronting the rising Germany together. Ikenberry speculates that there is a similar dynamic in U.S.-China relations.<sup>207</sup>

However, it is also true that the current European world order was crafted similarly to how Asian prosperity crosses through Westphalian international law. For instance, Chinese economic success is largely based on the Western open market system.<sup>208</sup> Further, the current Western order is a coalition-based leadership that is largely rule and institution-based,<sup>209</sup> making it difficult for any rising power to ignore it. Hence, no rising power is able to completely ignore mainstream international law, nor should they do so, as that would destabilize the world economy.<sup>210</sup> Further, to grow into a world power, rising Asian states, including China, would require partners and would need to behave in an exceptional manner.<sup>211</sup> It is apparent that rising nations need to find a delicate balance between conflicting European and Asian values, while also pursuing their domestic and economic priorities.

As mentioned, in contemporary times, both China and India remain committed to their values as enshrined in the Five Principles of Coexistence, which appears to be a welcoming strategy. However, could it be a panacea for all international ailments? One contradiction that TWAIL scholarship has consistently pointed to is that between the purported aims of international human rights law and the violations caused by international economic, particularly

---

<sup>204</sup> G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, 87 FOREIGN AFF. 23, 26–27 (2008).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 27.

<sup>208</sup> *Id.* at 29.

<sup>209</sup> Jan Klabbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations* 25 EUR. J. INT'L L. 645, 646, 674 (2014).

<sup>210</sup> *But see* Natarajan et. al, *supra* note 44, at 1949.

<sup>211</sup> *See generally* MARGARET MACMILLAN, PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR 32–33, 35 (2009) (describing Woodrow Wilson's efforts to create a League of Nations); Benjamin Ho, *Understanding Chinese Exceptionalism: China's Rise, Its Goodness, and Greatness* 39 ALTERNATIVES: GLOBAL, LOC., POL. 164 (2014); Harold Koh, *On American Exceptionalism*, 55 STAN. L. REVIEW 1479, 1500–01 (2003).

trade, practices.<sup>212</sup> TWAIL offers tools for a transdisciplinary analysis and explores the impact of international trade practices in its socioeconomic analysis of problems in particular continents or countries.<sup>213</sup> For instance, China and India have developed trade partnerships with African countries, which are known to have poor human rights records and corrupt governments, to obtain fuel and raw materials to support their economic growth. Overall, China's position remains pragmatic and focused on development.<sup>214</sup> Since China and India strictly adhere to a non-interference policy, they do not interfere in local governance in African states, nor question the poor human rights records of those nations.<sup>215</sup> Clearly, this new Asian alignment has "permanently changed the economic, diplomatic, and geopolitical relationship between Africa and its traditional European trading partners."<sup>216</sup> The Western approach, contrary to the Asian approach, has dictated to African countries how to govern at the domestic level and how to operate within the international arena before providing any economic assistance.<sup>217</sup> Some scholars, such as Roland Paris, have questioned this Western approach. Paris states that such a process amounts to the "globalization of the very idea of what a state should look like and how it should act."<sup>218</sup> David Chandler goes further and questions the compatibility of the imposition of such Western values with the long-term effectiveness of state development.<sup>219</sup> Kim et al. argue that this "signals the potential for a pan-Asian perspective on human security that would likely find support in other regions, such as Africa, where governments have long chafed under the inclination of Western nations to interfere in domestic affairs for various reasons, including the promotion of concepts like human security."<sup>220</sup>

Nevertheless, it is worth questioning whether the non-interventionist approach of China and India could be a positive Asian paradigm, as it seems to be limited to wealth collection and, in that respect, resembles the old Westphalian colonial approach that focused on self-enrichment at the expense

---

<sup>212</sup> Badaru, *supra* note 58, at 383.

<sup>213</sup> *Id.* at 382.

<sup>214</sup> Jing Gu & Anthony Carty, *China and African Development: Partnership Not Mentoring*, 45 INST. DEV. STUD. BULL. 57, 60 (2014).

<sup>215</sup> *Id.*

<sup>216</sup> Isabelle Ramdoo, *The Saga of Raw Materials in Africa – What's at Stake?*, INT'L CTR. TRADE & SUSTAINABLE DEV. (Feb. 10, 2011), <http://www.ictsd.org/bridges-news/trade-negotiations-insights/news/the-saga-of-raw-materials-in-africa-%E2%80%93-what%E2%80%99s-at-stake>.

<sup>217</sup> Xavier, *supra* note 21, at 232.

<sup>218</sup> Roland Paris, *International Peacekeeping and the 'Mission Civilisatrice'*, 28 REV. INT. STUD. 637, 638–39 (2002).

<sup>219</sup> DAVID CHANDLER, *BOSNIA: FAKING DEMOCRACY AFTER DAYTON 197* (2d ed. 2000).

<sup>220</sup> Kim et al., *supra* note 53, at 54.

of non-European wealth. It is further argued that sovereign financing and providing debt to local African governments by China and India could result in creating the conditions for human rights violations.<sup>221</sup>

China and India remain committed to bilateralism in resolving their pending South China Sea and trans-boundary water disputes with their neighbors.<sup>222</sup> On July 12, 2016, the Permanent Court of Arbitration delivered its decision in favor of the Philippines in a case relating to historical title and the South China Sea.<sup>223</sup> From the very beginning, China did not recognize the jurisdiction of the Arbitral Panel and issued a Position Paper in 2014, which stated that it has historical title over the South China Sea and that the UN Convention on the Law of the Sea 1982 cannot resolve issues related to sovereignty.<sup>224</sup> In the past, India has engaged in bilateralism towards the resolution of the 73-year-old Kashmir dispute with Pakistan and pending territorial disputes of the McMahon Line and Aksai Chin with China.<sup>225</sup> In general, China and India's diplomatic relationships with each other and other neighbors heavily favor bilateralism, allowing them to maintain economic ties despite pending disputes.<sup>226</sup>

From that perspective, I argue that, at a regional level, such bilateralism may maintain the status quo between the nations or allow trade, but does not seem to uphold long-term international peace or prevent terrorism. It also does not seem to improve the welfare of subaltern groups such as Kashmiris or common fishermen belonging to states involved in the South China Sea dispute, who are

---

<sup>221</sup> FoZIA NAZIR LONE, *Extraterritorial Human Rights Violations and Irresponsible Sovereign Financing*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 233, 233, 235 (Juan Pablo Bohoslavsky & Jernej Letnar Čeranič eds., 2014); JOHN H. KNOX, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 18 (2008); HAKEEM O. YUSUF, *Oil on Troubled Waters: Multi-national Corporations and Realising Human Rights in the Developing World, with Specific Reference to Nigeria*, 8 AFR. HUM. RTS. L.J. 79, 84–85 (2008); see also, e.g., *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124 (2013); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007); Christine Kaufmann, *Case Profile: Shell Lawsuit (re Nigeria)*, BUS. & HUM. RTS. RESOURCE CTR., U. ZURICH, [https://www.ivr.uzh.ch/dam/jcr:fffff-f-abae-0dd7-0000-00004ee916ce/24\\_Case\\_Profile\\_Shell\\_Lawsuit\\_Nigeria.pdf](https://www.ivr.uzh.ch/dam/jcr:fffff-f-abae-0dd7-0000-00004ee916ce/24_Case_Profile_Shell_Lawsuit_Nigeria.pdf).

<sup>222</sup> Huiping Chen et al. *Exploring China's Transboundary Water Treaty Practice Through the Prism of the UN Watercourses Convention*, 38 WATER INT'L 217, 217–18 (2013).

<sup>223</sup> S. China Sea Arbitration (Phil. v. China), 2013–19 PCA Case Repository 471–77 (2016).

<sup>224</sup> *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, MINISTRY FOREIGN AFF. CHINA (2014), [https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1368895.htm](https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm).

<sup>225</sup> Agreement on Bilateral Relations between the Government of India and the Government of Pakistan (Simla Agreement) 2 July 1972; Agreement on the Political Parameters and Guiding Principles for the Settlement of the India-China Boundary Question, China-India, Apr. 11, 2005 [hereinafter India-China Boundary Agreement]; The Boundary Agreement Between China and Pakistan, China-Pak., Mar. 2, 1963 12 P.R.C.T.S. 64; RICHARD SISSON & LEO E. ROSE, WAR AND SECESSION: PAKISTAN, INDIA, AND THE CREATION OF BANGLADESH 221, 223 (1990);

<sup>226</sup> See, e.g., SISSON & ROSE, *supra* note 225, at 46; China-India Boundary Agreement, *supra* note 225.

seemingly caught up in constant violence and scarcity of resources. The strict devotion to non-interference and bilateralism may prove to be not only counterproductive, but also hazardous to human security and international human rights development. Hence, simply calling for intellectual liberation and returning to cultural roots is an uncertain enterprise, because it merely means reviving traditional Chinese and Indian values, which can be very old-fashioned or no longer functional. Clearly, affording a wide margin of appreciation to European values, such as human rights concepts, is important.

There also seems to be some disconnect in the emerging Asian paradigms, which seemingly embrace a cherry-picking approach towards international law. Many international scholars have described Chinese and Indian approaches to international law as formalist dualism.<sup>227</sup> On the one hand, they reject imperialism, but on the other they practice European international law insofar as it benefits them. For example, India adopted a “non-alignment” policy during the Cold War era to protect its own interests.<sup>228</sup> India also argued colonial victimization for rejecting the ratification of the Non-Proliferation Treaty 1968.<sup>229</sup> However, India uses Westphalian international law when claiming sovereignty over the territory of Kashmir and Arunachal Pradesh (the McMahon Line).<sup>230</sup> Likewise, China sees international law as an instrument, which it will use only if it is advantageous to its cause and, if not, China propounds to “create a new instrument to replace it.”<sup>231</sup> The essential elements of this dualistic approach hence adopt the defensive, security-oriented sovereignty that arose in Europe in the seventeenth century, which has always been the basis of military and economic competition among the Western powers.<sup>232</sup>

Offering a different interpretation, Chimni describes the Indian approach to international relations as dualism because its colonial liberation and its creation as a post-colonial state were regulated by Western international law.<sup>233</sup> For him, dualism also means opposing the policies of imperialism, while also attempting

---

<sup>227</sup> See Carty & Lone, *supra* note 183; BS Chimni, *International Law Scholarship in Post-colonial India: Coping with Dualism* 23 LEIDEN J. INT'L L. 23 (2010); Sung Won Kim et al., *Eastphalia Rising? Asian Influence and the Fate of Human Security*, WORLD POL'Y J. 53 (2009).

<sup>228</sup> Carty & Lone, *supra* note 183, at 98–100.

<sup>229</sup> ND Jayaprakash, *Nuclear Non-Proliferation Treaty: The “Greatest Con Game,”* 43 ECON. & POL. WKLY. 43, 43 (2008).

<sup>230</sup> Carty & Lone, *supra* note 183, at 93.

<sup>231</sup> Pan, *supra* note 173, at 238–39 (citations omitted).

<sup>232</sup> Carty & Lone, *supra* note 183, at 98.

<sup>233</sup> Chimni, *Coping with Dualism*, *supra* note 78, at 23.

to use existing Western international law to bring about change in the international system to benefit Third World countries.<sup>234</sup>

Martin Jacques argues that more than any other society, China is deeply aware of and influenced by its history.<sup>235</sup> At the same time, China does not reject international law in its entirety as a falsity.<sup>236</sup> This is mainly because international institutions stand on foundations of positivist international law and are the pathway to economic development.<sup>237</sup> Similarly, India in the post-colonial era is grappling with deciding the extent to which it should remain within the established boundaries of mainstream liberal international law while also clinging to its colonial past and embracing its traditional values.<sup>238</sup> Both countries also suffer from deep internal problems. China's strong, top-down leadership leaves no space for democracy<sup>239</sup> and India's governmental policies and democratic institutions are internally tainted with a neo-colonial mindset that is feudal, religious,<sup>240</sup> and bureaucratic in nature. This neo-colonial mindset and India's proclamation to the world of its new paradigms on international law are some of the biggest impediments to India's economic development.<sup>241</sup>

While keeping in view the above discourse, what does it mean for the Third World scholars to be TWAIL-ers inside a state that aims for the power of the West? These nations, while using a TWAIL outlook, are involved in a great global power competition and Asian regionalism while aspiring to become world leaders. TWAIL-ers such as Chimni argue that all post-colonial scholarship in the Third World has to come to terms with the double life of international law, which is a double-edged sword of subjugation and possible liberation.<sup>242</sup>

---

<sup>234</sup> *Id.* at 25.

<sup>235</sup> JACQUES, *supra* note 200, at 87, 111–12.

<sup>236</sup> Avery Goldstein, *An Emerging China's Emerging Grand Strategy: A Neo-Bismarckian Turn?*, in INTERNATIONAL RELATIONS THEORY AND THE ASIA–PACIFIC 57–106 (John Ikenberry & Michael Mastanduno eds., 2003).

<sup>237</sup> Ikenberry, *supra* note 204, at 29.

<sup>238</sup> Chimni, *Coping with Dualism*, *supra* note 78, at 25.

<sup>239</sup> See Fozia Lone, *Democracy in Stages*, S. CHINA MORNING POST (May 13, 2016) <https://www.scmp.com/comment/insight-opinion/article/1943518/democracy-hong-kong-must-be-advanced-stages>.

<sup>240</sup> *World Report 2015: India*, HUM. RTS. WATCH (2015), <https://www.hrw.org/world-report/2016/country-chapters/india>.

<sup>241</sup> *Narendra Modi Is Damaging India's Economy as Well as Its Democracy*, ECONOMIST (Oct. 24, 2019), <https://www.economist.com/leaders/2019/10/24/narendra-modi-is-damaging-indias-economy-as-well-as-its-democracy>; Lone, *supra* note 239; JACQUES, *supra* note 200, at 211.

<sup>242</sup> Chimni, *Coping with Dualism*, *supra* note 78, at 23–24.

TWAIL scholars also have to grapple with and perhaps get accustomed to the double duality, not just of mainstream international law, but of their own states that are engaged in pursuing their national interest in a very non-TWAIL manner on national, regional, and international platforms.<sup>243</sup> For example, the promulgation of the idea of “Indian” human rights cannot be used as a cover for the actions of the far-right government in power.<sup>244</sup>

As Chatterjee points out, scholars from the periphery “cannot be for or against” international law but can “only devise strategies for coping with it.”<sup>245</sup> As argued in this discourse by TWAIL scholars, China and India have adopted a dualistic approach to international law and both appear to constantly change or selectively pick their normative as well as practical positions while defending their strategic self-interests. TWAIL-ers need to invent strategies to manage this duality. For example, the marginalization of discourse on the key issue of caste discrimination in India shows that international scholarship has certain entrenched weaknesses in terms of the solutions it offers, particularly on issues that cannot be addressed with only recommending changes in law.<sup>246</sup>

There are, however, positive alternatives. In formulating potential developments of TWAIL scholarship in the future, Appiagyei-Atua recommends a “theory of community emancipation.”<sup>247</sup> In this perspective, communities should be empowered to root out challenges to their emancipation from both domestic and international sources.<sup>248</sup> It is a “needs-capacities-duties-rights framework,” allowing people and communities to assess what is required, with the assumption that people will follow the rules developed through this consensus.<sup>249</sup> In this theory, development is dependent on the duties to moral and political authorities, people themselves, and their groups and communities in an undisturbed structure, which allows for development.<sup>250</sup> In terms of

---

<sup>243</sup> *Id.* at 24; Brian-Vincent Ikejiaku, *International Law Is Western Made Global Law: The Perception of Third-World Category*, 6 AFR. J. LEGAL STUD. 337 (2014); see Appiagyei-Atua, *supra* note 3; Parmar, *supra* note 22, at 364; Fagbongbe, *supra* note 76; S.R. Ratner, *Ethics and International Law: Integrating the Global Justice Project(s)*, in PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES 2–3 (2013).

<sup>244</sup> See Written Testimony of Dr Nitasha Kaul, Associate Professor, Centre for the Study of Democracy University of Westminster, London, UK, Hearing on “Human Rights in South Asia: Views from the State Department and the Region, Panel II,” U.S. House of Representatives Subcommittee on Asia, the Pacific and Nonproliferation (Committee on Foreign Affairs October 22, 2019), at 10.

<sup>245</sup> PARTHA CHATTERJEE, A POSSIBLE INDIA: ESSAYS IN POLITICAL CRITICISM 280 (1997).

<sup>246</sup> Srinivas Burra, *TWAIL's Others: A Caste Critique of TWAILers and Their Field of Analysis*, 33 WINDSOR Y.B. ACCESS JUST. 111, 117 (2016).

<sup>247</sup> Appiagyei-Atua, *supra* note 3, at 234.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 229–30.

<sup>250</sup> *Id.*

development, it is categorized as being the result of active contribution (where persons can enjoy their rights and will perform their duties largely without coercion), leading to sustainable development, and therefore passive or negative contributions would affect the relationship with rights accordingly.<sup>251</sup>

Scholars such as Ratner have called out the unwillingness of scholars to go far enough in challenging the way wealth has been distributed and how those foundations could be challenged.<sup>252</sup> There is clearly a challenge in balancing the need for achieving justice with the practical realities of stability, with “relative justice and peace” not being sacrificed to absolutism, and yet remaining open to questions that may appear to have revolutionary answers.<sup>253</sup>

#### TENTATIVE CONCLUSIONS—A CALL FOR ADOPTING A MULTIDISCIPLINARY APPROACH

TWAIL-ers are developing a new era of international law scholarship by reviewing it from alternative critical perspectives.<sup>254</sup> They, along with CLS and other scholars, have aimed to bridge the gaps in terms of understanding concepts such as colonialism,<sup>255</sup> sovereignty, and customs, leading to the cross-fertilization of knowledge and generating possibilities for developing universal perspectives within the discipline of international law.<sup>256</sup> With the rise of Asian states such as China and India, scholars are rethinking international law from Eastphalian paradigms, teaching courses, delivering lectures, convening conferences, and publishing in journals that focus on understanding the Asian countries’ views on international law.<sup>257</sup> This illustrates the impact and importance of the Third World for the growth of international law.

While reviewing the Third World approaches, this Article attempted to demonstrate that the methods of international law are elusive, and that subjective

---

<sup>251</sup> *Id.*

<sup>252</sup> Steven Ratner, *Ethics and International Law: Integrating the Global Justice Project(s)*, 5 INT’L THEORY 1, 24–25 (2013).

<sup>253</sup> Buchanan, *supra* note 16, at 453.

<sup>254</sup> Natarajan et. al, *supra* note 44, at 1948;

<sup>255</sup> *Id.* at 1951; Buchanan, *supra* note 16, at 452.

<sup>256</sup> See Mickelson, *supra* note 60, at 355–56 (discussing how various backgrounds and points of view of international law shaped TWAIL approaches to international law).

<sup>257</sup> *Id.*; Natarajan et. al, *supra* note 44, at 1948; XUE, *supra* note 165, at 211–12; Tony Carty & Fozia Lone, Course at The University of Hong Kong Faculty of Law: National Views of International Law (June–July 2010); Antony Anghie & B. S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77 (2003); TWAIL Conference at The American University in Cairo, 21–24 (Feb. 2015). See generally THIRD WORLD Q. (illustrating a journal published since 1979 focusing on third world issues).

factors that lead to and create law (such as politics, self-interest, culture and power and so on) are brushed aside as idiosyncratic and not a part of law. It would, hence, be accurate to suggest that for positivist scholars, international law has become a “consensual vocabulary and grammar.”<sup>258</sup> These mainstream international scholars, while discussing historical, political, and theoretical doctrines of international law, have tried to keep their political discourse legal, when in reality it should be the political discourse that leads these so-called legal narratives.<sup>259</sup> In this way, positivist scholars have imprisoned contemporary international law and embedded its normative standards into restricted rhetorical interpretations, which are immersed in biases and self-interest.<sup>260</sup> International law has been, as such, limited by how these scholars and their nations have described it, in discourse that “[substitutes] analogy for analysis.”<sup>261</sup> In that myopic, Western-centric discussion, the Third World was neither completely allowed to emerge as an autonomous conceptual entity, nor were its historical, racial, and ethnic issues permitted to develop separately. Rather, these elements were downgraded to superficial studies in European societies about multiculturalism or minority rights and not understood on their own merits.<sup>262</sup>

As discussed, contemporary international law is at a crossroads on many different levels, especially as the peripheral nations (i.e. the Third World) are taking center stage while the world order is embroiled in tacit civilizational war. Under these circumstances, to understand the future nuances of international law, it is important to review the possible paradigms that rising nations can offer. As reviewed, Asian paradigms could be useful for refreshing attitudes in international law and, to some extent, for mitigating its areas of intolerance. The TWAIL narrative has also proven useful for rising states in the Third World, particularly China and India, to articulate their departure from international law, which is mainly propelled by their subjugated past.<sup>263</sup> The process of universalization has led to the dominance of certain sources and centers of knowledge.<sup>264</sup> These nations, among others, have seemingly adopted practices

---

<sup>258</sup> Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHINESE J. INT'L L. 1, 32 (2009).

<sup>259</sup> Badaru, *supra* note 58, at 384–85.

<sup>260</sup> Cf. Okafor, *supra* note 79, at 376.

<sup>261</sup> Rein Müllerson, *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia*, 8 CHINESE J. INT'L L. 2, 2 (2009).

<sup>262</sup> OLIVIER CORTEN ET AL., *NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND AMERICAN EXPERIENCES* 421–22 (José María Beneyto et al. eds., 2012); Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527, 1533 (1992).

<sup>263</sup> Xavier, *supra* note 21, at 229–31.

<sup>264</sup> Odumosu, *supra* note 82, at 471.

that call for non-intervention and bilateralism.<sup>265</sup> In a modern yet volatile world, this approach could be very conformist and may not provide many dividends if practiced where human rights or human security is at stake. Although these rising nations are eager to make contributions to the contemporary legal order based on their own traditional and religious values, the rejection of European international law on economic expansion and human rights protection seems to be impractical and damaging even for their own people. China and India have adopted a formalist, dualist approach towards international law, but are required to reflect on how to fulfill their responsibility towards greater global engagement, such as with regard to climate change and human security. The failure to rise to the occasion could severely harm the politico-economic destiny of these nations and shatter the optimism of billions of subaltern people in the Third World.<sup>266</sup>

To reach a broader audience and touch on more critical thoughts within the larger international scholarly community, it is essential that scholars adopt a continuing multidisciplinary approach<sup>267</sup> and go beyond the discipline of international law, venturing into specialized areas such as human rights, critical theory, legal history, politics, and diplomacy. First, I believe that undertaking this journey is meaningful as it provides scholars with intellectual inspiration and adequate opportunity for a thorough legal reflection. Second, as I attempted to discuss in this critique, international law is not based on any well-established axiom or postulate that could be accepted without controversy as a normative standard for the entire multicultural and multiethnic global community. The existing system is arguably only partially complete, serving mainly the interests of the West, which is now engaged in neo-colonial practices.<sup>268</sup> International law is grounded in political foundations, and a new approach is required to better understand and resolve ongoing struggles.<sup>269</sup>

Obviously, it is difficult to find new strategies and innovative modes of action that abide by the normative structures of European international law and yet somehow increase genuine participation at the decision-making level by peoples of the Third World.<sup>270</sup> This process is not a smooth one and may at times “reflect a deeper level of contradiction,” demonstrating that “we are divided,

---

<sup>265</sup> ANJALI GHOSH, INDIA'S APPROACH TO FOREIGN POLICY 357 (2009); Ronald C Keith, *The Origins and Strategic Implications of China's "Independent Foreign Policy"* 41(1) INT'L J. 95, 95 (1986).

<sup>266</sup> Appiagyei-Atua, *supra* note 3, at 231.

<sup>267</sup> Galindo, *supra* note 57, at 46-47.

<sup>268</sup> Anghie & Chimni, *supra* note 1, at 96.

<sup>269</sup> Kennedy, *supra* note 116, at 335.

<sup>270</sup> Galindo, *supra* note 57, at 41.

among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.”<sup>271</sup> Adopting the multidisciplinary approach is perhaps a logical strategy to deal with the divergent practices of rising Asian nations, as well as to understand, manage, and rebut limited interpretations of international law produced by positivist scholars.<sup>272</sup> TWAIL demands looking at alternative histories, and that plays into concepts like self-determination and how such concepts are understood.<sup>273</sup> A multidisciplinary approach will also encourage scholars to stretch the boundaries of international law as well as inspire a dialogue outside disciplinary categories.

International concerns, fears, and apprehensions are not static in nature but rather are in the process of constant transformation. Even at a personal scholarly level, as we think and rethink, imagine and reimagine our own thoughts and ideas, transformation and cross-fertilization of our notions is in constant progression.<sup>274</sup> Similar subjective transformations are occurring at national levels in the minds of rising leaders, an awareness that is reflected in their international practices. Hence, multidisciplinary scholarly exposition towards the understanding of diverse practices of international law would allow scholars to tackle subjectivity by accepting it as a part of international legal discourse. This exposition by scholars would also better outline the conditions for various derivations, creating amongst scholars a new culture for appreciating other value systems while being tolerant and respectful towards each other.<sup>275</sup>

When the efforts to resolve injustice require either lending dialectic support, “venturing into fields such as politics, social and economic casuistry,”<sup>276</sup> or adopting a multidisciplinary approach, we must do so. It is also believed that a multidisciplinary approach provides a genuine opportunity for international scholars to conceptualize their own thoughts and practice,<sup>277</sup> and to share and receive ideas that shape and reshape our own perceptions, resulting in a deeper understanding of international law and its subjectivity. This also gives a larger role to scholarly work, which has usually been seen as subjective or “‘peripheral’ to the discipline’s metropolitan ‘centre.’”<sup>278</sup> The adoption of a

---

<sup>271</sup> Kennedy, *supra* note 139, at 1685.

<sup>272</sup> Odumosu, *supra* note 82, at 473; Natarajan, et al., *supra* note 44, at 11.

<sup>273</sup> Parmar, *supra* note 22, at 366.

<sup>274</sup> Cf. Attar & Tava, *supra* note 18, at 14.

<sup>275</sup> Odumosu, *supra* note 82, at 477.

<sup>276</sup> Koskenniemi, *supra* note 138, at 32.

<sup>277</sup> Attar & Tava, *supra* note 18, at 10.

<sup>278</sup> Fleur Johns et al., *Editors' Introduction: India and International Law in the Periphery Series*, 23 LEIDEN J. INT'L L. 1 (2010).

multidisciplinary process in fact exposes, articulates, and scrutinizes hopes and expectations, which allows for crafting narratives that link varied philosophies and disciplines together. “It is in these moments of telling different stories and listening to others [that] change happens.”<sup>279</sup>

---

<sup>279</sup> Fakhri, *supra* note 70, at 15.