

Framing the concept of TWAIL: “Third World Approaches to International Law”

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Abstract

The authors who identify themselves as “twailers” advocate for the importance of the thoughts related to the concept of “Third World Approaches to International Law”, known as TWAIL. This paper first explains the importance of understanding the concept of TWAIL - “Third World Approaches to International Law”. Afterwards, it frames the concept of TWAIL according to some of its main scholars, considering that one of its features is its extreme diversity. The challenge to this attempt of definition is to find unity within its broad diversity.

Keywords: Colonialism. International law. Third world. Third World Approaches to International Law. TWAIL.

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Introduction

Why understanding TWAIL is important?

The authors who identify themselves as “twailers” advocate for the importance of the thoughts related to the concept of “Third World Approaches to International Law”, known as TWAIL.

On one hand, twailers have questioned important issues regarding international law, such as the role of international financial institutions and economic law at large on the reproduction of economic exploitation of the Third World; war laws and the redefinition of the concept of terrorism; international criminal law; but mainly the rereading of the history of international law and its role in the reproduction and legitimation of colonial and neocolonial practices, as well as the critique of human rights.¹ On the other hand, twailers have used the historical sources of international law doctrines to challenge the veracity of those doctrines, and to demonstrate that international law is not based on intellectual and moral commitments that reflect its global subject matter, but only its european history. That is the reason why there would be significant space for the insights of TWAIL in mainstream scholarship.²

A key point is that twailers have dedicated themselves to study the historical evolution of international law to show the dialectical relationship between international law and colonialism/postcolonialism, and the role played by the former one to allow the last one, largely propelled by the civilizing mission aiming to define the relationship between europeans and non-europeans.³

The historical analysis is considered to be of high relevance because at a certain time, colonization was justified by standards stemming from natural law, like the right to trade or the right of residence. Nowadays, recolonization is being allowed by principles as for good governance and the respect for human rights.⁴ By the way, the other side of the dialectical relationship regards the construction of international law, and the recognition doctrine is an example which has allowed europeans to establish the criteria to distinguish among sovereign states and others.⁵ Twailers usually denounce the unclear purposes of international law forcefully.

Based in this context, this paper first explains the importance of understanding the concept of “Third World Approaches to Internacional Law” – TWAIL. Afterwards, it frames the concept of TWAIL according to some of its main scho-

lars, considering one of its features is its extreme diversity. The challenge to this attempt of definition is to find unity within its broad diversity.

What is TWAIL according to some of its main scholars

There are many different perceptions about "Third World Approaches to International Law", known as "TWAIL". Twailers are characterized by their extremely diversity of thoughts. Whatever TWAIL is a scholarly community and/or a political movement; a methodology; a set of approaches; a chorus of voices; a theory; a network of scholars; a political grouping; a strategic engagement with international law; an intellectual community; a school of thought; a rubric; a broad dialectic (or large umbrella) of opposition to the generally unequal, unfair, and unjust character of an international legal regime that helps subject the third world to domination, subordination, and serious disadvantage; or something else, it has some main features. Those features will be examined in the following analyses of twailers.

Bhupinder Singh Chimni asserts that anyone may be part of the TWAIL movement, as there is no need to subscribe to a party program. In his words, "it is a loose network of scholars whose work is animated with the concern to establish a truly universal international law that goes to promote a just global order"⁶. In other words, no one officially joins or applies to TWAIL since one becomes a twailer by simply selfidentifying as such.⁷

Michel Fakhri⁸, for instance, has observed he has met some people whose scholarship is aligned with TWAIL but vehemently insist that they are not twailers.⁹ According to him:

(...) this suggests that there is some element of being inside and outside of TWAIL, or some sort of TWAIL sensibility. Thankfully, TWAIL maintains a semblance of its own intellectual character through its ever-growing literature. One way that twailers connect is through the shared experience of reading much of the same texts - which creates an intimate relationship among strangers.¹⁰

The elements regarding the perception or definition of TWAIL, as well as its features pointed above, may be easily found in the writings of many twailers.

Balakrishnan Rajagopal acknowledges that the most important critique of unjust and unequal modern international law has been the charge that it is an

eurocentric regime, and he affirms that “in terms of international law, the various elements of this critique can be discussed under the rubric ‘Third World Approaches to International Law’.”¹¹

In a very strong article, Makau Mutua asserts:

The regime of international law is illegitimate! It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable and legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination. Historically, the Third World has generally viewed international law as a regime and discourse of domination and subordination, not resistance and liberation. This broad dialectic of opposition to international law is defined and referred to here as Third World Approaches to International Law (TWAAIL).¹²

Somewhere else, Makau Mutua states that:

In the last several hundred years, the globe has witnessed the universalization of Eurocentric norms and cultural forms through the creation of the colonial state and the predominance of certain economic, social, and political models. International law itself was founded on the preeminence of four specific European biases: geographic Europe as the center, and Christianity, mercantile economics, and political imperialism as superior paradigms. Both the League of Nations and its successor, the United Nations, revitalized and confirmed European-American domination of international affairs. In the post-War period, non-European states were trusted or mandated to Western powers or became client states of one or another Western state.¹³

Bhupinder Singh Chimni highlights the crucial role played by international law in maintaining the unequal structures and processes that manifest themselves in the growing north-south divide. For him, international law is indeed “the principal language in which domination is coming to be expressed in the era of globalization.”¹⁴ In his words:

International law has always served the interests of dominant social forces and States in international relations. However, domination, history testifies, can coexist with varying degrees of autonomy for dominated States. The colonial period saw the complete and open negation of the autonomy of the colonized countries. In the era of globalization, the reality of dominance is best conceptualized as a more stealthy, complex and cumulative process. A growing assemblage of international laws, institutions and practices coalesce to erode the independence of third world countries in favor of transnational capital and powerful States. The ruling elite of the third world, on the other hand, has been unable and/or unwilling to devise, deploy, and sustain effective political and legal strategies to protect the interests of third world peoples.¹⁵

In an important article about the past, present and future of international law¹⁶, Buphinder Singh Chimni explains the importance of the history of international law, and so why it has been so examined by third world scholars in the post-colonial period, in all its complexity, in order to challenge the celebratory history of international law written by Western scholars, "to dispel the idea that the non-Western world was unfamiliar with international legal practices in the pre-colonial era", to "contest the understanding that international law was simply a product of European Christian civilization",¹⁷

(...) to show how the development of international law since the 16th century was linked to the colonial project, like the rules of international law in crucial areas, such as laws relating to the acquisition of territory, recognition, state responsibility and state succession, were shaped by the necessities of colonialism.¹⁸

In a forceful way, Buphinder Singh Chimni states that:

The alienation of international law from the peoples of the third world was epitomised in the civilisation/barbarian divide that made them and their territory into objects of international law. If third world peoples ever metamorphosed into subjects of international law, it was only ever to surrender sovereignty to colonial masters. The moment of empowerment was the moment of complete subjection. It was a time of absolute alienation of third world peoples from international law. Death, destruction, pillage, plunder and humiliation are the key words that best capture the relationship between third world peoples and international law in this period. The relationship between colonialism and nature was no different in essence. Imperialism subjugated both peoples and nature in equal measure.¹⁹

On the other hand, Chimni stresses the complicity between history of international law and colonialism, and the effort to maintain this colonial international law as the universal international law. While the early scholarship tended to treat the colonial encounter as marginal to the story of international law, TWAIL scholars situate the colonial project at the very heart of international law. Consequently, they indict that "an emerging transnational capitalist class, constituted by the transnational fractions of the national capitalist classes, seeks to unify the world market through the instrument of international law. The transnational capitalist class is well on the way to realizing its goal with the aid of international law. But it is reproducing an international law that remains a divided self".²⁰

Moreover, Buphinder Singh Chimni emphasizes the importance to distinguishing a "third world approach to international law" from a "critical third

world approach to international law”. According to him, a third world approach to international law represents in general an attempt to understand the history, structure and process of international law from the perspective of third world states. On the other hand, a critical third world approach goes further and gives meaning to international law in the context of the lived experiences of the ordinary peoples of the third world in order to transform it into an international law of emancipation, offering a life of dignity for oppressed third world people²¹.

In the same way, Olivier Corten considers TWAIL as a contemporary way of critical approaches to international law²², and Karin Mickelson, Ibiromke Oduosun and Pooja Parmar highlight TWAIL’s multifaceted and complex third world engagement with international law, and its important task to problematize and contest the dominant, historically eurocentric accounts of the origin of international law and its claims of universality, justice and equity.²³

According to Obiora Chinedu Okafor, despite their “healthy” internal differences, TWAIL scholars are united by:

(...) a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order. They accomplish this through a commitment to centre the rest rather than merely the west, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.²⁴

In addition, the author highlights the importance of examining the colonial devices of international law to understand the nature of the current international legal regime. Thus, for him the first sensibility of TWAIL would be its commitment to taking seriously into account world history, and not merely western history, in order to understand the complex colonial gears used in the past, and thus to recognize similar techniques which are present nowadays, and to understand how those techniques continue to work today to maintain and increase global injustice.²⁵

The second TWAIL sensibility would be to take the equality of third world peoples seriously, so as to assume they deserve the same dignity, the same security, and the same rights or benefits from international action than do northern states people. Thus, the TWAIL vision of equality extends beyond formal equality, and it is “wary of glib assertions of universality that tend to elide or mask underlying politics of domination.”²⁶

The last key TWAIL sensibility, according to Okafor, would be the insistence on offering epistemic and ideational resistance to the global hegemonies, and the understanding the ways in which international law and global institutions have responded to the third world resistance.²⁷

Luiz Eslava and Sandhya Pahuja agree that the point of departure of TWAIL are the 'mainstream' interpretations of international law, and in opposition of those interpretations is "TWAIL's insistence that issues of material distribution and imbalances of power affect the way in which international legal concepts, categories, norms and doctrines are produced and understood." They observe also that TWAIL has made a substantive contribution to the revitalization of questions about justice in the international legal order.²⁸

Michael Fakhri understands TWAIL as a scholarly community and political movement. He defines it as "a movement that challenges the prevailing trend in international law that has legitimated global processes of marginalization and domination." In this way, TWAIL consider the situation of Third World peoples as the historical context from which one might imagine an emancipatory international law.²⁹ Furthermore, the author highlights the need to:

(...) take note of imperialism's change from historical colonialism and territorial expansion, to postwar neo-colonialism and the exploitation of post-colonial sovereign states, to contemporary global imperialism driven by a transnational capitalist class and international institutions.³⁰

Obiora Chinedu Okafor proposes that TWAIL can be thought of in the way suggested by its appellation, that is, as a broad approach. According to him, "the term "approach" accommodates both the theoretical and methodological dimensions and properties of TWAIL scholarship." Finally, he contends that the fact that this term is somewhat biased toward the methodological may dictate in favor of a broader concept, such as "school of thought", as an "intellectual community" grounded in similar ideas.³¹ Nevertheless, he highlights the diversity within TWAIL scholarship, as "some strains of TWAIL are more oppositional than reconstructive, while others are more reconstructive than oppositional."³²

Regarding the reconstruction of international law, Antony Anghie and Bhupinder Singh Chimni pledge for an approach to the discipline based on a philosophy of suspicion because:

It sees international law in terms of its history of complicity with colonialism, a complicity that continues now in various ways with the phenomenon of neo-colonialism, the identifiable and systematic pattern whereby the North seeks to assert and maintain its economic, military, and political superiority.³³

Andrew F. Sunter points out the important contribution of TWAIL in providing a critique of the contemporary international law regime from historical and cultural evidence, demonstrating that mainstream doctrines of international law are highly eurocentric and, therefore, not representative of the values and beliefs of the most part of the world's population. His understanding of TWAIL is that it maintains some hope for an emancipated reconstruction of international law, incorporating subaltern voices from the south into its discourse. In his words, "TWAIL represents more than a theoretical commitment to critical deconstruction; it also represents marginalized world-views."³⁴

Again, quoting Makau Mutua:

TWAIL is a historically located intellectual and political movement. It is therefore a form of intellectual consciousness that is not automatically bounded by geography, although its originators and most authentic thinkers have been from the Third World. Such originators have a direct-even personal-stake and experience in the material conditions of the Third World.³⁵

For Mutua³⁶, TWAIL is a reaction to decolonization and the end of direct european colonial rule over non-europeans, and it "describes a response to a condition, and is both reactive and proactive. It is reactive in the sense that it responds to international law as an imperial project. But it is proactive because it seeks the internal transformation of conditions in the Third World."

Vikrant Dayanand Shetty defines TWAIL as "a spread-out network of scholars, with common ideologies but no structure of authority. It has operated as a loose network."³⁷ Further, the author points out that TWAIL scholars have argued that theoretical views linked to colonialism and imperialism are essential for the understanding of the practicality of international law, and reminds that colonialization itself was justified as a 'civilizing mission' and that it was the duty of the more developed western states to civilize third world states. According to him, "The narrative of the civilizing mission has shaped the way both the historical and modern discipline has engaged with cultural differences. The central arguments indicate a faith that the West has a duty to civilize the failed state, the rogue state and the terrorist, so as to rescue the Third World from its backwardness as well as prevent this backwardness from threatening civilized

regions.”³⁸ It is important to note that the insistence on the issue of civilizing mission appears in many twailers works, and seem to be a common point on TWAIL thoughts.

Meghana Sharafurdeen points to three unique characteristics of TWAIL scholarship, which are TWAIL’s extreme relevance to the developing world, its lack of a mainstream presence, and the heterogeneous nature of its scholarship³⁹. Regarding the heterogeneous nature of its scholarship, Luiz Eslava and Sandhya Paruja highlight that although there is no single theoretical approach within TWAIL scholars, they share both a sensibility, and a political orientation: “TWAIL is therefore not so much a method, as a political grouping or strategic engagement with international law, defined by a commonality of concerns.” Furthermore, the authors defend the extension of the operation of international law to sites and subjects that have traditionally been positioned as the ‘others of international law’.⁴⁰

Karin Mickelson, Ibrónke Odumosu and Pooja Parmar observe that:

TWAIL scholars draw from a number of different disciplines and represent a diverse range of theoretical leanings - postcolonial, Marxist, post-structuralist and feminist, to name only a few. What these scholars share is the political, ethical and academic commitment to look at the history, structure and processes of international law and institutions from a particular standpoint: that of the peoples of the Third World.⁴¹

On the other hand, Pooja Parmar insists that there is an ideological resistance that underlies the whole TWAIL literature, and he suggests this is a resistance to the “*dis-regard*” within mainstream international legal theory of the ‘cultural and civilisational plurality’⁴². According to him, TWAIL offers a resistance to this *dis-regard*:

(...) to the manner in which mainstream international law is “inattentive” to certain histories; the way in which international legal theory, in pursuit of universalisms and celebrations of imagined ‘international communities’ and a ‘common global good’ chooses to “not concern itself” with the colonial past and the continuing presence of that past in the lives of particular peoples in particular places and in particular ways. It is a “*dis-regard*” that not only enables international law to ignore its colonial origins, and legitimise this “act of ignoring”, but to also excuse itself from any meaningful engagement with the Third World.⁴³

Ultimately, Parmar suggests that TWAIL engage upon a meaningful engagement with third worldism, challenging this “*dis-regard*” of non-euro-american thought and epistemology within international legal theory.⁴⁴

For TWAIL scholars, international law makes sense only in the context of the lived history of the peoples of the third world - the term “third world” would have a meaning and “denotes a unity that transcends the enormous diversity that marks it”⁴⁵.

According to Antony Anghie and Bhupinder Singh Chimni, two important characteristics of TWAIL thinking emerge from this:

First, the experience of colonialism and neo-colonialism has made Third World peoples acutely sensitive to power relations among states and to the ways in which any proposed international rule or institution will actually affect the distribution of power between states and peoples. Second, it is the actualized experience of these peoples, and not merely that of the States that represent them in international fora, that is the interpretive prism through which rules of international law are to be evaluated. This is because (...) Third World states often act in ways that are against the interests of their peoples⁴⁶.

It seems clear that a focus on the lives of third world peoples, who stand delegitimized through a particular history of the world, makes the history of international law, its theories, doctrines, institutions and practices an integral component of TWAIL. As put by Pooja Parmar:

In fact, the very idea of ‘Third Worldism’ is connected to a sense of history, and to demands for the recognition of alternative histories”. In the context of TWAIL, ‘Third World’ is a term that “locates the historic-cultural roots of [the] hierarchical ordering [of the international community] in the historical experience of colonialism and imperialism.”⁴⁷

As a consequence, the objectives of TWAIL pass through a transformation of international law, based on the lived experience of third world peoples, that is, considering the needs and interests of peoples rather than states, “from a language of oppression to a language of emancipation - a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples and that, thereby, promote truly global justice”⁴⁸. Vikrant Dayanand Shetty contends that “international law must, in the simplest of terms, focus on the effects of any policy on the individual’s life instead of only the relationship of the states.”⁴⁹ TWAIL call for paying attention to the untold stories of international law, and to finding ways of setting ‘subjugated knowledges’ free.

Bhupinder Singh Chimni pledges that it is “imperative that TWAIL urgently find ways and means to globalize the sources of critical knowledge and address the material and ethical concerns of third world peoples.”⁵⁰ According to Pooja Parmar, uncovering such knowledges requires a focus on ‘everyday

lives' of peoples⁵¹, but particularly third world peoples: "It strives for a meaningful engagement with lives of peoples whose interests, concerns, histories and struggles have been relegated to the margins of international legal theory, primarily as a consequence of colonialism and imperialism."⁵²

Although, Pooja Parmar explains that the focus must 'starts off thought' from the lives of third world peoples, but must not be interpreted as an uncritical privileging of stories of essentialized third world peoples.⁵³ Some TWAIL scholars place importance on local and international social movements as engines of reform for the third world and international law. Scholars who have studied the third world's connection to international law believe that the current global scenario suffers from narrow-mindedness that badly affects humanity.⁵⁴

Makau Mutua makes an important point the following way:

Any TWAIL scholarship or political action must be *fundamentally oppositional* to an important question in international law. Such disagreement must be related to an issue that is of significance to, or affects in an important way, the Third World. The purpose of such scholarship or work must be to eliminate or alleviate the harm or injury that the Third World would likely have suffered as a result of the unjust international legal, political, and economic order. Such scholarship or political action will be concerned with justice or the fairness of norms, institutions, processes, and practices in the transnational arena. Its overriding purpose must be the elimination of an aspect of Third World powerlessness. At a minimum, the author or political actor exposes, attacks, or unpacks a particular phenomenon that is inimical to the Third World. This is the most fundamental characteristic of TWAIL scholarship and political action⁵⁵."

Further, Makau Mutua highlights that TWAIL part from some assumptions: it is antihierarchical, counterhegemonic, suspicious of international creeds and truths; and it is a coalitionary movement⁵⁶. Asserting TWAIL is antihierarchical, the author states that international law has been driven by "complexes of superiority", that is, on the supremacy of white european peoples over non-europeans, and the "duty" of the former to civilize and control the latter:

The last five centuries of European hegemony manifest a pattern. The pattern is the long queue of the colonial administrator, the Bible-carrying missionary come to save the heathens, the commercial profiteer, the exporter of political democracy, and now the human rights crusader. International law has perhaps been the most important weapon in the spread of Eurocentrism, which has been presented as the pinnacle of human civilization. TWAIL, in contrast, assumes the *moral equivalency of cultures* and peoples and rejects "othering," the creation of dumb copies of the original⁵⁷.

Asserting TWAIL is counterhegemonic, Mutua explains it opposes the global hegemony of the west legitimized by the United Nations, whose structure is considered indefensible (mainly the Security Council), and whose organs and structure are used selectively depending on the interests of western powers.⁵⁸ And he highlights there are many examples of this selecting use of the mechanisms of Security Council after the 1990' and during the XXI century. Although the United Nations was put as the neutral, universal and fair guardian of the new order; actually, european hegemony over global affairs was simply transferred to the big powers – the United States, Great Britain, France, the Soviet Union, and China – through the allocation of permanent seats at the Security Council, the most powerful UN organ. For this scholar, “The primacy of the Security Council over the UN General Assembly, which would be dominated by Third World states, made a mockery of the notion of sovereign equality among states. Third World states now became fodder in the new bipolar Cold War vise, whose center was still the West”.⁵⁹

At the same vein, Vikrant Dayanand Shetty also highlights the serious democratic defect within United Nations structure, because the General Assembly, which consists of all the members of the UN, only has the power to make recommendations to the Security Council, whereas the Security Council consists of only fifteen members of which five members have permanent seats and the veto power.⁶⁰ Then, Makau Mutua concludes rightly that the use of the UN as a front by the big powers “simply changed the form of European hegemony, not its substance”.⁶¹

Concerning suspicion about international creeds and truths, Makau Mutua assumes that some degree of universality is desirable, but he explains that TWAIL oppose to attempts “to confer universality on norms and practices that are European in origin, thought, and experience”, mainly norms that are given the sanction of international law, like human rights and particular economic values, such as the protection of intellectual property through TRIPs. Further, he argues “TWAIL does not believe that free-market, private property, or trade values are superior to, or automatically trump, other human values. Otherwise, powerful economic and military interests are able to force their views on the rest of the world and freeze them as eternal, inflexible truths, much in the same way Christianity was forced on non-European peoples.”⁶²

Ultimately, as a coalitionary movement, Makau Mutua assumes that “the globalization of injustice is closely linked to the phenomenon of globalization.

TWAIL believes that forming coalitions with like-minded movements in all societies, including in the West, is an essential strategy for combating powerlessness and the victimization of the Third World and marginalized communities in the West." Thus, TWAIL seek to work together with other scholarly communities, like critical race theory (CRT) and new approaches to international law (NAIL).⁶³ The challenge for CRT, NAIL, and other western movements that oppose white supremacist and eurocentric hierarchies, according to the author, "is to realize that domination is global. They must work in an international idiom, and connect subordination of particular groups in the United States to the exploitation of the Third World."⁶⁴

Concerning the universality of international law, twailers argue that there is a very strong paradox because its creators have always asserted its european and christian origins. This is so relating to Hugo Grotius, the dutch scholar widely regarded as the father of international law, and Francisco de Vitoria, the sixteenth-century spanish christian theologian and legal scholar⁶⁵. According to Makau Mutua, "*Twailian* scholarship disavows the universalization of specific cultures under the guise of promoting global order, peace, and security. Instead, *twailers* call for dialogic maneuvers across cultures to establish, where necessary, the content of universally acceptable norms". Stating otherwise, TWAIL does not reject international law at all, but its illegitimate current regime, because it ignores the richness and diversity of the world, and "it is based almost entirely on the intellectual, historical, and cultural experiences of one region of the world. It privileges Europe, European knowledge and thinks European. Even the international law of human rights, arguably a benign strand of international law, is rooted in an arrogant Eurocentric rhetoric and corpus".⁶⁶

In a celebrated passage, Mohammed Bedjaoui has observed that "international law is premised on Europe as the center, Christianity as the basis for civilization, capitalism as innate in humans, and imperialism as a necessity."⁶⁷

On the other hand, Vikrant Dayanand Shetty observes that international law lays down rules that ignore the condition of uneven development in favor of uniform global standards, discarding the principal of special and differential treatment, which had been negotiated continually by TWAIL scholars. He points out that:

(...) in reality though, the international law regime is not universal and impartial in relation to sovereign states. TWAIL scholars point to a two-tiered system of 'international' law that legitimizes and supports the actions of First World nations while concurrently criminalizing the actions of their Third World counterparts.⁶⁸

Makau Mutua contends that the notion of sovereignty was itself a very useful instrument to legitimize colonialism in the encounter between Europe and the rest of the world, "wherein a small number of European states fanned across the globe and took over more than three quarters of it for their own aggrandizement".⁶⁹

At the same sense, Antony Anghie⁷⁰ pointed that:

The colonial confrontation was not a confrontation between two sovereign states, but between a sovereign European state and a non-European state that, according to the positivist jurisprudence of the time, was lacking in sovereignty. Such a confrontation poses no conceptual difficulties for the positivist jurist who basically resolves the issue by arguing that the sovereign state can do as it wishes with regard to the non-sovereign entity, which lacks the legal personality to assert any legal opposition. Since the state is the central and most important actor in international law, sovereign statehood, as defined by European imperial powers, was the difference between freedom and the conquest and occupation of a people or society. The colonization of independent, non-European lands by Europeans was therefore justified, whether it was through military conquest, fraud, or intimidation.

Makau Mutua observes that europeans regarded colonization as part of their destiny, and as "good" for non-europeans in any case, that is why any method deployed in its pursuit was morally and legally just: "Brutal force, including the most barbaric actions imaginable, was applied by Europeans in the furtherance of colonialism".⁷¹

As a consequence, Antony Anghie points out that:

(...) by the end of the nineteenth century, international law had been universalized through the imperial conquests and the subjection of Africa, Asia, and the Pacific to European powers. North, Central and South America had been claimed by various European powers in the preceding four centuries.⁷²

The colonization and exploitation came with the force assimilation of non-european peoples into international law, and the universalization of european experiences. Vikrant Dayanand Shetty uses the term 'dynamic of difference' "to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as 'universal' and civilized and the other as 'particular' and

uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society."⁷³

Antony Anghie and Buphinder Singh Chimni stress that the concept of the "civilizing mission justified the continuous intervention by the West in the affairs of Third World societies and provided the moral basis for the economic exploitation of the Third World that has been an essential part of colonialism"⁷⁴. The authors explain that the concept of "civilizing mission" operates by characterizing non-European peoples as the "other"-the barbaric, the backward, the violent who must be civilized, redeemed, developed, pacified". And they add that "race has played a crucially important role in constructing and defining the other"⁷⁵.

On the other hand, Antony Anghie and Bhupinder Singh Chimni reflect on the fact that:

Since the beginnings of international law, it is frequently the "other," the non-European tribes, infidels, barbarians, who are identified as the source of all violence, and who must therefore be suppressed by an even more intense violence. However, this violence, when administered by the colonial power, is legitimate because it is inflicted in self-defense, or because it is humanitarian in character and indeed seeks to save the non-European peoples from themselves⁷⁶.

More recently, the document presenting the 2015 Third World Approaches to International Law Conference in Cairo, Egypt, asserts the following:

Third World Approaches to International Law (TWAIL) is a movement encompassing scholars and practitioners of international law and policy who are concerned with issues related to the global South. The scholarly agendas associated with TWAIL are diverse but the general theme of its interventions is to unpack and deconstruct the colonial legacies of international law and engage in decolonizing efforts. The term was coined in the 1990s through an alliance of scholars committed to critically investigating the mutually constitutive relationship between international law and the third world/global South. For legal projects operating at the margins of the mainstream discipline, the TWAIL network enables solidarity and mutual support through a shared political commitment to advocating for the interests of the global South. It endeavors to give voice to viewpoints systemically underrepresented or silenced. (...) This conference brings together the first major gathering of TWAIL scholars in the global South. Building upon past TWAIL events, and with praxis in mind, the conference aims to provide the space for scholars to continue to collaborate and conspire.⁷⁷

Final considerations

From the analyses explained above, it can be understood that TWAIL is a very diverse ‘movement’ - using the term adopted in the 2015 Third World Approaches to International Law Conference in Cairo, Egypt. This paper has approached that TWAIL has been given many concepts, as a scholarly community; a political movement; a methodology; a set of approaches; a chorus of voices; a theory; a network of scholars; a political grouping; a strategic engagement with international law; an intellectual community; a school of thought; a rubric; or a broad dialectic (or large umbrella) of opposition to the generally unequal, unfair, and unjust character of an international legal regime that helps subject the third world to domination, subordination, and serious disadvantage. Nevertheless, the term ‘movement’ seems to be the one which better accommodate the broad idea of “approaches”.

This extremely diverse movement, however, presents some key features within its diversity. First, TWAIL is based on a condemnation of current international law and on an opposition to the politics of empire, to the narrative of the civilizing mission and to the “dis-regard” within mainstream international legal theory of the cultural and civilizational plurality. Second that those concepts like universality of human rights, sovereignty, nation-state, civilization and development are attacked as instruments for legitimating, interfering and controlling third world peoples. Third, that the debate TWAIL enhances is of relevance to the third world because it’s drawn from the history of international law and colonization, so there would be a sense of a need to connect with the past. Fourth that TWAIL comprises a diversity of perspectives and viewpoints. Fifth, that it seeks internal transformation of the material conditions in the third world; and sixth, that it has an agenda that is both scholarly and political.

Enquadrando o conceito de TWAIL: "Abordagens do Terceiro Mundo ao Direito Internacional"

Resumo

Os autores que se identificam como "Twailers" defendem a importância dos pensamentos relacionados ao conceito de "Abordagens do Terceiro Mundo ao Direito Internacional", conhecido como TWAIL. Este artigo busca primeiro explicar a importância de entender o conceito de TWAIL - "Abordagens do Terceiro Mundo ao Direito Internacional". Posteriormente, visa enquadrar o conceito de TWAIL de acordo com alguns de seus principais estudiosos, considerando que uma de suas características é sua extrema diversidade. O desafio para essa tentativa de definição é encontrar unidade dentro de sua ampla diversidade.

Palavras-chave: Abordagens do Terceiro Mundo ao Direito Internacional. Colonialismo. Direito internacional. Terceiro Mundo. TWAIL.

Notas

- ² SUNTER, Andrew F. TWAIL as Naturalized Epistemological Inquiry. **Canadian Journal of Law & Jurisprudence**, 20, 2007, pp. 475-510, p. 480.
- ³ BACHAND, 2010. The author reminds: "For example, Makau Mutua explains how the Protocols and General Acts of the Berlin Conference had for the effect to legalize the colonization of Africa and the imposition of borders on this continent that had absolutely nothing to do with its social realities; that "wars of conquest and fraudulent treaties with African rulers and societies were the agencies for the effective imposition of European sovereignty", despite the apparently fraudulent nature of those treaties; and the colonial borders were eventually validated and legitimized by the League of Nations and the United Nations".
- ⁴ BACHAND, 2010.
- ⁵ Bachand states that: « *S'attardant cette fois-là sur la fin du XIX^e siècle, Anghie explique qu'alors que les colonisateurs justifiaient régulièrement la conquête du territoire par l'inexistence de souverain (au sens européen) sur ceux-ci, la colonisation était aussi parfois justifiée par des traités de cession de territoire ou des traités établissant des régimes de capitulation conclus avec les dirigeants des sociétés colonisées. Face à cette situation, les internationalistes devaient donc expliquer la distinction entre les territoires conquis sous prétexte de l'absence de souverain, et ceux qui l'étaient grâce à un acte juridique passé avec un souverain. Or c'est la doctrine de la reconnaissance qui a permis de régler ce problème : en faisant de la reconnaissance un critère pour l'obtention, pour les organisations sociales non européennes, de la personnalité juridique, on a ainsi permis au colonisateur de conclure des traités de cession avec certains souverains (dont les territoires étaient « reconnus » comme États capables de s'engager juridiquement au regard du droit international), et de conquérir des territoires qui n'étaient pas reconnus. Plus important encore, cette doctrine de la reconnaissance a permis aux Européens d'établir des critères établissant ce qui était nécessaire pour faire partie de la famille des nations, c'est-à-dire d'être reconnus par eux.* » (BACHAND, Rémi. Les Third world approaches to international law: Perspectives pour une approche subalterniste du droit international. In : TOUFAYAN, Marc; TOURME-JOUANNET Emmanuelle et RUIZ FABRI, Hélène.

- Droit international et nouvelles approches sur le Tiers-monde: entre répétition et renouveau.** Paris: Société de législation comparée, 2013, p. 395 e [ss.].
- ⁶ CHIMNI, B. S. The World of TWAIL: Introduction to the special issue. **Trade L. & Dev.**, 3, 14, 2011, p. 17.
- ⁷ For example, Antony Anghie states “My own field is international law. I am a member of the Third World Approaches to International Law (TWAIL) group of scholars.” (ANGHIE, Antony. *LatCrit and TWAIL. California Western International Law Journal*, 42, 2011-2012, p. 311-319, p. 311).
- ⁸ For example, Olivier Corten states that he knew TWAIL in 2010, and that “*il a immédiatement se senti proche des sensibilités qui sont à la base de sa création. Il se déclare un ‘sympathisant’ et un ‘novice’.* » (CORTEN, Olivier. Les TWAIL: approche scientifique originale ou nouveau label fédérateur? In : TOUFAYAN, Marc ; TOURME-JOUANNET Emmanuelle ; RUIZ FABRI, Hélène. **Droit international et nouvelles approches sur le Tiers-monde: entre répétition et renouveau.** Paris: Société de législation comparée, 2013, pp. 357-367, p. 357.)
- ⁹ Recently, in september 2017, in a seminar in Bogota, Colombia, I had the opportunity to ask Martti Koskenniemi if he considered himself as a twailer. He answered he would not be comfortable by identifying himself as a twailer because he comes from a first world country, Finland. According to him, twailers have the life experience in the third world. At the same occasion, Anne Orford, from Australia, said she would be happy to be considered as a twailer.
- ¹⁰ FAKHRI, Michael. Introduction – Questioning TWAIL’s Agenda. **Oregon Review of International Law**, 14, 2012, p. 1-15, p. 8.
- ¹¹ RAJAGOPAL, Balakrishnan. International law and its Discontents: Rethinking the Global South. **American Society International Law Proceedings**, 106, 2012, pp. 176-181, p. 176.
- ¹² MUTUA, Makau. What is TWAIL? **American Society of International Law Proceedings**, 94, 31, 2000, p. 31.
- ¹³ MUTUA, Makau. Sauvages, Victims and Saviours. The Metaphor of Human Rights. **Harvard International Law Journal**, 42, 201, 2001, p. 214.
- ¹⁴ CHIMNI, B. S., Third World Approaches to International Law: A Manifesto. **International Community Law Review**, 8, 2006, p. 3-27, p. 3.
- ¹⁵ CHIMNI, 2006, p. 26.
- ¹⁶ CHIMNI, B. S., The Past, Present and Future of International Law: a Critical Third World Approach. **Melb. J. of Int’l L.**, 8, 499, 2007.
- ¹⁷ CHIMNI, 2007, p. 500.
- ¹⁸ CHIMNI, 2007, p. 501.
- ¹⁹ CHIMNI, 2007, p. 501.
- ²⁰ CHIMNI, 2007, p. 502.
- ²¹ CHIMNI, 2007, p. 499.
- ²² CORTEN, 2013, p. 365.
- ²³ MICKELSON, Karin; ODUMOSU Ibranke; PARMAR, Pooja. Situating Third World Approaches to International Law (TWAIL): Inspirations, Challenges and Possibilities. **International Community Law Review**, 10, 2008, p. 351-353.
- ²⁴ OKAFOR, Obiora Chinedu. Newness, Imperialism, and International Legal Reform in our Time: a TWAIL Perspective. **Osgoode Hall Law Journal**, vol. 43, n. 1 & 2, 2005, pp. 171-191.
- ²⁵ OKAFOR, 2005, p. 178.

- ²⁶ OKAFOR, 2005, p. 179.
- ²⁷ OKAFOR, 2005, p. 179.
- ²⁸ ESLAVA, Luiz; PAHUJA, Sandhya. Between Resistance and Reform. TWAIL and the Universality of International Law. **Trade Law & Development**, 3, 2011, pp. 103-130, p. 105.
- ²⁹ FAKHRI, Michael. Introduction – Questioning TWAIL’s Agenda. **Oregon Review of International Law**, 14, 2012, p. 1-15, p. 2.
- ³⁰ FAKHRI, 2012, p. 3.
- ³¹ “According to *The Oxford Dictionary of Current English*, in the context in which it is used in this paper, the term “approach signifies a “way of dealing with a... thing. Similarly, *The Oxford Thesaurus* defines that term as a “method, procedure, modus operandi, way, technique, style, manner, [or] attitude.” (OKAFOR, Obiara Chinedu. Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both? **International Community Law Review**, 10, 2008, p. 371-378, p. 377.
- ³² OKAFOR, 2005, p. 17. Moreover, the author adds that some TWAIL scholars are avowed socialists (such as Bhupinder Chimni), but many are not. Some can be seen as leaning toward post-structuralism (such as Rajagopal and Vasuki Nesiah), but many do not accept the poststructuralist label. Some are feminists (such as Celestine Nyamu, Sylvia Tamale, and Nesiah), but many may not make bold to claim that prize. TWAIL is therefore not even close to a theology. Just like the third world itself, it may be considered “a chorus of voices” rather than a simple monolithic collegium.
- ³³ ANGHIE, Antony; CHIMNI, B. S. Third World Approaches to International Law and Individual Responsibility in Internal Conflict. **Stud. Transnational Legal Policy**, 36, 2004, p. 185-210, p. 200.
- ³⁴ SUNTER, 2007, p. 478.
- ³⁵ MUTUA, 2000, p. 31.
- ³⁶ MUTUA, 2000, p. 31.
- ³⁷ SHETTY, Vikrant Dayanand. Why TWAIL Must Not Fail: Origins and Applications of Third World Approaches to International Law. **King’s Student Law Review**, 3, 2011-2012, p. 68-82, pp. 72-73.
- ³⁸ SHETTY, 2011-2012, p. 78.
- ³⁹ SHARAFUDEEN, Meghana. 2010 - 2011: Taking the road less travelled. **Trade L. & Dev.** 3, 6, 2011, p. 7.
- ⁴⁰ ESLAVA; PAHUJA, 2011, p. 104.
- ⁴¹ MICKELSON; ODUMOSU; PARMAR, 2008, p. 351.
- ⁴² PARMAR, Pooja. TWAIL: An Epistemological Inquiry. **International Community Law Review**, 10, 2008, p. 363-370, p. 368.
- ⁴³ PARMAR, 2008, p. 368.
- ⁴⁴ PARMAR, 2008, p. 368.
- ⁴⁵ ANGHIE; CHIMNI, 2004, p. 185-186.
- ⁴⁶ ANGHIE; CHIMNI, 2004, p. 185-186.
- ⁴⁷ PARMAR, 2008, p. 366-367.
- ⁴⁸ ANGHIE; CHIMNI, 2004, p. 185-186.
- ⁴⁹ SHETTY, 2011-2012, p. 81.
- ⁵⁰ CHIMNI, 2006, p. 4.
- ⁵¹ PARMAR, 2008, p. 363.

- ⁵² PARMAR, 2008, p. 365.
- ⁵³ PARMAR, 2008, p. 365.
- ⁵⁴ SHETTY, 2011-2012, p. 76-77.
- ⁵⁵ MUTUA, 2000, p. 36.
- ⁵⁶ MUTUA, 2000, p. 36.
- ⁵⁷ MUTUA, 2000, p. 36.
- ⁵⁸ “Against this backdrop, what is one to make of American opposition to attempts by some Third World states to acquire even a single nuclear weapon when the United States possesses ten thousand of them? In the other critically important international fora—the World Bank, the IMF, and the GATT/WTO regime—Western control of the global economy and resources is a matter of public record. This disparity between the West and the Third World is so ingrained in public consciousness that it is rarely a matter of serious public debate.” (MUTUA, 2000, p. 37).
- ⁵⁹ MUTUA, 2000, p. 34.
- ⁶⁰ SHETTY, 2011-2012, p. 76-77.
- ⁶¹ MUTUA, 2000, p. 34.
- ⁶² MUTUA, 2000, p. 38.
- ⁶³ “CRT, which is a response to American racist and sexist subordination, employs multidimensionality and intersectionality to understand and challenge white power in America. Its understanding of the use of law and the exercise of power as tools of domination and exclusion mirrors TWAIL. Its authors have identified national parallels that are really a microcosm of the international legal order. White supremacist hierarchies dominate both the national and international legal orders. CRT is driven by two basic interests: “The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and the professed ideals such as the “rule of law” and “equal protection.” The second is a desire to not merely understand the vexed bond between law and racial power but to change it.”” (MUTUA, 2000, p. 38).
- ⁶⁴ MUTUA, 2000, p. 37.
- ⁶⁵ MUTUA, 2000, p. 33.
- ⁶⁶ MUTUA, 2000, p. 36.
- ⁶⁷ BEDJAOUI (1979) apud MUTUA, 2000, p. 33.
- ⁶⁸ SHETTY, 2011-2012, p. 71-72.
- ⁶⁹ MUTUA, 2000, p. 33.
- ⁷⁰ ANGHIE, Antony. Finding the Peripheries. Sovereignty and Colonialism in Nineteenth-Century International Law. **Harvard International Law Journal**, 40, 1999, p. 40.
- ⁷¹ MUTUA, 2000, p. 33.
- ⁷² ANGHIE, 1999, p. 40.
- ⁷³ SHETTY, 2011-2012, p. 74-75.
- ⁷⁴ ANGHIE; CHIMNI, 2004, p. 192.
- ⁷⁵ ANGHIE; CHIMNI, 2004, p. 192.
- ⁷⁶ ANGHIE; CHIMNI, 2004, p. 193.

⁷⁷ THE AMERICAN UNIVERSITY IN CAIRO. **Third World Approaches to International Law: on praxis and the intellectual**. Department of Law, February 21-24, 2015. Available at: <http://www.uwind-sor.ca/twail2015/sites/uwind-sor.ca.twail2015/files/cairo_twail_conference_program_mar_2.pdf>. Access in sept. 20, 2017. According to this document: "The theme necessitates self-reflection as TWAIL has sought to distinguish itself from other critical legal approaches through its political and transformative commitments. We invited presentations and panels that seek to engage with these issues. For instance, how do we understand and interrogate our roles as intellectuals in political life? What is the relationship between our scholarly endeavors and societal structures; whether preserving the status quo, shaping reform, or advocating for radical change? What are the various conduits that link our work as intellectuals with politicians, activists, advocates, revolutionaries, civil servants, soldiers, artists, writers, union representatives, civil society leaders, peasant movements, and so on? How does the idea of TWAIL as praxis relate to TWAIL as theory and/or method? How does it differ from other notions of praxis? (...) As with previous TWAIL conferences, this is an opportunity for us to take stock and look to the future. It provides a forum for the TWAIL community to reconnect, this time in the global South. At the same time, the conference seeks to deepen and re-imagine engagement with underexplored alliances such as with indigenous movements, environmental issues, and transnational intellectual and political actors in the Middle East and North Africa, and we have conference panels dedicated to exploring each of these themes. The conference also seeks to pursue relationships with potential interdisciplinary allies, whether scholars or practitioners, in cognate fields. This is reflected particularly in our plenary session on new interdisciplinary frontiers, examining international law and the regulation of population movement, an issue of particular concern in Africa and the Middle East."

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