

LEARNING 'TWAIL' AND 'UNLEARNING' IMPERIALIST APPROACH TOWARDS A BALANCED VIEW OF INTERNATIONAL LAW

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ABSTRACT

The old European agenda of 'civilizing mission' was based on a primordial presumption (or chiselled belief) that non-Europeans lack sovereignty because of non-Europeans instinctually being barbaric, violent, backward, uncivilized and incapable. A burden cast upon the 'white man' to civilise the global order, unethical propaganda developed to sanctify colonialism. With the establishment of the United Nations post World War II and the development of 'sovereign equality', it was believed that there would be a reclamation of lost civilizational values of the Third World. However, the functioning of international law even today remains under the whims of powerful elite clubs. This article sketches out a critical legal studies approach to unearthing how colonialism did not end but has merely changed its character. The article exposes how the Westphalian global governance system has proved incapable to ensure the egalitarian inclusion of the Third World in the functioning of international law.

Keywords: International Law, TWAIL, Colonialism, Critical Legal Studies, FWAIL

- I. Introduction
- II. The World of TWAIL and Critical Legal Studies
- III. Boomerang Effect and The Identity Crisis
- IV. Ghosts of Idiosyncrasy: Criticisms of TWAIL Scholarship
- V. Birth of Fourth World Approach to International Law (FWAIL)
- VI. Conclusion

I. Introduction

EVERY DISCOURSE requires an underlying theoretical foundation and a critical approach to its functioning, and international law should be no exception. Theoretical foundations of international law are concomitants of history, politics, anthropology, ethics, pragmatism and most importantly positivism. However, through the prism of critical legal studies, the

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functioning of international law may also be categorised as a gateway to legitimise greed, structuralise power, expand territories and create a community de rigueur with principles of universality.¹ The methodology and premises of international law have evoked different perspectives from different schools of thought.² As we approach the end of the second decade of the twenty-first century, international politics is witnessing unprecedented dynamism and undercurrents of new world order. From the electoral victory of Donald Trump in the United States, United Kingdom - EU membership referendum in 2016 to geopolitical changes in the South Asian³ regions like in Myanmar⁴ and Afghanistan, China's active diplomatic negotiations of Belt and Road Initiative (BRI) project to pandemic outbreaks like COVID-19, strengthening of BRICS and BIMSTEC to Indian Prime Minister Narendra Modi's effort to reengage and revive SAARC amidst the Coronavirus recrudescence in 2020, the global order is witnessing irreverence of all that was revered. President Donald Trump addressing the 74th Session of the United Nations General Assembly at the United Nations Headquarters in 2019, remarked:⁵

If you want freedom, take pride in your country. If you want democracy, hold on to your sovereignty.... The future does not belong to globalists. The future belongs to the patriots. The future belongs to sovereign and independent nations who protect their citizens, respect their neighbours, and honour the differences that make each country special and unique.

An appeal to 'hold on to your sovereignty' was also the reflection of a long-acknowledged view that the international order has not been truly orderly. A growing sense of desperation among countries that have been predominantly ostracised by the entitled elites (Victorian powers of World War II), has raised suspicion on international institutions and the international legal system's original purpose of establishing horizontal equality among the nation-states.

¹ Phillip R. Trimble, "International Law, World Order, and Critical Legal Studies" 42(2) *Stanford Law Review* 811 (1990).

² Swati Singh Parmar and Adithya Variath, *An Introduction to International Law* 85 (India: Thomson Reuters, 2021).

³ The Asan Institute for Policy Studies. "Asan International Security Outlook 2020: Neo Geopolitics." *Asan Institute for Policy Studies* (2020), available at: <http://www.jstor.org/stable/resrep20680> (last visited on November 09, 2021).

⁴ Adithya Anil Variath, Myanmar's Human Rights Violations questions the credibility of ASEAN's Regional Human Rights Mechanism, *South Asia Journal*, available at: <http://southasiajournal.net/myanmars-human-rights-violations-questions-the-credibility-of-aseans-regional-human-rights-mechanism/> (last visited on November 09, 2021).

⁵ Remarks by President Trump to the 74th Session of the United Nations General Assembly, The White House, available at: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/> (last visited on March 21, 2020).

Colonial and post-colonial realities, history, scholarship of international law is structured around traditional imperialist normative order.⁶

What the new world order appeal to today is an alternative approach and conceptual tools to develop a series of doctrines and principles carved out of experiences and civilizational values that exists outside the realm of Victorian historical practices. This appeal for change and reform in international law is too stentorian to disdain. This approach focuses on the civilization of diversity, non-universality and pluralism of international norms. Gradually, this development thematically acknowledges the existence of the narrative coherence of a ‘Third World’, and validates the normative questions of power politics, the institutionalisation of global domination, imperialism, colonialism and neo-colonialism.

The policy-oriented approach of international law was developed by Yale Law School Professors Myres S. McDougal (1906-98) and Harold D. Lasswell (1902-78), the duo Michael Reisman called more productive than the association of Karl Marx and Friedrich Engels, insofar the realm of international law is concerned.⁷ It is based on five core commitments: commitments to theory and interdisciplinarity, transnationalism, process, normativity and connecting law and policy through practice and public service.⁸ International law according to this approach is a set of reflective experiences and principles that were developed in Europe (civilised). These were through the idea of ‘Expansion of International Society through Westphalian Sovereignty’ extended to the non-European (uncivilised) world.

Victorian jurisprudence and its normative interpretations in the past, and to a large extent in the present have condemned cultural differences of the so-called ‘uncivilised’. With the rise of positivism as a way of juristic thought in international law, the 19th century also witnessed the Victorian epoch of imperial expansion. The positivism of international law is based on the

⁶ Antony Anghie, “The Evolution of International Law: Colonial and Postcolonial Realities” 27(5) *Third World Quarterly* 739-753 (2006); Karen J Alter, “From colonial to multilateral international law: A global capitalism and law investigation” *International Journal of Constitutional Law* 1 (2021); James Thuo Gathii, “International Law and Eurocentricity” 9 *European Journal of International Law* 184 (1998); Turan Kayaoglu, “Westphalian Eurocentrism in International Relations Theory” 12(2) *International Studies Review* 193-217 (2010).

⁷ W.M. Reisman, “Myres S. McDougal: Architect of a Jurisprudence for a Free Society” 66 *Mississippi Law Journal* 17 (1997); Julien Cantegreil, “Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror” 60 *Maine Law Review* 97 (2008).

⁸ Myres S. McDougal and W. Michael Reisman, “The Prescribing Function in World Constitutive Process: How International Law Is Made” 6 (2) *Yale Studies in World Public Order* 249-284 (1980); W. Michael Reisman, Manoush H. Arsanjani, Siegfried Wiessner and Gayl S. Westerman, *International Law in Comparative Perspective* (New York: Foundation Press, 2004); Reisman, W. Michael, and Andrew R. Willard, “In Personal Performance Codes, One Size Doesn’t Fit All: Clarifying the Professional Ethical Responsibility of Decision Makers” 19 (1) *Asia Pacific Law Review* 1-11 (2011); Andrew T. Guzman, “A Compliance-Based Theory of International Law” 90 (6) *California Law Review* 1823-87 (2002).

Austinian idea of the state as the exclusive creator of law, sovereign authority and consent theory. Under the umbrella of natural law principles of international law, European and non-European societies are bound by universal foundations.⁹ Positivism, due to its imperfect interpretive character devised a series of formal doctrines that used explicitly racial and cultural criteria to ascertain certain states civilised, and therefore sovereign, and other states uncivilised and non-sovereign.¹⁰ Thus, non-European societies were ostracised from the community of international law-making.

Without a legal personality, these societies were incapacitated of facilitating any legally perceptible objection to their dispossession and were thus reduced to thingamabobs of conquest and exploitation. As advocated by Antony Anghie, “this law legitimised conquest as legal, and decreed those lands inhabited by people regarded as inferior and backward were *terra nullius* and it affirmed the validity of unequal treaties and established the doctrine of convenient recognition.”¹¹

A critical approach of reforming, retelling, rethinking and rewriting the norms and ideologies of international developmentalism and international law through constructive rejection and pragmatic opposition of mainstream normative commitments of Eurocentric or colonial accounts of the international legal order is known as Third World Approach to International Law (TWAIL). TWAIL can be also constructed as a methodology to reject ‘legalised hegemony’¹², or a distinctive way of thinking and formulating analytical tools to explore what international law is and should be.¹³ According to Prof. R.P. Anand, “the ‘white man’s burden’ in respect of the impoverished, conquered and humiliated natives of the Third World continues

⁹ Charles Alexandrowicz, *An Introduction to the History of International Law in the East Indies: 16th, 17th and 18th Centuries* (Clarendon Press, 1967).

¹⁰ Jianming Shen, “The Basis of International Law: Why Nations Observe” 17 (2) *Penn State International Law Review* 309 (1999); Hans J. Morgenthau, “Positivism, Functionalism, and International Law” 34 (2) *The American Journal of International Law* 260 (1940).

¹¹ Antony Anghie, “The Evolution of International Law: colonial and postcolonial realities” 27 *Third World Quarterly* 745 (2006).

¹² Upendra Baxi, “What may the ‘Third World’ expect from international law?” 27 *Third World Quarterly - Reshaping Justice: International Law and the Third World* 713-725 (2006).

¹³ B. Simma and Andreas L. Paulus, “A Symposium on Method in International Law” 93 *American Journal of International Law* 291 (1999).

through the developed countries superiority and dominant voice in the international economic system.”¹⁴ As well put by Antony Anghie:¹⁵

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.

The third world internationalism is an effort to give voice to the voiceless. One of the counter-arguments raised against TWAIL is the proposition to live in reality, as colonialism is a phenomenon of the past and its after-effects have eroded with time and the establishment of international institutions. TWAIL as intellectual development is attempting to offer a platform to rethink the past injustices.

The ‘twailian’ way of thought as a systematised belief acknowledges how international law has failed to take into its realm the civilizational manifestations and experiences of a large part of the world community. Western norms were disseminated as civilised and universal, non-adherence by colonies was considered uncivilised and legitimised intervention and subjugation. The League of Nations’ approach of labelling them as ‘backward territories’ characterising the differences between the civilised and uncivilised in economic terms was also disreputable.¹⁶ The Post-World War II era created around 100 new states and they argued that formulation of a legal system created by the imperial powers was deceitful to further its interests and that new states had played no role themselves in its formation. TWAIL in this regard is an effort not just for representation, but also for participation and contribution.

Even today, first world powers continue to have a Hobbesian view of international law in which they have the Leviathan power to impose order. It has been argued by thinkers that the central

¹⁴ R.P. Anand, *Confrontation or Cooperation? International Law and the Developing Countries 2* (New Hope India Publications 2nd edn., 2011).

¹⁵ Antony Anghie, “Finding the peripheries: Colonialism in nineteenth-century international law”, In *Imperialism, Sovereignty and the Making of International Law* 40 (Cambridge Studies in International and Comparative Law, 2005).

¹⁶ See Richard Falk, Balakrishnan Rajagopal, (eds.) *et. al.*, *International Law and the Third World: Reshaping Justice* 42 (Routledge, 2008).

challenge of global governance is the institutional architecture of the United Nations which places the responsibility of international peace on five permanent members of the Security Council with veto power, the result of World War II is that the victors retain a monopoly over violence and conflict.¹⁷ The establishment of the United Nations has promoted decolonisation in theoretical contexts, however, germs of colonialist power politics still survive in a different character. The modern colonialism masquerading as ‘liberal reformist’ responsibility can be reflected in Responsibility to Protect (R2P) doctrine enabling intervention, modern conceptions of sovereignty, coercive diplomacy, first world scholarship, cultural subversion and lack of involvement of third and fourth world in global institution building despite their socio-economic progress.

II. The World of TWAIL and Critical Legal Studies

Montesquieu justified European adventurism, certainly overlooking the ethical ‘spirit’ of which he was a champion. He remarked:¹⁸

Most of the people on the coast of Africa are savage or barbarian, they are lazy, they have no skills, they have an abundance of precious metals which they take straight from nature. All civilised people, therefore, are in a position to trade with them to their advantage. They can get them to value many things which are of no value, and get a very high price for them.

Scholars have categorised the third world as victims and the powerless in the international economy, like Makau Mutua in framing a worldwide of Third World, cites Julius Nyerere:¹⁹

The Third World consists of the victims and the powerless in the international economy... Together we constitute a majority of the world’s population, and possess the largest part of certain important raw materials, but we have no control and hardly in influence over the manner in which the nations of the world arrange their economic affairs. In international rule making, we are recipients and not participants.

¹⁷ Shashi Tharoor and Samir Saran, *The New World Disorder and the Indian Imperative* 46 (Aleph Book Company, 2020).

¹⁸ Montesquieu, *De l’esprit des lois*, in 2 Oeuvres Complètes xxi (Paris: Gallimard, 1951).

¹⁹ Makau Mutua, Antony Anghie, “What Is TWAIL?” 94 *Proceedings of the Annual Meeting, American Society of International Law* 31 (2000).

Together we constitute a majority of the world's population and possess the largest part of certain important materials (service and goods), but we have no control and hardly any influence over how the nations of the world arrange their economic affairs. In international rulemaking, Global South (Third World) is a recipient and not a participant.²⁰ Contemporary imperialism is ubiquitous, but it remains an untold truth. It is a complex philosophy embedded in the decentralised structures of global governance. TWAIL is a counter-hegemonic response to symbolised hegemony of international law. TWAIL for Indians is a search, a search to establish 'welfarism' in international law. The new approach studies along with jurisprudence, the interrelation of law with other strands including scholarship, global administrative practices, conflicts, bureaucracies, financial assistance, decision making and procedural methodologies to reject the domestication of universalism. The works of Christopher Weeramantry, Antony Aghie, B.S. Chimni, R.P. Anand, Upendra Baxi, Balakrishnan Rajagopal, Richard Falk, Mohammed Bedjaoui to Sylvia Tamale have provided an impetus to the growth of TWAIL scholarship.

A. Divided we stand, United we fall

The idea of establishing an 'Imperialist Global State' contemplated into international institutions' idea of development. The United Nations insisted that development is not a right, but a goal shared by all the nations of the world. The United Nation's conception of sustainable development goals' disproportionate emphasis on raising finances globally was viewed with scepticism by developing countries as a ploy to stall their development as the majority of the principles did not apply to already developed.²¹ The goal of 'development of new economic order was premised on international institutions restructuring relative and regional programmes. The idea of shared development of world order also brought along the idea of shared responsibility. World Conferences on development to ensure responsibility led to laying down of universal parameters i.e. all nations irrespective of their socio-economic conditions shall abide by these comprehensive guidelines. This further hastened inequality in the international order.

Agreements like Kyoto and Rio and instruments like SDGs have overshadowed the failure of the developed world to live up to their responsibility viz. commitments of emissions, aid,

²⁰ K. Nyerere, *South-South Option in The Third World Strategy: Economic and Political Cohesion in the South* 9-10 (London: Third World Foundation, 1983).

²¹ Press Release, *Developing countries face \$2.5 trillion annual investment gap in key sustainable development sectors*, UNCTAD, June 24, 2014.

ethical principles of IPRs etc. Setting universal restrictions on Nations shows a sense of desperation by the already developed to establish universal responsibility. The Western elite opinions on climate change consider the root cause of damage as a combination of population growth and poverty of the Third World. Irrespective of the fact that from 1850 to 2001, developed countries with 20 per cent of the world population are responsible for 79 per cent of historical Carbon emissions.²² It is paradoxical to witness how the countries who have already exploited ‘common’ resources for region-specific development, are restricting others from utilising their fair share from what is ‘common’.

The traditional international environment law appropriates colonies for material production. Trump’s repudiation of the Paris Climate Agreement and Bush’s repudiation of the Kyoto Protocol, both rest on the notion that it is unfair for the United States and other developed European nations to take on huge burdens when developing countries “free ride” by refusing to take on legally binding cuts in emissions. The Third World response to this marginalisation has been the principle of ‘common but differentiated responsibility’.²³ The idea revolves around the natural law principle of equity, and how the usage of resources by developing countries is necessary for survival and not to lead a luxurious lifestyle.

B. Institutional restructuring of Institutions

The world needs multilateralism, but also inclusive equality. Article 2 (1) of the United Nations Charter ensures ‘sovereign equality’,²⁴ but commentators of International Organisations would seldom disagree that the tenets of ‘sovereign equality’ is an idealistic fantasy. The welfare and development of the third world is in principle the primary concern or priority of the United Nations. Uganda’s representative emphasized, “We would rather have an imperfect multilateral system than none at all,” calling for the United Nations Assembly’s intergovernmental nature to be preserved and the Security Council to be reformed to make it more inclusive and

²² Developed Countries Are Responsible for 79 Percent of Historical Carbon Emissions, Centre for Global Development, August 18, 2015, *available at*: <https://www.cgdev.org/media/who-caused-climate-change-historically> (last visited on March 21, 2020).

²³ ‘Common but Differentiated Responsibilities’ (CBDR) was enshrined as Principle 7 of the Rio Declaration at the first Rio Earth Summit in 1992. It states: “In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

²⁴ The United Nations Charter, art. 2(1).

representative.²⁵ 2020 commemorated the seventy-fifth anniversary of the United Nations, time is ripe to reform and revolutionise the governance structure of the United Nation's organs. The Security Council is a result of a war, a creation of the winners of that war, a part of the effort to maintain and defend the 'universal morality' entrusted with the power to effectuate reality into dystopia through the veto power.

The United Nations Security Council neither represents the power realities of the contemporary era nor incorporates the security considerations of developing countries into its structure. Security Council is disproportionately represented. While Europe is overrepresented by the United Kingdom, France and Russia, other geographical regions comprising mostly the third world of Asia, Africa and Latin America are underrepresented. The developing countries' security concerns are represented by China as the only permanent member of the Asian continent. How far the South Asian countries trust China to represent their concerns is still suspicious considering Chinese diplomatic patterns in the Security Council.²⁶

Inequality of power dynamics and clout in international politics can be explained by the fact that despite causing the global financial crisis, including the Euro Zone crisis, the disintegration of sovereignty and bailouts, it is somewhat ironic that the financial agents that caused the crisis have become the judges of the suitability of public policies adopted to contain its damage.²⁷ The Bretton Woods Institutions – the World Bank and the IMF over time have transformed into ancillary organs of the Western world, without substantial representation from the third world. All 12 managing directors of the IMF since its inception have all been Europeans,²⁸ and all 11 presidents of the World Bank have been Americans.²⁹ These institutions established to protect, project, promote and ensure transparency and legitimacy in the world order have become non-universal politicised clubs. The Third World oriented approach intends to bring

²⁵ Meetings Coverage, *United Nations Reforms Crucial for Effective, Relevant Multilateralism, Speakers Tell General Assembly, as Meeting on International Day Concludes*, General Assembly United Nations Reforms Crucial for Effective, Relevant Multilateralism, Speakers Tell General Assembly, as Meeting on International Day Concludes, General Assembly GA/12141, April 25, 2019.

²⁶ Manoj Joshi, China saves Masood Azhar: Fighting terror needs action, not the UN, ORF Online, available at: <https://www.orfonline.org/research/china-saves-masood-azhar-fighting-terror-needs-action-not-the-un-49029/> (last visited on March 21, 2020).

²⁷ United Nations Conference on Trade and Development, Trade and Development Report, VIII (Sept. 6, 2011).

²⁸ IMF Managing Directors, International Monetary Fund, available at: <https://www.imf.org/en/About/senior-officials/managing-directors> (last visited on March 21, 2020).

²⁹ Past Presidents, The World Bank, available at: <https://www.worldbank.org/en/about/archives/history/past-presidents> (last visited on March 21, 2020).

institutional reforms that would sagaciously, justly, and impartially maintain international peace and security for the benefit of the entire world population.

C. Unlearning imperialism

Lord Rosebery called imperialism “a greater pride in Empire a larger patriotism.”³⁰ Imperial interest in public affairs can be traced to 1884 with the opening of the Conference of Berlin that agreed to divide Africa. The Berlin Conference legitimated and formalized the process of European colonization of Africa (Scramble for Africa).³¹ Correlating imperialism with domination and imposition of one’s own unimpeachable system of thoughts on other legal and economic systems, it is undeniable that eurocentrism legitimated this domination. International law accompanied this imperialism through the system of direct appropriation, the right of effective occupation, the definition of absolute sovereignty, the mandate or trusteeship systems, and so on.³² International law and legal system for the entire classical period was torn between two trends: regional/cultural (laws of the uncivilized) on one hand and universal/formal (laws of the civilized) on the other.

The philosophy of international law is based on the idea of the equality of states. The idea is reinforced in the United Nations Charter in article 2(1) proclaims that it is “based on the principle of the sovereign equality of all its Members.” In 1979 the General Assembly reinforced that idea by passing a resolution entitled – “Inadmissibility of the Policy of Hegemonism in International Relations” (which the United States and three other members opposed).³³ Two region-specific approaches have shaped international order, the Eurocentric approach of law and American centric approach to politics. A passage by Charles Krauthammer in Time asserted the hegemonic character of international politics by the Global North:³⁴

³⁰ Patricia Pugh, “Bernard Shaw, Imperialist” 11 *Shaw and Politics* 98 (1991).

³¹ Elizabeth Heath, *Encyclopaedia of Africa: Berlin Conference of 1884–1885 Meeting at which the major European powers negotiated and formalized claims to territory in Africa; also called the Berlin West Africa Conference*, Oxford University Press, Oxford Reference, available at: <https://www.oxfordreference.com/view/10.1093/acref/9780195337709.001.0001/acref-9780195337709-e-0467> (last visited on March 21, 2020).

³² Antony Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” 5 *Social and Legal Studies* 321 (1996).

³³ UN General Assembly, *Inadmissibility of the policy of hegemonism in international relations*, 3 GA Res. 34/103 (December 14, 1979).

³⁴ Chalmers A. Johnson, *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* 68 (Civil Military Relations, 2004)

America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will.

“No State,” said Kant, “shall by force interfere with the Constitution or Government of another State”.³⁵ The western powers ‘utopianise’ a ‘world government’ that relishes the legitimacy of its actions throughout the world. The legitimacy was based on an unauthorised responsibility to maintain order throughout the world. For maintaining this order, the world government was vindicated to intervene in sovereignty. Law as an instrument of social power is versatile to manipulation. The moral responsibility was formalised in the law with the development of Responsibility to Protect (R2P). The R2P framework addresses the “moral imbalances” between sovereignty and human rights and proposes that approaching sovereignty as responsibility answers this moral inadequacy.³⁶ However, the United States’ military intervention without the approval of the UN Security Council in the 1999 Kosovo war disclosed the problematic consequences of this attitude of governance.

Another aspect of internationalism is the claims of global capitalism that developing countries should adopt market-based reforms that align with the global majority, even when they are inconsistent with the interests of the majority of the population. This also reflects the agenda that prioritizes the further development of the already developed. Rosa Luxemburg was among the first to argue in her book ‘The Accumulation of Capital’ in 1913 that imperialism is linked to the very survival of capitalism. She recognized the historical fact that “the extension of capitalism into new territories was the mainspring of the ‘vast secular boom’ between the seventeenth and the nineteenth centuries.”³⁷ TWAIL believes there is an invisible but intimate relationship between capitalism, imperialism, and international law which disadvantages the subaltern groups. The United Nations undoubtedly gave a theoretical framework towards decolonization but it certainly enabled the emergence of an inter-subjective consensus on international law and its values.

³⁵ H.S. Reiss (ed.), *Cambridge texts in the history of political thought, Immanuel Kant*, Donna M. Brinton, Janet M. Goodwin, *Kant: Political Writings* 96 (Cambridge University Press, 1991).

³⁶ Christina Gabreila Badescu, *Humanitarian Intervention and the Responsibility to Protect, Security and human rights*, *Global Politics and the Responsibility to Protect* 5 (Routledge, 1 Edn., 2012).

³⁷ Joan Robinson, “Introduction to Rosa Luxemburg”, *The Accumulation of Capital* 28 (Monthly Review Press, 1951).

D. Relative right to development

International law is sometimes overestimated, sometimes underestimated. The truth is, that international law is, in the words of Professor Brierly “neither a chimaera nor a panacea.”³⁸ An unwritten agenda of international law is to provide a gateway for development. What the west calls ‘collective development’, is ‘survival’ for many least developed countries. Survival in this geo-economic arena for many third world countries is different from the traditional ‘right to development’ debate in the late 1990s which rejected the state as an agent of socio-political transformation. The primary issue with the least developed countries is the incapability of states to push for reforms due to the inaccessibility of resources. The post-modern philosophical content of ‘land without borders’ has failed to provide context to present-day solutions.

The surge of survival has led to third world countries coming together to form regional institutions. These institutions e.g., BRICS, BIMSTEC, ASEAN etc are epicentres of contemporary geopolitics. The ethos of many of these institutions rejects the western ideas of a free market, radical democratic politics, centralization and bureaucratization of authority and imposition of homogeneity. By resisting the “globotony” of economic alienation, the TWAIL movement appears to argue for a culturally legitimate way of bringing about economic and social progress, and of questioning the monopolistic violence of development.³⁹ India’s 1998 nuclear weapons can also be viewed through a prism of defying the hegemony of coercive non-proliferation or unequal counter-proliferation of nuclear weapons.

III. Boomerang Effect and the Identity Crisis

The third world is a socio-political reality. Geo-economically they constitute the victims and powerless. Mainstream international law (hereinafter ‘MIL’) is a Eurocentric political and intellectual movement. Pluralistic identity across the globe is profoundly challenged due to the MIL movement of universalism and the assertion of modernism oriented globalised order. The adoption of universal ideas often dilutes the representative character of a nation. As economic modernization and social change separate people from their local identities, the strength of a nation-state to represent its people also weakens. This longing for identity is exploited by ‘fundamentalist actors’ who seek to provide context and meaning to individual lives.⁴⁰ The

³⁸ J. L. Brierly, “The Law of Nations” (Oxford University Press, 2nd Edn., 1936).

³⁹ Balakrishnan Rajagopal, “Post development as a Vision for a Third World Approach to International Law” 94 *Proceedings of the Annual Meeting, American Society of International Law* 306 (2000).

⁴⁰ Shashi Tharoor and Samir Saran, *The New World Disorder and the Indian Imperative* 39 (Aleph Book Company, 2020).

continuous exploitation of identity also shapes the policy of exploited states, for example, China's rhetoric of '100 years of humiliation'.

The third world found itself in a perception dilemma or what the authors argue as a boomerang effect. The post-colonial states after reconstructing their foundations learning from the historical injustices started engaging in their own relative brutalities viz, women, minorities, caste, race, culture, religion and indigenous peoples. In the global south, the struggle against external factors changed its colour to struggle against internal atrocities. Due to this, international human rights law emerged as a pivotal and revolutionary discourse of the global order to offer mechanisms by which Third World subjects could seek protection.

The Universal Declaration of Human Rights in 1948, as the name suggests 'universal' (drafted by geopolitical superiors for geo-political inferiors) laid down transpose postulates for the development of the third world.⁴¹ TWAIL rejects these universal principles and calls for a relative framework of human rights law. Larissa Ramina in her paper argues regarding "the internationalization of the discourse of human rights"⁴² quoting Opeoluwa Adetoro Badaru adds "one has to have a critical eye especially as it is obvious that human rights seem to come hand-in-hand with neoliberal policies. A TWAIL perspective helps one to be conscious of the oppressive potential of universality and to scrutinise which aspects of human rights may be made universal and which aspects need to be re-examined".⁴³

It is a common concern to ask whether human rights are the new 'standard of civilisation',⁴⁴ a concept that justified and facilitated colonialism and imperialism throughout the 19th century. It was for this reason that international human rights law holds a special interest and appeal for Third World scholars. Institutionalization and professionalization are two aspects of the contemporary human rights movement that attract significant criticism from TWAIL, to the extent that they prioritize 'procedure over substance, elections over meaningful participation, economic rights over economic justice etc.'⁴⁵ Human rights law is controversial because it

⁴¹ Rf. Drafting History: Universal Declaration of Human Rights, Research Guides United Nations Library and Archives, *available at*: <https://libraryresources.unog.ch/c.php?g=462664&p=3163021> (last visited on March 21, 2020).

⁴² Larissa Ramina, TWAIL - "Third World Approaches to International Law and human rights: some considerations" 5(1) *Revista de Investigações Constitucionais* (2018).

⁴³ Opeoluwa Adetoro Badaru, "Examining the Utility of Third World Approaches to International Law for International Human Rights Law" 19(4) *International Community Law Review London* 379-387 (2008).

⁴⁴ Jack Donnelly, "Human Rights: A New Standard of Civilisation?" 74 *International Affairs* 1 (1998).

⁴⁵ Nitina Tzouvala, "New Approaches to International Law: The History of a Project" 27 *The European Journal of International Law* 220 (2016).

legitimised the intrusion of international law in the internal affairs of a state, like an intervention for the protection of human rights. One can argue that the protection of rights has been an integral part of the ‘civilizing mission’ from the very start.⁴⁶

IV. Ghosts of Idiosyncrasy: Criticisms of TWAIL Scholarship

The threat of recolonization and universal abstraction of international law is haunting the third world.⁴⁷ The economic and political independence of the third world is undermined by the transcendental uniform global standards. Prof. Upendra Baxi, India’s leading voice on jurisprudence in his paper on TWAIL writes:⁴⁸

Incommensurable histories and diverse visions of international futures in here in the very act of naming the ‘Third World’. Narrative coherence, if not integrity, thus remains always at stake in naming the world and telling stories about them.... Third World remains the vehicle, vessel and visage of global domination.

TWAIL has not been averse to criticism from different perspectives. While this approach is considered nihilistic, anachronistic and ambiguous by western thinkers⁴⁹, some believe that TWAIL’s resistance to international law scholarship and international law itself occupies the same terrain as international law and as such, its failure to offer a realistic alternative.⁵⁰ No idea can be insulated from contextual and jurisprudential criticism. However, these jurisprudential principles (positivism, naturalism and pragmatism) also facilitated the defence of imperialism as a civilizational right. The question of ambiguity is certainly a feature of TWAIL that has shrieked critical questions. But, the TWAIL movement has never advocated for theoretical sophistication and objectivity. It is an approach that tries to codify pluralism and challenge the hegemonic international order. In a heterogeneous subaltern, post-colonial and culturally plural society, no premise can be labelled as homogenously clear. TWAIL is a call to recognise that

⁴⁶ Gerrit W. Gong, *The Standard of Civilisation in International Society* 14-15 (Oxford: Clarendon Press, 1984).

⁴⁷ B.S. Chimni, “Third World Approaches to International Law: A Manifesto” 8 *International Community Law Review* 3 (2006).

⁴⁸ Upendra Baxi, “What may the ‘Third World’ expect from international law?” 27 *Third World Quarterly - Reshaping Justice: International Law and the Third World* 713 (2006).

⁴⁹ Ian Hunter, “The Figure of Man and the Territorialisation of Justice in ‘Enlightenment’ Natural Law: Pufendorf and Vattel” 23 *Intellectual History Review: Discourses of Humanity in the Enlightenment: Local Mediations of a Global Aspiration* 1 (2012).

⁵⁰ James Thuo Gathii, “The Agenda of Third World Approaches to International Law (TWAIL)”, in Jeffrey Dunoff and Mark Pollack (eds.), *International Legal Theory: Foundations and Frontiers* 33 (Cambridge University Press, 2019).

the present normative regime originates from the material consequences and psychic repercussions of the colonial venture. It is an attempt to revitalise the question of what is the purpose of international law – power or justice?

V. Birth Of Fourth World Approach to International Law (FWAIL)

The neologism “the Fourth World” was first coined by George Manuel in 1974 in his work, ‘The Fourth World: An Indian Reality’.⁵¹ FWAIL is a new flag Asians will wave in the coming years. The Asian region is the new geopolitical hotbed with relative problems influencing international politics. FWAIL is a socio-political intellectual movement to study the impact of international law on the indigenous population. It seeks to examine geopolitical and historical roots of regional conflicts in the Asian region and to explore philosophies for recognition of indigenous rights for political sovereignty and governance under international law.

It also provides a framework for the right to self-determination and decolonisation of an international framework. Developed and proposed at the inaugural Asian Law and Society Association (ALSA) Annual Conference in Singapore in 2016, FWAIL scholarship is an extension of the existing world model referring to the community of indigenous people descended from a common nation of aboriginal populations who have been deprived of their territory and political rights, such as many indigenous people currently struggling for their independence in multiple regions in Asia.⁵²

The movement is an attempt to give an active voice to those who have been victimized by predatory policies of the state system and international law. Nearly 400 “legally” recognized indigenous nations exist within and around the 48 contiguous US state borders because of their signed and ratified treaties with the US government.⁵³ Many of these communities have continued to demand legal recognition of their “nationhood” status under international law. The two essential components of FWAIL are, first, “FWAIL is a revolution. It contends that the political and economic subordination of the indigenous community has been facilitated not only by international government or international order but also by the law of the domestic government. Domestic order has played a significant role in the exploitation and

⁵¹ George Manuel, Michael Posluns, *The Fourth World: An Indian Reality* 2 (University of Minnesota Press, 1974)

⁵² Hiroshi Fukurai, “Fourth World Approaches to International Law (FWAIL) and Asia’s Indigenous Struggles and Quests for Recognition under International Law” 5 *Asian Journal of Law and Society* 224 (2018).

⁵³ Presidential Address at 2017 Annual Conference of the Asian Law and Society Association (ALSA) in Hiroshi Fukurai, “Fourth World Approaches to International Law (FWAIL) and Asia’s Indigenous Struggles and Quests for Recognition under International Law” 5 *Asian Journal of Law and Society* 226 (2018).

marginalization and victimization of indigenous communities.”⁵⁴ Second, “FWAIL intends to enrich discussions of the Third World by including the indigenous people and communities whose rights and struggles for autonomy, self-determination and political independence have been disregarded during the development of international law.”⁵⁵

TWAIL remains critical of the predatory role of the international organizations and other supranational entities that impose neoliberal policies on the Third World through hegemonic domination. Although based on relativism, FWAIL is critical of some aspects of TWAIL scholarship, such as creating a homogenous voice of the heterogeneous community to develop a common language of opposition to the hegemony of First World international law. FWAIL seeks to create an international legal framework that must recognize the legal status of the nation in such a way that the indigenous community will be able to participate meaningfully in the formulation of national and international policies.⁵⁶

VI. Conclusion

Alexandrowicz in his work ‘International Law in the East Indies: 16th, 17th and 18th Centuries’ showed how when the European adventurers arrived in Asia, “they found themselves in the middle of a network of states and inter-State relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilization”.⁵⁷ Today, we are witnessing the de-globalisation of international law. Jean Baudrillard sees in globalization the end of both the universal and of cultural particularity, as it represents, according to him, ‘the triumph of unipolar thought over universal thinking’.⁵⁸ The absence of a universal order does not imply that the global order is lawless. TWAIL as a philosophy is both reactive and proactive. It is reactive as it counters the historical edifice of international law as an imperial Eurocentric project. But it is proactive because it seeks the internal transformation of conditions in the Third World.⁵⁹

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Hiroshi Fukurai, “Original Nation Approaches to “Inter-National” Law (ONAIL): Decoupling of the Nation and the State and the Search for New Legal Orders” 26(1) *Indiana Journal of Global Legal Studies* 199-262 (2019).

⁵⁷ C.H. Alexandrowicz, “An Introduction to the History of International Law in the East Indies: 16th, 17th and 18th Centuries” *Clarendon Press* (1967).

⁵⁸ Jean Baudrillard, “From the Universal to the Singular: The Violence of the Global”, in Jerome Bindé (ed.), *The Future of Values: 21st Century Talks* 20 *Berghahn Books*, (2004).

⁵⁹ Makau Mutua and Antony Anghie, “What Is TWAIL?” 94 *Proceedings of the Annual Meeting, American Society of International Law* 31 (2000).

The future of TWAIL scholarship holds in moving forward by radical and reformist trends to form a progressive and diverse international order. The TWAIL's rejection of the mainstream norms of international law is a comeuppance for international authoritarians, who under the guise of granting a universal liberal order used international law as an exclusive diktat to legitimise illegitimate actions. TWAIL has to construct and present an alternative normative legal edifice for international governance. The ethos of progress, modernity, humanity and civilization is not an exclusive domain of developed countries ethos. The exclusivity to these has enabled the imperialist powers to create and perpetuate narrow universalism through its own spatial, economic, cultural and political biases on the subaltern protagonist.

With the emergence of economic powerhouses such as China and India and other BRICS nations that include Brazil and South Africa, economic order is predicting a shift of power from Global North to Global South. With economic power comes the diplomatic responsibility to eradicate conditions of underdevelopment in third world countries. Imperialism in disguise is not a necessity. It might not fade away, but it can be defied. The authors believe that the future lies in developing international law through de-globalizing, rethinking, acceptance and the need to shift ends from power to justice.