The European Journal of International Law Vol. 34 no. 4

After TWAIL's Success, What Next? Afterword to the Foreword by Antony Anghie

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Abstract

In the span of two decades, Third World approaches to international law (TWAIL) experienced a meteoric rise, becoming not only one of the most interesting but also one of the dominant approaches to international law. This Afterword to the Foreword by Antony Anghie reflects upon the rise of TWAIL and its significance to the discipline of international law. I argue that having become part of the disciplinary mainstream, TWAIL 'civilizes' international law, making it more difficult for international lawyers to ignore or dismiss the colonial origins and legacies of their field. As TWAIL leaves a mark on international law, new spaces for international legal action by the peoples of the global South might have been opened. Does greater action weaken TWAIL's central insights about colonial origins and legacies? Maybe, and if so, a mainstream TWAIL opens also disciplinary space for other critical approaches that shine light on Third World experiences of international law that point not just to oppression but also to North/South engagement and, potentially, Southern resistance.

1 Introduction: A Meteoric Rise

Third World approaches to international law (TWAIL) has had a success that is difficult to ignore. It was born as an academic movement in a conference organized in 1997 by a group of doctoral students. Rallying for the democratization of international legal scholarship, they urged fellow international lawyers to contest the discipline's privileging of Western voices and to formulate a critique of mainstream international law's reproduction of the structures that dominate Third World peoples. In 1999, TWAIL was probably too recent and controversial a phenomenon to be included in the *American Journal of International Law*'s famous symposium on method.[1] The avid international lawyer might remember the methods that paraded through the special

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[1] 'Symposium, Method in International Law', 93 *American Journal of International Law* (1999) 291.

issue: positivism, policy-orientated jurisprudence, international legal process, critical approaches, international relations, feminism and law and economics. Fortunes have been mixed for these methods and their main exponents. Having captured the imagination of a new generation of scholars, nothing resembles the meteoric rise of TWAIL over the past two decades.

'TWAIL was omitted' (from the 1999 symposium), Antony Anghie and B.S. Chimni noted in the opening of their own piece on method. That piece, written at the invitation of the editors after the symposium was published, never made it to the *American Journal of International Law*, but it was ultimately published in 2003 in the then recently launched *Chinese Journal of International Law*.[2] Two decades later, Anghie received the Manley Hudson Medal from the American Society of International Law (ASIL), the highest honour 'for outstanding contributions to scholarship and achievement', awarded by the same society that runs the publication that shunned TWAIL before. Also in 2023, Anghie published a *European Journal of International Law* (*EJIL*) Foreword, the *EJIL* singling TWAIL out as a topic deserving of deep examination. I thank the *EJIL* editors for asking me to give brief comments as part of the Afterword, for it offers a unique opportunity to reflect upon the rise of TWAIL and its significance to international law.

The success of TWAIL has been such that I suggest recognizing the dominant position it has acquired in the discipline by provocatively declaring it part of international law's mainstream. Counting within its ranks at least five ASIL Grotius lecturers, four United Nations special rapporteurs, countless professors across continents and works published in the discipline's main journals, publications extensively cited, academically and by the International Court of Justice – let's say it: TWAIL belongs to the mainstream.[3]

What does this mean for TWAIL, for the academic discipline of international law and for international law in general? I argue that TWAIL's intuitive insight about the colonial origins and legacies of international law has resonated well with the lived experiences of the peoples of the Third World. This resonance explains TWAIL's meteoric success, which, as I argue, is a good thing for the discipline of international law. When TWAIL becomes mainstream, we are forced to acknowledge not only that international law was forged in the colonial encounter but also that its central rules and doctrines justified non-Western peoples' dispossession. A mainstream TWAIL makes it more difficult to ignore international law's colonial origins and makes it easier to think about how to break with colonial legacies. I will argue that, in this sense, a mainstream TWAIL 'civilizes' the discipline of international law.[4] As TWAIL fulfils its

[2] Anghie and Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', 2(1) *Chinese Journal of International Law* (2003) 77.

[3] See Eslava, 'TWAIL Coordinates', *Critical Legal Thinking* (2019) https://criticallegalthinking.com/2019/04/02/twail-coordinates/, at 7 (noting the relevance of a citation by the International Court of Justice in the *Chagos* advisory opinion). Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Feb. 25, 2019) Separate Opinion of Judge Cançado Trindade.

[4] I use this term ironically to point out that the discipline that created a standard of civilization to exclude non-Western peoples is now 'civilized' by approaches that force the discipline to confront its past.

calling, the discipline pays greater attention to the global South. Does this also give rise to international legal relations between the North and South that, instead of reproducing colonial legacies, carve out space for Third World resistance, developing legal frameworks that empower the global South? I think so. But, then, TWAIL's own success may be a reason to call for renewed approaches beyond its central insight and methodological assumptions in order to account for Third World experiences of international law that point not just to oppression but also to North/South engagement and, potentially, Southern resistance.

2 TWAIL Becomes Mainstream

Needless to say, so many within and beyond TWAIL, including myself, have been influenced by Anghie's body of work. His 2005 book *Imperialism, Sovereignty and the Making of International Law* quickly became a classic – but a classic of a genre that did not exist before, a genre itself created just a few years prior, in the 2003 method piece, among other TWAIL writings.[5] The book showed something new: what international law looks like when, in this case, its history is no longer retold from a uniquely European or Western standpoint but recast from the angle of the relationship between international law and the Third World more broadly – the non-European societies and territories that from the 16th century onwards were colonized by European empires.

We all learned from Anghie that sovereignty did not simply emerge as a European gift to human civilization but that it was forged in the colonial encounter. We learned that sovereignty was at the centre of the international legal project, not as the quest to produce legal order among sovereigns but, rather, as the production of legalized hierarchy and inequality, conferring sovereignty to European peoples while withdrawing sovereignty from the non-European world. We thus learned that the imperial dispossession of the non-European world was not just sanctioned by international law but that the discipline's founding fathers and subsequent eminences – Francisco de Vitoria, Hugo Grotius, Emer de Vattel, John Westlake and so on – also constructed an international legal discourse to produce imperial dispossession.

While both the 2003 methods piece and the Foreword describe TWAIL as the project to understand international law through the 'lived history' and 'lived experiences' of the peoples of the Third World,[6] Anghie's book specifies lived experiences as colonial experiences, offering at the same time a theory of the transhistorical reproduction of these experiences from origins to colonial legacies. International legal rules and doctrines, forged in the colonial and imperial encounter, reproduce inequalities between the First and the Third World today. This insight – about international law's 'colonial origins' and 'colonial legacies' as the defining experience of Third World peoples with international law – resonated with many in the

[5] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 3.

[6] Anghie and Chimni, *supra* note 2, at 78; Anghie, 'Rethinking the World, Remaking International Law: A TWAIL Retrospective', 34(1) *European Journal of International Law* 7, at 32.

global South (and increasingly in the North's South).[7] This insight also proved to be incredibly fertile. It inspired a whole generation of international legal scholars probing exciting new legal arenas, topics and corners of the world where colonial origins and legacies were found. This is the generation that has adopted and expanded its agenda into new areas, catapulting TWAIL to the mainstream as one of the most powerful and global academic movements in contemporary international law.[8]

The Foreword crowns TWAIL's ascent. Like previous accounts on TWAIL, the Foreword examines its origins and key themes – colonial continuities, political economy and history – and argues for the continuing relevance of the First/Third World distinction, examining the use of force, migration and human rights as examples. Anghie then outlines his current work and concludes advocating for a cosmopolitan TWAIL. The Foreword, however, is also different. Anghie covers these topics with the confidence of the curator. As the title makes clear, the foreword is a retrospective, and Anghie is taking us on a TWAIL tour. As in an anteroom to the exhibition, we see TWAIL I, the predecessors, the great international lawyers that pushed the Third World international legal project, from Bandung to the New International Economic Order. Then, an important part of the retrospective is devoted to TWAIL II, or TWAIL proper, the collective of scholars that founded the movement. But the retrospective's highlight is the new generation of TWAIL scholars who (accompanied by many TWAIL II members) have produced 'rich and path-breaking scholarship'.[9]

TWAIL has always been ecumenical, inviting many TWAILs to its fold. In the Foreword, however, Anghie takes his curatorial role seriously. The Foreword seems to regard commitment to TWAIL's core insight as a criterion to identify what counts as rich and path-breaking. What brings together new work on racial capitalism – the COVID and climate crises or legal pedagogics – is the identification of colonial origins and legacies.[10] Work in these areas, as well as in areas that have been traditionally understudied by TWAIL – indigenous peoples and race – proposes a transhistorical narrative where the colonized non-European is like the Third World, like the capital-importing country, like the racialized refugee, like the vaccine-less global South, like the South in the North, so that today's indigenous peoples are like the 'Indians' of Vitoria. The restating of the structure – the assertion of cultural difference behind international law claims to universality – seems more important than retelling each of these histories.

7 Anghie himself explains success in those terms in the Foreword. Anghie, *supra* note 6.

8 The Foreword notes the global character achieved by Third World Approaches to International Law. *Ibid.*, at 106.

9 *Ibid.*, at 12.

10 The Foreword's shift to political economy, for example, is a shift in subject matter within the same structure (*ibid.*, at 39), examining a neoliberal international law (at 41) – on racial capitalism (at 43), on the impact of the crises including the pandemic on the Third World (at 105) and on teaching (at 106).

3 A Mainstream TWAIL Is a Good Thing

A mainstream TWAIL is good news for the discipline of international law, for TWAIL's basic insight about colonial origins and legacies challenges some of the discipline's long-held assumptions, such as the one considering international law to be a civilizing force that brings order, peace and justice to the ruthless power politics of interstate relations. TWAIL's challenge to this assumption is welcomed. Too often we believe that the world would be a better place with more international law – better, for example, if only the Paris Agreement, the Marrakech Global Compact or the Refugee Convention would be respected.[11] We then forget that it is international law that confers rights to states, rights to burn carbon, exclude the migrant or trade away the refugee. We may find solace in the future conviction of white war criminals in the Russian-Ukrainian war, regardless of whether starvation in the global South becomes the price to secure conviction. I am sure many international lawyers have had similar experiences, where we find ourselves asserting our disciplinary aspirations rather uncritically, while brushing aside international law's dark side.

Foregrounding international law's colonial origins and legacies, TWAIL forces us not to forget the dark side. It forces the mainstream to remain aware of international law's contribution to domination and human suffering. Aware that when we say Paris, we must not forget that 'nationally determined contributions' ended differential North/South treatment based on historic emissions, thus foreclosing a potential redistributive tool. Aware that when mentioning Marrakesh and the Refugee Convention we know that the economic migrant is not an innocent legal category and that non-refoulment does not mean a right to asylum. That international lawyers are now forced to confront their discipline's colonial past and legacies might produce a larger impact on the discipline. TWAIL 'civilizes' international law in the sense that awareness of colonial origins and legacies may well become a yardstick to determine membership in the mainstream. The new contours of the discipline will depend on how the traditional liberal internationalist mainstream begins to draw upon the lived experiences of the Third World to reconceptualize its understanding of the neutrality and universality of international law.

More concretely, scholars and practitioners who ignore international law's colonial origins and legacies will risk relegation to the discipline's margins. Some political-realist–rational-choice scholarship as well as some legal-formalist scholarship could be normatively regarded as no longer valid positions because of their colour blindness, for instance.[12] Then, their interpretations of international rules and doctrines, for example – expansive interpretations of self-defence as an exception to the prohibition

[11] Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015; Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration Marrakech, Morocco, 10 and 11 December 2018, UN Doc. A/CONF.231/3; Convention Relating to the Status of Refugees 1951, 189 UNTS 150.

[12] See, e.g., Lorite Escorihuela, 'Cultural Relativism the American Way: The Nationalist School of International Law in the United States', 5(1) *Global Jurist Frontiers* (2005) 1 Article 2; Gathii, 'Beyond Color-Blind International Economic Law', 117 *AJIL Unbound* (2023) 61.

to use force and, more specifically, the unwilling or unable standard (both examined in the Foreword) – could be considered no longer plausible interpretations of international law.

A few months ago, the Biodiversity beyond National Jurisdiction (BBNJ) Treaty was adopted.[13] Negotiations to reach a compromise securing conservation as well as sustainable use of marine genetic resources beyond national jurisdiction pit the North, advocating for freedom of the high seas, against the South, defending the principle of the common heritage of humankind and, thus, the fair and equitable sharing of benefits. Protracted negotiations left a European representative feeling that 'African and developing countries are simply playing China and Russia's game. Diplomacy, law, intrigues, betrayals, interests, truths. In these critical times I have understood more than ever that Europeans, Americans, Australians, English, Canadians and New Zealanders all come together in a natural way, we have in our blood this brotherhood of thought and behavior, devotion and good faith – something strange separates us from the rest of the world'.[14]

As these views were shared on the floor and online, the backlash was swift, and the post was quickly deleted with regret. This example suggests the continuing relevance of TWAIL's core insight not only regarding conflicting interests between North and South but also regarding perceptions about the ideological, as well as the racial, gap between the two. At the same time, TWAIL civilizes the mainstream, rendering arguments about 'blood' and 'brotherhood' off-limits, thus fashioning a mainstream that rules out racism as well as colour – TWAIL blindness – and welcomes good faith legal cosmopolitanism – namely, belief in legal universality that is aware of international law's colonial origins and legacies.

4 Conclusion: Beyond TWAIL?

When TWAIL civilizes the mainstream, does it also change the lived experiences of the peoples of the Third World? Does it open up experiences of international law connected not only to domination but also to resistance? In the BBNJ negotiations, did it facilitate the recognition of the common heritage of humankind, thus increasing the prospects of future North/South redistribution? Perhaps. If so, there is a paradox: the power of its insight is also TWAIL's main weakness. In civilizing the mainstream, increasing opportunities for strategic use of international law by the global South, TWAIL enables lived experiences that defy the deep-structured international law that it discovered.

In *Imperialism, Sovereignty and the Making of International Law*, Anghie not only understands Third World experiences as colonial origins and legacies, but he also discovers in these experiences the presence of an international legal structure that

[13] Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (A/CONF.232/2023/4) adopted on 19 June 2023.

[14] I am leaving out the reference as the point is to show disciplinary trends rather than individual attitudes.

has endured from the colonial encounter to the post-colonial present. Anghie proposes a two-dimensional legal structure. International law first creates a gap between Western and non-Westerns peoples rendered as culturally different peoples, and then it creates mechanisms to bridge, but ultimately never close, the gap between them. These two dimensions – the 'dynamic of difference' and the 'civilizing mission' – define the structure of international law.[15]

Structuralist approaches to international law see law as a language, structured by the network of differentiations established between terms, as in the binary opposition between sovereignty and international community, in which the meaning of each term is not fixed but changes according to the relationship established with the other terms.[16] TWAIL, as articulated in the Foreword, however, presents not just a linguistic structure but also a deep structure. In Anghie's words, 'the "civilizing mission" has an almost ontological character. It is not only a historical phenomenon … but also a fundamental and enduring feature of international law'.[17] The language to create the gap changes over time – race, civilization, economic development – but the gap is always the same: European/non-European, First/Third World, Global-North/South. And although the 'techniques of law, governance and administration' that international law creates to bridge the gap also change, 'reproduced in very different vocabularies and doctrines over time', the gap between the superior European and the inferior non-European always remains unbridgeable.[18]

It would be premature to declare – after TWAIL's success and the potential increase of Southern international legal resistance – the beginning of an end of the dynamic of difference and the civilizing mission. But if these two dimensions of international law are not constitutive elements of a deep structure, but elements used in legal argumentation, then we may see arguments associated with these dimensions used not only by Western international lawyers securing domination but also by international lawyers tinkering with them in unexpected ways to resist. Non-Western international lawyers have not only critiqued the standard of civilization, but they have also appropriated and internalized it to breach the gap between the Western and non-Western world. They have also inverted the dynamic of difference to show a lack of civilization on the Western side. They have taken the same sovereignty that emerged to dispossess them, turning it upside down, not only to secure a space of autonomy through the principle of non-intervention but also for North/South redistribution, through the principle of permanent sovereignty over natural resources. There is a Southern history to these and other international legal strategies that a deep-structuralist TWAIL misses.

Not only does common heritage – a legal doctrine formulated and defended by Third World international lawyers from the 1960s to the 2023 BBNJ Treaty – but also other doctrines like sovereignty, a formal definition of statehood, the right to self-determination, differential treatment in trade and environmental law belong to a

[15] Anghie, *supra* note 5, at 37, 40.
[16] See, e.g., Kennedy, 'Theses About International Law Discourse', 23 *German Yearbook of International Law* (1980) 353.
[17] Anghie, *supra* note 6, at 29.
[18] *Ibid.*

history in which peoples of the Third World have experienced international law both as legitimizing and effecting Western domination as well as shaping North/South encounters and, at times, enabling Southern resistance. If common heritage, sovereignty and statehood do not have a transhistorical but, rather, a contingent meaning and significance, then international lawyers must find international law's meaning and significance in concrete North/South controversies.

International lawyers who have been too focused on revealing international law's deep structure may find themselves ill-equipped to examine North/South encounters, for, while foregrounding Vitoria and Westlake, they have missed international law as it has been experienced by Titu Cusi Yupanqui and Tsurutaro Senga. This is not to say that Southern experiences of resistance have been successful, but even in defeat there is something to learn. International legal scholarship can be Eurocentric when it exclusively focuses on the Western canon of events, treaties and authors for celebratory purposes as well as when, for critical purposes, it takes only the Western canon as the canon shaping international law's life.

In the search for international law's non-Eurocentric past and present, it is time to celebrate TWAIL while exploring other possible, non-deep-structuralist accounts of international law. Anghie himself, in *Imperialism, Sovereignty and the Making of International Law*, offered such an alternative, which is surprisingly absent from the Foreword. Anghie's dynamic of difference focuses on the European/non-European gap, but, before the gap and its dynamic of exclusion, Anghie shows inclusion of the non-European Other within international law's realm. Remember that Vitoria excludes indigenous peoples only after including them under *jus gentium*.

We have grown accustomed to thinking about international law as a unidirectional Eurocentric phenomenon, but it takes two to dance, two to dominate by inclusion and more than two to produce legal hegemony. And, in these entanglements, subversion and resistance are possible. Let us appreciate TWAIL's achievements and thank it for civilizing the mainstream. Moreover, a mainstream TWAIL might leave room for other approaches to undertake the task of unearthing the hidden Southern histories of international law, histories that resonate with many who may be ready not only to condemn colonial legacies but also to sharpen their critical tools to fight for the emancipation of the geographical and metaphorical South.