# The Promise of International Law: A Third World View

**(Including a TWAIL Bibliography 1996–2019 as an Appendix)**

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Grotius Lecture Presented at the
2020 Virtual Annual Meeting of the American Society of International Law
June 25, 2020

Last Edited: July 9, 2020



* I would like to thank Charles Jalloh, Antony Anghie, Obiora Okafor, Antony Anghie, Titilayo Adebola, Olabisi Akinkugbe Ohio Omiunu, and my colleagues at Loyola University Chicago School of Law for their comments on various ideas as I prepared this lecture. Thanks too to the International Law Reference Librarian at Loyola University Chicago School of Law, Julienne Grant, for her assistance. I could not also have prepared this lecture and the bibliography without the excellent research assistance of Loan Tran, Harrison Mbori, Shelby Kost, Jasmine Stanzick, Louis-Raymond Gomes, Lily Ealey, Dalaal Jaber and Ethan Thuo.

## INTRODUCTION

Thank you very much Prof. Padideh Alai for that very kind introduction. I would also like to thank you, Dean Camille A. Nelson of the Washington College of Law and the Society for this really special honor of inviting me to give the Grotius Lecture this year. I also thank the President of the Society Catherine Amirfar for her leadership and stewardship. My thanks too to my friend, Fleur Johns, for accepting to be the discussant for this lecture. Like you, I look forward to her response very much.

I have titled this lecture, "The Promise of International law: A Third World View." This lecture argues that one important way to trace the promise of international law at this moment of difficulty is to go outside the beltway of our discipline to places often unfamiliar in our textbooks and the locations where we practice and teach international law. To do that, this lecture will take you to places like Arusha, Tanzania, which until not too long ago was the seat of three international courts. By taking you to places like Arusha, Tanzania the goal of this lecture is to make two primary points.

First, I challenge the limited geography of places and ideas that dominate the beltway of our discipline. This limited geography and set of ideas is characterized by the law of Geneva, the law of Strasbourg, the law of New York and that of Washington DC. These are the types of places that our discipline celebrates as producers of the type of international law that in turn becomes the benchmark for the efficacy of international law produced elsewhere. These are also the locations where the bulk of international legal practice is produced and which influences and reinforces our understandings not only of international practice but also of international law more generally.

My second major point, which follows from my first point, is that the Third World is an epistemic site of production and not merely a site of reception of international legal knowledge. Recognizing the Third World as a site of knowledge production and of the practice of international law disrupts the assumptions that international legal knowledge is exclusively produced in the West for consumption and governance of the Third World. Further, that as Third World Approaches to International Law (TWAIL) scholarship argues, the Third World as understood here speaks from a subaltern epistemic location. This means that this Third World approach contests the idea that international law is applicable everywhere and that we should therefore regard it as a view from nowhere. Third World States and TWAIL scholars have contested this non−situated, universal status of international law in a variety of ways for several generations now. TWAIL challenges a view of international law that fails to engage in its complicity in histories of colonization, plunder and enslavement whose legacies continue to date. TWAIL challenges views of the history of international law that consider the centrality of its involvement in slavery, plunder and colonization as being benign or that simply ignore as inaccurate for ignoring or underpaying international law's central role in historical processes whose legacies in contemporary inequalities and inequalities continue to date.

Ultimately, I argue in favor of ending the insularity of international law characterized by a limited set of locales and ideas. I make the case why we should embrace the practice and scholarship of international law about and from the Third World as integral to our discipline and practice rather than as destabilizing, irrelevant and different. By taking this scholarship and practice more seriously, we can both de-marginalize this third world input into international law and learn from the ways that it provides distinctive visions of international law.

## PART ONE: INTERNATIONAL LAW'S LIMITED GEOGRAPHY OF PLACES AND IDEAS

In this part of the lecture, I challenge the limited geography of places and ideas that dominate the beltway of our discipline in both our scholarship and practice. There is now ample empirical evidence that our textbooks are more likely to be filled with cases and examples from the international law produced in places like Geneva, New York and Washington DC. Our scholarship and practice privileges certain locations while excluding and rendering other locations and their international legal activities invisible. My argument is not that there is zero attention to international legal work and scholarship produced in locations that do not carry the prestige our discipline associates with locales like Geneva, New York, Washington DC, Paris, London and the Hague[1] that are considered key international law locales.

Rather, my point is that there is often too little if anything at all in our casebooks and in our practice about the international law produced in places like Arusha, Tanzania. In addition to being home to two international courts at the moment, the East African Court of Justice and the African Court on Human and Peoples' Rights, Arusha is also home to several very active international legal organizations including the East African Law Society and the Pan-African Lawyers Union to name a few. My claim is that the international law produced here ought to receive our attention as much as the international law produced in the global capitals of international law.[2] As Anna Spain Bradley has argued in another context, our approaches to international law should not continue to be "descriptively omissive" of actors and ideas outside the global capitals of international law.[3]

In some ongoing research, for example, I found that in the 66 contentious cases completed in the ICJ between 1998 and 2019, only four non–OECD law firms –[4] by

[1] The Hague is sometimes referred to as the international law capital of the world.
[2] There is some interesting new work beginning to focus on non-western cities in international legal history. *See, e.g.*, Ohio Omiunu, *City Reports on International Law: Lagos in Focus* (ILA Study Group Report, 2020).
[3] Anna Spain Bradley, *Book Review, The Internationalists: How a Radical Plan to Outlaw War Remade the World by Oona Hathaway and Scott Shapiro*, 112 AM. J. INT'L L. 334 (2018).
[4] An example is the DRC law firm of Cabinet Tshibangu and Associés that appeared in Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo, Judgment, I.C.J. Reports, Nov. 30, 2010).

which I mean law firms based outside the West – appeared before the court.[5] By contrast, a total of 32 law firms/associations from OECD countries appeared before the Court. This is especially striking because 50 of the parties in those 66 contentious cases were non-OECD states. That means that non-OECD states gave instructions 100 times in that time period and in only 4 cases did they give instructions to non-OECD law firms. Even further, three of the non-OECD law firms appeared together with law firms from OECD countries. This imbalance in the representation of non-OECD states by OECD law firms in my view indicates that the practice of international law entrenches the dominance of practitioners and law firms from OECD countries arguably in the court that should be the most international court of them all.

The Registrar of the East African Court of Justice recently shared with me the nearly 200 names of the practitioners that have appeared or that appear regularly before the East African Court of Justice since it started operations in 2005.[6] All the names of the practitioners there were unsurprisingly from the East African region. It is quite clear from the names I got that practitioners in OECD states do not practice before international courts in places like Arusha and neither do those who practice in places like Arusha practice in the courts based in the global capitals of international law, like in the ICJ, as some of my ongoing empirical research shows.[7]

The fact that the practicing bars in places like the Hague, rather than in places like Arusha, are the places we look up to understand international law, has an uncanny continuation of the dominance of former colonial metropolitan centers over sub-regional and regional courts in Africa, and the non-West in general, in the production of international legal knowledge that our discipline celebrates as the benchmark.

Now just to be clear, the East African Court of Justice and the African Court on Human and Peoples' Rights which both became functional in 2006 have decided important cases and I am sure many of you can readily name some of those cases. That is also true of the International Criminal Tribunal for Rwanda ("ICTR") which until December 2015 was based in Arusha and whose functions have been continued in the Hague under the name the International Residual Mechanism for Criminal Tribunals (IRMCT).[8] I

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[5] *See* JAMES GATHII, HOW INTERNATIONAL IS THE INTERNATIONAL COURT OF JUSTICE (forthcoming 2021).

[6] E-mail from Registrar of the East African Court of Justice (Mar. 2020). *See also* Kurt Taylor Gaubatz & Matthew MacArthur, *How International Is International Law*, 22 MICH. J. INT'L L. 239 (2001).

[7] Perhaps the only exception is international criminal law where the ICC bar indicates some diversity in terms of the geographical location of the practitioners who are listed as Counsel before the ICC. *See List of Counsel Before the ICC*, INTERNATIONAL CRIMINAL COURT (June 22, 2020), https://www.icc-cpi.int/about/registry/Pages/list-of-counsel.aspx. However, as Xujith Xavier argues, even here we see a domination of western lawyers. *See* Sujith Xavier, *Theorising Global Governance Inside Out: A Response to Professor Ladeur*, 3 TRANSNAT'L LEGAL THEORY 268 (2013); Sujith Xavier, *Looking for 'Justice' in all the Wrong Places: An International Mechanism or Multidimensional Domestic Strategy for Mass Human Rights Violations in Sri Lanka?, in* POST-WAR SRI LANKA: PROBLEMS AND PROSPECTS (Amarnath Amarasingam & Daniel Bass eds., 2015).

[8] UN International Residual Mechanism for Criminal Tribunals, https://www.irmct.org/en (last visited June 20, 2020).

also know that there is increasing attention to these African courts in journals, books and blogs. So let me make it clear, my point is not that the decisions of these courts are a largely unknown quantity or that they are unimportant or that they are irrelevant because only practitioners from where they are based practice before them. Far from it. Rather, my point is that the case law that dominates our discipline in terms of illustrative cases in our case books or citations we make to assert important international legal principles in litigation come less from places like the international courts in Arusha, Tanzania. Yet, the international law produced in places like Arusha is hiding in plain sight! Further and more crucially, the international law work produced in places like Arusha is not regarded as a source of important theoretical innovations in international law. My point therefore is that the international law produced in places like Arusha is marginalized doctrinally and theoretically, as Anthea Roberts recent book confirms.[9]

Scholars studying the African human rights system like Rachel Murray, Obiora Okafor, Cristof Heyns and Magnus Killander,[10] and Solomon Ebobroah[11] to name a few, have noted the often too ready dismissal and neglect of African institutions because they are considered to be outside of the 'ruling' or 'dominant Western and European States.'[12]

On the scholarship front, Rachel Murray who has authoritatively studied the international human rights system in Africa from its beginning notes that international lawyers have for the most part relegated Africa's international human rights system by the way side. Prof. Murray argues this is because these international lawyers who she writes about regard the African human rights system as having 'less value' than its European and Western regional counterparts.[13] Murray argues that scholarship on the African human rights system often depicts it as an example of 'what not to do.'[14] She notes that many textbooks and casebooks fail to "concentrate upon the progressions and

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[9] ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL 271 (2018) (arguing that "the United States and the United Kingdom often enjoy the 'exorbitant privilege' of issuing the world's 'reserve law'. This capture marginalizes major civil law traditions, like the French and German systems"). In addition, Sujith Xavier makes this point powerfully in the context of international criminal law when he argues that "[d]epicting a very singular narrative that focuses on the facts, as witnessed by those in Berlin, Hamburg, London and New York, and theorising from this perspective may not yield any results that actually help us to understand the different political compromises involved and how these institutions are created and operate. The description of the international legal order cannot be a single story." Sujith Xavier, *Theorising Global Governance Inside Out: A Response to Professor Ladeur*, at 284 (Osgoode Hall Law School, Research Paper No. 29/2013, 2013).

[10] Cristof Heyns & Magnus Killander, *Africa in International Human Rights Textbooks*, 15(1) African Journal of International and Comparative Law 130-137 (2008).

[11] Solomon Ebobrah, *A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justic*e, 7 AFR. HUM. RTS. L.J. 307–32 (2007).

[12] *See generally* THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT (Charles Jalloh, Kamari Clarke & Vincent Nmehielle eds., 2019).

[13] Rachel Murray, *International Human Rights: Neglect of Perspectives from African Institutions*, 55 INT'L & COMP. L. Q. 193 (2006).

[14] *Id.* at 193.

developments from the African system, equating its comparatively young age with inexperience, ineffectiveness and irrelevance."[15]

Murray, who for the record is not African as far as I can tell, further notes that the "international literature on human rights and international institutions often do not cite African institutions' case law or activities as examples or suggestions of best practice or indicators of the development of international human rights law."[16] She notes that the assumption in the literature is that "the African system is behind in its approach, is still learning and, conversely, that the European system is transferable and applicable in a variety of situations."[17] She recommends overcoming this view of seeing the African human rights system "as a threat to human rights,"[18] or as ineffective and irrelevant.[19] After outlining the contributions and 'significant impact' of the African human rights system, Murray concludes that failing to take into account these impacts, by citing "seriously the rulings of these institutions, attention is drawn to them and some degree of respect may be accorded to them without losing sight of criticisms."[20]

It is notable that Rachel Murray was writing in 2006 when she observed the obscurity of the African human rights system. Needless to note, Prof. Murray is not alone in regarding the African human rights system as a positive example of human rights law and international adjudication. It is notable that Prof. Murray's response to the criticisms of Africa's then very nascent human rights system were observed in 2006. This is because 2006 was the same year that the International Law Commission prepared its report on fragmentation of international law.[21] That report did not make reference to any of Africa's still fledgling international courts – Africa is mentioned less than 10 times mostly in reference to International Court of Justice decisions rather than Africa's own courts, regimes and practices of international law. By contrast, Europe is mentioned over 170 times with a whole sub-section devoted to the European Court of Human Rights on the question of systemic integration. Asia appears exactly once in the main text. The six references to Asia are primarily cases on international arbitration.

Writing in 2019, Adamantia Rachovitsa[22] comes largely to the same conclusions as Rachel Murray.[23] Adamantia Rachovitsa discusses a stream of scholarship that argues

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[15] *Id.* at 195. For a text that focuses on the African human rights system, see FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA (2d ed. 2012).
[16] Murray, *supra* note 13, at 196.
[17] *Id.* at 195.
[18] *Id.* at 203 (arguing that failing to take into account the African human rights system "undermines the very validity of a universal system of human rights law…but also deprives the system of the respect necessary for the enforcement of its decisions").
[19] *Id.* at 195
[20] *Id.* at 203.
[21] U.N. INT'L L. COMMISSION, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, A/CN.4/L.682 (2006).
[22] Adamantia Rachovitsa, *On the New Judicial Animals: The Curious Case of an African Court with Material Jurisdiction of a Global Scope*, 19 HUM. RTS. L. REV. 255–89 (2019).
[23] Rachel Murray, *The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights*, *in* THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT

that the African Court on Human and Peoples' Rights threatens jurisprudential chaos.[24] One of the causes of such jurisprudential chaos was that the court exercises too vast a jurisdiction over violations not only of regional, but also of sub-regional and global human rights treaties. Particular anxiety is expressed in this literature about the court expanding its scope of focus beyond the interpretation and application of the African Charter on Human and Peoples' Rights to incorporate United Nations human rights treaties. So why should scholars be concerned that the African Court on Human and Peoples' Rights can interpret, apply and declare violations of UN human rights treaties? Should the African court's jurisdiction be limited to the African Charter on Human and Peoples' Rights and only African treaties? Would the African Court by applying and interpreting UN human rights treaties be undercutting or promoting the universality of international law? What role if any should regional courts like the African Court on Human and Peoples' Rights play, if at all, on the development of international law?

Those who argue that "different interpretations of similar or identical rules of international law can undermine the general integrity of international law, and the overall consistency of international law"[25] overemphasize the risks of divergence from global norms. This in turn overlooks how courts like the African Court on Human and Peoples' Rights actively participate in the development of international law.[26]

This emphasis on the risks posed by the African human rights system to what are regarded as the proper, mainstream and successful models of regional human rights adjudication means courts like the African Court on Human and Peoples' Rights are regarded as subordinate rather than equal participants in the development of international law. Such views presuppose non-Western international courts are or ought to be passive junior imitators of their western counterparts and as such that they have no role in producing but only in receiving international law. Such a view that denigrates the role of non-Western international courts is simply mistaken. This mistaken view

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965-88 (Charles Jalloh, Kamari Clarke & Vincent Nmehielle eds., 2019) (affirming the broad jurisdiction of the African Court of Human and Peoples' Rights to interpret treaties other than the African Charter on Human and Peoples' Rights).

[24] Adamantia Rachovitsa, *On the New Judicial Animals: The Curious Case of an African Court with Material Jurisdiction of a Global Scope*, 19 HUM. RTS. L. REV. 255–89 (2019).

[25] *Id* at 275.

[26] The point Rachel Murray and Adamantia Ranchovitsa make about the African human rights system is particularly salient as exemplified by the scholarship of an increasing number of scholars from Obiora Okafor's class 2007 book, Activist Forces. In that book, Okafor resists the temptation to dismiss the African human rights system offhand and concludes that there are 'modest harvests' associated with the case law of these courts. *See also* James Thuo Gathii & Jacqueline Wangui Mwangi, *The African Court of Human and Peoples' Rights as an Opportunity Structure, in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (ISBN 9780198868477) (James Gathii ed., Oxford University Press, 2020).

privileges both the UN and European human rights systems and presumes that the African system should be dependent on these systems.[27]

These critiques of the African Court on Human and Peoples' Rights are also a reflection of the dominance of how research agendas from and for a western audience characterize non-western international legal engagements. These non-western legal engagements are often seen to be falling short, to be inadequate because they do not correspond to the benchmark set by the theoretical needs of and questions set in the western academy. This leaves little scope for scholarship outside these well-established systems of scholarly knowledge circulation. These critiques assume that the African Court has to mimic its western counterparts – including in ensuring nothing less than the Queens English in their judgments and rulings.[28] (Ignoring of course the importance of the jurisprudence of the African Court especially for democratization and not merely for advancing human rights struggles defined from a narrow western centric perspective.[29]) My point here is not in favor of recognizing the voice of the others of international law, but rather to actively resist knowledge production systems that silence them and their engagements with international law.

Let me give you the example of how and why East African Court of Justice which has redeployed from its initial design as an international trade court to become a human rights and rule of law court serves as an example for international law elsewhere.[30] This

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[27] For a similar view, see Joseph Slaughter, *Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World*, 40 HUM. RTS. Q. 740 (2018).

[28] According to one commentator, "Admittedly, the practice of the African Court has encountered serious issues and has raised many reservations and criticisms from commentators. It is impossible to list here the many criticisms levelled at the Court. I had already expressed concern many years ago about the perceived lack of rigour in the reasoning of the ACtHPR judgments. States could legitimately be frustrated by the laconism of the Court's replies to some of their arguments, in particular on questions of jurisdiction and admissibility (see, for example, the Court's most recent Order)." Apollin Koagne Zouapet, *'Victim of its commitment… You, passerby, a tear to the Proclaimed Virtue': Should the Epitaph of the African Court on Human and Peoples' Rights be Prepared?*, EJIL: TALK! (May 5, 2020), https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/. For another view, see *The African Court of Human and Peoples' Rights as an Opportunity Structure," in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (ISBN 9780198868477) (James Gathii ed., Oxford University Press, 2020). For the view that there is a new research agenda of putting the African human rights system in conversation with human rights systems from other regions, see Başak Çalı, Mikael Rask Madsen & Frans Viljoen, *Comparative Regional Human Rights Regimes: Defining a Research Agenda*, 16 INT'L J. CONSTITUTIONAL L. 128–35 (2018).

[29] Olabisi Akinkugbe, *Towards an Analyses of the Mega-Politics Jurisprudence of the ECOWAS Community Court of Justice, in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (ISBN 9780198868477) (James Gathii ed., Oxford University Press, 2020).

[30] For a thorough discussion of the role of the East African Court of Justice in democratization, see James T. Gathii, *Chapter One: International Courts as Coordination Devices for Opposition Parties: The Case of the East African Court of Justice, in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (ISBN 9780198868477)

redeployment with its attendant risks suggests that Africa's international courts will not always replicate the European model on which they are based. In other words, this redeployment from their original mandates to new aims shows the capability of these newer international courts to evolve in ways that could be instructive for international courts elsewhere as I will illustrate momentarily. Before doing so, let me illustrate how this re-deployment of trade courts to become human rights and environmental courts happened.

In East, West and Southern Africa, the respective sub-regional courts – the East African Court of Justice, the Economic Community of West African Community Court of Justice and the Southern Africa Community Development Tribunal were initially designed without explicit jurisdiction over human rights.[31] In West Africa, explicit jurisdiction over human rights was subsequently conferred by treaty. That was not the case in East and Southern Africa. In East Africa, the relevant treaty provided that jurisdiction over human rights would be given at a future date. However, the East African Court of Justice did not wait for that conferral of jurisdiction. Instead, it established a cause of action for violations of human rights. According to the court, a case that raises a question of whether or not human rights protections enumerated under the founding treaty of the East African Community, could be decided under the court's jurisdiction to interpret and apply East Africa Community treaties.[32]

You may say these interpretive moves are quite familiar and that they pose risks for these courts. You would be right.[33] What is significant though is not whether or not they imitate older courts and in particular the European ones on which they are modeled. Rather, their redeployment from trade to human rights and environmental courts is indicative of an institutional flexibility than has not nearly been possible in international courts elsewhere. By defying the distinct compartmentalization of trade and human rights courts, Africa's international courts have broken the post-second world war distinction of separate courts for trade, on the one hand, and for human rights, on the other. Perhaps, there are lessons for other international courts here.[34]

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(James Gathii ed., Oxford University Press, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630724.

[31] Treaty for the Establishment of the East Africa Community, art. 27(2) (The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction); Karen J. Alter, James T. Gathii, & Laurence R. Helfer, *Backlash against International Courts in West, East, and Southern Africa*, 27 EUR. J. INT'L L. 293 (2016).

[32] Katabazi v. Sec'y Gen. EAC, Ref. No. 1 of 2007; Rugumba v. Sec'y Gen. EAC, Ref. No. 8 of 2010; Independent Medical Legal Unit v. Attorney General of Kenya, Ref. No. 3 of 2010; James T. Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249 (2013).

[33] *See* Karen Alter, James Gathii & Laurence Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293 (2016), HTTP://WWW.EJIL.ORG/ARTICLE.PHP?ARTICLE=2647&ISSUE=131.

[34] Just as much as there is payoff in what Africa's international courts are doing, there are payoffs to focus on what Africa's national courts are doing in international criminal law and beyond. As Max du Plessis reminds us in a recent article, "too much focus is given to the ICC and international institutions,

The environmental cases before Africa's international courts also tell us something important about how third world scholars and states have taken on environmental causes as integral to international law — rather than requiring the establishment of specialized environmental tribunal. [35] The major feature of these judicial environmentalism is the manner in which Africa's international courts have embraced the principle of systemic integration, which is promoting coherence within a fragmented system of international law rules.[36] In effect these courts apply and interpret rules of international law outside their immediate sub-regional treaty system. [37] The best example here is the East Africa Court of Justice's First Instance Division Serengeti decision in which the Court stopped the government of Tanzania from building a road through a UNESCO world heritage site.[38]

It is not surprising therefore that in West Africa, international lawyers there have brought environmental cases to the Economic Community of West African States Court of Justice based in Abuja, Nigeria. This has been replicated in East Africa as well as in the Inter-American Court of Human Rights.[39] Notably, the Inter-American Court of Human Rights has used the principle of indivisibility and interdependence of social, economic and cultural rights, on the one hand, and civil and political rights to make the

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and comparatively too little work is done generally to gather together the experiences, judgments and best practices of national legal systems." Although du Plessis directs our attention particularly to South Africa's important case law on immunity and universal jurisdiction, his invitation that there are lessons for international law and international institutions more generally to learn from national legal systems in African countries is an important one. He in particular focuses on the innovations of the South African Constitutional Court in cases like the Torture Docket case. That unprecedented decision held that "international law imposes a duty on South Africa to investigate crimes committed entirely in the territory of its neighbor despite the absence of any suspects or accused in South African territory and without regard to whether a prosecution based on the evidence gathered during the investigation would eventually materialize." The "Court construed the duty to investigate allegations of extraterritorial torture committed by and against non-nationals to be an independent duty of a state exercising universal jurisdiction over torture." Max du Plessis, *The Crimes Against Humanity Convention, (Overlooked) African Lessons, and the Delicate Dance of Immunity*, 17 J. INT'L CRIM. JUST. 11 (2019). The "literature and debate about universal jurisdiction has focused on whether customary international or treaty law prescribes a duty to prosecute or to extradite those accused of committing international crimes and, if so, how much actual state practice supports it. By contrast, much less has been said about a separate duty to investigate such crimes." As best as I can tell, no other national court has come to such a significant conclusion.

[35] For further discussion on recent environmental cases before Africa's international courts, see James T. Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHICAGO J. INT'L L. 386 (2016).

[36] *Id.* at 431.

[37] *Id.*

[38] African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania, East African Court of Justice, Ref. No. 9 of 2010.

[39] *See, e.g.*, Giovanny Vega-Barbos & Lorraine Aboagye, *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL: TALK! (Feb. 26, 2018), https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/.

latter set of rights justiciable to environmental rights.[40] This approach of seeing the environment as an integral part of the international legal framework rather than treating the environment as a specialized or self-contained regime disconnected from the rest of international law is an important reframing and insight especially in light of concerns of climate crisis.[41]

In fact, TWAIL scholars from R.P. Anand,[42] to Karin Mickelson[43] to Usha Natarajan[44] to name a few have long before the current concern about the climate crisis argued in favor of averting environmental catastrophes that have faced the global south with urgency. They argued these catastrophes cannot be separated from other challenges that are equally as serious and as devastating.[45] In so doing these scholars questioned the conventional understanding of International Environmental Law as being driven primarily by concerns for the environment (primarily on the part of the North) and having to respond to concerns about development (primarily on the part of the South). As Karin Mickelson has argued, we should not delude ourselves into "thinking that… ecological integrity, basic human needs, and human rights can be meaningfully dealt

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[40] *Id.*

[41] J. Peel & J. Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT'L L. 683 (2019) (noting that "attention to the types of climate cases emerging in the Global South promotes a reframing of our understanding of climate litigation").

[42] R.P. ANAND, LEGAL REGIME OF THE SEA-BED AND THE DEVELOPING COUNTRIES (1975); R.P. Anand, *Development and Environment: The Case of the Developing Countries*, 20 INDIAN J. INT'L LAW. 1 (1980); R.P. Anand, *Industrialization of the Developing Countries and the Problem of Environmental Pollution*, 4 MAZINGIRA (OXFORD) *16* (1980).

[43] Karin Mickelson, *South, North, International Environmental Law, and International Environmental Lawyers*, 11 Y.B. INT'L ENVTL. L. 78 (2000).

[44] Usha Natarajan, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 OR. REV. INT'L L 177 (2012); Usha Natarajan & K. Khoday, *Fairness and International Environmental Law from Below: Social Movements and Legal Transformations in India*, 25 LEIDEN J. INT'L L. 415 (2012); Usha Natarajan, *International Environmental Law, in* INTERNATIONAL LAW AND AFRICA COURSE (Rom Bhandari ed., 2012).

[45] The linkages between the environment and human needs is widely recognized by the decisions of Africa's international courts. *See* James T. Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHICAGO J. INT'L L. 386 (2016). Courts in the Global South have also been very active with climate change litigation. *See* J. Peel & J. Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT'L L. 683 (2019). Third World jurists like Justice Christopher Weeramantry's powerful pro-environmental dissenting opinion in the ICJ's 1999 decision, Kasikili/Sedudu Island (Botswana/Namibia) is particularly noteworthy. *See* James T. Gathii, *Geographical Hegelianisam in Territorial Dipsutes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), in* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW POLITICS AND GLOBALIZATION 75 (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., 2003). In Paragraph 117 of his dissent, Justice Christopher Weeramantry argued that, "[t]he future will demand an international law that is sensitive and responsive to the problems of environmental law. The careful integration of the necessary principles of environmental law into the traditional body of international law is an important task awaiting attention. The principles and the duties arising from environmental obligations now superimpose themselves upon such rights arising from State sovereignty as may have been recognized by prior international law in an absolutist form."

with in isolation from each other."[46] She has also traced the colonial legacies of international environmental law and unearthed its partial narratives about non-European peoples damaging and despoiling the environment.[47] She pushed back against environmental accounts that promoted a view of rare habitats and rich biodiversity resources as only worthy of protection because only Western states and environmental groups sought to do so. That is why it is impressive to see lawyers in West Africa challenging the boundaries of who can bear responsibility for environmental damage by bringing cases in the ECOWAS Community Court of Justice against multinational corporations,[48] even though the States have defined the jurisdiction of that court to exclude suit against private actors.[49] The bold vision of international law that should succeed the current one should break down these boundaries that create accountability gaps.[50]

Let me use another example to illustrate the invisibility of international legal work in Africa. This is the important role played by one of the most senior international legal jurists who also happens to hail from Africa, Dr. (Navianethem) Navi Pillay. She was one of the judges who helped to lay the groundwork for functioning of the International Criminal Tribunal for Rwanda from its infancy. Less remembered though is the central role she played in nudging the prosecution to amend its indictment in the Akayesu case to include crimes of sexual violence.[51]

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[46] Karin Mickelson, *South, North, International Environmental Law, and International Environmental Lawyers*, 11 Y.B. INT'L ENVTL. LAW 78 (2000).
[47] *Id.*
[48] Socio-Economic Rights and Accountability Project v. Nigeria & others, Ruling, Suit No: ECW/CCJ/APP/08/09 and RUL. No: ECW/CCJ/APP/07/10 (ECOWAS, Dec. 10, 2010). In these preliminary ruling by the court, while grappling with important international law principles, the court dismissed the claims against the following companies: the Nigerian National Petroleum Corporation (NNPC), Elf Petroleum Nigeria Ltd, Agip Nigeria Plc and the Multinational Companies (MNCs): Shell Petroleum Development Company (SPDC), a subsidiary of the Royal Dutch Shell, Chevron Oil Nigeria Plc, Total Nigeria Plc, and ExxonMobil Corporation.
[49] Socio-Economic Rights and Accountability Project v. Nigeria, Case No. ECW/CCJ/APP/08/09, Judgment (Dec. 14, 2012).
[50] Matiangai V. S. Sirleaf, *The African Justice Cascade and the Malabo Protocol*, 11 INT'L. J. TRANSITIONAL JUST. 76 (2017) ("The (Malabo) Protocol permits jurisdiction over both natural persons and entities on established bases – consent, territorial, nationality, passive personality and protective principles. This represents a significant advancement of ICL. The devastating impact of corporate malfeasance in Africa explains this development. The Protocol could enable African states to respond more effectively to challenges posed by corporations, thereby transforming the justice cascade."); Joanna Kyriakakis, *Article 46C: Corporate Criminal Liability at the African Criminal Court*, *in* THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT 793 (Charles Jalloh, Kamari Clarke & Vincent Nmehielle eds., 2019); Don Deya, *Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes, Open Society Initiative for Southern Africa (OSISA)* (Mar. 6, 2012).
[51] Adrien Katherine Wing, *International Human Rights and Black Women Justice or Just Us*, *in* JEREMY LEVITT, BLACK WOMEN AND INTERNATIONAL LAW: DELIBERATE INTERACTIONS, MOVEMENTS, AND ACTIONS 49 (2015); Anna Spain, *African Women Leaders and the Advancement of Peacebuilding in International Law*, *in* JEREMY LEVITT, BLACK WOMEN AND INTERNATIONAL LAW: DELIBERATE INTERACTIONS, MOVEMENTS, AND ACTIONS 135 (2015).

This account of her role is given by the current President of the International Criminal Court, Chile Eboe-Osuji. Judge Eboe-Osuji recalls that when he worked in the Office of the Prosecutor of the ICTR, it was Judge Pillay who asked the prosecution in the trial of that case what the judges were expected "to do with the evidence of sexual violence, which had been led in the case without a charge relating to sexual violence."[52] This account is confirmed by Erik Mose, who was the President of the ICTR at the time of the Akayesu decision.[53] As Judge Chile Eboe-Osuji remembers, "it is fair to say that without Navi Pillay promoting the question, the indictment in the *Akayesu* case may never have been made to plead the charge of sexual violence."[54] According to Judge Chile Eboe-Osuji, the *Akayesu* case which is "one of the most inspirational nuggets of jurisprudence in modern international law,"[55] would not have been possible if Dr. Navi Pillay had not helped clear the path to that decision. Yet as we all know of Dr. Pillay, she was not one to "suffer credit to be given to her alone for the *Akayesu* reasoning on sexual violence as an act of genocide."[56] Indeed there were two other judges on that Bench and there were civil society groups involved in seeking to have gender offenses be prosecuted as well.[57] As we all know, that judgment inspired 'much legal writing and further judicial reasoning.'[58]

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[52] Chile Eboe-Osjui, *Navi Pillay In Her Age: An Introduction*, *in* CHILE EBOE-OSJUI, PROTECTING HUMANITY: ESSAYS IN INTERNATIONAL LAW AND POLICY IN HONOR OF NAVANETHEM PILLAY 10 (2010). This account is also confirmed by Kelly D Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16, at 17 (2004), available at https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1370&context=hrbrief. Askin notes that:

> "In the midst of trial, a witness on the stand spontaneously testified about the gang rape of her 6-year-old daughter. A subsequent witness testified that she herself was raped and she witnessed or knew of other rapes. Fortunately, the sole female judge at the ICTR at that time, Judge Navanethem Pillay, was one of the three judges sitting on the case. Having extensive expertise in gender violence and international law, Judge Pillay questioned the witnesses about these crimes. Suspecting that these were not isolated instances of rape, the judges invited the prosecution to consider investigating gender crimes in Taba and, if found to have been committed and if attributable to Akayesu, to consider amending the indictment to include charges for the rape crimes Consequently, an amended indictment was filed, charging Akayesu with three counts of rape and other inhumane acts as crimes against humanity. The genocide court in the amended indictment also referred to the alleged sexual violence."

[53] Erik Mose, *On the Bench with Navi*, *in* CHILE EBOE-OSJUI, PROTECTING HUMANITY: ESSAYS IN INTERNATIONAL LAW AND POLICY IN HONOR OF NAVANETHEM PILLAY 26 (2010) (noting that it is "common knowledge that Navi actively asked questions concerning sexual crimes, and the Prosecution subsequently filed an indictment which later led to the finding in Akayesu that rape may under certain circumstances constitute genocide").

[54] As Chile Eboe-Osuji further notes, "without Navi Pillay's presence on the Bench that tried that case, there might never have been an opportunity to consider the question of sexual violence in that judgement." Eboe-Osuji, *supra* note 52, at 10.

[55] *Id.* at 4.

[56] *Id.* at 10.

[57] Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda*, *in* HUMAN RIGHTS ADVOCACY STORES (2008), *available at* https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1626&context=facpubs (after one witness "confirmed that she had never been questioned about [the rape] by any investigators of the Tribunal," the "President of the Tribunal and then Judge Aspergen returned to this line of questioning, and [the witness] testified further that she had heard that other girls had been raped in Akayesu's bureau

This example further illustrates how international courts based in Africa can be thought of co-partners in an equal role as other international courts in the development of international law rather than being in a hierarchical relationship to those based elsewhere. This example also shows the types of important if not pioneering doctrinal developments that have grown out of international courts in Africa.

If I may just go back to Arusha one more time. In a recent book, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*, Kamari Maxine Clarke[59] chronicles the work of the largest international lawyers society in Africa, the Pan African Lawyers Association, (PALU). Prof. Clarke discusses the role of the Pan-African Lawyers Union proposals to expand the criminal jurisdiction of a future African Court of Justice and Human Rights in the proposed Malabo Protocol. She concludes that the vision of international criminal justice embodied in the proposed Malabo Protocol seeks to "redefine the nature of violence in Africa as embedded in multiple forces of plunder and economic inequalities and multiple actors ranging from individual perpetrators to leaders of multinational corporations and terrorist gang networks."[60] Even with the expanded set of international crimes that would come under the jurisdiction of the African court if the Malabo Protocol received the requisite ratifications, Prof. Clarke argues there is nothing substantively different about this court because it is "envisioned as operating within a legal realm that is quite similar to other courts elsewhere."[61]

However, what is even more compelling about Prof. Clarke's account is that it is not only framed at the level of the law and doctrine of international criminal law, or to use her words 'technocratic articulations of objective certainty.'[62] Rather, her ethnographic account emphasizes why we should pay attention to "feelings about inequality and injustice that shape how international law is perceived and how justice is experienced affectively."[63] By affective justice, she does not mean to minimize the important legal controversies such as those relating to immunity from prosecution that tend to dominate discussions of international criminal justice in Africa. Instead, she points to the productive potential of paying attention to the "feelings of inequality [such as the view that the ICC has targeted only African or poor countries] and racial oppression that

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communal) ("[F]eminist activists formed a non-governmental organization ("NGO"), the Coalition for Women's Human Rights in Conflict Situations ("Coalition"), in 1996 specifically to monitor the ICTR and ensure that it protected the rights and interests of women appearing before the Tribunal. In light of [the witnesses'] testimony, the Coalition submitted an amicus curiae brief…"). Additionally, Patricia Viseur Sellers, the Gender Advisor in the Office of the Prosecutor, was a great advocate of progressing the sexual violence charge in the Rwanda Tribunal. *See* JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS fn.170 (Shane Darcy & Joseph Powderly eds., 2011).

[58] Eboe-Osuji, *supra* note 52, at 4.

[59] KAMARI MAXINE CLARKE, AFFECTIVE JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE PAN-AFRICANIST PUSHBACK (Duke University Press 2019).

[60] *Id.* at 212.

[61] *Id.* at 212.

[62] *Id.* at 224.

[63] *Id.* at 226.

remain illegible before the law."[64] It is this sense of affective justice that she argues has become the motive force for the pan-Africanist backlash against the International Criminal Court. For Prof. Clarke therefore, international law operates "within particular affective realms rooted in histories, memories and experiences.[65] From that perspective, our understanding of international justice will be diminished if we only focused on whether or not African states were complying with rules of international criminal law to the exclusion of 'other logics.'[66] For Prof. Clarke these other logics that are often excluded in the law and doctrine of international criminal law include what she calls deep seated histories of injustice such as the absence of international institutional intervention into colonialism and apartheid and the inequalities in the way in which international criminal justice is administered today.[67]

The point here is that to understand more fully what is done in the name of international law and its goals such as the promotion of peace and the protection of rights, it is important to go beyond merely reflecting on what the rules of international law are and how they are applied. One way of doing so is as Prof. Kamari Clarke challenges us, is that should not always assume the international legal rules and institutions are necessarily impartial, objective and neutral. Instead, she challenges us to also pay attention to how these rules and institutions have complicated historical legacies and sometimes even destructive consequences in the ways in which they are applied. As Anne Orford has argued, "it is timely to explore other – no less scientific – methodologies that might (that do) shape the work of professional legal scholars and our relation to the many realities that we seek to study and the many institutions and publics to which we are called to account."[68]

Perhaps one lesson we can draw here then is that international law scholarship ought to have a place that foregrounds thick descriptive accounts and local knowledge(s) over approaches that proceed from abstract models or universal assumptions.[69] After all, I believe that the goal our discipline has to go beyond approaches, such as those

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[64] *Id.* at 214.
[65] *Id.* at 261.
[66] *Id.* at 263.
[67] *Id.* at 8.
[68] Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT'L L. 384 (2014).
[69] James T. Gathii, *Introduction, in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING INTERNATIONAL LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (ISBN 9780198868477) (James Gathii ed., Oxford University Press, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630722 (noting that the "book expands the aperture for examining the work of international courts by looking at the roles Africa's international courts play beyond measuring compliance and effectiveness. [It] shows how filing cases in these courts enables, spurs and emboldens political and legal mobilization. To demonstrate how these courts facilitate this role, the chapters in this book adopts an in-depth case-study approach that emphasizes thick-description and analysis about how these cases filed in these courts enable, spur and embolden political and legal mobilization."); PATRICK CHABAL & JEAN-PASCAL DALOZ, CULTURE TROUBLES: POLITICS AND THE INTERPRETATION OF MEANING 222–23 (2006) (arguing in favor of analysis of culture that privileges thick description rather than abstract models, that privileges local knowledge over universal assumptions).

characterized an exclusive black letter law emphasis, that do not adequately capture the type of epistemic injustices that could result from the failure to adequately capture alternative views or for my purposes the experience and world-views of non-western peoples. It is the privileging and centrality given to certain locales and ideas in the production of very particular types of (governing) international law, against which other less visible locales and ideas are to be measured that is the problem.

TWAIL scholars and Third World states contest these very particular types of governing international law for being promoted as applicable everywhere as if they were actually views from nowhere.[70] Third World States and TWAIL scholars have contested this non−situated, universal status of international law in a variety of ways.[71] I will return to this theme of epistemic locations in my discussion in Part II.

## PART TWO: TWAIL AS A SUBALTERN EPISTEMIC LOCATION

My second major point in this lecture is that TWAIL speaks from a subaltern epistemic location. This means that TWAIL not only questions international law's presumed universality,[72] but that it theorizes and views international law from the perspective of the Third World.[73] The reference to the Third World in TWAIL does not refer to a geographical space, or one that is historically fixed in time or that supposedly represents a true essence of the Third World. Neither is it a view based on Third World statehood or third world nationalism – after all, many Third World scholars such as Makau Mutua have shown how colonially created statehood replicates many of the legacies of colonial rule.[74] To be clear therefore, the use of the term Third World is an anti-subordinating term whose aim or goal is to disrupt and hopefully dismantle the hierarchies on which unequal production about the knowledge of international law is produced and practiced. It provides the analytical tools to examine whether there are unequal economic, political, military or even racist underpinnings of our various rules, practices and

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[70] Annelise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, 6 L & CRITIQUE 39, 48 (1995), *available at* https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1786&context=facpub.; Annelise Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723 (1993); Babatunde Fagbayibo, *Some Thoughts on Centering Pan-African Epistemic in the Teaching of Public International Law in African Universities*, 21 INT'L COMM L. REV, 170-89 (2019).

[71] For more, see James Gathii, *The Agenda of Third World Approaches to International Law, in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey Dunoff & Mark Pollack eds., forthcoming Cambridge University Press 2020).

[72] Makau Mutua, *What is TWAIL*, 94 AM. SOC'Y INT'L L. PROC. 31 (2000).

[73] Luis Eslava, *TWAIL Coordinates*, BLOG OF THE GRONINGEN JOURNAL OF INTERNATIONAL LAW (Apr. 1, 2019), https://grojil.org/2019/04/01/twail-coordinates/.

[74] Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995); Usha Natarajan, *John Reynolds, Amar Bhatia & Sujith Xavier, Introduction: TWAIL – on Praxis and the Intellectual*, 37 THIRD WORLD QUARTERLY 11 (2016) (noting that TWAIL has its own sub-alterns and biases including issues of indigeneity, gender and caste); *See also* OBIORA CHINEDU OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA (2000).

scholarship on and of international law and discusses and debates what can be done to overcome these inequalities.

The point about alternative epistemic locations that are made possible by the antisubordination perspective that I have just alluded to, is that it counteracts dominant accounts of international (whether for example, European or American or otherwise). This perspective also challenges the hierarchical and unequal manner in which rules of international law from some parts of the world become predominant while others are regarded as subordinate or irrelevant. This part of the lecture discusses examples of third world scholarship in international law that respond to the epistemic silencing of the third world.

Take the example of James Sakej Youngblood Henderson's scholarship countering Eurocentric representations of indigenous inadequacy in international law. Henderson advocates for indigenous humanities not merely as an art of self-affirmation, but as an alternative epistemological point of departure for international law.[75] A point of departure that would overcome what he calls the 'cognitive annihilation' of indigenous heritages and world-views.[76] Unlike the written rules and doctrines of international law, indigenous lawyers he argues "are reintroducing ancient visions of human relationships…as discursive remedies to our suffering, rather than quibbling word games and conceptual riddles as in Eurocentrism. The remedies [he argues] are in our vision, consciousness, and feelings. They remain in the places and ceremonies that our Creator placed them; it is for us to continually rediscover and renew these teachings."[77]

Similarly, Adrien Wing has argued that there are 'spirit injuries' that arise from a combination of physical, emotional, and spiritual harms of discrimination and oppression that arise in the context of self-determination struggles to overcome racist, alien or colonial rule.[78] Spirit injuries may occur on both a personal level, leading to the "slow death of the psyche, the soul, and the personal" and on a group level, leading to the "devaluation and destruction of an entire culture."[79] Wing popularized this concept of spirit injury which is "broadly applicable… to sociological, anthropological, and political conceptions of violence."[80] Such injuries that go beyond the doctrinal

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[75] James Sakej Youngblood Henderson, *Postcolonial Indigenous Legal Consciousness*, 1 INDIGENOUS L. J. 21 (2002) (discussing the 'cognitive imprisonment and imposed inferiority' of indigenous peoples embedded in international law).
[76] *Id.* at 7.
[77] *Id.* at 4, 13.
[78] Adrien Katherine Wing, *Healing Spirit Injuries: Human Rights in the Palestinian Basic Law*, 54 RUTGERS L. REV. 1087, 1088 (2002); (applying 'spirit injury' to the Palestinian people have suffered many violations of their human rights (including exile, family dissolution, land dispossession, death, torture, and imprisonment) and have faced racism, cultural stereotypes, political imperialism, and dehumanizing ideology). Adrien Wing, *The South African Transition to Democratic Rule: Lessons for International and Comparative Law*, 94 AM. SOC'Y INT'L L. PROC. 254 (2000). (applying 'spirit injury' to harms arising from apartheid in South Africa).
[79] *Id.* at 1089.
[80] Nick J. Sciullo, *Spirit Injury and Feminism: Expanding the Discussion*, PROCEEDINGS OF THE GEORGIA COMMUNICATION ASSOCIATION 26 (2013).

categories of international law indicate the different epistemic locations of international law.

TWAIL feminist scholarship also illustrates what it means to proceed from an alternative epistemic location by foregrounding race and gender. TWAIL feminists do this in part by exposing overlapping and interdependent forms of gender subordination and discrimination as a central point of inquiry. In addition, in response to U.S. style white feminism and its claims of universality, early TWAIL feminist scholarship emphasized the commonality of women's experiences could not serve as a template for feminisms in the third world.[81] Critical Race Feminists led by scholars like Adrien Wing[82] argue that the identities of women of color are multiplicative, in the sense that they possess multiple consciousness, based on their intersectional identities.[83] They also argue against feminist analysis that un-problematically sweep women from many parts of the world into their analysis as simplistic and inaccurate.[84] Like Critical Race Theorists, Critical Race Feminists examine women's experiences through race and gender "lenses" simultaneously rather than only through one of them.[85] Indeed, TWAIL feminist scholars quite easily draw on the multiple intersections of oppression that women are subjected to. In questioning white feminism's universalist claims, TWAIL feminists draw on the multiple experiences of women of color including black, queer, transgender, lesbian, as well as their anti-colonial, anti-imperialist, and anti-capitalist stances.[86]

Similarly, Henry Richardson III's important scholarship challenges how international legal history scrubbed clean the history of racial oppression and "massiveness of the slave system since before the beginning of the [American] Republic" and how that system and the accompanying history sought to show how African Americans lacked "talent and public competence…[and] praiseworthy personal attributes."[87] Henry J. Richardson III's book, *The Origins of African American Interests in International Law* (2008), is an excellent example of international law scholarship that recovers the epistemic silencing of African Americans in international law. In the book, Prof.

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[81] Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of US Feminist Legal Scholarship*, 16 HARVARD L. WOMEN'S J. 189 (1993).

[82] Adrien Wing, *Global Critical Race Feminism Post 9-11: Afghanistan*, 10 WASH. U. J.L. & POL'Y 19, 20 (2002) [hereinafter *Global CFR: Afghanistan*].

[83] On multi-consciousness, see Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297 (1992).

[84] In *Global CFR: Afghanistan*, *supra* note 82, Adrien Wing argues that by the "term women of color, I refer to groups both inside and outside the United States. In the American context, I am including African Americans, Latinas, Asian, and Native Americans, as well as Arabs, Muslims, and any other group that is being socially constructed as people of color."

[85] *See Global CFR: Afghanistan*, *supra* note 82, at 25.

[86] J. Oloka-Onyango & Sylvia Tamale, *'The Personal Is Political,' or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691, 700 (1995). For a view challenging TWAIL to take LGBT issues on board, see D. Otto, *Gastronomics of TWAIL's Feminist Flavourings: Some Lunch-Time Offerings*, 9 INT'L COMM L. REV. 345 (2007).

[87] Henry J. Richardson, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILLANOVA L. REV. 1096–97 (2000).

Richardson III sought to uncover "the origins of African American's own jurisprudence about international law" in the 17th to 19th centuries. While Antony Anghie's work examines non-European encounters with international law, Richardson examines how international law sees African Americans from the perspective of "European and other militarily and economically prominent sovereigns and peoples."[88]

Yet notwithstanding being critical of the accounts of international legal history that exclude how international law was implicated in the subordination of non-Europeans for Anghie and in the slavery of African Americans for Henry J. Richardson III, they do not dismiss international law as hopelessly unhelpful for these subordinated peoples. In addition, notwithstanding their critique that international law mirrors our Eurocentric tools of knowledge production and that the very nature of international legal scholarship is dominated by Western(ized) analytic tools, TWAIL scholars like Richardson and Anghie are still hopeful that international law can make a difference.

Quite notably, TWAIL scholars do not only emphasize an international law comprising merely of positive rules. For example it is especially striking that Henry J. Richardson's book powerfully argues that in the 17th to 19th centuries – during slavery – what he refers to as international law in that time period was "one candidate among several sources of [outside] norms"[89] that African Americans "desired to…to be locally authoritative" as they sought their freedom from slavery and white racism. They saw such outside law as necessary in "confirming their right to be free of slavery and [to be] treated with dignity" because the local law that governed them denied their 'rights and humanity.' This appeal to outside law Richardson argues was part of Black resistance against 'white slavery, oppression and slave culture.' According to Richardson, in the period between 1790 to 1910:

> "Blacks needed the State to be judged and reigned in under international law to prevent it from continuing its membership in the international slave system, and to force it to fulfill its moral obligations to revamp its domestic law so as to eliminate domestic racism against blacks and to create a the legal and material conditions for Black freedom and equality." African Americans therefore sought what Richardson called "a new American interpretation of international law."

Similarly, although Anthony Anghie's 2004 classic, *Imperialism, Sovereignty and the Making of International Law* offers an unparalleled analysis of the foundational and systemic nature of colonialism and its afterlife – imperialism – from the natural law period through the era of positivism to the era of pragmatism and to the end of the cold war, it is nevertheless hopeful that "international law can be transformed into a means

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[88] *Id.* at 1094; *See also* James T. Gathii, *Henry J. Richardson III: The Father of Black Tradition of International Law*, 31 TEMP. INT'L & COMP. L.J. 325 (2017).

[89] Other sources included according to Richardson, "the law of God, to British postures and policies in the American Revolution, to the model of liberation presented by the Haitian Revolution, to natural-law based principles of freedom invoked by white American colonists." *Id.* at xxiii.

by which the marginalized may be empowered. In short, that law can play its ideal role in limiting and resisting power."[90]

You see this if you read Alejandro Alvarez,[91] R.P. Anand,[92] Tieja Wang,[93] Onuma Yasuki,[94] Georges Abi-Saab,[95] Mohammed Bedjaoui,[96] Taslim O. Elias,[97] Buphinder Chimni,[98] Upendra Baxi[99] Christopher Weeramantry[100] and Kamal Hosain among others.[101] What is striking about this group of third world scholars is that they never sought to fit conventional tropes of the discipline. These international lawyers spread throughout the third world in Asia, Africa, the Middle East, Latin America and beyond

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[90] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND INTERNATIONAL LAW 318 (2005).

[91] ALEJANDRO ALVAREZ, AMERICAN PROBLEMS IN INTERNATIONAL LAW (1909).

[92] R. P. ANAND, NEW STATES AND INTERNATIONAL LAW 46 (1972) (arguing that "what has been called the 'geography' of international law has radically changed. ... [I]he majority in this expanded world community consists of small, weak, poor, underdeveloped, former colonies filled with resentment against their colonial masters, and needing and demanding the protection of the international society. The new majority has new needs and new demands and they want law to serve their needs and heed to their demands. The alteration in the sociological structure of the international society, it is stressed, must be accompanied by an alteration in law").

[93] Wang Tieya, *The Third World and International Law, in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 959 (R. St. J. Macdonald & D. M. Johnston eds., 1983) ("[a]lthough Third World countries are adamantly opposed to the imperialistic, colonialistic, oppressive and exploitative principles and rules of traditional international law, they do not reject international law itself.... The attitude of the Third World towards international law is very clear: it neither accepts nor rejects international law in its entirety pages"). *Id.* at 961–62.

[94] ONUMA YUSAKI, INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD, (2017).

[95] Georges Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOWARD L.J. 95 (1962).; Georges Abi-Saab, *The Third World and the Future of the International Legal Order,* 29 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 40 (1973). The paper did not appear in the conference proceedings. THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, 4 VOLS. (Cyril Black & Richard A. Falk eds., 1969). *See also* Laurence Boisson de Chazournes, *Portrait de Georges Abi-Saab, in* THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY: LIBER AMICORUM GEORGES ABI-SAAB 3-8 (Laurence Boisson de Chazournes & Vera Gowland-Debbas eds., 2001).

[96] MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ORDER (1976).

[97] TASLIM O. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW (1974); TASLIM. O. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW (1980); TASLIM. O. ELIAS, THE MODERN LAW OF TREATIES (1974). For further insight into Elias, see Carl Landauer, *Things Falls Together: The Past and Future Africas of T. O. Elias's Africa and the Development of International Law*, 21 LEIDEN J. INT'L L. 351 (2008); James Thuo Gathii, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 LEIDEN J. INT'L L. 317 (2008).

[98] B.S CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (2d ed 2017); B.S CHIMNI, INTERNATIONAL RELATIONS: PERSPECTIVES FOR THE GLOBAL SOUTH (2012).

[99] UPENDRA BAXI, HUMAN RIGHTS IN A POSTHUMAN WORLD: CRITICAL ESSAYS (2009); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2012); Upendra Baxi, *What May the Third World Expect from International Law*, 27 THIRD WORLD Q. 713 (2006).

[100] CHRISTOPHER G. WEERAMANTRY, NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP (1992); CHRISTOPHER G. WEERAMANTRY, ARMAGEDDON OR BRAVE NEW WORLD? REFLECTIONS ON THE HOSTILITIES IN IRAQ (2005); CHRISTOPHER G. WEERAMANTRY, SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW (2005).

[101] Cynthia Farid, *Legal Scholactivists in the Third World: Between Ambition, Altruism and Access*, 33 WINDSOR Y.B. ACCESS JUSTICE 57 (2016) (examining the work of Dr. Kamal Hossain, a Bangladeshi international lawyer).

engaged in what Vasuki Nesiah has described as rebel imagination of the plural ways in which the promise international law could be re-imagined.[102] These isolated rebel imaginations are what today has crystallized into TWAIL. This earlier scholarship though produced in disparate continents and published in a wide-ranging set of places is therefore much better understood as a part of a large protracted and ongoing struggle against the international law they were taught – and that they sought to re-make so that it could become more international than they had received it.

These scholars and practitioners of international law were at the very core of the resistance to and agitation against alien, racist and colonial rule as countries then under colonial rule sought self-determination and independence from European powers.[103]
Perhaps the signature quote that exemplifies this attitude is Tieya Wang's when he says:

> "[a]lthough Third World countries are adamantly opposed to the imperialistic, colonialistic, oppressive and exploitative principles and rules of traditional international law, they do not reject international law itself.... The attitude of the Third World towards international law is very clear: it neither accepts nor rejects international law in its entirety."[104]

For TWAIL scholars, therefore, notwithstanding its complicity in the repression and silencing of non-European and other peoples, international law – or at least parts of it – had potential to be rescued from its dark sides. Today's TWAIL scholar activists engage with the promise or dreams that the first generation of TWAILers who were involved in anticolonial resistance and who celebrated the end of formal colonial rule in the era of self-determination. Today, third world scholars contest the continuities of coloniality that survived de-colonization. TWAIL scholars expose or unmask the Eurocentric leanings and underpinnings of international law after decolonization and how these leanings and underpinnings are very similar to the ways in which European international law constructed colonial difference between the colonized and colonizers. They expose the partiality of the post-second world war rules American dominated multilateral order. By exposing the centrality and power of the United States in the post-

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[102] Vasuki Nesiah, *Decolonial CIL: TWAIL, Feminism, and an Insurgent Jurisprudence*, 112 AJIL UNBOUND 313–18 (2018). *See also* Carl Landauer, *The Polish Rider: CH Alexandrowicz and the Reorientation of International Law, Part I: Madras Studies*, 7 LONDON REV. INT'L L 321 (2020) (analyzing the prominent international legal historian, CH Alexandrowicz, known for his advocating of the East's imprint on international law).

[103] For an example on Mohammed Bedjaoui's role in the context of Algeria, see Umut Özsu, *'In the Interests of Mankind as a Whole': Mohammed Bedjaoui's New International Economic Order*, 6 HUMANITY 129, 131 (2015), https://muse.jhu.edu/article/576930/pdf ("Bedjaoui devoted the bulk of his energy to a series of reform proposals. At root, nearly all such proposals promoted the establishment of new international institutions to complement existing United Nations agencies and departments, encouraged resistance to attempts on the part of developed states to co-opt or otherwise deracinate the ''common heritage of mankind'' doctrine, and called for greater use of General Assembly resolutions as a means of circumventing the influence of a Security Council dominated by great powers… For Bedjaoui, the Third World was entrusted with the responsibility of militating for the new order that would make such development possible, acting not simply on its own behalf but as a representative of the ''whole world community.'").

[104] Wang Tieya, *The Third World and International Law*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 961–62 (R. St. J. Macdonald & D. M. Johnston eds., 1983).

second world war order, TWAIL scholars contested the framings of the post-second world war order along the liberal/realist framings of the period.

TWAIL scholars do not simply reject approaches to international law that have the types of silencing effects or that preclude asking certain questions or which disallows or denigrates scholarship, views and practice from 'subaltern epistemic locations.'[105] Rather Third World scholars have and continue to offer how international law can be built or rebuilt. In this sense, like Siba Grovogui, I believe what is at stake is not an issue of inclusion or exclusion of non-western peoples, states within Western international law. Rather, it involves considerations of the very terms of the constitutional order of "post-Enlightenment social knowledge, its structures of thought, and related constructions of political subjectivity"[106] of which international law is a central part.

My overriding claim here therefore is as follows. Third World scholars have always been simultaneously critical of but clearly enamored by international law while offering how alternative or non-western ideals could introduce new meanings, standards, rules and norms of international law.

TWAIL scholars are therefore always self-aware and conscious that their scholarship and practice is trapped within problematic structures of knowledge that represent partial interests and priorities as they struggle to move them beyond those problematic foundations. As Diane Otto posed two decades ago, the question for critical scholars like TWAILers is 'whether it is possible to imagine processes whereby non-dominant, non-elite, subaltern individuals and groupings could participate as subjects of international law'?[107] This is an enduring theme in TWAIL scholarship and practice.

A recent book edited by Michael Fakhri, Vasuki Nesiah and Luis Eslava on the legacies of the Bandung conference of 1955 dares to imagine such a non-dominant, non-elite subaltern perspective by authoritatively re-telling the history of international law by placing the non-western world at the center, thereby de-centering the Westaphalian myth. In doing so, the book critically engages the third world's resistance to the global north by looking beyond Europe and North America as the "organizing geopolitical and

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[105] Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WISC. INT'L L. J. 353-419 (1998) (In particular, Mickelson notes that a major purpose of TWAIL scholarship is to end the silencing and marginalization of third world voices that make visible the marginalization and oppression of third world peoples.). *See also* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE (Cary Nelson & Lawrence Grossberg eds., 1988), *available at* https://jan.ucc.nau.edu/~sj6/Spivak%20CanTheSubalternSpeak.pdf; Prabhakar Singh, *Indian International Law: From Colonized Apologist to a Subaltern Protagonist*, 23 LEIDEN J. INT'L L. 79 (2010).

[106] SIBA GROVOGUI, BEYOND EUROCENTRICISM AND ANARCHY: MEMORIES OF INTERNATIONAL ORDER AND INSTITUTIONS 49 (2006).

[107] Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC'Y & LEGAL STUD. 337, 364 (1996).

cultural fulcrum of the world."[108] The book uses the Bandung conference of 1955 as a point of departure to examine how it created 'new anti-colonial possibilities.'[109] It is this sense of possibility that Third World scholars, peoples and States have continued to invest in international law, notwithstanding its imperial past.

Retelling international law from such a view of the Third World focuses on how it matters for the majority of the people of the world – people often subordinated in multiple ways – by their states in conjunction with international institutions, global capital and so on.[110] TWAIL scholars are therefore able to simultaneously challenge views of colonialism being a thing of the past that our discipline sometimes too quickly assumes by exposing the uncanny colonial continuations in the present, while at the same time seeking reform of international law and seeing the utility of using it to promote change.

To counteract this ever-present challenge of retrenchment and backward movement, TWAIL scholars like Balakrishnan Rajagopal focus our attention to thinking of international law from below, focusing on those most marginalized particularly in development policies.[111] For Rajagopal, the process of imposing development in the Third World is a major cause of poverty, misery and violence.

Think about it, a large percentage of people in the world do not live in urban areas – they live in rural areas and are likely to be engaged in agriculture. Yet the predominant regimes of global trade and investment are not structured in ways that promote and uplift the interests of these rural farmers. Today we are more likely to hear about the fate of farmers in Europe and North America who are heavily subsidized (when we are not hearing the interests of industry), rather than those in developing areas whose fates are intricately linked to the heavy subsidization of their counterparts in the global north. One only has to remember the heavy subsidization of cotton farming in the United States that the Dispute Settlement Body of the World Trade Organization found inconsistent with the US's WTO obligations.[112] Those subsidies the WTO found had created something greater than the great depression in the cotton market in ways that made it impossible for farmers in Africa and Latin America who are more efficient/low cost cotton producers to benefit from selling their cotton on the global market. This is just one example of the structural conditions that disadvantage those who live in the

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[108] BANGDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 7 (Luis Eslava, Michael Fakrhi & Vasuki Nesiah eds., 2017).
[109] *Id.* at 24.
[110] *See* MOHAMMAD SHAHABUDDIN, ETHNICITY AND INTERNATIONAL LAW: HISTORIES, POLITICS AND PRACTICES (2016).
[111] BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND RESISTANCE (2013).
[112] United States – Subsidies On Upland Cotton, AB-2004-5, WT/DS267/AB/R (Mar. 3, 2005), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm. *See also* Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433 (2002), *available at* https://digitalcommons.law.seattleu.edu/faculty/415/.

bottom billion. Further, it is now well established as an empirical matter that the "flow of money from rich countries to poor countries pales in comparison to the flow that runs in the other direction."[113] This means as Jason Hickel argues that "The usual development narrative has it backwards. Aid is effectively flowing in reverse. Rich countries aren't developing poor countries; poor countries are developing rich ones."[114]

Rules of international law entrench these structural inequalities by privileging the rights of corporate plant breeders in agricultural markets – in ways that undermine the rights and the ability of small-scale farmers to collect, store and benefit from their own innovations and seeds. Hence, although a large number of people in the world today live in rural areas and depend on agriculture for their livelihoods, the predominant rules of our discipline, especially those relating to intellectual property rights are heavily weighted against the most needy and vulnerable farmers. As TWAIL scholars from Michael Fakhri[115] to Titilayo Adebola[116] write this bias in favor of big agriculture and plant breeders has attendant consequences on the livelihoods of farmers in the global south including their right to food. The promise of international law is highlighting those least off like the small-scale farmers, many of them often women.

This approach turns the focus of our discipline on its head, so that instead of focusing only on the formal sources of our discipline, such as treaties, custom, judicial opinions and state practice, we can also focus on ordinary people and social movements not only in resisting rules made from above, but in forging new ones that reflect their concerns.

## CONCLUSION

I started this lecture by highlighting why we should take the international law in places like Arusha more seriously. As I end my lecture point, I want to emphasize three points: First, that there is a remarkable energy and indeed what I can call a renaissance of third world scholarship in international law.[117] For example, a bibliography of TWAIL

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[113] *See* Jason Hickel, *Aid in Reverse: How Poor Countries Develop Rich Countries*, THE GUARDIAN (Jan. 14, 2017), https://www.theguardian.com/global-development-professionals-network/2017/jan/14/aid-in-reverse-how-poor-countries-develop-rich-countries.

[114] *Id.*

[115] *See, e.g.*, Michael Fakhri, *A History of Food Security and Agriculture in International Trade Law, 1945–2017*, *in* NEW VOICES AND NEW PERSPECTIVES IN INTERNATIONAL ECONOMIC LAW: EUR. Y.B. INT'L ECON. L. 55 (J. D. Haskell & A. Rasulov eds., 2020), https://law.uoregon.edu/sites/law1.uoregon.edu/files/fakhri_history_of_food_2020.pdf.

[116] Titilayo Adebola, *The Regime Complex for Plant Variety Protection: Revisiting TRIPS Implementation in Nigeria* (Warwick Law School, PhD Thesis, 2017).

[117] A Third World Approaches to International Law Review, (TWAILR), has now been established. In its founding statement, TWAILR editors declare that the "scholarly agendas associated with TWAIL are diverse. They incorporate perspectives from across the fields of Third Worldist, Marxist and feminist thought, postcolonialism and decoloniality, Indigenous studies and critical race theory, and more. The common themes of TWAIL's interventions are to unpack and deconstruct the colonial legacies of international law, and to engage in efforts to support the decolonisation of the lived realities of the peoples of the Global South and the rupture or radical transformation of the international order which

scholarship that I have prepared, and that is attached to this lecture as an appendix, shows a steady increase in scholarly production from 1996 to 2019. This bibliography includes articles, book chapters and essays published not only on databases available in the Europe and North America, but also in journals and books that do not readily show up in the beltway databases of our discipline.[118] When I examined all these publications on a graph, I saw a steady increase in the scholarly production that associated itself with Third World Approaches beginning in 1998 through to 2012, and since then I can report that there has been a bigger and sustained upward trend.

This nearly 600 item bibliography that spans both international law and international economic law is great for anyone who would like to diversify their syllabus and curriculum; it can add to the citations in briefs for cases, in scholarly and other writing. If you are interested in digressing from the Western canon that excludes non-Western international law, if you are interested in learning from some of the scholarship that is actively engaging in decentering knowledge and knowledge production[119] in the sense that I have noted in this lecture, there is a growing scholarship you can now readily refer to.

One of many contributions that this TWAIL scholarship has made is directing our attention to re-examine the history.[120] As Bhupinder Chimni powerfully and carefully traces for us in the latest edition of his book, *International Law and World Order: A Critique of Contemporary Approaches*,[121] this turn to history in our discipline owes no small part to TWAIL scholars.

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governs their lives." TWAILR Founding Statement, available at https://twailr.com/about/founding-statement/.

[118] For an example of a venue that encourages and pools scholarly analysis in international law and international economic law outside the usual beltways, see https://www.afronomicslaw.org/, a blog focusing on international law and international economic law as it relates to Africa and the Global South. Another forum is the International Economic Law Collective, which "provides a space for critical reflection on the complex interactions in the growing field of international economic law and exploring how epistemological and methodological diversity in the discipline can contribute towards the development of a more holistic landscape of scholarship on law and the governance of the global economy," see https://warwick.ac.uk/fac/soc/law/research/centres/globe/ielcollective/. Another off-beltway forum is the series of conferences and events organized under the umbrella of 'Teaching and Researching International Law in Asia, TRILA,' see https://cil.nus.edu.sg/wp-content/uploads/2020/06/TRILA-Project-Report-Final-compressed-v2.pdf.

[119] This is inspired by Sujith Xavier. Sujith Xavier & John Reynolds, *'The Dark Corners of the World': TWAIL And International Criminal Justice*, 14 J. INT'L CRIM. JUSTICE 959 (2016), https://academic.oup.com/jicj/article-abstract/14/4/959/2236032?redirectedFrom=PDF.

[120] *See, e.g.*, Tiyanjana Maluwa, *Reassessing Aspects of the Contribution of African States to the Development of International Law Through African Regional Multilateral Treaties*, 41 MICH. J. INT'L L. 327 (2020), https://repository.law.umich.edu/mjil/vol41/iss2/4/ (arguing that postcolonial African states have been active participants in developing new rules of international law).

[121] BHUPINDER CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 320–56 (2d ed. 2017) (with regard to Martii Koskeniemmi). With regard to David Kennedy, Chimni notes that "Despite being interested in the history of international law, Kennedy never gave serious consideration to the role of colonialism and imperialism in the development of international law…It was not until his third world students produced work on the relationship between imperialism and international law that the theme found its way into his writings." *Id.* at 306.

Second, I want to note that TWAIL scholars practice what they preach. Let me illustrate this in just one area that has featured in this lecture, human rights. Tendayi Achiume is the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. Obiora Okafor, another TWAILer, is the UN Independent Expert on Human Rights and International Solidarity and a former Chairperson of the United Nations Human Rights Council Advisory Committee. Balakrishnan Rajagopal is new UN Special Rapporteur on the Right to Housing and Michael Fakhri is the new UN Special Rapporteur on the Right to Food. So TWAIL is not merely cheap talk. TWAIL scholars are quite active in the practice of international law.

This does not of course mean that TWAIL does not have its blindspots, every approach or method has some. This third point is particularly important at this moment in the history of the United States and indeed of the world. I cannot emphasize enough why embracing the analytical tools of Third World Approaches to International Law and its twin sibling Critical Race Theory would be important for tracing and tracking issues of race and identity not only in domestic law, but also in the imperial histories of our discipline.[122] After, we can all agree that issues of race and identity have so far been underemphasized, understudied and undertheorized in international law and that we can and need to do better, including in this learned society.[123] A major point of my lecture

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[122] For more on this, see James Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other*, 67 UCLA L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3620343.

[123] For example, it took more than 100 years for the American Journal of International Law to have its first African American Editor. A report of an ad hoc Committee appointed by then American Society of International Law President Sean D. Murphy investigated discrimination against women that occurred during the Society's early years. The Executive Council adopted a resolution recognizing that women had been excluded from membership in the Society during its early years and conferred membership on Jane Addams, Belva Ann Lockwood, and on any other women whose applications for membership were denied from 1906–1921. Thereafter at the Executive Council meeting on April 4, 2018, during the 112th Annual Meeting of the Society, the Executive Council adopted a Resolution providing that:

> "The American Society of International Law acknowledges its persistent failure during the first decades of its existence to embrace the participation of persons of color and members of other underrepresented groups and to actively encourage their membership in the Society. FURTHER RESOLVED, That the American Society of International Law welcomes and actively seeks the full participation of persons of color and members of other underrepresented groups in all of its activities, and recommits itself to its goal of achieving and maintaining a membership that is diverse and inclusive."

This resolution was adopted pursuant to a report on exclusion of minorities from the American Society of International law led by Prof. Henry J. Richardson III. See ASIL Ad Hoc Committee, *Final Report From The ASIL Ad Hoc Committee Investigating Possible Exclusion or Discouragement of Minority Membership Or Participation By The Society During Its First Six Decades Submitted To The President For The Executive Council Of The Society* (Jan. 2020) (Otherwise referred to as the Richardson Report). The other members of the committee which were appointed in November 2018 by then President of the American Society of International Law, Sean Murphy, were Professor Eleanor Brown, Pennsylvania State University Law School; Professor Tiyanjana Maluwa, Pennsylvania State University Law School; Professor Janie Chuang, American University Law School and Professor Rafael Porrata-Doria, Temple University Law School. *See also Statement by President Catherine Amirfar Regarding Racial Violence*

therefore has been that the promise of international law and in fact a full accounting of our discipline would be incomplete without critical approaches such as Third World Approaches to International Law or Critical Race Theory particularly if we are interested in a truly international law that goes beyond the usual beltways.

Thank you for your attention and patience and I very much look forward to the response from Prof. Fleur Johns.

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*and Injustice in the United States*, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 3, 2020), https://www.asil.org/sites/default/files/pdfs/ASIL_Statement_Racial_Violence.pdf.

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