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# Re-Examining Third World Approaches to Decolonizing International Law (TWAIL)

CHIDI ANSELM ODINKALU

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## INTRODUCTION

International law is living through a significant period of both crisis and opportunity. From the most pressing issues of peace and security in Afghanistan and Ethiopia,<sup>1</sup> to the management of global public goods in the global response to the COVID-19 pandemic, or lack of it,<sup>2</sup> and the attendant sovereign debt pandemic,<sup>3</sup> its major institutions are engaged in existential struggles for relevance and agency. On many issues where multilateralism begged to be optimized at the turn of the millennium, the world today appears to count the lowest common denominator as progress (when there is any). It is important to understand why now is an excellent opportunity for new voices and actors to contribute to reimagining international law and relations.

## WHY TWAIL?

International law was not always open to participation by all the peoples of the world. It was historically parochial, racialized, gendered, and anchored in exclusivity and exclusion and anarchical. Karl Polanyi recalls that international law for most of the nineteenth century was defined by “anarchistic sovereignty and ‘justified’ intervention in the affairs of other

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**Chidi Anselm Odinkalu** received his Ph.D. in law from the London School of Economics and Political Science. A former Chair of Nigeria’s National Human Rights Commission, he is currently a Professor of Practice in International Human Rights Law at the Fletcher School of Law and Diplomacy. He also Chairs the Board of Directors of the International Refugee Rights Initiative (IRRI) and the International Advisory Board of Global Rights.

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countries.”<sup>4</sup> The General Act, which concluded the conference of European powers and the United States on February 26, 1885, was ostensibly adopted for the purpose of “furthering the moral and material well-being of the native populations” of Africa, none of whose representatives were welcome to be part of the continent’s carve up at the conference.<sup>5</sup> Only a century ago, the League of Nations Covenant spoke with effusive paternalism in Article 22 about territories “inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world,” who were thus unqualified to participate by themselves in international law and relations.<sup>6</sup> These developments reflected the reality of a world dominated by Europe, which, as John Furnival points out in his study of colonial policy in Burma and Dutch India,<sup>7</sup> expanded its reach through rampant colonial acquisitions, that denied the personhoods of colonized peoples, whether as humans or as social or political communities.

Colonized populations were and are not the only ones excluded. Women were too. In the United Kingdom, for instance, women only became eligible to enter the legal profession a mere century ago.<sup>8</sup> In some countries, such as in some of the Gulf states, women only acquired the right to vote in the twenty-first century,<sup>9</sup> and in at least eleven countries, gay people are still liable to be killed for who they are or whom they love.<sup>10</sup>

For most of its life, international law legitimized these exclusions and worse. It was a system that both privileged Western versions of history and simultaneously dis-incentivized or distorted Third World memories. These were not supposed to survive the establishment of the United Nations (UN),

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whose founding charter promised “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>11</sup> The UN Charter did provide some inspiration for decolonization that would follow in its wake. However, while the end of World War II would inspire an intensification of decolonization and self-determination campaigns across the global south, commitment to sovereign equality coexisted blissfully in the UN Charter with the recognition of “the administration of territories whose peoples have not yet attained a full measure of self-government,”<sup>12</sup> as well as the invidious paternalism of the trusteeship system.<sup>13</sup>

In the aftermath of World War II, Arturo Escobar reminds us, “the discourse of war was displaced onto the social domain and to a new geographical terrain: the Third World began to occupy a prominent place,”<sup>14</sup> effectively creating “a space for ‘subject peoples’ that ensures control over it.”<sup>15</sup> If there was a “third” world (from French, *tiers monde*), it was preceded by a first and a second. Thus, although the space of international relations created in the UN Charter promised “sovereign equality,” in reality, international relations was built on sovereign hierarchies in which there were “nations big and small.” Recognition of these hierarchies has inspired movements for diminution of inequalities in participation and voice in international law and relations, one of the best known of which is the Third World Approaches to International Law (TMAIL). TMAIL is sometimes mis-understood or mis-characterized as one among “rejectionist impulses” against international law.<sup>16</sup> Far from being rejectionist, however, TMAIL seeks to democratize international law and access to it.<sup>17</sup>

#### RE-EXAMINING TMAIL

This is the context that framed the TMAIL panel at the 2021 edition of The Fletcher School’s Decolonizing International Relations (DIR) Conference. The panel comprised Egypt’s former Ambassador to Rwanda and current Legal Counsel of the African Union (AU), Namira Negm; Vasuki Nesiah, Professor at the NYU Gallatin School; and Obiorah Chinedu Okafor, Edward B. Burling Chair in International Law and Institutions at the Johns Hopkins University School of Advanced International Studies (SAIS) and United Nations Independent Expert on Human Rights and International Solidarity. The present author moderated the panel. The scope of the panel discussion ranged widely, addressing issues as the mission of TMAIL, its role at the present (and significant) moment in international relations, and how excluded actors, including states, citizens and institutions, can enhance their voice in international law at this significant moment.

It has been said of TMAIL that its exponents “are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order...a commitment to center the rest rather than merely the west, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.”<sup>18</sup> The panel underscored the urgency of the broadest possible participation in the

reimagining of international law and relations in the present. To do so, it addressed three priorities: the politics of international law as a discipline, foregrounding questions of resources and their distribution, and the distribution of knowledge. In this connection, the argument was put forward that the privileged Western default setting of international law is a space, not a place, and the Third World is an approach to international law, not a geo-physical identity marker.

Despite the parochial history of international law, the panel agreed that TWAIL is far from a movement to dismantle it, arguing that it is rather a plea to re-imagine international law and make it more inclusive in equity of all parts, voices and experiences of the world. Rather than a world that fetishizes law and seeks the arguably unattainable goal of having sovereign power bow to law that only conforms to self-interest, TWAIL seeks instead to use law to discipline or constrain power in a way that also serves the disadvantaged and those presently and historically excluded. It does this by maintaining healthy skepticism about unaccountable assertions of universality in international law.

As a complement to this skepticism, TWAIL also encourages close study of trends in regionalism.<sup>19</sup> One major regional system discussed by the panel was the AU, whose membership includes 55 states of the African continent. The panel argued a case for fuller attention to “African approaches to international law” within the TWAIL umbrella, illustrating this with several examples of how the continent wrestles with finding “African solutions to African problems.”<sup>20</sup> Among other examples, it pointed to the establishment of an African Continental Free Trade Agreement (ACFTA) as a recent advancement in regional economic relations and trade.<sup>21</sup> In the field of international justice, the African Court of Justice and Human Rights, whose establishment is provided for in a treaty adopted under the auspices of the African Union in 2014,<sup>22</sup> is seen as a complement to the International Criminal Court (ICC), whose well-advertised concentration on cases and situations from Africa have provided a rich source of chronic friction with the AU.<sup>23</sup> Conceding that some of the present solutions devised by the continent were constrained by unfavorable state practice, the panel suggested that the answer to these lay in refining adaptations incrementally over time, asserting that “[international] law is not the Koran or the Bible; it is a man-made rule that we can change when possible.” State practice remains an invaluable source of both international norms and of evidence of such norms, even if, sometimes, it could also create what has been described as “a sense of hypocrisy that diminishes the fidelity to law of other actors.”<sup>24</sup>

The panel underscored the point that TWAIL is not a project for unattainable uniformity among nations and peoples defined by bewildering diversities in both identities and interests, but rather a call for solidarity in the pursuit of shared goals of more equitable international relations and better representation in its evolution. To attain this goal, TWAIL seeks to distill directions from both theory and .....  
 practice, take a long view of advocacy for reform and transformation in international relations, and also to build dialogues characterized by intersectionality in generations, gender, and geographies. This movement is well placed to benefit from contemporary progress in the digital ecology in advancing inclusion and voice in reshaping international law. Closing the digital divide is one among many practical possibilities by which TWAIL can adapt its methods and address the enhanced need for solidarity in the consequences of historic exclusions from international law and its institutions. This agenda is also a way to popularize the idea that the contemporary crises of international institutions—embodied in their failure to address the emergencies laid out in this article’s introduction—represent an opportunity and good moment to redress the worst of the legacies from the parochial origins of international law and relations.

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**EXCERPTS FROM THE PANEL**

The following section provides excerpts from the panel, “Third World Approaches to International Law,” at the 2021 Decolonizing International Relations Conference,<sup>25</sup> held October 28 to 30, 2021. Questions posed to the panel, either by the moderator or the audience, are included in bold italic font.

***What is TWAIL?***

**VASUKI NESIAH:** TWAIL is a graduate student project. TWAIL emerged from discussions between graduate students from outside of the United States, who were studying international law. International law pre-TWAIL felt as if it did not take into account the colonial experience. Hence,

TWAIL has been about educating each other about international lawyers from the Global South.

[...]

I currently study racial capitalism. TWAIL has often had three inter-related areas of focus: the politics of international law as a discipline, questions of resources and their distribution, and the distribution of knowledge.

**OBIORAH CHINEDU OKAFOR:** It is very important that we study, and we oppose. What we consider fair, unequal, and unjust in the character of the international justice system has legitimized the domination of Third World peoples. This is a broad idea. Although it is broad it does not mean it is ineffective. We should see TWAIL as a choir that melds into one song.

There are four main analytic techniques we bring to our work to scrutinize international law: One, take world history seriously, not western history! We see western history privileged in international law. Two, we take seriously the equality of Third World people. We must also go beyond formal equality. Three, we have a suspicion of assertions of common humanity—they must be proved. Four, we think through and take seriously Third World resistance.

**NAMIRA NEGM:** I am speaking from the perspective of a practitioner. There is no one approach toward the work on Third World approaches to international law. International law is a reflection of the political sphere at a certain point in time and different perspectives emerge when we negotiate. We must harmonize the priorities of many countries.

What we are trying to do in the AU, we are trying to find an Afrocentric approach to international law. Moving from various levels of occupation, we must address that we have had very little input in the formulation of international law. Now we must formulate our perspective. It's "African solutions to African problems,"—consensus among Africans about how we solve our own problems. It is a part of identifying our common values.

For example, trade: We have many institutions that guide trade, but none are African. We are creating the African Free Trade Zone to make rules about trade that are for us.

With the ICC, although they call for universality, and Africa is the biggest block in the court, most of the cases are focused on Africa. Without more cases that focus on other areas of the world, the focus of the majority of the crimes is on Africa. This has pushed us to gather resources to create an African Court. Regardless of our participation in the creation of the document, we are allowed not to agree with the implementation. Therefore, we are allowed to create legal instruments that focus on our ideals.

Finally, countries can speak freely against UN ideas in the AU, but not in the UN. There exists fear of political backlash and means that all perspectives are not heard.

*How does TWAIL advance a new understanding of the Third World?*

**NESIAH:** The West is a project, not a place. The Third World is not a place, it is a political position. International law has been taught through liberal internationalism. TWAIL is about opening up the space from alternative visions of modernity and the global. The dominant force has resulted in colonialism, slavery, and alternative forms of empire. Seventy percent of arms sales in the world are from security council members. We are trying to have a more critical perspective on what produces and guides conflict.

**TWAIL** shows us our blindness. TWAIL shows us the connection between power and knowledge. The nation state should be seen as something crafted in the crucible of colonialism. We need to keep an eye on alternative traditions for seeing the world.

Is international law viable as is or should we dismantle it?

**OKAFOR:** Some, but not others, have been forced to be occupied. Reality cannot simply just be changed, through wishful thinking. We cannot just throw away the effects of colonialism. The ways power produces silence is important. Change happens non-linearly and over the long arc of time. It depends on what our ambitions are. Yes, there is a way forward, and that is not saying that the conditions we see today are great. We must contextualize where we are based on where we've been. It is hard to imagine a world where power simply bows to law. But what we are trying to do is use law to discipline power in a way that serves the disadvantaged.

*What is the AU's vision for accountability of state actors, and how do you breach the chasms between the AU and western countries on international humanitarian law?*

**NEGM:** We have rules to impose sanctions on unconstitutional changes in government. Politics play a major role in the AU. If you sat in some of those discussions, you'd be shocked. The positions of many governments float regarding the imposition of sanctions and there is a plethora of opinions. The AU has had many reactions to coups in the continent and we are working to find a group consensus on how to handle coups. Although we accept governments who can come to power unconstitutionally, they are not accepted fully until they create a constitutional government.



When we talk about accountability, the idea of the African Court is our new idea to impose accountability. We will be able to garner more support when there is another large political incident, unless the ICC hears the AU's position. Law is not the Koran or the Bible, it is a man-made rule that we can change when possible.

*Why would a ruler, who is liable to the prosecutor, ratify the Malabo Protocol? How can we trust an actor who comes to power unconstitutionally to create a fair constitution when they are in-charge of the mechanisms of creating constitutionality?*

**OKAFOR:** It is good that bad things [happen], so we find examples to teach kids. We must simply name power grabs as bad. We must use these instances to interrogate why, how and when we respond. Sometimes it is hard to understand why certain governments ratify documents that will be used against them, but they might ratify if they are unable to see how the documents can be used against them.

**NEGM:** Why don't we have enough ratifications on the Malabo protocol? We would assume they would easily ratify this protocol. If those sitting in the chair of the president in Africa would be immune to the jurisdiction of the African Court, why don't they ratify? We don't know. We are studying why. There are many countries that signed and ratified the Rome Statute that didn't sign up for the Malabo Protocols. That needs to be understood.

*Can you speak to the interactions between TWAIL and human rights?*

**NESIAH:** Within Asia, many of us have joined social movements challenging human rights abuses in our states. One way modern TWAIL may differ from the original TWAIL is our suspicions of the nation state. States are often a barrier to protect people from international hegemony, but now we look more at social movements, and transnational solidarity for these struggles. Looking at the example of homophobia, we must think of these topics in its multiple layers. We must see issues and interconnected.

What makes it challenging and exciting to be a TWAILER is that you must keep all of these balls in the air at all times. We must think about the global scale, and we must not develop a hierarchy of human rights.

**NEGM:** In the Third World, we do not have a harmonized understanding of what is constituted as human rights. Togetherness is better than individualism in negotiations. In the UN General Assembly, it's the power of the numbers that speaks. Violence in our countries comes from lack of



development, and many other reasons. The catalysts are not always internal as well. We must always view things from multiple dimensions before we decide what is true.

*Who can play a role in embedding emergent practices [of TWAIL] in international law?*

**OKAFOR:** A multitude of various actors must bring the ideas of TWAIL into the realm of international law and other rooms of power. We all play a role in embedding new types of practices into international law. Students are a huge part of this. Lean into this movement and bring your thoughts into the space through your writing. Participate in whatever way you can.

**NEGM:** It's very important that when we look at perspectives of TWAIL, we look at the politics at a certain given time, and all dimensions, not just the law on its own: look at the context of why the law was inserted."

**OKAFOR:** We need more balance between practice and theory. Through conversations, we are able to find more common ground than we can through publications.

**NESIAH:** There is a significance to the positionality of graduate students. Your main work is to think and to think critically. What made TWAIL important is its focus on people. We had to make it a collective practice. TWAIL became a home. It allows us to be collaborative with the people. Find your mentors. TWAIL is both an approach to law and a network of scholars. No one is policing it, but it is grounded in a particular approach to politics, the politics of knowledge and its distribution. Different people have difference lines of influence that shape their work which helps provide a diversity of options.

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**CHIDI ODINKALU:** TWAIL is a broad church, and everyone is invited to take a stake. *f*

**ENDNOTES**

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