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## **TWAIL: A Paradox within a Paradox**

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What insight do critical perspectives bring to international legal theory? In the following article, I answer this question through an examination of TWAIL. Troubled by geopolitical imbalance in the enterprise of international law, a group of critically minded scholars sought to expand the scope of legal scholarship. They would do so by growing a scholarly community sensitive to Third World concerns in their engagement with international law. Movements are known to collapse just as quickly as they sprout and it is testament to TWAIL's force that, twenty years on, it is still gaining momentum.

Self-described as a theory, method, sensibility, movement, and, as per the moniker, approach, TWAIL's place in legal theory remains ambiguous. Drawing on a range of TWAIL scholars as well as journeymen commentators, I investigate, first, how its scholars represent TWAIL's theoretical credentials and, second, where its contribution fits in the field.

### **I- AN ALTERNATIVE TO SAWDUST**

*Publicists don't do theory.*<sup>1</sup> Piercing when first uttered, the charge has since lost some of its sting, reduced to a refrain among those international legal scholars who do in fact do theory. Doctrinal analysis may still rule the roost but we would be remiss not to acknowledge the manifold developments in international legal theory that have occurred since the days of Lauterpacht, McNair, and Oppenheim.

Much of the expansion results from the rise of critical perspectives in international legal scholarship. Kennedy and Koskenniemi—or the Harvard school as Onuf christened it<sup>2</sup>—were instrumental in the development of New Approaches to International Law (NAIL), creating a climate conducive to the evolution of many others.<sup>3</sup> Progress is widespread in Feminist Legal Theory, Critical Race Theory, and Commodity Form Theory, each of which begins with a rejection of positivist orthodoxy in legal analysis: 'The current boom in social theory is deeply critical in spirit. Much of its energy is directed against the pretensions of science and the positivist temper of the modern world.'<sup>4</sup> Without succumbing to the inane suggestion that we are all critical now, there is

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\* Associate Professor, University of Warwick School of Law. I thank Professor Antony Anghie and the organisers of the 2018 TWAIL conference at National University Singapore. Opportunity to present a draft version of this article to fellow travellers compelled me to up my game culminating in what I hope is a meaningful contribution to the TWAIL corpus. My efforts did not shield me from insightful and challenging observations and the article is much improved owing to their interventions. I am equally indebted to the junior TWAIL scholars who, during the Q&A, let the punches fly. TWAIL is nothing without critique and the quality of the queries fills me with confidence about TWAIL's future. Any and all shortcomings are, of course, my own doing.

<sup>1</sup> China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005); China Miéville, 'The Commodity-Form Theory of International Law: An Introduction' (2004) 17 *Leiden Journal of International Law* 271.

<sup>2</sup> Karin Mickelson, 'Taking Stock of TWAIL Histories' (2008) 10 *International Community Law Review* 355.

<sup>3</sup> Nicholas Onuf, 'International Legal Theory: Where We Stand' (1995) 1 *Int'l Legal Theory* 2.

<sup>4</sup> *ibid.*

much to be gained from examining the contribution of critical approaches to international legal scholarship. Other than undermining the positivist premise that ‘things must be one way or the other’,<sup>5</sup> what insight do critical perspectives bring to international legal theory?

In the following article, I answer this question through an examination of Third World Approaches to International Law (TWAAIL). Troubled by geopolitical imbalance in the enterprise of international law, a group of critically minded scholars sought to expand the scope of international legal scholarship. They would do so by growing a scholarly community sensitive to Third World concerns when engaging with international law.<sup>6</sup> Movements are known to collapse just as quickly as they form and it is testament to TWAAIL’s significance that, twenty years on, it is still gaining momentum. In the past two years alone, dedicated issues appeared in the American Journal of International Law,<sup>7</sup> the Third World Quarterly,<sup>8</sup> the International Journal of Criminal Justice,<sup>9</sup> and the Windsor Yearbook of Access to Justice.<sup>10</sup> In the near past, the list of publications explodes into a cornucopia of scholarly engagement with all matters international, legal, and Third World.<sup>11</sup> TWAAIL has not only survived tests of time, acrimony, and even self-doubt but it has thrived under inhospitable conditions.<sup>12</sup>

Despite its scholarly success, questions remain about TWAAIL’s operative framework: theory or method, movement or sensibility? Self-described as all of the above but also, per the moniker, an approach, TWAAIL’s place in legal theory remains ambiguous. Does it proffer ideas about international law’s character and legitimacy or is it solely dedicated to identifying instances of operational prejudice? Does it possess its own identity or is its existence contingent on the thing it opposes? Make no mistake about it: at universities across the world, junior and senior scholars alike continue to expand TWAAIL’s orbit. Some are travelling the beaten paths of TWAAIL’s denizens while others punish its boundaries, taking TWAAIL in pioneering directions. Nevertheless, observable across and within TWAAIL scholarship is tension, perhaps even confusion about its identity. Drawing on a range of TWAAIL stalwarts as well as journeymen contributors, I investigate, first, how TWAAIL’s credentials are represented and, second, where TWAAIL fits in international legal theory.

Beginning as an analytic tool, TWAAIL provides a platform for two levels of investigation. At the first level, TWAAIL scholars seek to expose the etiological role of colonialism in modern international law. Much research is dedicated to highlighting the ways colonialism—and later imperialism—manifest in the *foundations* of the legal regime. At the second level, TWAAIL scholars explore the

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<sup>5</sup> *ibid.*

<sup>6</sup> James Thuo Gathii, ‘TWAAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography’ (2011) 3 Trade L. & Dev. 26; Karin Mickelson, ‘Taking Stock of TWAAIL Histories’ (2008) 10 International Community Law Review 355; Karin Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’ (1997) Wis. Int’l L. J. 353.

<sup>7</sup> James Thuo Gathii, Henry J Richardson and Karen Knop, ‘Introduction to Symposium on Theorizing Twaail Activism’ (2016) 110 AJIL Unbound 18.

<sup>8</sup> Richard Falk, ‘Foreword: Third World Approaches to International Law (TWAAIL) Special Issue’ (2016) 37 Third World Quarterly 1943.

<sup>9</sup> Asad Kiyani, John Reynolds and Sujith Xavier, ‘Foreword: Third World Approaches to International Criminal Law’ [2016] Journal of International Criminal Justice 915.

<sup>10</sup> Sujith Xavier and others, ‘Placing TWAAIL Scholarship And Praxis: Introduction To The Special Issue Of The Windsor Yearbook Of Access To Justice’ (2016) 33 Windsor YB Access Just. v.

<sup>11</sup> My own database of TWAAIL texts, including only those pieces that engage directly with TWAAIL as theory, method, or movement, comes in at just under 300.

<sup>12</sup> Gathii (n 6) 42–43.

colonial and Eurocentric legacies that pervade the *operation* of international law.<sup>13</sup> Historic imbalances are not the sole impediment to greater equality in international legal relations, rather, the international legal regime—including doctrines, processes, and techniques—is programmed to preserve a historically contingent structure and the stratification of geopolitical power that ensues. European ascendancy is to remain ascendant. TWAIL thus provides us with two fundamental premises: i) Rather than a concert of nations, colonial conquest is the point of origin of international law and ii) Though international law is no longer overtly colonial, colonial legacies ensure that it remains chauvinistic in practice and effect.

If TWAIL stopped there, it could develop as a theory *about* law, an external, even detached critique of prejudice in international law with a variety of case studies deployed to substantiate its premises.<sup>14</sup> But TWAIL ploughs forward, launching a normative campaign in support of the reconstruction of international law along equitable lines. In and of itself, the hybridity is not unique to TWAIL. Many theories possess both negative and positive dynamics, critiquing the structure and operation of the law in one breath and proposing a reformative plan in the next. What make TWAIL's dual character theoretically wonky are its contradictory thrusts. TWAIL does not merely declare that international law is misapplied, misrepresented, or malfunctioning. Such failings could be overcome with low-level reform. TWAIL scholars go further than this proclaiming the entire structure and operation as both prejudicial and predatory or prejudicial because they are predatory. Everything from the form of the legal argument to its core doctrines are indicted, leading the reader to the natural conclusion that the regime must be jettisoned in its entirety if TWAIL's normative ambitions are to be realised. The natural conclusion, however, is not what TWAIL reaches, taking a utopian turn and calling for greater equality, equity, justice, democracy, truth, and all things fuzzy in the *operation* of international law. As Antony Anghie declares, the ambition of TWAIL scholars is 'to create a truly universal international law that promotes a compelling vision of international justice.'<sup>15</sup> An incongruity emerges: how can international law be hopelessly prejudicial and predatory yet a beacon for universal justice in equal measure?

I reconcile TWAIL's Janus-faced character by drawing on the distinction between restricted and general jurisprudence.<sup>16</sup> For its part, TWAIL rejects a restricted approach to jurisprudence. While its practitioners possess analytical competences and aspirations, the movement is driven more by its political ambition: promoting justice in the Third World and beyond. On its face, TWAIL's partiality appears to neutralise its capacity as a theory however, upon deeper examination, TWAIL soars when seen through a general jurisprudence lens. Prior to the reduction of the study of law from investigations into social reproduction to the identification of coercive rules, law and justice were treated as Siamese twins. Legality operated in realms of social being and existence, uniting the behavioural with the transcendental. Through this lens, TWAIL appears revolutionary but not for the anti-hierarchical and counter-hegemonic scholarship its scholars are commonly garlanded for.

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<sup>13</sup> Antony Anghie, 'TWAIL: Past and Future' (2008) 10 *International Community Law Review* 479.

<sup>14</sup> Anne Peters, 'There Is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law' (2001) 44 *German Y.B. Int'l L.* 25.

<sup>15</sup> Antony Anghie, 'LatCrit and Twail' (2012) 42 *California Western International Law Journal* 311, 320.

<sup>16</sup> Costas Douzinas and Adam Geary, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing 2005).

TWAIL revolutionises legal theory by merging analysis of social reproduction with ideas about the common good, breaking from the positivist taboo on holding naked normative ambitions. Proudly, TWAIL also breaks from the modern tradition of *feeding sawdust* to students of theory, serving them instead a doubly provocative and stimulating dish that ultimately transforms the potential of legal theory itself.<sup>17</sup>

The remainder of the article is divided into four sections. In the first, I adumbrate a *version* of TWAIL history. I use the word version to underscore the contested nature of TWAIL. While I rely on what some might label TWAIL stalwarts—Anghie, Chimni, Gathii, Mutua, and Okafor—others reject this artificial borderline, pointing, ironically, to the cohort of scholars that preceded them<sup>18</sup> and those who followed,<sup>19</sup> each of which provides a distinct representation of the movement. My choice is informed as much by temporality as it is by methodology. Intervening in the debate at a specific point in time, these scholars reflect a shared perception of international law’s failings and a shared weariness of the nihilism that ultimately consumed Critical Legal Studies. As I conclude in the opening section, due to their conflicting sensibilities, they find themselves torn between TWAIL’s analytical predilections—the centring of conquest, colonialism, and predation as empirical and discursive objects of study—with its normative pretensions—international law can be better than it is. Ultimately they prefer TWAIL’s analytic role, dedicating little scholarship to the normative alternative they hope for.

The choices that inform my second section are no less controversial. Drawing on a select collection of critiques of TWAIL—Bachand, Haskell, and Tilmann and Diggelmann—I explicate the confusion that TWAIL triggers among a range of critical theorists (curiously legal scholars with political economy leanings are especially befuddled). My collection is controversial for I rely on individuals who are unlikely to self-identify with TWAIL and, for the most part, only make a single ad hoc intervention in the debate. By choosing journeymen scholars, I run the risk of inferring that TWAIL lacks depth. The choice was intentional but, self-evidently, not for this reason. If TWAIL is to be more than a secret handshake, it must be intelligible to *non-believers*. The confusion of these critics, driven in part by their repudiation of both TWAIL’s analytic methods and normative aspirations I admit, provides some indication of the uncertainty that reins. While not a flawless barometer, antagonists can be helpful in pinpointing gaps in reasoning irrespective of their intentions, gaps that I highlight in the second section.

I expect my third section to prove the least controversial of the article, at least to the present era of TWAIL scholars. Reviewing articles by Cynthia Farid and John Reynolds, I conclude that TWAIL is morphing into a guerrilla theory, one where its proponents appear less enamoured with the descriptive-analytical component, preferring its normative-activist side. New practitioners of TWAIL call for militancy, for the tactical use of law, and for the deployment of non-law, all in pursuit of political projects. Incongruity appears once again though, in this instance, at a higher level than the analytic-normative clash. Here TWAIL represents itself as incongruent with mainstream legal theory altogether. Charges of subjectivity, anti-intellectualism, and incivility are water off a duck’s back

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<sup>17</sup> *ibid.*

<sup>18</sup> Mickelson (n 2).

<sup>19</sup> Usha Natarajan and others, ‘Introduction: TWAIL - on Praxis and the Intellectual’ (2016) 37 *Third World Quarterly* 1946.

with young TWAIL scholars embracing these contingent categories. To them, the ad hominem attacks of mainstream scholars are driven more by self-preservation than scholarly rigour. The conclusion of this section proves ominous: if there is no room for compromise, does TWAIL embrace the mantle of iconoclast or pariah?

The answer to this question as well as to the central question of the article is presented in the final section. What insight do critical perspectives, namely TWAIL, bring to legal theory? In contrast to modern legal theory, a corpus that classifies for the purpose of division rather than elucidation, historical jurisprudence or what Douzinas and Gearey term general jurisprudence has greater ambition: to unite law and justice, to join the analytic and the normative. TWAIL aspires not simply to explain global political economy and the perverse stratifications that pervade. Its main ambition is to demonstrate how the new orthodoxy in legal theory is designed to obfuscate the reciprocal nature of freedom and subjection; how the quality of life enjoyed in the First World compels the immiseration of the Third World. Without acknowledging the inseparability of the analytic and the normative, we are left with orthodox legal theory's artificial division as we succumb, in the words of Orwell, to an illusion of solidity when all we have is pure wind. TWAIL scholars, self-evidently, reject this separation. To them, international legal scholarship is as much an instrument for academic critique as it is for radical political change. TWAIL's insight is that confrontation, rather than consensus, is key to the advance of legal theory.

## II- CAN TWAIL SPEAK?

9- One of the first and still most famous pieces on TWAIL is by Makau Mutua, eponymously titled 'What is TWAIL'?<sup>20</sup> Mutua is incendiary: 'international law is illegitimate', 'predatory', and 'imperial'; international law plunders, subordinates, and delegitimises the Third World; international law creates and perpetuates 'a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.'<sup>21</sup> Denoted by a heterogeneous group of scholars and activists, stretching back to the days of decolonisation, Mutua tells us that TWAIL is united by a common idea—European international law was developed to legitimate the conquest of non-European lands and peoples—and a common sense of mission—to develop an alternative legal framework upon which a just world order can be fashioned.

10- Central to Mutua's argument is a dialectical relationship between Europe and the Third World, with each being constituted in opposition to the other. Sundhya Pahuja makes a similar claim, arguing that to conceptualise key doctrines of international law—such as sovereignty—Europe juxtaposed itself against non-Europeans, constituting the self as sovereign and the other as non-sovereign.<sup>22</sup> Stated baldly, without the Third World, there is no Europe. In contrast to prosaic classifiers—developed and underdeveloped, Global Norths and Souths, or even a globalised world—TWAIL spotlights a Third World identity, seeking to maintain emphasis on the 'oppositional dialectic between the European and the non-European' and, critically, on 'the plunder of the latter by

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<sup>20</sup> Makau Mutua, 'What Is TWAIL?' (2000) 94 American Society of International Law Proceedings 31.

<sup>21</sup> *ibid* 31.

<sup>22</sup> Sundhya Pahuja, 'The Postcoloniality of International Law' [2005] Harv. Int'l L. J. 459, 463.

the former.<sup>23</sup> According to Mutua, a dialectical relationship pervades all aspects of international law compelling opposition first and reversal second. Indeed, most of the article is dedicated to championing the moral equivalency of cultures, to rejecting the othering—or, worse, saving—of non-Europeans, and to pursuing a counter-hegemonic agenda for the democratisation and reconstruction of international law.

11- Despite Mutua's obvious commitment to TWAIL's normative mission, he dwells on TWAIL's analytic component. Colonial confrontation figures prominently in TWAIL discursive tactics, providing the basis of critique for most historical legal events stretching as far back as Columbus' conquests, traversing the scramble for Africa, the 'Age of Empire', the human rights narrative, and reaching into the formation of the World Trade Organisation.<sup>24</sup> TWAIL critique is deployed in support of two objectives: to highlight the ways in which the colonial confrontation and its contemporary extensions preserve an unjust global order (descriptive-analytic) and to take action 'to eliminate or alleviate the harm or injury that the Third World [suffers] as a result of the unjust international legal, political, and economic order' (activist-normative).<sup>25</sup> Caught in a feedback loop that orbits both objectives, TWAIL's analytic predispositions fuse both ratiocination and passion: TWAIL scholarship is anti-hierarchical, counter-hegemonic, and anti-universalist. Perhaps for this reason, Mutua never proclaims TWAIL as either a theory or a method. Thick and through, politically and intellectually, TWAIL is a *movement*. Irrespective whether its members are reformists or radicals, they unite in their recognition of the need to reconstruct international law.

12- Missing from Mutua's biographical account is perhaps what matters most: he elides a rigorous discussion about TWAIL's relationship to intellectual movements and does not reflect on the potential conflict between analysis and advocacy. While the former can be easily remedied, the latter is potentially damning. Hilary Charlesworth has cautioned against the pitfalls when merging rational analysis with political advocacy as 'the close relationship between the analytical and the normative ambition can result in a precarious one-sidedness or even blindness concerning counter-arguments and aspects that do not fit into the picture.'<sup>26</sup> We deduce that Mutua is relaxed about this possibility not to mention about partiality in general: '[TWAIL's most authentic thinkers] have a direct—even personal—stake and experience in the material conditions of the Third World.'<sup>27</sup> To Mutua, 'political and ideological commitment to a particular set of views' enhances rather than detracts from TWAIL's credibility.<sup>28</sup> At least in this piece, Mutua never engages with the irony that TWAIL scholars might 'ultimately fall prey to the same criticism they formulate.'<sup>29</sup>

13- Mutua's representation of the benefits of partiality in legal scholarship is better understood when read alongside that of two fellow travellers—Antony Anghie and Bhupinder Chimni—as they combine to adumbrate a distinct perspective on TWAIL and provide us with greater nuance about the

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<sup>23</sup> Mutua, 'What Is TWAIL?' (n 21) 35.

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.* 36.

<sup>26</sup> Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93 *The American Journal of International Law* 379.

<sup>27</sup> Mutua, 'What Is TWAIL?' (n 21) 38.

<sup>28</sup> *ibid.*

<sup>29</sup> Tilmann Altwicker and Oliver Diggelmann, 'What Should Remain of the Critical Approaches to International Law: International Legal Theory as Critique' (2014) 24 *Swiss. Rev. Int'l & Eur. L.* 69, 75.

movement and its potential theoretical incongruity.<sup>30</sup> In response to a predictable omission, Anghie and Chimni were belatedly invited to contribute an article on behalf of TWAIL to a Symposium on Method in International Law, a postscript to the official collection. Anghie and Chimni begin their submission by declaring that TWAIL is not a legal method, at least not if the purpose of a method is to determine what law is. To them, the *school of thought* classification better captures TWAIL's character, highlighting the distinctive way TWAIL scholars think 'about what international law is and should be', the specific 'set of concerns' they formulate, and 'the analytic tools' with which they explore these.<sup>31</sup> Echoing Mutua, TWAIL investigates the colonial and neo-colonial relations imposed on non-Europeans and the use of law to legitimise the ensuing material divisions and authority differentials. So far so good: again we face a descriptive-analytic *non-method* that centres colonial confrontation and its Eurocentric legacy in its critique of international law.

14- Not without controversy, Anghie and Chimni next offer a periodised timeline of TWAIL, distinguishing between early and late post-colonial scholarship.<sup>32</sup> TWAIL I indicts European international law for its colonial and oppressive character, retrieves organic Third World histories of international law, embraces international legal principles such as sovereign equality and non-intervention, and advocates the establishment of a new international economic order.<sup>33</sup> TWAIL II scholarship calls into question many of the foundations of its predecessor, interrogating the state-centric—and undemocratic—character of international law, and resisting any knee-jerk commitment to European accounts such as locating state sovereignty as the beginning and end of international law. TWAIL II also pursues a more nuanced analysis of structural factors, problematising Eurocentrism in the underlying epistemology. To TWAIL II, colonialism is neither an event nor an aberration to be critiqued from the perspective of our enlightened modernity. They regard it as etiological and thus constitutive of international law itself. Doctrines of universality, *jus cogens*, and even sovereignty were designed to elevate European subjectivity to the level of international legality, violently reducing non-European epistemologies into primitive worldviews in the process.<sup>34</sup> They point to the overrepresentation of European scholars in the production of international legal scholarship and their avoidance—often censorship—of non-European perspectives.<sup>35</sup> So virulent is European opposition to non-European perspectives that a 'philosophy of suspicion' has emerged in TWAIL II, one that encourages scholars to pursue contextualised analyses of all international legal artefacts, refusing to take anything for granted.<sup>36</sup> Anghie and Chimni conclude that international law's oppressive character is tied to its constitution, necessitating engagement with questions about the theories and methods available for the analysis of international law.

15- Again we are on solid ground: despite proclamations to the contrary, TWAIL brandishes its theoretical credentials. Our two earlier premises are evident. First, TWAIL scholars centre colonialism and Eurocentrism in their analyses of historical international law and, second, they seek

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<sup>30</sup> Anghie and Chimni (n 20).

<sup>31</sup> *ibid* 77.

<sup>32</sup> In separate articles, Galindo and Mickelson respectively problematise the practice of periodising TWAIL's development. George Galindo, 'Splitting TWAIL' (2016) 33 Windsor Yearbook of Access to Justice 37; Mickelson (n 2).

<sup>33</sup> Anghie and Chimni (n 20) 81.

<sup>34</sup> Pahuja (n 23) 464.

<sup>35</sup> Anghie and Chimni (n 20) 86–87.

<sup>36</sup> *ibid* 96.

to uncover legacies of these dubious modalities in contemporary international law.<sup>37</sup> As a result of their efforts, an alternative history of European international law is now at our disposal as well as a series of analytic tools scholars can deploy to carry forward a TWAIL-based analysis of current legal developments. Anghie and Chimni privilege in their investigations both historical and sociological methods over doctrinal ones. They reject positivism for its formalism and naturalism for its Eurocentrism seemingly, however, remaining open to both under the right conditions.<sup>38</sup> They also qualify Critical Legal Studies, acknowledging the validity of the indeterminacy thesis while highlighting the curious habit of law's indeterminacy to 'very rarely work in favor of Third World interests.'<sup>39</sup> This final statement opens the door to TWAIL's normative turn.

16- One reason international law rarely works in favour of the Third World is because of the elision of Third World perspectives. Customary law, criteria for statehood, human rights norms, among others, are based in European subjectivity yet posited as universal objectivity.<sup>40</sup> Anghie and Chimni thus raise the importance of a popular barometer when evaluating the impact of international law on human well-being. Too many Third World states operate *against* the interests of their populations, necessitating a two-fold analysis in any TWAIL-based examination: from the perspective of Third World states and from that of Third World peoples. We are told that popular perceptions of the (in)justice of international law can be gleaned from the forms and levels of resistance or acceptance manifest among Third World peoples. To Anghie and Chimni, TWAIL is reflexive and should draw on 'the lived experience of Third World peoples' when charting a pathway to emancipation. And, just like that, we find ourselves squarely in the normative realm, reading about how international law *ought* to be. International law is, first and foremost, 'a means of constraining power'.<sup>41</sup> Next, it possesses 'transformative potential' and is thus vital in the pursuit of global justice.<sup>42</sup> We face a three-fold matrix for the reconstruction of international law: democratic, equal, and just.

17- Unfortunately, Anghie and Chimni's claims figure as little more than a wishlist, leaving the reader to guess why they hold the promise of international law so highly, particularly after the better part of the article is dedicated to condemning international law for its prejudicial impact on the Third World. Their thinking is informed more by realism than optimism: 'there are real dangers in conceding the entire arena of international law to other methodologies and actors in the aspiration to find a more powerful discourse which would render injustice with such clarity and persuasion that it would compel the changes in international relations which TWAIL seeks.'<sup>43</sup> However, their conclusion epitomises TWAIL's incongruity: 'In TWAIL, then, we offer an ongoing project that is continuously questioning not only the foundations and operations of international law, but also its own methodological premises' in the hopes of formulating 'an international law that might hold good

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<sup>37</sup> JT Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184.

<sup>38</sup> Anghie and Chimni (n 20) 99.

<sup>39</sup> *ibid* 101.

<sup>40</sup> For an example of the partiality of customary law, see George Rodrigo Bandeira Galindo and César Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' (2017) 16 *Chinese Journal of International Law* 251.

<sup>41</sup> Anghie and Chimni (n 20) 101.

<sup>42</sup> *ibid*.

<sup>43</sup> *ibid*.

to its ideals and serve the cause of global justice.<sup>44</sup> While conveying the essence of both TWAIL's descriptive-analytical approach and its activist-normative agenda, Anghie and Chimni tumble into TWAIL's incongruity. If the foundations, operations, and methodologies of international law are biased not to say jingoistic, which ideals are we meant to actualise? For that matter, how do we reconcile TWAIL's scepticism of universal creeds with its call to serve the cause of global justice? TWAIL is beginning to appear nebulous as a theory and ineffective as a project.

18- Aware of the questions and controversies that TWAIL courts, Obiora Okafor intervened to clear the air. He would do so by tackling 'mainstream positivist understandings of the concepts of "theory"' from a TWAIL perspective.<sup>45</sup> Notice the contrasting position to our previous scholars: he begins by jettisoning, at least temporarily, talk of movements and projects (though not of normative ambition). His aim is close to my own: to 'assess how well or poorly TWAIL scholarship rates against those (admittedly contingent) measures' such as theory and, equally in his case, methodology.<sup>46</sup> The parentheses are informative for Okafor signposts his intent to problematise the categories many scholars take for granted. Not unlike Anghie and Chimni, Okafor does not accept standard definitions, choosing complexity over ease.

19- He opens with a salvo, adopting an interdisciplinary representation of theory. He proclaims that, in the first instance, a theory is a 'system of ideas' that attempts to describe some aspect of the world and, in the second, the system predicts probable futures.<sup>47</sup> Plotting a trajectory between the past and the future necessitates an internally logical framework. Whether the logic is constructed (positivism) or observed (gravity) is irrelevant: what matters are that both articulation and application of the theory achieve internal coherence. Without coherence, the description is contingent or, worse, wrong. Okafor continues. Since social phenomena are forever in flux, a theory must also be agile if it is to remain relevant when subjected to changing circumstances. Next, a theory requires a principal idea to facilitate controlled and cumulative engagement: dialogue, exploration, and contestation take place within established boundaries. Finally, a theory must be testable: can the enquiry and the findings be reproduced? Testability adds an element of credibility to research, even if the logic remains internal to the theory.

20- Through Okafor, we are left with five core descriptive-analytic questions: 1) Does TWAIL attempt to describe the world; 2) Does the system predict probable futures; 3) Is TWAIL logical; 4) Can TWAIL's findings be tested; and 5) Does TWAIL possess a principal idea? Okafor responds bluntly to the first four: 1) Yes, 'TWAIL scholarship describes the behaviour of a related set of social phenomena'; 2) Yes, 'TWAIL scholarship tends to offer windows into international law's tomorrow'; 3) and 4) Doubly yes, 'one does not have to accept a particular TWAIL argument or thesis to agree that TWAIL work cannot really be impeached on [logic and testability].'<sup>48</sup> Similar to Anghie and Chimni's contribution, Okafor's discussion is restricted to proclamations about TWAIL; evidence and analysis are either absent altogether or too superficial to refute.

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<sup>44</sup> *ibid* 102.

<sup>45</sup> Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 *International Community Law Review* 371.

<sup>46</sup> *ibid*.

<sup>47</sup> *ibid* 372.

<sup>48</sup> *ibid* 373-4.

21- Okafor regards the fifth criterion as determinative, dedicating a separate section to its elaboration. While TWAIL is denoted by ‘internal diversity’ as we have already observed, it ultimately coheres ‘around a broadly unifying intellectual idea...to expose, reform, or even research those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order.’<sup>49</sup> Internal contestations, even internal contradictions, are part and parcel of the evolution of a theoretical school and, according to Okafor, weak grounds for reproach. Moreover, the very controversy that provoked this investigation—incongruity between rational analysis and political normativity—is no controversy at all but a necessary part of TWAIL. Having answered all five questions in the affirmative, Okafor concludes that TWAIL is indeed a theory: ‘there can be no reasonable doubt that TWAIL scholarship as a corpus does fit into our working definition of the term “theory.”’<sup>50</sup>

22- For my part, I believe that doubts abound. Perhaps because of the overrepresentation of assertions and the under-representation of analysis, we are left with the distinct impression that Okafor’s preferred definition was cobbled together with the aim of reaching a predetermined conclusion. For example, when exploring TWAIL’s testability, he draws on Makau Mutua and Celestine Nyamu’s (separate) work on international human rights law as well as James Gathii’s research into the doctrine of pre-emptive war, proclaiming that each enquiry provides presumptive evidence of TWAIL’s testability: the proffered arguments, he says, are ‘as grounded in systematic logic as can possibly be.’<sup>51</sup> Okafor is over-egging the TWAIL pudding. The arguments he references are indeed logical, coherent, and persuasive. They might even be testable but evidence of this is not provided. What is missing is an examination of these arguments against the theory of TWAIL rather than against the argumentative flair of the authors. Testability is not a rhetorical feature but a theoretical one: a common logic is deployed for the articulation of generalisations that can be verified through exercises in reproduction. Okafor does not test the arguments offered by his peers against any common logic, nor does he apply the analysis to a parallel case study to verify the objectivity of the findings, satisfying himself with claims about the *systematic logic* of the arguments alone to corroborate TWAIL’s testability.

23- Shifting from theory to method Okafor adopts a light-touch approach to his analysis of TWAIL’s methodological qualities. Referencing his earlier work, he reiterates the stock methods of TWAIL-based critique including global historicism, non-contextual historical analysis, scepticism toward universality, and emphasis on popular resistance to international law.<sup>52</sup> There is much overlap with Anghie, Chimni, and Mutua including, primarily, the melding of TWAIL’s analytical pursuits—historical analysis of international law—with its normative ambitions—resistance to international law.

24- When measured against bespoke definitional garb, TWAIL appears dapper, strutting around international legal scholarship as theory, method, and something else. I am not alone in my dissatisfaction with this conclusion with Okafor himself hinting at the negative consequences to

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<sup>49</sup> *ibid* 376.

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid* 374.

<sup>52</sup> *ibid* 377; Obiora Chinedu Okafor, ‘Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective’ (2005) 43 *Osgoode Hall LJ* 171.

TWAIL's high degree of versatility.<sup>53</sup> To counter-balance his own analysis, he deploys an overarching modality—approach—to capture TWAIL's true character: 'although it does lean more in favor [sic] of the methodological than the theoretical, the term "approach" does in this case largely accommodate both the theoretical and methodological dimensions and properties of TWAIL scholarship.'<sup>54</sup> As Okafor acknowledges, approach is a catchall term, designating 'method, procedure, modus operandi, way, technique, style, manner, [or] attitude.'<sup>55</sup> TWAIL, it seems, befuddles orthodoxy at all levels including the textual favouring the abstract 'approach' rather than its more technical counterparts of theory and method. Hedging a tad more, Okafor concludes his contribution by deploying the school of thought moniker in his final paragraph: TWAIL, we are told, is an intellectual community united by a common idea.<sup>56</sup> In short, notwithstanding, the promenade, we end up precisely where we left off.

25- When read alongside Mutua, Anghie, and Chimni, we observe more Venn diagram than mirror image. To Mutua, TWAIL is a movement; to Anghie and Chimni, it is a project; and to Okafor it is a theory, method, and approach. To Mutua, international law must be opposed; to Anghie and Chimni, scepticism is sufficient; and to Okafor, resistance is needed. To Mutua, the aim is wholesale reconstruction of the global order; to Anghie and Chimni, impregnating extant international law with popular Third World views and conceptions of justice is the ambition; and to Okafor, the aim is to build a community that can redress 'doctored pictures of international law'.<sup>57</sup> Some might say—including these same authors—that the differences are more a matter of degree or tactic than of substance. There is validity in this assertion as more unites than distinguishes them. Nevertheless, movements, projects, theories, and schools of thought require cohesion and coherence. Doubts emerge when foundational thinkers represent TWAIL's character and ambition in promiscuous ways, particularly when these ambitions create logical fissures if not inconsistencies.

26- The challenge for Okafor is no different from the challenge our previous three scholars face: reconciling TWAIL's analytical predilections with its normative pretensions. This leads to a degree of conflation. Consider that, in some instances, TWAIL scholars celebrate doctrines such as sovereign equality, custom, and voluntarism. They do so despite the doctrines' intimate relationship with colonialism and their susceptibility to deconstruction vis-a-vis TWAIL's critical outlook. Why? The doctrines happen to cohere with some of TWAIL's normative pursuits, specifically greater autonomy for Third World states from an overarching Eurocentric international legal order. Political realism means that TWAIL scholars are comfortable jettisoning the colonial indictment when the colonial construct suits its normative ambitions. Worse than this, however, is that TWAIL's commitment to the putative normative preferences of the Third World—equality, democracy, and justice (are these really Third World?)—intimates a form of utopian-naturalism that harkens to Vitoria or even to the New Haven school. Of course this can not be the case with even the most

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<sup>53</sup> Okafor, 'Critical Third World Approaches to International Law (TWAIL)' (n 46) 375.

<sup>54</sup> *ibid* 377.

<sup>55</sup> *ibid* 378.

<sup>56</sup> In an earlier piece, he referred to TWAIL as a chorus of voices rather than a school of thought.

Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time' (n 53) 176.

<sup>57</sup> Okafor, 'Critical Third World Approaches to International Law (TWAIL)' (n 46) 377.

novice TWAIL scholar fully aware of TWAIL's rejection of power-based hermeneutic freedom.<sup>58</sup> And around and around we go, and where we end up...

### III- WITH FRIENDS LIKE THESE...

27- How do TWAIL scholars square the circle? John Haskell does not believe they can.<sup>59</sup> Despite the praise—or perhaps sympathy—he affords TWAIL, it is evident from his critique that Haskell regards TWAIL's theoretical and normative limitations as fatal. His critique begins and ends with TWAIL's Eurocentrism, a vicious charge to level against an anti-colonial movement.<sup>60</sup> Here Haskell relies on Chimni, largely because of their shared Marxist penchant with Haskell criticising Chimni for failing to be Marxist enough. According to Haskell, Chimni does not problematise core flaws within the international economic system. In a nutshell, the global capitalist order is intrinsically exploitative: 'economic development, or the costs of cosmopolitan lifestyles, or even the accumulation of capital itself' are the source of First-to-Third world imbalance.<sup>61</sup> Chimni, for his part, laments the failure of First World states to allow 'a more gradualist and meaningfully [sic] transition of former colonised people into the international economic regime of production and commodity exchange.'<sup>62</sup> Chimni's critique, we are told, possesses a neoliberal hue, pointing to insufficient regulations, an absence of transparency and accountability, and inadequate trade liberalisation programmes. According to Haskell, at no point does Chimni question the foundations of international economic law and the seeming inevitability of inequality within the existing framework.<sup>63</sup> Haskell's ultimate critique of TWAIL's analytical framework is the binary conception of international law that emerges in much of the scholarship: legal and non-legal, just and unjust. Through TWAIL scholarship we learn much about the prejudicial character of international law, a critique that co-exists alongside a call for more international law: '[TWAIL] employs the existing [European] ideology and intellectual tools to try and 'make good' on the system's promise.'<sup>64</sup>

28- Beyond the analytic flaws, Haskell finds elements of Eurocentrism in TWAIL's normative ambition. Using Mutua's celebration of native forms, Haskell highlights the proximity between liberal and Third World fetishisation of indigeneity.<sup>65</sup> Mutua claims that fertilising extant structures with pre-colonial paradigms will create conditions conducive to achieving the state of equality, justice, and international democratic collaboration TWAIL hopes for.<sup>66</sup> To Haskell, Mutua and other TWAIL scholars are committing two fundamental errors: denying the materialist transformations that have occurred to indigenous societies since conquest and romanticising an exotic normative framework solely for its non-European character.<sup>67</sup> As Edward Said argued in a different context<sup>68</sup>—

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<sup>58</sup> Anghie and Chimni (n 20) 99.

<sup>59</sup> John D Haskell, 'TRAIL-Ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' (2014) 27 *The Canadian Journal of Law and Jurisprudence* 383.

<sup>60</sup> *ibid* 403.

<sup>61</sup> *ibid* 404.

<sup>62</sup> *ibid* 404–5.

<sup>63</sup> *ibid* 405.

<sup>64</sup> *ibid* 386.

<sup>65</sup> *ibid* 404.

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid*.

<sup>68</sup> Edward W Said, *Orientalism: Western Conceptions of the Orient* (Pantheon Books 1978).

and Mutua himself for that matter<sup>69</sup>—European liberals often deploy essentialist tropes when engaging with the Third World. While TWAIL’s intentions are surely different, Haskell infers some uncomfortable accusations about Mutua and his putative normative romanticism.

29- Ultimately, Haskell contributes to the debate about TWAIL’s place in international legal theory. His opening representation of the movement is comprehensive, capturing many of its idiosyncrasies including the theoretical incongruity I engage with throughout this article or what he calls a ‘curious paradox’.<sup>70</sup> He also identifies important flaws including TWAIL’s over-reliance and over-commitment to extant institutions and structures. There is, however, also some uncertainty, exaggeration, and even misdirection in his analysis. Beginning with the uncertainty, a reader would be forgiven for failing to know if Haskell is bothered by TWAIL’s analytic inadequacies or normative conservatism? Haskell’s observations, valid as they happen to be, are jumbled together, leaving the reader with enough rope to hang TWAIL a dozen times. He also exaggerates Chimni’s commitment to economic liberalism, if not neoliberalism. The quotes Haskell relies upon form part of Chimni’s call for ‘free trade scepticism’.<sup>71</sup> While Chimni eschews the radicalism of Miéville, there is little evidence that he adheres to free trade dogma as each section is written to endorse scepticism toward these tropes. Moreover, we must disregard Chimni’s opus in favour of the selected quotes to find Haskell’s claims persuasive.<sup>72</sup> Questions may arise about the quality of Chimni’s Marxist analysis—Miéville makes a similar argument<sup>73</sup>—but to move from interpretive flaw to ideological complicity requires a leap of canyon like distance. And finally misdirection: Haskell falls into the Bachand, Cutler, Knox, and Miéville camp, critical legal theorists with a predilection for Marxist legal analysis.<sup>74</sup> None of them are TWAIL scholars and, to their credit, never claim to be. While three of the five have either written directly about or touched upon TWAIL in their scholarship, in all instances, they do so to argue for the inclusion of more Marxism in TWAIL’s engagement with international law. While I acknowledge the value of Marxist analyses—international law makes little sense without some understanding of commodity form theory—to critique TWAIL for failing to be something it never aspired to is baffling. Positivism has weaknesses, yes, but not because Austin did not rely on external morality. I disagree with the New Haven School but I do so because of their pretensions to universality from within a parochial and elitist cave rather than the absence of

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<sup>69</sup> Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002).

<sup>70</sup> Haskell (n 60) 383.

<sup>71</sup> BS Chimni, ‘Developing Countries and the GATT/WTO System: Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations’ in Joel P Trachtman and Chantal Thomas, *Developing Countries in the WTO Legal System* (Oxford University Press 2009) 24.

<sup>72</sup> Bhupinder S Chimni, ‘Capitalism, Imperialism, and International Law in the Twenty-First Century’ (2012) 14 *Or. Rev. Int’l L.* 17; BS Chimni, ‘Prolegomena to a Class Approach to International Law’ (2010) 21 *European Journal of International Law* 57; Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* 3.

<sup>73</sup> Miéville (n 1) 67–68.

<sup>74</sup> Rémi Bachand, ‘Les Third World Approaches to International Law: Perspectives Pour Une Approche Subalterniste Du Droit International’ in Mark Toufayan, Emmanuelle Tourme-Jouannet and Hélène Ruiz Fabri, *Droit International et Nouvelles Approches sur le Tiers-Monde: Entre Répétition et Renouveau* (Société de législation comparée 2013); Claire Cutler, ‘Gramsci, Law, and the Culture of Global Capitalism’ (2005) 8 *Critical Review of International Social and Political Philosophy*; Robert Knox, ‘What Is to Be Done (With Critical Legal Theory)?’ (2011) 22 *Finnish Yearbook of International Law* 32; Miéville (n 1).

positivist inflections. For its part, TWAIL has its flaws, some of which Haskell aptly puts his finger on, but failing to be Marxist enough, either in analysis or in normative ambition, is more straw than substance.

30- In the end, Haskell fails to square the circle for the same reason that Rémi Bachand, in an equally thrilling piece on critical perspectives, is unsuccessful.<sup>75</sup> Their critiques focus on *what TWAIL is not* rather than on *what it is*. Bachand begins with the point of divergence between TWAIL scholars, pointing to the different approaches they adopt toward representations of the Third World, perceptions of the international legal regime, and, of course, the relationship between the two. However, as others have observed, TWAIL scholars still share an ontology and a normative objective.<sup>76</sup> Ontologically, TWAIL scholars examine international law's impact upon systems of domination and exploitation, with emphasis on the cultural predispositions written into juridical categories that both reify and legitimise Third World subordination. Normatively, TWAIL scholars adopt a common ethic, aiming to develop an alternative legal regime to redress prejudicial relations and reverse, historical injustices. Bachand then describes some of the shortcomings that emerge in TWAIL scholarship including the failure to problematise elite collaboration among Third and First world classes,<sup>77</sup> TWAIL's over-reliance on liberalism,<sup>78</sup> and, finally, TWAIL's misplaced campaign in support of human rights.<sup>79</sup> His critiques, especially the liberalism charge, are compelling. As discussed earlier, TWAIL scholars accept Eurocentric constructs—analytic and normative—when this suits Third World ends. It is impossible to reconcile this posterior position with the anterior critique. Next, Bachand is on point regarding TWAIL's relationship to human rights. Since Mutua's bomb,<sup>80</sup> few TWAIL scholars have been as ferocious toward the human rights regime, searching for any saving grace and even relying on the narrative in pursuit of Third World aims.<sup>81</sup> Bachand's first round of critiques points to internal flaws in TWAIL's framework, challenging it for what it purports to be. His second round of critiques, however, harkens more to Miéville and their shared Marxist predilections.

31- To Bachand, a key flaw is TWAIL's failure to problematise specific categories of subordination.<sup>82</sup> In TWAIL scholarship, gender and, occasionally, indignity are casually tackled but race, religion, and class are not examined with any rigour. Due to the dialectical relationship drawn

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<sup>75</sup> Bachand (n 75) 395.

<sup>76</sup> *ibid* 402.

<sup>77</sup> *ibid* 406.

<sup>78</sup> *ibid* 410.

<sup>79</sup> *ibid* 411.

<sup>80</sup> Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harv. Int'l L. J.* 201.

<sup>81</sup> Obiora Chinedu Okafor, 'Praxis and the International (Human Rights) Law Scholar: Toward the Intensification of TWAILian Dramaturgy' (2016) 33 *Windsor YB Access Just.* 1; Opeoluwa Adetoro Badaru, 'The Right to Food and the Political Economy of Third World States' (2014) 1 *Transnat'l Hum. Rts. Rev.* 106; Penelope Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 *Journal of Human Rights and the Environment* 5; Robert Johnson, 'The Model Law on HIV in Southern Africa: Third World Approaches to International Law Insights into a Human Rights-Based Approach' (2009) 9 *African Human Rights Law Journal* 129; Opeoluwa Adetoro Badaru, 'Examining the Utility of Third World Approaches to International Law for International Human Rights Law' (2008) 10 *International Community Law Review* 379.

<sup>82</sup> Bachand (n 75) 412.

between the Third World and Europe, both sides are universalised, glossing over the internal divisions that exist. Building on this point, Bachand reprimands TWAIL for failing to address the treatment afforded to the wretched of the wretched: lower castes, creole, and indigenous societies among others.<sup>83</sup> These gaps result in a misrepresentation of the nature of exploitation, creating false binaries and false unities. Next is TWAIL's elision of a critical take on the state itself. Here we return to his point about ruling class collaboration and the unity that has emerged between transnational elites.<sup>84</sup> In this way, TWAIL privileges formal instances of domination—the US-UK invasion of Iraq—rather than the informal ones—the kleptocracy that colours Egyptian politics<sup>85</sup> or that drives international trade negotiations.<sup>86</sup> Bachand concludes on the superficiality of TWAIL's engagement with capitalism including, from the perspective of the Third World, the reduction of its populations to a docile labour class on one hand and an equally voracious consumer class on the other. Over-accumulation in the West would inevitably give way to exploitation in the Third World as capitalist interests search for opportunities beyond their borders to profit, compelling TWAIL to engage more deeply with global political economy.<sup>87</sup> Adopting what some might regard as a radical position, Bachand even alleges that many of the economic crises that litter the Third World were intentionally provoked to further indebt the Third World, providing leverage for prying open Third World markets. In short, TWAIL comes up short for paying short shrift to the intrinsic nature of exploitation in a capitalist system. To a certain extent, Bachand's second round of critiques is more devastating than the first. He does not nit-pick but underscores structural flaws, such as the anachronistic character of the Third World moniker and the amateurish treatment of transnational capitalism and its accompanying regulatory framework.<sup>88</sup> We are reminded of the work of William Robinson including his late-stage critique of the BRICS nations as a progressive agglomeration of states formerly known as Third World.<sup>89</sup> There is much to be said about his reflections and there is urgency in the need for TWAIL to come to grips with the changes that have manifested in the past generation, including the contradictory erosion and resurgence of the nation-state. Bachand's gripe with TWAIL is not with the incongruity but with analytic shortcomings in the TWAIL framework. Indeed, in contrast to Haskell and Miéville, Bachand is sympathetic to TWAIL's normative-political agenda, himself championing something similar in others texts. Yet, in the end, we are still left wondering what he thinks TWAIL is: an incomplete theory, an amateurish movement, or a flawed approach?

32- Two final journeymen, Tilmann and Diggelmann, follow Haskell and Bachand's lead: critiquing TWAIL from a general critical theory perspective or outside the TWAIL ambit.<sup>90</sup> Their contribution is welcome, in part because they provide an account of the key threads of critical theory, including TWAIL, in international law, but also because they open their article with reference to the

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<sup>83</sup> *ibid* 414.

<sup>84</sup> *ibid* 419.

<sup>85</sup> Mohsen al Attar, 'Counter-Revolution by Ideology? Law and Development's Vision(s) for Post-Revolutionary Egypt' (2012) 33 *Third World Quarterly* 1611.

<sup>86</sup> Mohsen al Attar and Miriam Clouthier, 'Sharing Power: The Case for Public Consultations on Trade' (2015) 30 *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 465.

<sup>87</sup> Bachand (n 75) 424.

<sup>88</sup> *ibid* 419–20.

<sup>89</sup> William I Robinson, 'The Transnational State and the BRICS: A Global Capitalism Perspective' (2015) 36 *Third World Quarterly* 1.

<sup>90</sup> Altwicker and Diggelmann (n 30).

point of conflict between rational analysis and political advocacy, also quoting Charlesworth approvingly.<sup>91</sup> Tilmann and Diggelmann find much value in the ‘heritage’ of critical international legal theory in general and of TWAIL specifically for the three contributions they make to the debate.<sup>92</sup> They point first to ‘context sensitive doctrinal work’ as a response to indeterminacy: ‘[i]t is a claim to be conscious of the indeterminacy of law of the relativity of our knowledge.’<sup>93</sup> Next is the healthy scepticism critical theories encourage toward international law including progressive discourses. Ambivalences are rife and it is vital that international lawyers acknowledge the hierarchy of priorities intrinsic to policy decisions.<sup>94</sup> Finally, emphasis on subjectivity challenges foundations of international law including its putative objectivity and impartiality. Applying a variation of the realism model, ‘[critical international law] stresses the socially conditioned character of our knowledge and draws the interest to the lawyer’s knowledge, background and constraints.’<sup>95</sup> Since international law cannot be explained by reference to the law alone, doctrinal analyses will always conceal more than they reveal. Methods must be more expansive if we wish to represent international law in all its subjective glory.

33- Despite providing a fine overview of the analytical riches manifest to critical approaches, from both Third World and gender perspectives, Tilmann and Diggelmann do not advance a resolution to the incongruity. Even their conclusion, dedicated to highlighting the flaws of fashionable theories such as global constitutionalism and global pluralism, does not delve into the analytic-normative conundrum. Instead, they simply expand on the tools available for critical theoretical research—a mostly methodological discussion—while underscoring the benefits occasioned by the application of critical theory to the analytic tasks faced by international lawyers. Ironically, their contribution is more celebratory than critical. On this point, there is little controversy: even sceptics such as Bachand, Haskell, and Miéville recognise the analytic heft TWAIL adds to international legal analysis. Also like them, however, Tilmann and Diggelmann do not get us any closer to squaring the circle: Miéville does not think it possible, Haskell and Bachand are optimistic though only with a Marxist turn, and Tilmann and Diggelmann evade. Fortunately for our examination, two scholars, publishing immediately following the latest TWAIL conference offer their own ideas. Since the answer is not forthcoming from either TWAIL stalwarts or journeymen, let us consider the contributions proffered by some TWAIL’s younger pioneers.

#### **IV- PROFESSIONAL OR GUERRILLA SCHOLARS?**

34- At the Cairo conference, participants deliberated about the relationship between TWAIL and the politics of praxis, subsequently publishing a series of articles that problematise the role of scholars, lawyers, and movements in the struggle against prejudicial international law. Cynthia Farid’s contributes an examination of the ‘scholactivist.’<sup>96</sup> Looking past the hideousness of the appellation, there is something to it: a scholactivist is a scholar ‘explicitly connected to political

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<sup>91</sup> *ibid* 75.

<sup>92</sup> *ibid* 86.

<sup>93</sup> *ibid*.

<sup>94</sup> *ibid* 88.

<sup>95</sup> *ibid* 89.

<sup>96</sup> Cynthia Farid, ‘Legal Scholactivists in the Third World: Between Ambition, Altruism and Access’ (2016) 33 Windsor YB Access Just. 57.

projects or movements.<sup>97</sup> Operating within learned institutions, a legal scholactivist seeks to expand the semiotic scope of domestic and international law and, in the process, to introduce new interpretive—and thus political—possibilities. Following the lead of Hani Sayed, Farid distinguishes TWAIL scholactivists from ‘the deterritorialized Third Worldist international lawyer’ whose role is traditionally limited to systematic engagement with foundational questions about world order: Abi-Saab, Sornarajah, and Vergès are examples.<sup>98</sup> Scholactivists reach beyond orthodox scholarly work, committing using their legal acumen in support of ‘social or political change’.<sup>99</sup> They aspire to be true renaissance scholars: ‘[l]egal scholactivists connect scholarship, policy and praxis...[t]hey operate in multiple capacities...they participate in social movements, institute legal claims in the course of their work in domestic as well as international forums, advocate for legal reform, and contribute to academia as scholars. [To them] the term scholar, lawyer, expert or consultant is fluid.’<sup>100</sup> Seemingly selfless, scholactivists are motivated as much by their careers as by their causes: ‘both ambition and altruism coalesce as a common objective.’<sup>101</sup>

35- Farid’s article underscores the importance of advocacy to a widening scope of scholars including, self-evidently, TWAIL. Like Mutua proclaims, TWAIL sees no glory in scholarly detachment: theirs is a political pursuit and a social responsibility.<sup>102</sup> We are reminded here of Edward Said’s intellectual warrior, operating in ‘a spirit of opposition, rather than in accommodation...dissent[ing] against the status quo at a time when the struggle on behalf of underrepresented and disadvantaged groups seems so unfairly weighted against them’<sup>103</sup> and ‘may the personal costs be damned.’<sup>104</sup> As is made plain throughout this article, an intimate relationship exists between legal analysis and political advocacy making TWAIL a poster-child for Farid’s scholactivist. Despite its usefulness in understanding this *new breed* of scholar, Farid’s construct is not as sure-footed as she suggests. In the immediate, Farid is vulnerable to the Charlesworth challenge about weakened analysis in the face of forceful politics; the ‘delicate balancing exercise’ scholactivists attempt when mediating both activism and intellectual engagement.<sup>105</sup> What impact does TWAIL’s commitment to Third World emancipation have on the credibility of their legal analysis? There is, however, no need to revisit this critique.

36- What perturbs more is Farid’s curiously uncritical representations of credentialism, careerism, and classism, normative pursuits that would see many Third World revolutionaries rolling in their graves. Not only is her celebration of the material antithetical to TWAIL’s spirit of normative resistance but it also grates against its democratic inclinations. According to Farid, irrespective of elite disconnect or professional institutionalisation, scholactivists are still expected to speak for the Third World. It is ‘a fundamental ethical enterprise’ for the Third World’s agents hold the key to the

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<sup>97</sup> *ibid* 64.

<sup>98</sup> *ibid*.

<sup>99</sup> *ibid* 64–65.

<sup>100</sup> *ibid* 65.

<sup>101</sup> *ibid*.

<sup>102</sup> Makau Mutua, ‘The Richardson Escuela: Law as Politics’ (2017) 31 *Temp. Int’l & Comp. L.J.* 247.

<sup>103</sup> Edward W Said, *Representations of the Intellectual: The 1993 Reith Lectures* (1st American ed, Pantheon Books 1994) xvii.

<sup>104</sup> *ibid* 45.

<sup>105</sup> Farid (n 97) 84.

reconstruction of international law along counter-hegemonic lines.<sup>106</sup> Her latent vanguardianism contradicts much of the earlier TWAIL scholarship on democracy and popular politics. Farid does adopt language about the ‘lived realities’ of Third World peoples but she dedicates far more copy to celebrating the role of elite agents in promoting Third World interests. Even decisions about which interests matter are left to the prerogative of these same individuals who will help the Third World masses articulate the ‘concrete normative priorities’ to be pursued through international law.<sup>107</sup>

37- Farid’s argument breaks from TWAIL’s normative core. According to everything we have read to date, TWAIL is an ethical-driven movement that aims to generate an international law as European outer-state law purports to be: an inclusive global framework of human interaction informed by cosmopolitan ethical principles.<sup>108</sup> To achieve this aspiration, however, cosmopolitanism is key for TWAIL ascribes legitimacy to normative ambitions that emanate from an inclusive mix of value systems: the new international law must be reflective rather than constitutive of cosmopolitanism.<sup>109</sup> In practical terms, TWAIL’s reconstruction begins and ends with horizontal democracy, uniting all societies without either prejudice or privilege, save for the privileges of justice-inspired interventions designed to offset imbalances in collective endowments and socio-economic development. Some of this speaks to Farid’s *ethical enterprise* but mostly guards against her vanguardianism, leaving us with a seemingly un-TWAIL normative pursuit.

38- Writing at the same time and ostensibly about the same topic as Farid is John Reynolds.<sup>110</sup> His article and his conclusions, however, could not be more different. Building his argument around a fusion of Edward Said’s amateur intellectual and Walter Rodney’s guerrilla intellectual, Reynolds explores the space afforded to legal scholars to employ unorthodox theories such as TWAIL for both analytical and normative prescriptions. He also tackles the role of the scholar-intellectual placing emphasis on academic-lawyers and their relationship to struggles against oppression.

39- Reynolds reminds us that Said was virulently anti-professionalism. His use of the term in *Representations of the Intellectual* is wholly pejorative deploying it to denigrate ‘the depoliticised expert figure whose professional intellectualism is self-serving and deferential to established, and establishment, structures.’<sup>111</sup> Instructive for our investigation into TWAIL is Said’s depiction of international lawyers. To Said, public international law is an institutional structure designed to sterilise debates about global justice. Instead of embracing the political and contentious character of the debates and accepting that the pursuit of common ground requires struggle and compromise, international law provides neutered language and depoliticised processes, all of which are designed to repackage debates about the common good into little more than technical tussles. The World Trade Organisation provides the most galling example of this process in action, depoliticising political economy and, in the process, reducing concerns about maldistribution, misrepresentation, and

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<sup>106</sup> *ibid.*

<sup>107</sup> *ibid* 86.

<sup>108</sup> Brian-Vincent Ikejiaku, ‘International Law Is Western Made Global Law: The Perception of Third-World Category’ (2014) 6 *African Journal of Legal Studies* 337.

<sup>109</sup> Falk (n 8).

<sup>110</sup> John Reynolds, ‘Disrupting Civility: Amateur Intellectuals, International Lawyers and TWAIL as Praxis’ (2016) 37 *Third World Quarterly* 2098.

<sup>111</sup> *ibid* 2099.

misrecognition into talking points about trade barriers, market access, and technology transfer.<sup>112</sup> Reynolds' point about 'civility' in legal and academic discourse is made evident through critiques about the brutality of the global economy:<sup>113</sup> often dismissed for being too political and too emotive, they are allegedly lacking in the sanctimonious qualities of impartiality, balance, and reasonableness as if, to paraphrase Stephen Salaita, anyone would ever aspire to viewing a starving child with the impartiality, balance, and reasonableness of an international lawyer.<sup>114</sup>

40- Through these tropes, European intellectual engagement, both analytic and normative, is elevated to the mountain tops, celebrated for its putative scientific neutrality.<sup>115</sup> When measured against this barometer, TWAIL is easily dismissed for failing to meet the requisite standards. Recall that TWAIL celebrates partiality. Of course the orthodox standards are insidiously parochial, emerging within a system of institutionalised inequality and privilege. I use the term insidious as both terms and tone of the debate permitted are decided by Europe and deployed to neuter any impassioned condemnation of the benefits Europe acquires from a prejudicial legal order. In contrast to impartial European scholars and, it should be said, to Said's 'idealised and elite' intellectual, Reynolds citing Walter Rodney embraces the guerrilla intellectual.<sup>116</sup> Acknowledging institutionalised inequality and 'the initial imbalance of power in the context of academic learning', the guerrilla intellectual is subversive in pursuit of partisan goals and 'to sabotage the power disparity':<sup>117</sup>

Given the inequality of arms in these contexts and beyond, for Rodney the task of the guerrilla is to wage a struggle on her own terms, not by confronting the dominant power directly but by occupying the terrain, entering the institutions and setting free the entire structure.<sup>118</sup>

41- Reynolds is in fighting-form when discussing the relationship between the intellectual and the Palestinian liberation struggle but a tad more circumspect on TWAIL itself. His hesitation surely results from his view of TWAIL as a failure: '[w]hile aimed at fundamentally reshaping international law from below, TWAIL scholarship has, however, also shown how this transformative project has been unsuccessful for the most part.'<sup>119</sup> Success has been achieved on the analytic front—in making evident the analytical shortcomings of orthodox approaches to international law—but not on the normative front as TWAIL has failed to supplant the current regime.<sup>120</sup> Reynolds' expectations of TWAIL are two-fold: to reshape how international law is thought of (analytic-descriptive) and to align scholars with social movements (activist-normative). He proposes a precise form of praxis for TWAIL, one that coheres both with Farid's call for TWAIL to participate in social movements and

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<sup>112</sup> Nancy Fraser, 'Reframing Justice in a Globalising World' (2005) 36 *New Left Review* 69; BS Chimni, 'A Just World under Law: A View from the South' (2007) 22 *Am. U. Int'l L. Rev.* 199.

<sup>113</sup> Prabhakar Singh, 'Macbeth's Three Witches: Capitalism, Common Good, and International Law' (2012) 14 *Or. Rev. Int'l L.* 47, 72.

<sup>114</sup> Reynolds (n 109) 2102.

<sup>115</sup> For an opposing view of neutrality, elaborated through the lens of regime bias, please see Gus Van Harten, 'TWAIL and the Dabhol Arbitration' (2011) 3 *Trade, Law and Development* 131, 147–52.

<sup>116</sup> Reynolds (n 111) 2109.

<sup>117</sup> *ibid* 2110.

<sup>118</sup> *ibid*.

<sup>119</sup> *ibid* 2113.

<sup>120</sup> *ibid* 2111.

with Soranajah's call to use international law tactically in service of the Third World: 'the utilisation of quintessentially liberal legal institutions to articulate more radical anti-colonial arguments.'<sup>121</sup>

42- Notice how both Farid and Reynolds resolve the analytical-normative conundrum. Just as our TWAIL stalwarts favour the descriptive-analytical part of TWAIL's identity, so do our young pioneers adopt a similar strategy: privileging the activist-normative side. TWAIL must 'remain militant in the pursuit of political projects', 'engage the law tactically ...and move beyond the landscape of law where necessary.'<sup>122</sup> He argues that liberalism neutralises antithetical or merely non-conforming analytic and normative sensibilities, relegating them to a secondary position: the standard occupies the centre with everything else existing at the periphery. TWAIL is thus reduced to a form of resistance rather than an alternative way of knowing: reactive rather than proactive, critical instead of creative. Since TWAIL's aim 'is to dismantle the restrictions that we artificially construct and impose on our thinking and communication', Reynolds advocates remaining sceptical of claims of impartiality, balance, or reasonableness.<sup>123</sup> To him, the status quo is nothing more than a normative platform and these *qualities* are celebrated precisely because they preserve the dominant approach to international legal relations.

43- Through Reynolds, we understand TWAIL is beset by a higher-level incongruity than the one I am focused on: TWAIL is incompatible with mainstream international legal theory altogether. To the mainstream, TWAIL is illegible for its fails to conform to established analytic practices and rejects the normative status quo. Though TWAIL's approach may render it vulnerable to charges of subjectivity, anti-intellectualism, or even incivility, these charges are mostly spurious attacks designed to exclude forms of legal scholarship that challenge established practices and hierarchies. To Reynolds, mainstream dismissal of TWAIL is an inevitable act of self-preservation.

44- Bluntly, European legal academy seeks to dictate to the Third World how the latter can speak about its experience of colonialism and oppression, how it may analyse the structures developed in support of campaigns of conquest, and what reformative measures the Third World might pursue. The pretext of the oppressor is to stifle the precise forms of engagement—democratic, equitable, contextual, and revolutionary—that TWAIL aspires to. Oppressive structures are driven by self-preservation and one strategy is to limit the forms of discourse that threatens them. As such, TWAIL is a guerrilla theory. The theory classification is apropos for TWAIL seeks to explain the social phenomenon of international law, drawing upon the colonial confrontation and its contemporary manifestations and problematising the persistence of power asymmetry in the global legal order. The guerrilla qualification is also on point for TWAIL rejects orthodox claims about the limits of theory—to explain—preferring a radical agenda—to subvert: theirs is a political programme and a social responsibility to eliminate the harm the Third World suffers from injustice in international law. Rather than a theory *of* law or *about* law, we are facing a theory *against* law or, to be more accurate, against the narrow parameters within which legality is permitted to blossom. What I describe throughout as a theoretical incongruity appears fortuitous: TWAIL refuses to be civil, insisting that legal scholarship owes a duty to those who are marginalised or whose lives are made precarious

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<sup>121</sup> M Soranajah, 'On Fighting for Global Justice: The Role of a Third World International Lawyer' (2016) 37 Third World Quarterly 1972.

<sup>122</sup> Reynolds (n 111) 2110.

<sup>123</sup> *ibid* 2111.

through legal machinations. If this claim is accurate, where does TWAIL fit in the wider debate about international legal theory?

## V- FROM RESTRICTED TO GENERAL JURISPRUDENCE

45- Accidental perhaps but TWAIL pursues what Douzinas and Gearey describe as a ‘general jurisprudence’ approach in the investigation of international law.<sup>124</sup> Echoing Plato, Aristotle, and Hegel, Douzinas and Gearey remind us that jurisprudence was originally devised to explore legal aspects of social bonds, ‘to discover and promote a type of legality that attaches the body to the soul, keeps them together and links them to the broader community.’<sup>125</sup> As the forebear of political philosophy, sociology, and even anthropology—disciplines dedicated to investigating ‘the persistence of the social bond’—jurisprudence is the *wisdom* and *conscience* of law, an ideal against which state law and state behaviour are measured.<sup>126</sup> Against this standard, *is* and *ought*, the *analytical* and the *normative* are natural bedfellows, providing a basis for explorations into the meaning of justice. Counter-intuitively, the birth of new disciplines had a reductionist effect on jurisprudence, downgrading the study of law from a cognitive and moral investigation into a pedantic search for rules, (il)legalities, and definitions. To speak of the history of jurisprudence and, doubly, of international legal theory is thus to tell a ‘story of decline’: ‘the movement from general to restricted concerns.’<sup>127</sup> The impact has been devastating for normative jurisprudence as the study of law became ensnared by positivism and its crusade for formal reason. Even ethics, the focus of Aristotle’s seminal texts, were now subsumed within codes and manuals, instructing practitioners about permissible and impermissible acts with meaning struck from the examination.<sup>128</sup> The study of law committed itself to scientific methods, looking for observable and objective phenomena, investigations that can be reproduced, and results that can be tested. Normative considerations such as context or non-systemic items such as history or anthropology were removed from the jurist’s scope: ‘law should be approached as a coherent and self-referential system of rules.’<sup>129</sup>

46- Contrary to what has been alleged, the theoretical incongruity TWAIL supposedly suffers from is more representative of the failings of the international legal academy than of TWAIL. TWAIL sets itself against this restricted form of jurisprudence precisely because ‘[l]aw’s meaning coerces and legal values constrain.’<sup>130</sup> Dominant values in international law such as impartiality, balance, or reasonableness are expressions of power that allow established hierarchies to persist. It is unsurprising that ‘[t]he ‘others’—the poor, the underprivileged, the minorities and the refugees—can find little solace in rules and principles that sustain and are sustained by subjection.’<sup>131</sup> For the aspiring scientist, the sanctimonious pragmatist, and the professional jurist, rules are a boon for they ‘de-personalise power’ affording it the illusion of legitimacy and, in the process, restricting creative and moral methods of priority setting. By privileging formalism, international legal theory is, first,

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<sup>124</sup> Douzinas and Geary (n 15).

<sup>125</sup> *ibid* 3.

<sup>126</sup> *ibid* 4.

<sup>127</sup> *ibid*.

<sup>128</sup> For a discussion of the flawed nature of this approach, please see Jennifer K Robbennolt, ‘Behavioral Legal Ethics’ (2013) 45 Arizona State Law Journal 1107.

<sup>129</sup> Douzinas and Geary (n 15) 6.

<sup>130</sup> *ibid* 9.

<sup>131</sup> *ibid* 8.

restrictive, and, second, oppressive: ‘Power is legitimate if it follows law, *nomos*, and if *nomos* follows *logos*, reason.’<sup>132</sup> These words could have been approvingly spoken by Lauterpacht or Thomas Frank, both of whom linked legality to legislative power and little else. The quest for understanding justice or the pursuit of justice itself, central to the pre-positivist era, is now a question of procedure rather than substance, of technique rather than art, and ultimately of legality rather than equity. In a restricted jurisprudential model, jurists search for markers, standards, and predicates to distinguish international law from other social phenomena and then measure all potential law against a narrowly delineated framework. The most nefarious consequence of this process is the surrender of the *hard* questions: those that can not be answered through this narrow jurisprudential enquiry are delegated to political philosophers or, worse, to legislators. To paraphrase Reynolds, the appearance of impartiality and objectivity in international legal scholarship has become more important than the aims of justice and equality that supposedly inform international law itself. In the end, both human behaviour and human morality suffer at the hands of restricted jurisprudence, reduced to a binary of opposing forces separated only by a spurious standard of legality.

47- Against the restrictive jurisprudence of orthodox international legal theory, Douzinas and Gearey develop their idea of general jurisprudence, theoretical investigations into ‘legal aspects of social reproduction’ and how societies ‘develop their idea of the common good’.<sup>133</sup>

A general jurisprudence addresses all those issues that classical philosophy examined under the titles of law and justice. Today it includes the political economy of law, those global processes and institutions which regulate flows of capital and people from Nairobi to Neasden, privileging some and turning other into refugees without rights; the transitions from Empire to nation which characterise the postcolonial condition; ideological and imaginary constructions and scenarios through which we understand ourselves and relate to others; ways in which gender, race or sexuality create forms of identity that both discipline bodies and offer sites of resistance; the action of rights which allows people both to acquire and to contest identities. And as legality operates both at the level of social being and social existence, a general jurisprudence examines ways in which subjectivity is created as a side of freedom and of subjection.<sup>134</sup>

Reading their description of general jurisprudence feels a lot like reading TWAIL. TWAIL scholarship draws upon doctrines, interprets instruments, and proffers predictions about the impact of the international legal structure upon First-to-Third World relations while preserving an unshakeable commitment to ideas of the common good.

48- Through a general jurisprudence lens, TWAIL’s theoretical incongruity appears more visionary than misguided. Described as the ‘natural companion’ to its analytical frame,<sup>135</sup> TWAIL’s normative ambitions represent an overt attempt to link legality to body, soul, and a broader global community. According to Chimni, for example, international lawyers can peacefully transform ‘the global relations of production, consumption, and distribution’ and, ultimately, achieve ‘ethical forms

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<sup>132</sup> *ibid* 9.

<sup>133</sup> *ibid* 10.

<sup>134</sup> *ibid*.

<sup>135</sup> Altwicker and Diggelmann (n 30) 74.

of global societal relations.<sup>136</sup> Even as part of Mutua's scorched earth approach to scholarship, we are told not to abandon international law but to reconstruct it so as to achieve 'a truly universal platform'<sup>137</sup> or 'true universalization.'<sup>138</sup> Aware that this appeal clashes with his earlier suspicion of universal creeds,<sup>139</sup> Mutua qualifies it with a demand for 'the full democratization of the structures of both national and international governance'<sup>140</sup> so that we can both honour the diversity of cultures and develop common human principles. All of this is antithetical as much to Austin's positivist tradition as it is to Marx's materialist one: 'TWAIL seeks to formulate an international law that might hold good to its ideals and serve the cause of global justice.'<sup>141</sup> Anghie and Chimni are realists on one hand—to abandon international law to imperialists is to condemn the Third World to further exploitation—and idealists on the other—international law can be much better than it is. TWAIL is distinct from both orthodox and critical international legal theory, swayed neither by formalism nor by nihilism, ultimately rejecting a restrictive approach to jurisprudence.

49- Where TWAIL stumbles is not in failing to conform to orthodox representations of theory but in failing to articulate its own representations of otherness. Numerous are the calls for change, reform, even revolution but few programmes have been developed to match the ambition. Yes, the Third World project was assassinated;<sup>142</sup> yes, the New International Economic Order was side-tracked and eventually coop-ted;<sup>143</sup> and, yes, the solidarity needed to build a more just world is eroding.<sup>144</sup> And what of it? Battening down the hatches to a castle of critique and self-validation, leaves the terrain of creativity unguarded and vulnerable to colonisation. Neoliberalism 1.0, 2.0, and 3.0 were only possible because critical TWAIL scholars were caught in 'a classic Hegelian dialectic of the self and the other whereby the otherness tends to dominate the Third World subject and is predetermined in favour of the West. TWAIL's involvement with such a dialectic scheme only reinforces the subordination, to the extent that the subordination becomes reasoned subordination for the Third World subject':<sup>145</sup> the First World leads and the Third World resists.

50- Yet alternatives are available. The Third World Project, with its aim of global social renewal, is a forceful starting point.<sup>146</sup> Despite its liberal tendencies, the Third World Project merges positive and negative liberty, offering an altogether distinct philosophical foundation for world order. Beyond this, however, is the occasional radical regional international legal initiative that some Third World states have launched: the Bolivarian Alliance of the Americas remains at the pinnacle of potential but

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<sup>136</sup> Altwicker and Diggelmann (n 26) 74.

<sup>137</sup> Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (n 81) 244.

<sup>138</sup> Mutua, *Human Rights: A Political and Cultural Critique* (n 70) 3.

<sup>139</sup> Mutua, 'What Is TWAIL?' (n 21) 37.

<sup>140</sup> *ibid.*

<sup>141</sup> Anghie and Chimni (n 20) 102-3.

<sup>142</sup> Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New Press : Distributed by WW Norton 2007) 207.

<sup>143</sup> Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011).

<sup>144</sup> Chimni, 'A Just World under Law: A View from the South' (n 113).

<sup>145</sup> SG Sreejith, 'An Auto-Critique of TWAIL's Historical Fallacy: Sketching an Alternative Manifesto' (2017) 38 *Third World Quarterly* 1511, 1512.

<sup>146</sup> Prashad (n 143) 76.

others such as the Latin American and Caribbean Unity Summit, Mercosur, or even the new constitutionalism of certain South American states are promising.<sup>147</sup>

51- Could TWAIL scholars reorient their efforts toward building an alternate international legal framework informed by these models? The answer is mixed. While some initiatives such as the Bolivarian Alliance of the Americas and the new constitutionalism challenge the strictures of the liberal legal paradigm, others such as Mercosur take them for granted to the point of giving shape to a form of Third World neoliberalism. TWAIL scholars must be discerning for many parts of the Third World have succumbed to the dominant worldview and are now even colluding toward its preservation.<sup>148</sup> Edward Said is on point when he asserts that ‘[o]ne should not pretend that models for harmonious world order are ready at hand, and it would be equally disingenuous to suppose that ideas of peace and community have much of a chance when power is moved to action by aggressive perceptions of vital national interests or unlimited sovereignty.’<sup>149</sup> International law is far from the apex of hegemony, even less so today in a world of resurgent ethno-chauvinistic nationalism. Nevertheless, without developing an alternative framework, one that takes us beyond orthodox approaches to international legal theory, TWAIL will remain hindered by the old thinking and old formulations that perpetuate global stratification and Third World subjugation.

## VI- ONLY PARADOXES TO OFFER

‘The philosophers have only interpreted the world in various ways; the point is to change it.’

Karl Marx

In this article, I sought to unpack TWAIL’s theoretical credentials. What insight does it offer to international legal theory? Perhaps immodestly, my answer is plenty. Its analytic dimensions, most developed in its early days, are compelling. Early publicists were beset by their European origins and Eurocentric doctrines, casually overlooking international law’s outer-state character. Hardly resulting from any concert of nations, international law was brutally imposed by Europe on the non-European world. For legal theorists, this presented a conundrum. What system of ideas could be argued to underpin international legal doctrine? Neither imperialism nor colonialism provided comfortable answers, prompting theorists to opt for the safe ground of sovereignty and, ironically, voluntarism. The paradoxes of international law—that it was anything but voluntary for those outside of Europe and premised on the denial of non-European sovereignty—had little bearing on their reflections, only appearing late in the day when, first, Pashukanis joined the fray and, second, Third World legal scholars intervened. As others observed, there was precedent to the TWAIL critique but the breadth and depth of the critique developed by TWAIL stalwarts far exceeded the earlier iteration.

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<sup>147</sup> Mohsen Al Attar and Rosalie Miller, ‘Towards an Emancipatory International Law: The Bolivarian Reconstruction’ (2010) 31 *Third World Quarterly* 347; Clarissa de Oliveira Gomes Marques da Cunha and Henrique Weil Afonso, ‘Toward Dystopian Futures? Legal History, Postcoloniality and Critique at the Dawn of the Anthropocene’ (2017) 14 *Veredas do Direito* 187.

<sup>148</sup> Robinson (n 90).

<sup>149</sup> Edward W Said, *Culture and Imperialism* (1st Vintage Books ed, Vintage Books 1994) 21.

Where TWAIL truly soars is in the challenge it poses to orthodoxy. Modern international legal theory is beset by formalism, preferring to remain aloof from party politics and class struggle.<sup>150</sup> The ambition of its scholars is analysis first and critique second with meaningful change rarely figuring into the equation. To many legal scholars, musing and reflecting about suffering is not only sufficient but the most that can be expected of intellectuals. Retreating under the cover of slogans, they tell us that their analysis is legal and not normative, that justice is blind, and that theory must remain detached if it is to remain at all.

TWAIL scholars reject these artificial standards. To them, intellectual work is an avenue through which radical political change is pursued. Its guerrilla character gives it heft, without which TWAIL would find itself hobnobbing with the centres of power. Not without a hint of irony considering my earlier remarks, TWAIL returns to Marx, treating scholarly engagement as a form of praxis: more Marcuse, less Adorno. There is precedent here. Adorno's mentor, Walter Benjamin, declared that '[the] tiger's leap into [a revolutionary] past...takes place where the ruling class gives the commands.'<sup>151</sup> Yet, by choosing international law and international legal theory as their preferred battlegrounds, TWAIL finds itself swimming up a waterfall, battered by gravity and bloodied by water. Do theory and action, detachment and commitment exist on a spectrum or are they strangers in the night, oblivious to the other's existence? Like international legal theory's response to human history, TWAIL's answer is paradoxical. The subversion it pursues often feels half-hearted or, at least, incomplete. TWAIL scholars condemn international law's origins, legacies, and reverberations but seek international law's redemption within itself. Like any impossible conundrum, it seems, the paradox is everything and nothing.

Like most TWAIL scholars, I am more sanguine about TWAIL than I am about international law. TWAIL provides a compelling critical apparatus, one that borrows and rejects analytical methods, that celebrates and condemns normative pursuits, and that submits to and subverts tenets of international law. Is it a theory? Yes, but a theory that challenges what legal theory is meant to be. Those who look to TWAIL for deliverance and, equally, those who look to TWAIL for disappointment are committing acts of self-harm; there is enough in TWAIL to defend and to forsake international law. Like the international legal regime it critiques, I am forced to conclude that, at this stage, TWAIL has little more than paradoxes to offer. But, oh, what succulent paradoxes they are.

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<sup>150</sup> Miéville (n 1).

<sup>151</sup> Stuart Jeffries, *Grand Hotel Abyss: The Lives of the Frankfurt School* (Verso Books 2016) 5.