

## “Let Us All Agree to Die a Little”: TWAIL’s Unfulfilled Promise

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*Third World Approaches to International Law (“TWAIL”) has aspirations to transform the tools and institutions of international law—which have served for centuries to construct, enact, and extend Western exploitation and domination—into tools and institutions for Global South empowerment, agency, and freedom. Characterizing itself as an intellectual and political movement, TWAIL promises to pave a path forward through a combination of scholarship and politics to achieve radical change. In this Article, I argue that TWAIL’s promise is unfulfilled—and that, if TWAIL’s current trajectory continues, its promise is likely to be unfulfillable. I first sketch TWAIL’s origin and key successes, including bringing awareness to the colonial roots and neo-imperial present of international law. Yet I contend that TWAIL’s diverse critical insights have not led to cohesive conceptual, doctrinal, or political positions, which would serve as tools to empower Global South-based actors. I propose that this is, at least partly, due to TWAIL’s ambivalence toward the Third World state, its absence of a theory of legitimate political violence in international law, its failure to identify a methodology of representing the ‘voices’ of the Global South, and the growing influence of an academic ethos I call ‘critique-as-wellness.’ For those motivated by TWAIL’s ambitions, I suggest three possible directions to take: the construction of a grassroots-centered campaign in the service of Global South peoples; the formation of a movement focused on empowering Global South states; or a coalition originating from the Global North aimed at reshaping Western attitudes and actions toward the Global South.*

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The title of this piece is drawn from a speech by President of Algeria Ahmed Ben Bella in 1963—when he was Prime Minister—at the first Organization of African Unity Summit: “It is because Tunisian brothers died . . . because Moroccan brothers died . . . because Egyptian brothers died . . . and because Libyan brothers and others lost their lives that Algeria is free . . . African brothers agreed to die a little so that Algeria might become an independent State. So let us all agree to die a little, or even completely, so that the peoples still under colonial domination may be freed.” His Excellency Ahmed Ben Bella, Prime Minister of Alg., Address at the Organization of African Unity Summit (May 1963), *reprinted in* Celebrating Success: Africa’s Voice over 50 Years, 1963–2013 8 (U.N. Econ. Comm’n for Afr., 2013).

## TABLE OF CONTENTS

INTRODUCTION . . . . .	80
I. TWAIL'S AMBITIONS . . . . .	84
A. <i>Snapshot of TWAIL</i> . . . . .	84
B. <i>TWAIL's Key Aims</i> . . . . .	85
II. TWAIL'S MISSING MOVEMENT . . . . .	84
A. <i>No Political Movement and Not in Service of         the Third World</i> . . . . .	90
B. <i>Counterarguments</i> . . . . .	91
1. <i>Selective Evidence</i> . . . . .	91
2. <i>Instrumentalization Is a Trap</i> . . . . .	93
3. <i>The Scholarship Is the Practice</i> . . . . .	95
4. <i>Protect Critique from Criticism</i> . . . . .	95
C. <i>Explaining Failures</i> . . . . .	97
1. <i>The Missing Third World State</i> . . . . .	97
2. <i>No Theory of Legitimate Political Violence</i> . . . . .	99
3. <i>Can the Subaltern's Second Cousin Speak for             the Subaltern?</i> . . . . .	101
4. <i>Critique as Detachment and Critique as Wellness</i> . . . . .	107
III. ALTERNATIVE OPTIONS . . . . .	114
A. <i>Global South Peoples</i> . . . . .	116
B. <i>Toward an Emancipatory Global South State</i> . . . . .	120
C. <i>Transforming from the Metropole</i> . . . . .	126
CONCLUSION . . . . .	130

## INTRODUCTION

*Soraya was sitting in my office, and she was furious. An LL.M. student from East Africa, a former community organizer and government lawyer, she had been encouraged to read recent scholarship produced by the Third World Approaches to International Law ("TWAIL") movement and to consider applying for a doctorate to study in that critical tradition. "I have never wanted an article to succeed so much and been so angry at where it ends. How should we mobilize our skills? How can someone who wants to actually contribute to change do anything with this argument? I came here wanting to learn the tools to empower my country, my people. I thought this kind of scholarship is where I would find those tools. But this is just telling me that my country was colonized and that international law was used by those who colonized us. I don't need to be told that. There is nothing for me here."*

*Hassan—an international legal adviser for a Middle Eastern state—was having a coffee in the delegates lounge of the United Nations in New York, overlooking the East River. I asked him what TWAIL had contributed to his work and his practice. "I never had the attitude that the law was going to save us. I knew that the law was the only tool*

*we had. I didn't think it was a claim of justice, or about the moral force of law on its own. I don't need to be convinced to abandon my faith. I know that international law is used to maintain control over us. I want to know what we should do about it. Why is it only the positivists and the realists who are providing answers? For me, as a practitioner, TWAIL is totally useless."*

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To encounter TWAIL is to feel a jolt of recognition and a sense of purpose. TWAIL has aspirations to transform the tools and institutions of international law—which have served for centuries to construct, enact, and extend Western exploitation and domination—into tools for the empowerment, agency, and freedom of the Global South. The “loose network” of TWAIL is united by a shared concern for the peoples and places of the Third World. But TWAIL promises to be more than a loose network of scholars thinking critically about international law and colonialism. Referring to itself as a movement,<sup>1</sup> TWAIL calls upon its members to marshal intellectual and political power not only to transform legal discourses and construct new theories of international law, but also to forge legal governance projects and international institutions and frameworks in service of the Third World.<sup>2</sup> Thus, as a critical project, TWAIL offers a bold diagnosis of international law's failures and complicity. But, crucially, TWAIL also purports to represent an alliance of legal scholars engaged in a shared endeavor to bring about radical political change.<sup>3</sup> TWAIL has claimed to

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1. See Makau Mutua, *What Is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 36 (2000) (“TWAIL is both a political and an intellectual movement.”); Andrew F. Sunter, *TWAIL as Naturalized Epistemological Inquiry*, 20 CAN. J.L. & JURIS. 475, 481 (2007) (“TWAIL is both a political and an intellectual movement . . .”); Michael Fakhri, *Questioning TWAIL's Agenda*, 14 OR. REV. INT'L L. 1, 11 (2012) (“TWAIL is unquestionably a political project.”); Obiora Chinedu Okafor, *Praxis and the International (Human Rights) Law Scholar: Toward the Intensification of TWAILian Dramaturgy*, 33 WINDSOR Y.B. ACCESS JUST. 1, 3 (2016) (identifying the adoption of the TWAIL vision statement at the 1997 conference at Harvard Law School as “a key moment in the development of TWAIL as a scholarly and political movement”); Ashley M. Stone, *Introduction to Third World Approaches to International Law (TWAIL Singapore)*, 20 OR. REV. INT'L L. 333, 333–34 (2019) (naming TWAIL “a scholarly community and a political movement,” whose agenda is “inherently political”); Mohsen al Attar, *TWAIL: A Paradox Within a Paradox*, 22 INT'L CMTY. L. REV. 163, 170 (2020) (“Thick and through, politically and intellectually, TWAIL is a *movement*.”); Vijayashri Sripati, *The United Nation's Role in Post-Conflict Constitution-Making Processes: TWAIL Insights*, 10 INT'L CMTY. L. REV. 411, 416 (2008) (“As is perhaps well known, TWAIL is not simply an ‘intellectual trend or an academic pursuit,’ but a ‘historically located intellectual and political movement.’”).

2. See, e.g., James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 35 (2011); see also Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3 TRADE L. & DEV. 103, 104 (2011) (“Although there is arguably no single theoretical approach which unites TWAIL scholars, they share both a sensibility, and a political orientation. TWAIL is therefore . . . defined by a commonality of concerns” that center around attempting “to attune the operation of international law to those sites and subjects that have traditionally been positioned as the ‘others of international law.’”).

3. See Mutua, *supra* note 1, at 31, 36 (stating that TWAIL seeks to “eradicate the conditions of underdevelopment in the Third World” and that the purpose of TWAIL “must be to eliminate or alleviate the harm or injury that the Third World would likely have suffered as a result of the unjust international legal, political, and economic order”); Antony Anghie, *What Is TWAIL: Comment*, 94 AM. SOC'Y INT'L L. PROC. 39, 39 (2000) (“I must reiterate Professor Mutua's emphasis on TWAIL as being a reconstructive project

offer law students, new lawyers, and emerging scholars the primary—perhaps, the only—viable path to critical, anti-imperialist scholarship and transformative international lawyering in support of the Global South.

Twenty-five years into this project, how does TWAIL stack up to these claims? The best TWAIL scholarship has made visible how modern international law and the subjugation of the Third World are inextricably linked.<sup>4</sup> Yet there are vanishingly few indications that TWAIL can legitimately refer to itself as a political movement or that it has actually empowered those that seek to use international law to create political change. TWAIL has centered emancipation and justice as key values to strive towards. Yet TWAIL has articulated no core political objectives and hardly any doctrinal or institutional courses of programmatic action, reflecting an unresolved ambivalence about its politics. The often celebrated proliferation of TWAIL scholarship may be serving the growth of the academic network and yet, frustratingly, not the fulfillment of its core promise.

Part of the task of a joint intellectual and political movement is to diagnose problems and propose and pursue solutions to them. Such a movement would need to answer questions like: What specific changes does TWAIL wish to achieve? Whom does TWAIL seek to empower by achieving these changes? And what power, resources, and tools will TWAIL require to achieve these objectives? The articulation of these questions and the generation of answers to them do not necessarily need to follow a prescribed timeline. But a diagnosis alone cannot function as a credible claim of acting in service of the Third World.

Operating as a loose academic network, TWAIL seems trapped in indulging in its hallmark diagnosis of international law while confining its capacity, as a movement, to answer these questions cohesively and programmatically to empower a new generation of international lawyers ready to work for change. This Article seeks to understand these shortcomings and to propose alternative ways forward.

In Part I, I sketch a thumbnail view of TWAIL and outline its foremost aims as articulated by TWAILers. In Part II, I assess TWAIL's performance against these stated objectives. In Part III, I suggest that those seeking to engage in

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which aims at eradicating the 'conditions of underdevelopment in the Third World.');" B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3, 4 (2006) ("[It is] imperative that TWAIL . . . address the material and ethical concerns of third world peoples . . . This paper seeks to take a small step in that direction" by "propos[ing] a set of strategies directed towards creating a world order based on social justice."); Gathii, *supra* note 2, at 43 ("TWAIL critics fail to acknowledge or realize that TWAIL-ers do not critique for the heck of it. They critique with a view to build on and transform the egalitarian aspects of international law, and do not critique to derive satisfaction out of deriding the work."); *id.* at 45 ("TWAIL scholarship makes bold critiques and equally bold reform proposals.").

4. For a comprehensive overview of TWAIL scholarship, see Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 EUR. J. INT'L L. 7 (2023).

international lawyering in service of the Global South acknowledge TWAIL's shortcomings and change tack. I present three potential courses of action for doing so.

Contemporary TWAIL sets itself out as an inclusive "big tent." It can thus be difficult to make statements regarding what "TWAIL says." In this Article, I limit my claims to those that are widely reflected in the TWAIL canon. Additionally, I adopt TWAIL's framing of the notion of the "Third World," despite significant debate about this term and its utility.<sup>6</sup>

In terms of methodology, I attempted to be comprehensive in my review of TWAIL literature. I drew in part on James Gathii's very useful bibliography, which I supplemented. I have endeavored, except where noted, to substantiate my descriptions and claims as grounded in TWAILers' articulation of their own project. I have sought to faithfully depict the nature and elements of TWAIL based on its self-presentation as a distinct academic community. My research was limited to authors who claim to be TWAILers and to be writing with a TWAIL approach. This Article reflects a review of academic publications in English and French, and it also draws from relevant academic panels and presentations. Ultimately, the effectiveness of my critique turns in part on whether my articulation of what TWAIL constitutes resonates with readers.

While I am not a member of TWAIL, I agree with its core diagnosis, and I take seriously the ambition of a critical approach to international law that aims to be a movement for political empowerment. This article is primarily addressed to students and young international lawyers (practitioners and scholars alike) who share TWAIL's fundamental insight but are frustrated that its transformative claims are not being fulfilled.

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5. See Fakhri, *supra* note 1, at 8 ("TWAIL prides itself on working to be as inclusive as possible . . . No one officially joins or applies to TWAIL since one becomes a TWAILer by simply self-identifying as such."); see also ANDREA BIANCHI, INTERNATIONAL LAW THEORIES 210 (2016) (remarking that the diversity of thought and approaches within TWAIL "makes generalizations very difficult").

6. See, e.g., Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353, 355–60 (1998) (recounting descriptions of the Third World as (i) interchangeable with terms such as 'less-developed' or 'developing,' (ii) the victims of the international economy, (iii) a political coalition of states in pursuit of a common goal, and (iv) a social movement—"an international protest of the weak against the strong, the poor against the rich," and ultimately rejecting each in favor of a framework which sees "the Third World as occupying a historically constituted, alternative and oppositional stance within the international system"); Madhav Khosla, *The TWAIL Discourse: The Emergence of a New Phase*, 9 INT'L CMTY. L. REV. 291, 293–94 (2007) (noting that the term 'Third World' might be understood in "various differing ways"—as "historically determined," "geographically determined," "economically determined," "politically determined," or, best, in a "more encompassing" fashion); see also M. Sornarajah, *On Fighting for Global Justice: The Role of a Third World International Lawyer*, 37 THIRD WORLD Q. 1972, 1973 (2016) ("The origin of the Third World lies in the resistance of its people to the norms of international order that justified their subjugation."). In this Article, I have generally used the term "Global South," rather than "Third World." I made this decision based on my extensive engagement with officials and lawyers from Global South states, who—in my experience—do not use "Third World" to refer to their countries. However, I have used "Third World" in instances in which I am discussing scholarship that employs the term.

## I. TWAIL'S AMBITIONS

A. *Snapshot of TWAIL*

TWAIL often traces its origins to a 1997 conference convened at Harvard Law School by a group of students and scholars affiliated with the university.<sup>7</sup> The field is frequently periodized, not without dissent, into pre-conference and post-conference eras. In the up-to-1997 era, termed “TWAIL I,” scholars critiqued international law for legitimizing the oppression of the Third World, developed Third World histories of international law, emphasized the principles of sovereign equality and non-intervention, and advocated for a New International Economic Order (“NIEO”).<sup>8</sup> Though they condemned international law for its complicity in subjugating the Third World, these early scholars also instrumentalized international law for their purposes.<sup>9</sup> Their core focus was on the newly independent states as the key site for empowerment and development of new international law and institutions.

By contrast, from 1997 onwards, “TWAIL II” scholars largely departed from many of the key tenets of TWAIL I while seeking to further develop TWAIL’s repertoire of critical and analytical tools. Notably, TWAIL II scholars both criticized and de-emphasized the post-colonial Third World state, opting instead to deal directly with the “lived experiences” of “Third World peoples” and Third World social movements.<sup>10</sup> They also brought a greater attention to the structural factors that produce or maintain inequalities between the Global North and the Third World.<sup>11</sup> Compared with TWAIL I, TWAIL II has been more skeptical of international law and more critical in its approaches. Some argue that we are now seeing the emergence of “TWAIL III,”<sup>12</sup> which is primarily concerned with the epistemological terrain of international law.<sup>13</sup>

7. Gathii, *supra* note 2, at 28–29.

8. See Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, 36 *STUD. TRANSNAT’L LEGAL POL’Y* 185, 187–89 (2004); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 73–94 (2003).

9. See BIANCHI, *supra* note 5, at 209–10. See generally Anghie & Chimni, *supra* note 8.

10. See, e.g., Khosla, *supra* note 6, at 297–98; RAJAGOPAL, *supra* note 8, at 9–23.

11. See, e.g., Anghie & Chimni, *supra* note 8, at 189–92; al Attar, *supra* note 1, at 171–72; Khosla, *supra* note 6, at 297–98.

12. See, e.g., Khosla, *supra* note 6, at 293 (arguing that the “different global circumstances that have emerged post 9/11 mark the emergence of a new phase for TWAIL scholars . . . TWAIL III”); Karin Mickelson, *Taking Stock of TWAIL Histories*, 10 *INT’L CMTY. L. REV.* 355, 361 (2008) (noting that “there have already been calls for the recognition of ‘TWAIL III’ scholarship, which some participants at the [Albany] workshop [of 2008] welcomed”); Sundhya Pahuja, Professor, Univ. of Melbourne, Lecture at University College London: *Empire Comes Home: Three Phases in the Struggle to Decolonise International Law* (Mar. 3, 2022).

13. See BIANCHI, *supra* note 5, at 210. See generally 9 *INT’L CMTY. L. REV.* 331 (2007).

TWAIL holds itself out as an inclusive, decentralized "big tent" that welcomes all those who self-identify as "TWAILers."<sup>14</sup> The self-described movement eschews a single theoretical approach and invites a wide array of voices, methodologies, and substantive inquiries. TWAIL scholars have written, for example, on topics as diverse as the state and sovereign equality between states,<sup>15</sup> the natural environment and its governance,<sup>16</sup> feminism and women's rights,<sup>17</sup> and even the role of hope in international law.<sup>18</sup>

### B. TWAIL's Key Aims

Many people come to TWAIL with rage. Rage can be an astringent, mobilizing, and powerful emotion, particularly in a discipline that emphasizes sameness and flattens context. Recruits come to TWAIL with rage about the world they live in, rage about the role their field is playing in making and sustaining that world. TWAIL holds out the promise of channeling that rage into a consciousness about law and an organized strategy about what to do to change it. In this sense, TWAIL often fashions itself as a scholarly movement meant to be in opposition to an international legal apparatus that continues, even after the formal end of colonialism, to subjugate the "Third World."<sup>19</sup> At least three sets of primary aims, which are interrelated in certain respects, may be detected in TWAIL's "big tent" approach.

The first espoused aim of TWAIL is to tell truths about how a dominant, Eurocentric international law has served to legitimize the violence, dislocation, predation, and deprivation wrought by and through colonialism and empire, and how colonialism and empire, in turn, constituted international law. Regardless of the specific subject matter of study, much of TWAIL scholarship aims to decenter dominant accounts of international law and uncover the

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14. See sources cited *supra* note 5.

15. See generally Antony Anghie, *Nationalism, Development, and the Postcolonial State: The Legacies of the League of Nations*, 41 *TEX. INT'L L.J.* 447 (2006); Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 *J.L. & POL. AFR., ASIA & LATIN AM.* 195 (2012); Roger Merino, *Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America*, 31 *LEIDEN J. INT'L L.* 773 (2018); George Rodrigo Bandeira Galindo, *On Form, Substance, and Equality Between States*, 111 *AJIL UNBOUND* 75 (2017).

16. See, e.g., Usha Natarajan, *Third World Approaches to International Law (TWAIL) and the Environment*, in *RESEARCH METHODS IN ENVIRONMENTAL LAW* 207 (Andreas Philippopoulos-Mihalopoulos & Victoria Brooks eds., 2017). See generally Karin Mickelson, *Competing Narratives of Justice in North-South Environmental Relations: The Case of Ozone Layer Depletion*, in *ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT* (Phoebe Okowa & Jonas Ebbesson eds., 2009); *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH* (Shawkat Alam et al. eds., 2015).

17. See, e.g., Vasuki Nesiiah, *The Ground Beneath Her Feet: TWAIL Feminisms*, in *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* 133 (Antony Anghie et al. eds., 2003). See generally Mosope Fagbongbe, *The Future of Women's Rights from a TWAIL Perspective*, 10 *INT'L CMTY. L. REV.* 401 (2008).

18. See generally Karin Mickelson, *Hope in a TWAIL Register*, 1 *TWAIL REV.* 14 (2020).

19. See, e.g., Mohsen al Attar & Rebekah Thompson, *How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination*, 3 *TRADE L. & DEV.* 65, 67 (2011).

colonial, Eurocentric, and imperial past and present of the international legal regime.<sup>20</sup>

TWAIL's second stated ambition is to envision a new international law in service of the Third World. According to Gathii, a "central element of TWAIL scholarship is to reform and remake international law by exploring alternatives to the problematic continuing legacy of colonialism in contemporary international law."<sup>21</sup> This reimagining entails a "commitment to rearticulate international law to achieve less subordinating and more liberatory ends" for the Third World.<sup>22</sup> There is an ongoing debate within TWAIL about whether the community should take a reformist or radical approach to international law as a framework. That said, TWAILers do not seem to seriously consider rejecting international law as a whole.

The third objective of TWAIL is to enact those prescribed changes in the world.<sup>23</sup> TWAIL takes seriously the idea that scholarship can mobilize and support political and institutional transformation. In one of the most widely cited pieces in the field, Makau Mutua called for TWAIL to bring about two foundational transformations: an internal transformation of conditions in the Third World<sup>24</sup> and an external transformation of international law into a system based on justice, not power.<sup>25</sup> Others, while still citing Mutua as the key source for the movement's overall objectives, have articulated this third goal slightly differently: to use international law "to further the interests of the

20. More recently, TWAIL scholars have applied these same tools to reveal the racialized origins of international law. The newest issue of the *Journal of International Economic Law* features several articles in this vein. See generally James Thuo Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law: Introduction*, 25 J. INT'L ECON. L. 1 (2022); Lily Mburu, *Book Review: A Racial Capitalism Panorama*, 25 J. INT'L ECON. L. 348 (2022).

21. James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 153, 170 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022) ("In short, TWAIL is more than merely a deconstructive and oppositional movement or network of scholars, but rather one that sees the potential of reforming if not remaking international law for the greater good."). See also *id.* at 153–54 ("[TWAIL] provides tools for probing the structural and systemic problems that are constitutive of and foundational to understanding questions of global poverty, wealth, as well as the role of ideals such as rights and policies such as development have played in the third world.").

22. E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462, 1498 (2021).

23. Mutua, *supra* note 1, at 31–32; Luis Eslava, *TWAIL Coordinates*, CRITICAL LEGAL THINKING (Apr. 2, 2019), <https://criticallegalthinking.com/2019/04/02/twail-coordinates> [https://perma.cc/C8VE-62Z6] ("TWAIL's agenda is directed at . . . redeploing law . . ."); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171, 190 (2005) (describing critical internationalists' aspirations to "imagin[e]—and what is more necessary, [to help] . . . create—a much more equal, fair, and just world"); Priya S. Gupta, *From Statesmen to Technocrats to Financiers: Development Agents in the Third World*, in BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW 481, 497 (Luis Eslava et al. eds., 2017) ("And yet, our task should not be simply focusing on the shortcomings of accountability and distributive aspects of the operation of private capital but rather crafting an emancipatory form of participation given the totalizing, and ever more diffused yet still narrowing, projects of international law, finance, and development.").

24. Mutua, *supra* note 1, at 31.

25. See *id.* at 36; Anghie, *supra* note 4, at 40.



peoples of the Third World.”<sup>26</sup> Yet, even where slight divergences in the movement’s core objectives are discernable, TWAIL scholars repeatedly insist that theirs is a political collective in service of a distinct constituency. One young TWAIL scholar, in extolling the diversity of perspectives within the network, notes: “This spectrum of views simultaneously uses and disavows international law tactically to attain a range of outcomes in support of Third World peoples and States, recognising conflict and dissonance as an integral part of this . . . movement.”<sup>27</sup>

Often, in TWAIL, international law is said to take on a dual—perhaps even a “paradoxical”—character:<sup>28</sup> Though in its current form it is a source of Third World immiseration, international law might yet be transformed to promote Third World interests.<sup>29</sup> International law, that is, holds redemptive potential, potential that the TWAIL project purports to harness.

TWAIL’s greatest achievement is found in the extensive body of work evidencing the various ways that international law has been, and continues to be, “co-constituted” with colonialism and imperialism.<sup>30</sup> Perhaps most prominently, the canonical work of Antony Anghie and B.S. Chimni forces international lawyers to confront their field’s unjust past.<sup>31</sup> These views have, as one leading TWAIL scholar put it, “ma[de] inroads” in scholarly journals in the West, as well as in scholarly communities in Asia, Africa, and Latin America.<sup>32</sup> There is no doubt that TWAIL has changed the way many scholars outside

26. Antony Anghie, *TWAIL: Past and Future*, 10 INT’L CMTY. L. REV. 479, 480 (2008).

27. Rohini Sen, *Concept: Third World Approaches to International Law*, in THE CRITICAL LEGAL POCKET-BOOK 88, 89 (Illan rua Wall et al. eds., 2021).

28. See, e.g., Mohsen al Attar, *Out of Place? Being Anti-Colonial in Law School*, MOHSEN AL ATTAR (Jun. 25, 2021), <https://mohsenalattar.org/out-of-place-being-anti-colonial-in-law-school> [<https://perma.cc/SA3A-5L5E>] (“When lecturing, for example, TWAIL scholars lament international law for being a handmaiden to just about every brutality Europe could conceive of since Vitoria sauntered onto the scene. In the same course, sometimes in the same lecture, we rescue international law, declaring it a fantastic(al) ‘means of constraining power’ and thus vital in ‘the fight for global justice’ . . . . Despite our anti-colonial credentials, we’ve practically essentialised international law, implying throughout our scholarship that even colouring within the lines is emancipatory.”).

29. See, e.g., Mutua, *supra* note 1, at 32 (articulating “an agenda for the reconstruction of international law through the TWAIL prism”); Anghie & Chimni, *supra* note 8, at 102 (“It is precisely by attempting the task of excavating [international law’s violent origins] that TWAIL seeks to formulate an international law that might hold good to its ideals and serve the cause of global justice . . . . This project may appear . . . paradoxical.”); Eslava & Pahuja, *supra* note 15, at 199 (“TWAIL can therefore be defined as a virtual site from which scholars and activists . . . can work both to resist and to reform international law. . . . [This constitutes a] duality of engagement with international law.”).

30. See generally JAMES THUO GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW (2010) (setting out the inegalitarian tendencies of the development of law around war and trade).

31. See, e.g., Anghie & Chimni, *supra* note 8. See generally Mutua, *supra* note 1; Gathii, *supra* note 2. While not referenced explicitly, TWAIL’s approach is gestured to in several leading textbooks of public international law. E.g., JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (9th ed. 2019) (citing Anghie and Gathii for the proposition that “international law was European in origin” and traveled beyond Europe “with the colonizers”).

32. Gathii, *supra* note 21, at 173.

TWAIL understand the law and the ways that they discuss and engage international legal history and its implications for the present.<sup>33</sup>

Yet this achievement has created something of a recursive loop, rather than the founding ethos of a programmatic movement. In a sense, TWAIL has become stuck for a quarter century in seeking to prove again and again the core thesis that international law is “co-constituted” with colonialism and empire.

For many students entering law school around the world today, the claim that law *was* a tool of empire, of slavery, of subjugation, and that law *is* co-constituted with political injustice, with war, with domination is obvious and unsurprising. Unlike the academics teaching in most law schools, today’s students were exposed to these claims at university, and many came of age understanding that law and legal institutions are often cynically and skillfully employed by the powerful to the detriment of justice. TWAIL’s initially shocking and provocative claim—captured most powerfully in Makau Mutua’s famous opening sentences in 2000: “The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West”<sup>34</sup>—can serve as an important starting point. Nevertheless, it cannot in itself constitute an intellectual and political movement.

In my professional engagements, I have found that many of those who might be expected to be the most receptive audience for TWAIL do not identify with the movement. In discussions with me, Global South government lawyers,<sup>35</sup> international lawyers litigating in collaboration with Global South states,<sup>36</sup> and

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33. Cf. GERRY SIMPSON, *THE SENTIMENTAL LIFE OF INTERNATIONAL LAW* 139 (2021) (discussing the impact of Antony Anghie’s *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005)).

34. Mutua, *supra* note 1, at 31.

35. One long-time legal diplomat and senior legal adviser from North Africa told me that he was familiar with TWAIL and agreed with many of its reflections on the history of international law and legal thought, but that as a practitioner, he found it “useless, lacking a constructive project,” and that its scholars struck him as deeply out of touch with the realities of international law as a tool in global politics. He expressed the sentiment (that I heard from many other practitioners) that there would be a ready audience of practitioners for new, bold scholarship. He said, “I get it. Many of these institutions are a reflection of colonial heritage; they were designed to sustain power hierarchies to our disadvantage. I got it. What do we do now?”

36. A practitioner who travels the world working with Global South states to help them terminate unjust bilateral investment agreements told me that he avoids any references to TWAIL in his work because “beyond lecturing officials in states [he] work[s] with that their situation is a result of colonialism, there is no framework that would provide [him] with tools for actually doing the work.” A leading international legal scholar and practitioner involved in a number of legal cases before international courts and tribunals that have been celebrated by TWAILers indicated that he has “never as such referenced a TWAIL article in [his] practice, or instructed [his] team to turn to TWAIL scholarship as such, although [he has] surely been influenced in [his] approach by TWAIL articles [he has] read over the years.” I asked him why, given that so much of his legal work is driven by a desire to address injustice perpetrated against the Global South and legitimized through international law. He said, “it is not material of the kind that a court or tribunal would normally turn to, but its influence is surely there in an indirect way, influencing counsel and at least some of the judges.”

lawyers working in Global South-based NGOs,<sup>37</sup> have dismissed the utility of TWAIL scholarship. These individuals expressed to me resentment of the repeated reference in TWAIL to the "Third World," the way that the scholarship appears to treat all non-Western states as an undifferentiated or interchangeable whole, and the lack of close engagement by TWAIL scholars with political realities and communities from those countries. For these and other reasons, these interlocutors indicated that they did not utilize the scholarship<sup>38</sup> or find it helpful in their legal work, primarily because it lacked any tactical, doctrinal, or institutional models and concepts for action and development.<sup>39</sup>

As a professor, I include TWAIL scholarship and a critical approach throughout all of my courses. It is certainly the case that students generally are receptive to a TWAIL lens and feel that critical components are important inclusions in international law classes as a way to understand the realities of the field more deeply.<sup>40</sup> Yet, for my purposes, the most telling reactions have been from graduate students who travel for study from the Global South and intend to return to their home countries to serve in government or become civil society leaders. Unlike many Western students, who are often thrilled by TWAIL scholarship and feel that it aligns with their sensibilities, Global South students are those who I imagine are the most crucial audience of TWAIL scholarship, especially its self-proclaimed programmatic and political strategies for radical change and empowerment of the Third World. Yet it is precisely those students who express the most frustration about TWAIL's current limitations.

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37. A Yemeni lawyer working in a civilian protection NGO in Sana'a told me, "I appreciate what they do, and of course they are right about the colonial and neo-imperial nature of international law, but the only scholars who have tried to help provide us with tools to achieve justice are [from the mainstream]."

38. One senior human rights practitioner from the Horn of Africa remarked to me that "[c]onversations with human rights academics, and rarely with practitioners or students, about TWAIL almost always start with how much we agree with its assessments and conclusions. The critique, no doubt, resonates with our experiences. However, these conversations also almost always end with an unanswered 'what next?' question."

39. I have heard, for example, that TWAIL scholarship is of no use when trying to undertake any of the legal tasks confronted by these individuals on a daily basis, such as advising state positions ahead of multilateral meetings, preparing submissions to arbitral tribunals, or crafting reports for U.N. bodies.

40. One of my students, speaking of her experience being assigned to read Mutua's *Savages, Victims, and Saviors* as part of a human rights clinic, noted that a self-deprecation of one's position as an elite law student working in human rights was built into the curriculum: "The TWAIL reading served as a placeholder for us all to excoriate ourselves and our position as the 'saviors' in Mutua's taxonomy. We went around the class critically tearing ourselves and our projects to shreds, but emerged on the other end of the class continuing with our work essentially as normal. At Harvard, loudly bemoaning the legacy of colonialism in your own work is a prerequisite to being inducted into progressive conversations on campus, that you realize that the field of human rights is messed up but are going to acknowledge the possible harm and try to conduct yourself and your projects differently."

## II. TWAIL'S MISSING MOVEMENT

### A. *No Political Movement and Not in Service of the Third World*

TWAIL has failed to produce a coherent set of new ideas about what international law should be, how it should function, what it should seek to do in the world, and how to get there. A central move of the literature is to claim that the authors (and the movement) “stand on the shoulders” of leading anti-colonial struggles and leaders who fought for national independence in the 1950s to 1970s.<sup>41</sup> Yet it is unclear what concrete inspiration contemporary TWAILers draw from these prior generations, or whether they would even agree with them on fundamental dispositions towards international relations or the purpose of international law. Further, TWAIL has failed to articulate sufficiently robust conceptions of what ideas like “anti-imperialism,” “emancipation,” “justice,” or “liberalism” mean. It is, in short, extremely difficult to “use” TWAIL scholarship politically or programmatically.<sup>42</sup>

Without such a programmatic vision of what a just, moral international order would look like, those seeking to reform international law according to TWAIL's commitments are left with little guidance. Even if one were to accept an argument that TWAIL is biding its time until revolutionary change upends the existing order, it remains unclear *what legal order* TWAIL would institute in its place. That is, TWAIL does not fulfill at least two of its own aims: to envision and to enact. The movement fails to put forward prescriptive proposals, and it also fails to work in concert with others to advance such proposals.<sup>43</sup>

Without a clear set of substantive political commitments, TWAIL has not developed any recruitment or dissemination practices, protocols, or approaches to changing and informing international legal practice. It has not created, for example, training programs for judges or arbitrators, workshops for government lawyers, accessible writings on TWAIL approaches to key areas of international

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41. The canonical iteration of this “move,” to which most subsequent TWAIL scholars cite, appears in Makau Mutua's opening salvo: *What is TWAIL?* See Mutua, *supra* note 1, at 32 (stating that “today's Third World scholars and political actors stand on the shoulders of Bandung and the Group of 77”); see also Obiora Chinedu Okafor, *The Bandung Ethic and International Human Rights Praxis: Yesterday, Today, and Tomorrow*, in *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW* 515, 516 (Luis Eslava et al. eds., 2017) (“For, if Makau Mutua is correct that critical TWAIL scholars like many of the contributors to this book ‘stand on the shoulders of Bandung’ . . .”).

42. This difficulty is not unique to TWAIL. For an assessment of leftist foreign policy's failure to create pragmatic plans for action in the United States, see Aziz Rana, *Left Internationalism in the Heart of Empire*, 69 *DISSENT* 12, 17 (2022) (“For left internationalists today, the lack of a global institutional infrastructure and networks of solidarity is a massive political challenge. American leftists face a basic predicament when arguing against the prerogatives of the U.S. security state or seeking to articulate an alternative vision.”).

43. See Akbar Rasulov, *The Nameless Rapture of the Struggle: Towards a Marxist Class-Theoretic Approach to International Law*, 19 *FINNISH Y.B. INT'L L.* 243, 253 (2008) (“There has been a great deal of brilliant critical writing on various international law subjects coming from the leftist quarters in recent years. But there have been no serious large-scale programmatic statements. Many skeptical voices, but no constructive visions. Many subversive questions, but no utopias.”).

lawyering (such as treaty negotiation, drafting and interpretation, or the creation of customary international law), or tactics for intervention in international organizations. Indeed, despite a recent turn to pedagogy in some areas of TWAIL scholarship, it has almost exclusively focused on how one might go about “decolonizing” the international law syllabus rather than strategic teaching and dissemination for TWAIL approaches to leadership, organization, and empowerment in and through international law.<sup>44</sup> The TWAIL network has, in practice, been limited to a small group of legal academics. Despite its claims to Third Worldist resistance,<sup>45</sup> TWAIL has, in a quarter century, failed to build a robust constituency in the Global South and to connect its work to movements rooted in the Global South.<sup>46</sup> It remains a Global North-dominated and largely English-language academic sub-field.

## B. Counterarguments

### 1. Selective Evidence

One counterargument to my observations above could be that my evidence base is too narrow. This argument might point to an alleged corpus of doctrinal TWAIL-imbued legal literature that my survey of the field has missed, or the existence of practitioners making meaningful changes to law and institutions as a product of TWAIL’s influence. It may also reference the fact that several prominent TWAILers—especially in the last decade—have taken key positions in multilateral organizations or have directly participated in domestic politics.<sup>47</sup> To be certain, the efforts by each of these TWAILers may contribute,

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44. *Id.* at 254 (“Performed ‘correctly’, a class-analytic re-theorization of international law can supply the leftwing international law project with a virtually endless stock of new programmatic suggestions. It can grant it access to ideological horizons that hitherto its participants could only have dreamt about, breathing life back into the idea of a ‘radicalism with rules’ and making possible once again the vision of a radical international law theory that is neither despairingly nihilist in its general outlook, nor hopelessly utopian. But every successful performance requires a certain degree of training and experience.”). *See also* Sornarajah, *supra* note 6, at 1985 (“[T]he best lawyers of the Third World thirst to join the institutions set up by the First World, and become betrayers of their own people. There must be early training in the universities of the Third World to prevent such tendencies.”).

45. *See, e.g.*, Eslava & Pahuja, *supra* note 15, at 204 (“Resistance and reform . . . come together in TWAIL to form a single process of destabilisation and renewal of international law’s history and operation.”); al Attar, *supra* note 1, at 176 (stating that Anghie, Chimni, and Mutua all meld TWAIL’s analytical pursuits “with its normative ambitions—resistance to international law”).

46. Some exceptions to this may be found in the Latin American critical tradition. In particular, the group Rethinking International Legal Education in Latin America (REDIAL—Repensando la Educación en Derecho Internacional en América Latina) is a network aimed at “reexamining the colonial past embedded in [international law], [and] interrogating ways and possibilities of transforming it in the present.” Amaya Alvez Marín et al., *Rethinking International Law Education in Latin America*, AFRONOMICSLAW (Sept. 17, 2020), <https://www.afronomicslaw.org/2020/09/17/rethinking-international-law-education-in-latin-america> [<https://perma.cc/AKL3-URLM>]. As noted *infra*, Gathii’s initiative in Afronomics also provides a hub for writing from scholars and practitioners of Africa and the Global South. *About*, AFRONOMICSLAW, <https://www.afronomicslaw.org/about> [<https://perma.cc/2VEY-4RR8>].

47. For example, Professor E. Tendayi Achiume served as the U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; Professor Michael

in some respect, to some beneficial outcomes or legal reforms for some actors or entities in the Third World. But so long as TWAIL as a whole articulates its aim as something as amorphous as “the emancipation of the Third World” through the remaking of international law and institutions, it is not clear why or how any of these individual endeavors should be understood as exemplifying TWAILian practice.<sup>48</sup>

The field where the limited examples of TWAIL practice have emerged—the soft law mechanisms of the international human rights system—may be seen to reflect some of the network’s unresolved ambivalences and the permissive function of the absence of core doctrinal and programmatic positions. TWAIL scholarship has been at its most scathing and compelling in critiquing the international human rights system. It has highlighted the cultural hegemony at the heart of International Human Rights Law (“IHRL”), including the way in which human rights norms have provided a cover for military and other interventions in the Global South. It has powerfully illustrated the ways in which IHRL sustains neo-imperial domination. Despite the centrality of TWAIL’s critique of IHRL to its founding ethos, TWAILers have and continue to participate in IHRL structures. Their engagement may be valuable from a reformist perspective. However, it is unclear how such participation aligns with TWAIL’s commitment to radical change. Nor is it clear how TWAIL seeks to distinguish itself, doctrinally and programmatically, from a broadly progressive, liberal international law approach, whose adherents also express deep concern for the well-being of the people of the Global South. Given the centrality of human rights law discourse to Western liberalism—and to the TWAILian critique of liberalism—it would be fair to expect TWAILers to articulate how participating in human rights bodies aligns with TWAIL’s founding promise: the transformation of the international legal system. For its part, that system is more than happy to claim the participation of such individuals as further evidence of its inclusiveness and liberalism.

Even if one is hopefully inclined to see these few examples as the *beginning* of a TWAIL practice, the effectiveness of TWAIL scholars participating in such governance mechanisms is hampered by the amorphous ambition of

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Fakhri is the U.N. Special Rapporteur on the Right to Food; and Professor Obiora C. Okafor serves as the U.N. Human Rights Council’s Independent Expert on Human Rights and International Solidarity.

48. Indeed, the fact that TWAILers herald the elevation of members of their own ranks to rapporteurship raises important questions about the movement’s plans and abilities to enact change: It is not an uncontroversial statement that the U.N. human rights treaty system is lacking when it comes to upholding the rights of Third World states or peoples. When TWAILers ascend to these positions, does this transform the work of a Special Rapporteur into an inherently TWAIL project? If so, how? What conceptual framework links their institutional positions to a movement in the service of “Third World peoples”? If it is simply the intellectual affiliation of the person holding that position, this begets further concerns—is all it takes to help the Third World to “care” about it?

TWAIL's current goals and the paucity of its developed tools.<sup>49</sup> Moreover, without answers to core questions regarding what TWAIL understands as a just international legal order, or the kinds of policymaking that should be appropriately seen as enacting TWAIL politics, the work of those individual TWAILers does not constitute the political action of *the movement*.

## 2. Instrumentalization Is a Trap

Another counterargument could be that TWAIL, on its own terms, is mostly focused on reshaping international law in the long-term, and that it is unfair to judge its performance at the twenty-five-year mark.<sup>50</sup> This argument might posit that liberal, international legalism has had at least two centuries to establish itself, and that it may take that long for TWAIL to displace the mainstream.<sup>51</sup> It might further posit that, in essence, the kinds of political and normative objectives TWAIL champions can be achieved only after fundamental changes are made to the way the international legal academy functions, whose voices are heard in international legal debates, what kinds of judges are seated in key positions in international tribunals, and the like. This argument might assert that international law remains tied to imperialism in ways that scholars and jurists have not fully appreciated and that as a consequence, TWAIL's top priority should be to continue exposing international law's complicity in the imperial project.<sup>52</sup> TWAIL, in this view, could be patiently biding its time until the revolution, at which point its transformative ambitions could be brought

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49. There seems to almost be a sense that a personal success for an individual TWAILer (often working in the West) is somehow automatically a victory for the "Third World" or the political objectives of TWAIL. This strikes me as a position that Western liberal elites would eagerly embrace.

50. An analogous argument is sometimes made in defense of the International Criminal Court. Under this view, the Court is still a "fledgling cause" or "beleaguered enterprise that needs all possible support, rather than nagging criticism, to achieve permanence in the international order." Samuel Moyn, *Anti-Impunity as Deflection of Argument*, in *ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA* 68, 79 (Karen Engle et al. eds., 2016).

51. This may explain why so many TWAIL scholars point to the quantity of TWAIL publications as somehow indicative of the movement's political value, if not success. See, e.g., Fakhri, *supra* note 1, at 8 (discussing the "growing number of TWAIL scholars who are working in a larger number of universities and contributing to a wider array of publications"). See generally James Thuo Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, *Symposium Issue Foreword*, 41 *HARV. INT'L L.J.* 263 (2000).

52. On how dominant approaches to methodology may specifically target TWAIL arguments in the historical vein, see Anne Orford et al., *Turning to History – A Political Project? The Politics of Engaging with the Past – An Interview with Anne Orford, Part I*, *VÖLKERRECHTSBLOG* (May 24, 2022), <https://voelkerrechtsblog.org/de/turning-to-history-a-political-project> [<https://perma.cc/S9DP-S4JX>] (on how "a consensus . . . around the question of what counts as the *proper* methods or the accepted rules for undertaking international legal work with a historical consciousness . . . would get in the way of having the kind of debate about the relation of international law to social, political, and economic transformation that I feel is vital and timely. . . . [M]ethodological gate-keeping tends to be applied more often to work that is disruptive or that challenges the status quo in some significant way . . . . [For example,] [t]hese methodological critiques were primarily being directed to the work of scholars who were part of the Third World Approaches to International Law (TWAIL) movement or who engaged with questions related to international law and empire").

to life.<sup>53</sup> A version of this argument might be that a true reconceptualization of the “building blocks” of international law<sup>54</sup> will require many decades of the “chorus of voices”<sup>55</sup> iterating and reiterating their scholarship until key elements of lawmaking, such as the doctrine of sources, can be remade.<sup>56</sup>

This *could* be an approach to shaping an academic network or community, one that claims its core purpose to be inviting scholars with very disparate normative or political views to focus on the co-constitution of law and imperialism. However, such a position is dissonant with what TWAIL currently claims to be doing as well as with its most potent recruitment tool for young scholars and international lawyers from the Global South. That is, TWAIL’s claim to be constructive and programmatic, and not only descriptive and critical, is currently central to the field’s story about itself.

A variation of this counterargument would be that I am misapprehending the proper objectives and goals of TWAIL by overstating the idea that it claims to both envision and enact.<sup>57</sup> This position might argue that TWAIL’s politics are focused on the politics of scholarship and the politics of knowledge-creation through legal-academic work. In other words—the argument might run—that while of course TWAIL authors make ambitious claims about emancipation or speaking for the lived experience of the Third World, the real core of the work that should be assessed is the productivity, generativity, and creativity of its academic output. This argument would not necessarily disagree with my evaluation of the current state of TWAIL. But it would posit that this current state of affairs is something to be celebrated because of the breadth of its analytical ambitions, rather than chastised for its failure to create an organized movement committed to a particular vision of political justice. That is, it may contend that the political ambitions of TWAIL are primarily focused on creating a nourishing, inclusive, and creative space for scholarship and scholars, and that TWAIL ought to be judged on the basis of its success in establishing this vibrant network.<sup>58</sup>

53. Cf. Moyn, *supra* note 50, at 76.

54. Independent International Legal Advocates, *Reconceptualizing International Law (Panel 1): The Case for Reconceptualizing International Law*, YOUTUBE (Dec. 7, 2020), [https://www.youtube.com/watch?v=\\_FWj-In3auF8](https://www.youtube.com/watch?v=_FWj-In3auF8) [<https://perma.cc/FU7F-WP7D>] (on rethinking the “building blocks in establishing the discipline [of international law]”).

55. Mickelson, *supra* note 6, at 360.

56. See *id.*

57. See Mutua, *supra* note 1, at 31–32; see also BIANCHI, *supra* note 5, at 224 (“The vision of a scholarship that can actually bring about the social and political change that is considered to be desirable is indeed self-empowering.”); *id.* at 225 (“[T]he way in which we look at the world *is* the world.”). But see Sunter, *supra* note 1, at 486–87 (“For Mutua, the intellectual ambitions of TWAIL cannot be severed from its political commitments. Nevertheless, while Mutua’s work is influential, his vision of TWAIL is by no means uncontested.”).

58. See, e.g., Usha Natarajan et al., *Introduction: TWAIL - On Praxis and the Intellectual*, 37 THIRD WORLD Q. 1946, 1946 (2016) (“For legal projects operating at the margins of the mainstream discipline, the TWAIL network enables solidarity and mutual support through a shared political commitment to advocating for the interests of the Global South. It endeavors to give voice to viewpoints systematically under-represented or silenced.”).



Such a counterargument essentially dismisses TWAIL's claims about its political, pragmatic, or instrumental—that is, achieving beneficial outcomes for the Third World—goals as necessary academic puffery; that, essentially, all scholars end their work with grandiose claims about impact, and I am taking these claims too seriously. My sense is that this is both an undercutting of TWAIL's promise, and that it diminishes the moral responsibility that arises when scholars in one place claim to be serving people and communities in another place through their expertise. My intuition is that there are many young international lawyers who take TWAIL's claims about itself on their own terms and have corresponding expectations about what TWAIL is promising to deliver.

### 3. *The Scholarship Is the Practice*

Perhaps the most radical response to my argument and assessment is that TWAIL *is* delivering on practice and politics, and that I am fundamentally misunderstanding what these ideas mean. More recent TWAIL scholarship, in what reads to me as an implicit turn away from the founders of the movement, appears to suggest that the very presence of TWAIL scholars, the act of engaging in scholarship, the existence of non-White bodies in academic spaces, the undertaking of radical or reparative reading, the convening of TWAIL conferences, is itself the "praxis."<sup>59</sup> According to this logic, the choices and speech acts of individual TWAIL scholars create a new politics of international law, reshape power, and thereby purportedly serve the Third World. These TWAILers might argue that the work of decolonizing syllabi or undertaking new forms of reading is more radical than seeking to recreate law or legal institutions.

I find this counterargument effective if and to the extent that it reflects a reframing of TWAIL's ultimate objectives. If TWAIL no longer shares the political commitments of its founders, then much of what follows may be irrelevant. Yet if TWAILers' core concern is now focused on epistemology and legal pedagogy, they can no longer legitimately claim to "stand on the shoulders of" anti-colonial leaders or use language like "resistance" in the way that term is commonly understood. This understanding of "praxis," if it now represents TWAIL's vision of its approach, should be clearly articulated and defended within and outside the field.

### 4. *Protect Critique from Criticism*

Another counterargument might accept some of my observations, but it would submit that it is wrong to articulate them as I have here, because it

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59. Cf. BIANCHI, *supra* note 5, at 225.

undermines a burgeoning unified front which exists “on the periphery”<sup>60</sup> of legal scholarship.<sup>61</sup> Or, they might contend that it is impossible to answer critiques about TWAIL’s political agenda or its goals because TWAIL is an “inclusive” movement, one in which there are no prerequisites to membership. For these critics, it is, first, impossible to critique TWAIL because of the welcoming “big tent” nature of the movement’s inclusiveness. Second, it is unwise and disloyal to one’s critical fellow travelers to do so.

Still, other defenders of TWAIL may contend that TWAIL *has* no “agenda,” precisely because by definition it cannot be associated with a totalizing political framework.<sup>62</sup> A person with this view might quietly agree with me that there are actually significant disagreements concerning vision, lawyering, and ideas of justice, as well as what it means to be a scholar in the world within the “left.” Yet they would argue that it is more important that all these diverging views band together and present themselves as a unified whole to bolster the sense that the critical/left approach has real numbers.<sup>63</sup> Some of the most moving accounts in TWAIL scholarship are about the kinds of networks, friendships, and bonds that have been formed in TWAIL conferences and workshops.<sup>64</sup>

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60. See David Kennedy, *The TWAIL Conference: Keynote Address*, 9 INT’L. CMTY. L. REV. 333, 333 (2007) (“Reflecting on the legacy and future of TWAIL is also an opportunity to say a few words about the scholarly project itself, the endeavor to think, to imagine, and to write a new international law. And to do so as peripheral intellectuals – or as intellectuals from the periphery.”); Srinivas Burra, *Teaching Critical International Law: Reflections from the Periphery*, TWAILR (Mar. 12, 2021), <https://twailr.com/teaching-critical-international-law-reflections-from-the-periphery> [<https://perma.cc/ZF6G-5PBV>].

61. This argument might reiterate the claim often heard within certain circles that it is impossible for “critical” people to get jobs—that the mainstream is taking names and exacting vengeance on the nonbelievers.

62. See al Attar, *supra* note 1, at 163 (introducing the central debates around and criticisms of TWAIL, characterizing “TWAIL’s place in legal theory” as “ambiguous,” and describing TWAIL’s “[self-]description” as a theory, method, sensibility, movement, and, as per the moniker, approach...). On the self-described sweeping and politically transformative goals of TWAIL, see Karin Mickelson & Usha Natarajan, *Reflections on Rhetoric and Rage: Bandung and Environmental Injustice*, in *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* 465, 480 (Luis Eslava et al. eds., 2017) (noting the need to “destabilize, provincialize, and remake the disciplinary mainstream”); Mohsen al Attar & Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian Reconstruction*, 31 *THIRD WORLD Q.* 347, 347 (2010) (highlighting a “cohesive counter-vision of international law” that could help “push forward a long-overdue reform of the international legal regime”). On the dogged refusal to admit any assessment exercises concerning the success or failure of TWAIL’s achievement of its self-avowed goals, see generally Fakhri, *supra* note 1. See also Okafor, *supra* note 23, at 176 (rejecting the presence of any “complete and compulsory liturgy” directing TWAIL’s “engagement with the international order”).

63. American Society of International Law, *2020 Grotius Lecture: The Promise of International Law: A Third World View*, YOUTUBE (July 6, 2020), [www.youtube.com/watch?v=neGcxJgRogE](http://www.youtube.com/watch?v=neGcxJgRogE) [<https://perma.cc/2A9R-SKCS>] (James Thuo Gathii on the “remarkable energy” and “renaissance of third world scholarship in international law . . . [A] bibliography of TWAIL scholarship that I have prepared . . . shows a steady increase in scholarly production from 1996 to 2019”).

64. Mickelson, *supra* note 18, at 27 (“The first TWAIL II gathering in 1997 . . . helped me feel that I was not alone, that I was part of a community that shared my dreams, fears and hopes. Since that time, more and more scholars and activists have come to be part of the TWAIL network. At TWAIL Singapore, I urged the participants to take advantage of the opportunity to build community. To meet, if they had not already done so; to renew old friendships and deepen acquaintanceships.”); Natarajan et al., *supra* note 58, at 1947 (“TWAIL conferences have attempted to be opportunities for building useful links between

There is no question that the kinds of choices I am calling for here, and the kind of open contestation within the critical/left community that I think would be important, would create divisions. If we take the stakes of TWAIL seriously, though, we ought to welcome these divisions.

### C. Explaining Failures

For those readers who share my sense that, until now, TWAIL has not sufficiently articulated a vision of political objectives and corresponding concrete proposals, in this section I explore four possible explanations for why this is the case.

#### 1. The Missing Third World State

The state is the single most important actor in current international law. States make and enact law, wage war, create treaties, and sit at the tables where law is debated and upheld. Because of this centrality, it is not possible to envision or enact a new international law in service of the Global South without a robust theory of the state (or its replacement). Such a theory could involve a complete rejection of contemporary norms of state sovereignty, centering groups and collectives other than the current 193 members of the United Nations. It could be, conversely, a vision that seeks to upend the norms of global institutions like the United Nations and its Security Council, developing a system to vest true power in Global South states in those fora. It could also elucidate a return to earlier visions of radical sovereign agency.<sup>65</sup> In order for TWAIL to stand a chance at reinventing international law, it must have an answer for the future role of the Third World state.

The current TWAIL movement, however, has largely left behind the Third World state as a vehicle for international law development or action.<sup>66</sup>

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like-minded networks and resources in the global North with those in Africa, Asia, and Latin America in mutually beneficial ways.”. See generally Fakhri, *supra* note 1.

65. See, e.g., Samuel Moyn, *Coda*, in *INVENTING THE THIRD WORLD: IN SEARCH FOR FREEDOM FOR THE POSTWAR GLOBAL SOUTH* 261, 265 (Gyan Prakash & Jeremy Adelman eds., 2023) (describing the rise and fall of the Third World as a “cautionary tale and object lesson for the future of global justice”); Göran Therborn, *The World and the Left*, 137 *NEW LEFT REV.* (2022), <https://newleftreview.org/issues/ii137/articles/goran-therborn-the-world-and-the-left> [<https://perma.cc/2AVX-E34F>]; Mark T. Berger, *The End of the “Third World”?*, 15 *THIRD WORLD Q.* 257, 257–58 (1994).

66. See, e.g., Mutua, *supra* note 1, at 37 (“The project of TWAIL advocates the full representivity of all voices, particularly those of non-state . . . poor who constitute the majority in the Third World”; moreover, TWAIL both opposes “the complicity of Third World states in the international legal and economic order” and “has a basic interest in the internal reconstruction and genuine democratization of Third World states.”); RAJAGOPAL, *supra* note 8, at 12 (“During the last couple of decades, it has become increasingly hard to place much hope in the capacity of Third World states to act as real guarantors of the democratic aspirations of the masses in the Third World.”); Eslava & Pahuja, *supra* note 15, at 220–21 (proposing local actions as “proper acts of resistance to the idea(l) of the international and its materialisation on the ground”); Usha Natarajan, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 *OR. REV. INT’L L.* 177, 185 (2012) (noting that “[m]ore recent TWAIL scholarship also proclaimed a shift in focus to the actualized experience of Third World peoples rather than Third World states”); Gathii, *supra* note 2, at 39 (“Many TWAIL-ers are also critical of many third world governments.”);

TWAILers frame this absence as one of the key differences in the periodization between the anti-colonial international lawyers of the nineteenth and twentieth centuries and the TWAIL movement.<sup>67</sup>

TWAIL scholarship reflects an ongoing conceptual ambivalence regarding how to understand and evaluate the state as the main political unit of international law.<sup>68</sup> To date, the movement has failed both (i) to articulate a theory on how or under what conditions TWAILers might work with or through the Third World state,<sup>69</sup> and (ii) to replace the state with another constituency or political collective that the movement's efforts can, should, and do champion beyond "Third World peoples." Instead, the analysis tends to begin and end with the twin observations that sovereignty and statehood are themselves European innovations founded on colonial predation and that the Global South state as a fact in the world has demonstrated itself to be rapacious, undemocratic, corrupt, and abusive of its own people. This usually takes readers in a few directions: the "lived experience" notion that TWAIL should be centered on the actual realities of individuals in the Third World;<sup>70</sup> that it should be focused on "social movements" in the Global South as the authentic voices of the wants and desires of "Third World peoples;" or that TWAIL is about creating some kind of new political and social community beyond the state—all without

Alexander Gilder, *Human Security, TWAIL, and the Importance of Self-Reflection in Our Own Scholarship*, 54 INT'L L. & POL. 1, 4, 9–10 (2021) (arguing that a human security approach should prioritize the individual, not the state, and should refrain from advancing "international law as a system created by states, for states"); accord Anghie & Chimni, *supra* note 8, at 186 ("[I]t is the actualized experiences of [Third World] peoples, and not merely that of the States that represent them in international fora, that is the interpretive prism through which rules of international law are to be evaluated. This is because . . . Third World states often act in ways that are against the interests of their peoples."); Kennedy, *supra* note 60, at 335 (2007) ("For some TWAILers, the third world state is part of the problem—a kleptocratic remnant of colonial rule and merchant capitalism."); Anghie, *supra* note 4, at 39 (commenting on the "failure of the post-colonial state in many third world countries").

67. See, e.g., Anghie & Chimni, *supra* note 8, at 190 (arguing that while TWAIL I viewed the "task of intellectuals . . . as supporting [the Third World] state in its nation building task," TWAIL II scholars "have developed powerful critiques of the Third World nation-state," whose "great projects of 'development' and nation building . . . worked to the disadvantage of Third World peoples").

68. See *id.* at 191 ("[I]t is sometimes through supporting the Third World state and sometimes by critiquing it that the interests of Third World peoples may be advanced.")

69. See Muhammad Azeem, *Theoretical Challenges to TWAIL with the Rise of China: Labor Conditions Under Chinese Investment in Pakistan*, 20 OR. REV. INT'L L. 395, 414 (2018) ("[A]n analysis of the state, especially the post-colonial state and Third World state, is missing in Chimni's work as well as in almost all the TWAIL literature.")

70. Anghie & Chimni, *supra* note 8, at 186 ("For TWAIL scholars, international law makes sense only in the context of the lived history of the peoples of the Third World."); Mickelson, *supra* note 18, at 21 (noting "TWAIL's stated commitment to prioritizing the lived experiences of Third World peoples"); *id.* at 27 ("For those who self-identify as part of TWAIL, a sense of solidarity with Third World peoples is both an inspiration and a vital element of our work."); Natarajan, *supra* note 16, at 217; Natarajan et al., *supra* note 58, at 1946 (arguing that TWAIL interventions seek to "decolonise the lived realities of the peoples of the Global South").

providing a concrete understanding of what any of that might look like or how we might get there.

Within the context of international legal doctrine and institutions, this failure of TWAILers to create a vessel for their "reimagining" of international law is a fatal one. Rejecting or critiquing the ubiquity of the state as the dominant political formation<sup>71</sup>—or the Third World state as a vehicle for liberation<sup>72</sup>—are potential starting points. But the fact remains that, given the state's central role as an actor in international law, TWAIL cannot move forward without formulating an alternative for the role of the state, one which mobilizes TWAIL's vision for a shift in the power structures of international law. Without such a plan, TWAIL will always be stuck only "imagining" international law's potential and never realizing it.

## 2. *No Theory of Legitimate Political Violence*

Notably for a movement that purports to be rooted in the anti-colonial era, TWAIL seems to assume that violence is not a legitimate option for the Global South<sup>73</sup>—that is, in those rare instances when TWAIL has something to say

71. See, e.g., Moyn, *supra* note 65, at 263–65; Matthew Craven & Rose Parfitt, *Statehood, Self-Determination, and Recognition*, in *INTERNATIONAL LAW* 221 (Malcolm D. Evans ed., 5th ed. 2018) ("As the pressure on the world's physical 'resources' continues to mount, however, the 'perfectability' of the State is thrown increasingly into doubt."); Anghie, *supra* note 4, at 108 ("Transformation in the international legal order is still driven principally by states . . . TWAIL II scholars are sceptical of the state itself.")

72. See, e.g., Gathii, *supra* note 2, at 41 ("TWAIL approaches have the additional utility of simultaneously presenting opportunities to examine how the mobilization of concepts of international law, such as sovereignty of Third World states, have served to deify state power at the expense of individual rights and freedoms."); Anthony Anghie, *Towards a Postcolonial International Law*, in *CRITICAL INTERNATIONAL LAW: POSTREALISM, POSTCOLONIALISM, AND TRANSNATIONALISM* 123, 140 (2014) ("What is required then of postcolonialism is an analysis that identifies all the many ways in which the peoples of Third World countries may be oppressed—whether this be through classic or modern forms imperialism, or the depredations of the postcolonial state exorbitantly and vociferously proclaiming its sovereignty and its nationalist credentials."); Anghie & Chimni, *supra* note 8, at 83 ("TWAIL II scholars have examined, on one hand, how the great projects of 'development' and nation-building promoted by international law and institutions and embraced in some form by Third World worked to the disadvantage of Third World peoples. On the other, they have examined whether and how international human rights norms may be used to protect Third World peoples against the state and other international actors."); Anghie, *supra* note 4, at 43 ("The violence of the post-colonial state has been an ongoing concern for TWAIL scholars. Indeed, that violence could be seen as another form of colonial continuity, the dictatorial leaders of the post-colonial state exercising, and indeed expanding on, the powers developed by the colonial state. In many developing countries, the post-colonial state became the vehicle by which particular ethnic groups fought to expand their power over minorities.").

73. See B.S. Chimni, *The Past, Present, and Future of International Law: A Critical Third World Perspective*, 8 MELB. J. INT'L L. 499, 511 (2007) (among the "four critical tasks" facing international lawyers "is to critique all forms of violence, be it domestic or international violence, or violence against humans or nature"); Gathii, *supra* note 2, at 46 ("[W]hile TWAILers would be the first to critique atrocities committed against third world peoples, they would not necessarily endorse military action as a corrective choice of means."); accord Tracy-Lynn Humby, *Evaluating the Value of TWAIL, Environmental Justice, and Decolonization Discourses as Framing Lenses for International Environmental Law*, 26 TRANSNAT'L & CONTEMP. PROBS. 317, 323 (2017) ("TWAIL scholars do not explicitly advocate violence as a form of resistance.").

about political violence at all. Indeed, other than predictable critiques of Western-led military interventions in the Global South, there is little to nothing written in TWAIL about how communities in the Global South might legally justify the use of violence in the service of anti-imperialism.<sup>74</sup>

It is perhaps worth reminding ourselves here that there is a large amount of mainstream international law scholarship that promotes and supports violence, utilizing international legal methodologies and expertise to do so. Scholarship in favor of or facilitating the establishment of the interventionist Responsibility to Protect (“R2P”), international legal justifications for humanitarian intervention, “offensive” peacekeeping, and expansive approaches to the right of self-defense are all forms of scholarship in the service of organized violence and bloodshed. That violence may be, in the eyes of its authors, humane, justified, or moral, but it is legal scholarship in the service of killing and destruction nonetheless. These international lawyers are all studying, exploring, and writing about systems that use lethal force in order to establish and enact particular political ideas. While there is a huge amount of TWAIL ink spilled in analyzing these scholars,<sup>75</sup> including pointing out their hypocrisies or paradoxes, there is no stream of TWAIL writing that focuses on how resistance movements today might break the law, attack particular targets, and instrumentalize international legal concepts to bolster their actions. TWAIL’s silence here is even more surprising given that, around the world, there are many armed movements that have at least facially serious claims that their actions are intended to fight against imperial domination.<sup>76</sup>

My argument here is not that these groups *necessarily* represent authentic anti-imperialist agendas (we would need to first theorize anti-imperialism to be able to make such a judgment on TWAIL grounds), or that armed political violence is necessarily a good idea in any given case. Rather, I mean to point out that the fact that this issue does not seem to be on the agenda for TWAIL

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74. I have found no evidence that the movement as a whole has adopted Chimni’s adherence to non-violence, nor any thick theoretical argument for *why* TWAIL should espouse non-violence at a global level. For a critique of this ambivalence, see John D. Haskell, *TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law*, CAN. J.L. & JURIS. 383, 405 (2014) (arguing that Chimni “specifically denounces any movement that is either ‘dogmatic’ or ‘violent’ without . . . addressing the historical reality that many instances of progressive reform have only operated out of necessity through, at times, violent techniques of resistance that, like dogmatism, ultimately is judged through the eye of the beholder, and more often the victor (e.g., one person’s guerilla soldier is another’s freedom fighter)”).

75. See generally Vijay Kishor Tiwari, *An Appraisal of Responsibility to Protect as an Evolving Norm in International Law: A TWAIL Critique*, 5 INT’L J.L. MGMT. & HUMANS. 1587 (2022); Ntina Tzouvala, *TWAIL and the “Unable or Unwilling” Doctrine: Continuities and Ruptures*, 109 AJIL UNBOUND 266 (2016).

76. TWAIL has yet to engage seriously with the ideas, for example, of the Moro Islamic Liberation Front, the Ejército de Liberación Nacional (ELN), the Houthis, and other armed entities that espouse anti-imperialism as part of their platforms. While it is far from required that TWAIL, *qua* movement, *should* support political violence, if TWAIL claims to be inspired by figures such as Césaire, Fanon, Cabral, and others, it is a conspicuous absence that the movement has little to nothing to say about whether international legal arguments should—or should not—be developed to justify political violence against unjust coercion and control.

is telling about the current state of the field's commitments.<sup>77</sup> Can and should TWAIL develop an international law of armed struggle and violent resistance? Perhaps the answer is that, today, TWAIL supports an entirely non-violent or even pacifist approach to international affairs. This may be true, but TWAIL has yet to articulate such a credo for the movement or justify why it makes sense in light of the many forms of brutal subjugation that the field seeks to uncover.

### 3. *Can the Subaltern's Second Cousin Speak for the Subaltern?*

A third element contributing to TWAIL's failures concerns a TWAIL mode of scholarly engagement that largely ventriloquizes people of the Global South.<sup>78</sup>

The vast majority of TWAIL scholarship is produced and published in the Global North.<sup>79</sup> Virtually all TWAIL gatherings have been organized and funded by Global North institutions, even in the rare event that they have physically taken place in the Global South.<sup>80</sup> While this fact is often apologetically mentioned in a single line in an article as an aside ("we wish things were different . . ."), it is rarely a sustained move of internal critique or self-reflection.

Many TWAIL scholars left their countries of origin in the Global South to attend elite graduate programs in the Global North, where they remained in academic posts. Meanwhile, an entire generation has been born and become adults in the Global South. This diasporic community has access to information

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77. Some scholars that I have spoken with have suggested that the reason for the absence are the profound physical, legal, and security risks that would face international legal scholars if they undertook the type of work that I suggest here. Obviously, like many political movements, TWAIL would need to assess these risks and utilize labor sharing in determining which scholars should put forward these kinds of arguments.

78. See Adolph Reed, Jr., "Let Me Go Get My Big White Man": *The Clientelist Foundation of Contemporary Antiracist Politics*, NONSITE.ORG (May 11, 2022), <https://nonsite.org/let-me-go-get-my-big-white-man> [<https://perma.cc/QSE5-CS49>] (describing the "ventriloquization" of a "largely disfranchised—and thus civically mute . . . black American population" by "racial brokers").

79. See Natarajan et al., *supra* note 58, at 1953 ("[W]hile most of the [Cairo] Conference participants originate from the South, more than half are based in institutions in the North."); Gathii, *supra* note 2, at 35 ("TWAIL, as a recent scholarly project, emanated from the efforts of third world scholars based primarily in North America, but it has joined existing streams of critical international law literatures from the geographical third world. Hence, TWAIL's novelty does not lie so much in heralding a critical third world voice, but rather in intervening within the dominant discourses of international law, particularly within North America, Australia and Europe."); Srinivas Burra, *TWAIL's Others: A Caste Critique of TWAILers and Their Field Analysis*, 33 WINDSOR Y.B. ACCESS JUST. 111, 113 (2016) (arguing that "while emphasizing the dominance of European and North American voices [in] the scholarship, certain third world voices and issues are pushed into oblivion," which "leads [one to] suspicion of [the] emancipatory potential of the TWAIL scholarship despite its well-intentioned challenge to . . . European and North American voices").

80. See Chimni, *supra* note 3, at 15 ("Academic institutions of the North, with their prestige and power, play a key role in [shaping the culture of international law]. These institutions, in association with State agencies, greatly influence the global agenda of research. Third world students of international law tend to take their cue from books and journals published in the North. From reading these they make up their minds as to what is worth doing and what is not? Who are good scholars and who are bad, or, which is the same, what are the standards by which scholarship is to be assessed?"). On the outsized role of Harvard Law School in particular, see al Attar, *supra* note 1, at 164.

and experienced world events in ways that are markedly different than a generation ago. Those who make up what one scholar describes as the “detritus of empire”<sup>81</sup> have dominated the field. To put it bluntly: TWAIL is largely a Western diaspora movement.

TWAIL’s composition in this sense is particularly awkward for a movement that places so much emphasis on its representational authority and on the assertion that it provides a “voice” for the Third World.<sup>82</sup> It is all the more concerning when that movement purports to be *the* disciplinary space from which one can understand not only the impact of international law *on* the Third World but also the present-day demands *of* the Third World from international law and legal institutions.<sup>83</sup>

Despite TWAIL’s constant references to the voices and lived experiences of Global South people to the movement, TWAIL typically fails to provide any credible account as to whom these terms represent. Indeed, assertions concerning the lived experiences of Global South people or their voices frequently lack any citations. TWAIL authors regularly fail to describe—under any scholarly methodology—whose lives, whose experiences, and whose voices they are purporting to represent or serve.

TWAIL tends to deal with this deficiency in a number of ways. First, TWAIL texts often lump together those living in the West and those in the Global South as, in the words of two leading scholars, “children of the postcolony.”<sup>84</sup> Second, recent TWAIL scholarship seems to suggest that being of the Third

81. PRIYA SATIA, *TIME’S MONSTER: HOW HISTORY MAKES HISTORY* 3 (2020).

82. See, e.g., Mickelson, *supra* note 6, at 360 (stressing that TWAIL “speaks of the Third World not as a bloc, but as a distinctive voice, or, more accurately, as a chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns.”); Sunter, *supra* note 1, at 478 (“TWAIL offers the hope of incorporating subaltern voices from the South into this discourse. TWAIL represents more than a theoretical commitment to critical deconstruction; it also represents marginalized world-views.”); Natarajan et al., *supra* note 58, at 1946 (“[T]he TWAIL network . . . endeavours to give voice to viewpoints systemically underrepresented or silenced.”); Opeoluwa Adetoro Badaru, *Examining the Utility of Third World Approaches to International Law for International Human Rights Law*, 10 INT’L CMTY. L. REV. 379, 381 (2008) (“[T]here is a permeating concern by TWAIL II scholars to identify and give voice to the marginalised people within Third World states – women, peasants, workers, minorities . . .”).

83. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 312 (2005) (“Pioneering Third World jurists have attempted to transform the old, Eurocentric, international law into an international law responsive to the needs, the interests and the histories of the developing world.”); Okafor, *supra* note 23, at 190 (“[W]ithout taking third-world peoples (especially their broadly shared histories, experiences, situations, and yearnings) much more seriously than has hitherto been the case, international lawyers are not likely to succeed in imagining—and what is more necessary, in helping to create—a much more equal, fair, and just world.”); Anghie & Chimni, *supra* note 8, at 186 (“TWAIL scholars seek to transform international law from a language of oppression to a language of emancipation—a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples.”); Mickelson, *supra* note 6, at 408 (discussing avenues to “mak[e] the system more responsive to the needs of States who have hitherto been excluded.”); al Attar & Miller, *supra* note 62, at 349 (“TWAIL scholars have compiled an impressive compendium of critical scholarship that not only undermines the liberal creation myth of *jus gentium* but also questions the legitimacy of the current international legal order.”).

84. Eslava & Pahuja, *supra* note 15, at 197 (“Born almost entirely in ex-colonies or part of their diasporas, TWAIL scholars are children of the postcolony.”).



World is a "state of mind" that is more about how one identifies, or with whom one creates bonds of solidarity, than about where one is born or where one lives and works.<sup>85</sup> Third, and more frequently, TWAIL literature simply ignores the problems inherent to ventriloquizing, including issues of credibility, representation, and authority to speak for others. This leaves the reader to wonder about the bases for many of TWAIL's claims regarding what is good or bad for "Third World peoples."

Let me first get out of the way the obvious fact that this is a deeply liberal, Western move. The idea of speaking for and on behalf of the people of the Global South, or telling the Global South what is good for them from the outside, is central to what many of us find troubling with liberal internationalism (or much of IHRL, for that matter). If TWAIL claims to speak on behalf of *others*, others located elsewhere, and if TWAIL garners much of its status and authority from this claim, for my purposes it matters less if this can be labeled liberal and more if this way of talking about people is defensible. The way TWAIL talks about "Third World peoples" matters not only because it is dubious as a description of reality but also because it takes up scholarly space that arguably should not belong, at least so extensively, to diaspora scholars and those working and living in the West.<sup>86</sup> In a scholarly movement that calls for attending to both the material conditions of the Global South and to the way that ideas and arguments impact the Global South, the current silence about this issue allows for and celebrates a mischaracterization of which people the scholarship and scholarly debates are in fact centering.

I assume that many Global North TWAIL scholars who engage in the practice of speaking for the Third World would find it problematic for there to be a panel regarding Black Lives Matter with no Black people speaking, or for a journal to publish a volume or host a conference on "Queer Perspectives on International Law" with no Queer-identifying people invited to contribute. That is, they might have some fundamental notion that even the most deeply

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85. See, e.g., Okafor, *supra* note 23, at 174 ("What is important is the existence of a group of states and populations that have tended to *self-identify* as such—coalescing around a historical and continuing experience of subordination at the global level that they feel they share—not the existence and validity of an unproblematic monolithic third-world category. That much is undeniable."); see *id.* at 175 ("[T]he expression is not *inflexibly* moored to a fixed geographic space – but rather to a self-expressed and shared sense of subordination within the global system."); Sen, *supra* note 27, at 89 ("For the purposes of TWAIL, Third World is a space that generates/informs approaches in opposition to continued hegemony in international law.")

86. Two TWAIL initiatives—James Gathii's Afronomicslaw Blog, which aims to "amplify the voices and issues that are not often part of the [international economic law and public international law] conversation," and the TWAIL Review, which is committed to "fostering a more inclusive, creative, and productive engagement with international law through thinking by and with the sensibilities of the Global South"—may constitute recent attempts from within the movement to address this relative dearth of representation of TWAILers living and working in the Global South. *About*, *supra* note 46; *Founding Statement*, THIRD WORLD APPROACHES TO INT'L L. REV., <https://twail.com/about/founding-statement/> [<https://perma.cc/2JQR-3PMB>].

held feelings of solidarity are not the same as genuine political representation and membership in a community.

My sense is that one reason that the movement does not address this issue is the complex identities and anxieties of the diaspora. The diasporic identity is in some ways not comparable to gender or race. It is, as many authors have discussed,<sup>87</sup> a kind of not-being in any place—a not-existing. Particularly in the early twenty-first century, with rising racism, Islamophobia, and militant white ethno-nationalism in many countries in the Global North, it is easy for members of the diaspora to over-identify with those in the Global South, whether from their countries of origin or more generally. Diaspora scholars are subject to any number of indignities (and worse) while living in the Global North. It is easy to slip into thinking that this is the same lived experience as the kinds of communities one writes about in one's scholarship.

My point here is that, over time, even those who spent their formative years in the Global South, but moved away since, often become less connected, less representative of, or less qualified to speak for, the views and perspectives of the Global South. Whatever passports they hold, they are less and less living members of that political community as they become members of a different—Western—political community. Time and distance may create distorted visions of the “Third World” one left behind decades ago. Again, the point is *not* that there is a “real” person from the Third World and a fake one, or a “true” voice and a pretend one. The point is that the limited engagement with and participation by those living and working in the Global South in contemporary TWAIL—especially at its leadership level—ought to be more openly discussed.

TWAIL claims to be a kind of scholastically informed movement lawyering but with neither a political movement nor much lawyering. Movement scholars in various disciplines—such as labor, criminal law, and political economy<sup>88</sup>—are

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87. See, e.g., EDWARD SAID, REFLECTIONS ON EXILE AND OTHER ESSAYS, *Introduction* (2000) (“But it would be disingenuous not to admit that the Palestinian experience seems retrospectively to have predisposed my own critical attention in favor of unaccommodated, essentially expatriate or diasporic forms of existence, those destined to remain at some distance from the solid resting-place that is embodied in repatriation.”); Dalia Al-Dujaili, *The Road to Nowhere: A Zine Chronicling Second-Generation Immigrant Experiences and Cultural Identities*, AZEEMA (Dec. 9, 2020), <https://www.azeemamag.com/stories/the-road-to-nowhere> [<https://perma.cc/RC4Z-WB8Q>] (“But we also all have the same feelings of uncertainty, alienation, and confusion. We all feel torn between two worlds.”); Padmini Sahu, *From Alienation to Assimilation: Exploring Jhumpa Lahiri’s The Namesake*, 6 CREATIVE LAUNCHER 141, 142 (2001) (“Diaspora evokes the specific trauma of human displacement. To be in diasporas (*dia* means through and *sporno* means scattered community) means to be in an unbelonging room.”). See generally William Safran, *Diasporas in Modern Societies: Myths of Homeland and Return*, 1 DIASPORA 83 (1991).

88. See, e.g., Derecka Purnell, *How I Became a Police Abolitionist*, THE ATLANTIC (Jul. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540> [<https://perma.cc/F7JT-FRC6>] (“I met, studied, and struggled alongside students and movement lawyers who explained the power and the purpose of the prison-industrial complex through an abolitionist framework.”). See generally Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. 90 (2020); Sukti Dhital,

working on critical analysis, illumination, and programmatic innovation *in community with* people whom they are writing about. There is a built-in check on their claims, born from constantly being in conversation with the political communities that they claim to be serving. But this is rarely the case when writing about the "Third World" or about international law as an abstract idea.<sup>89</sup> Because the "emancipation" of "Third World peoples" is so often taken as a stock phrase in TWAIL scholarship, it is rarely subject to serious critique and almost never subject to the views of the people that TWAIL claims to speak on behalf of or that TWAIL claims to want to "emancipate." The best—but still insufficient—stand-ins, in many cases, are representatives from the diaspora. Until we acknowledge and address the uncomfortable current realities of the makeup of the TWAIL movement and its claims, there is arguably no possibility for genuine solidarity or a sufficiently meaningful approach to representation or leadership.<sup>90</sup>

I will use myself as an example to demonstrate what I mean by diasporic distance. I am Iranian and American. I hold an Iranian passport and an American one. My ancestors are all Iranian. My first language was Farsi. I speak the language with my parents and my children. I have many family members who live in Iran; I have family members who fled; and I have many family members who sought voluntarily to migrate and were able to do so before this became functionally impossible. It is certainly true that I have had experience with how Westerners, white people, and scholars on the Left and the Right have interacted with my Iranian-ness. I have frequently been asked—by well-meaning Westerners on the Right, by some in the mainstream, *and* by members of the critical Left—to speak to the realities of Iranians, Middle Easterners, Muslims, and women in Islam. I have been asked at academic events whether I have a male escort and whether my father approves of how much I travel by myself. I have been told that I am "a credit to my people." I have been asked to scrap

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Lam Nguyen Ho & Margaret Satterthwaite, *Foreword: Critical Legal Empowerment*, 97 N.Y.U. L. REV. 1547 (2022); HAUWA IBRAHIM, SEVEN STRATEGIES FOR ACHIEVING JUSTICE IN SHARIA COURTS (2013).

89. TWAIL scholarship sometimes recognizes that the "Third World" moniker is unspecific, yet, in doing so, contends that it is a politically useful concept concerning a group of States and peoples, nonetheless. See, e.g., Okafor, *supra* note 23, at 174 (responding to criticism concerning the uncritical, monolithic nature of the "Third World" umbrella). The point is "not the existence and validity of an unproblematic and monolithic third-world category." *Id.* Rather, the point is "the existence of a group of states and populations that have tended to *self-identify* as such—coalescing around a historical and continuing experience of subordination at the global level that they feel they share . . ." See *id.*

90. So, it may be true that there is tactical political energy to be gained from claiming that "we are all developing countries now," Anna Saunders & Sundhya Pahuja, *Rival Worlds and the Place of the Corporation in International Law*, in *THE BATTLE FOR INTERNATIONAL LAW: SOUTH-NORTH PERSPECTIVES ON THE DECOLONIZATION ERA 172* (2019) (quoting Kerry Rittich), or "we are all the third world" (or as one student of Middle Eastern origin told me, after indicating that they have never traveled to the region: "we are all victims of colonization"). It is an assertion that allows one to make claims that draw legitimacy from being rooted in some kind of empirics or representation, but without providing the empirics to support the claim or without delineating who precisely is being represented.

my planned presentation in order to “tell the story of how I came to be sitting there.” I have been told that if more people were like me, there would be more hope for the Middle East. Many people have stories like this. There is no doubt that my “everyday life” is “governed” in ways that relate to my Iranian-ness, and there is also no doubt that imperial forces played a role in my being brutally disjointed from Iran (not least, the CIA’s involvement in the 1953 coup, the subsequent revolution, and ongoing sanctions).

Yet while my own lived experience may be *affected* by my Iranian-ness as I live in the West, my lived experience is *not* the lived experience of those living today in Iran. Iranian legal professionals and scholars cannot access the basic scholarly databases that I use daily. They cannot easily travel to conferences other than those in countries such as Zimbabwe, Venezuela, and Occupied Cyprus, as there is a very short list of countries that allow Iranians to travel without a visa.<sup>91</sup> They cannot jump on a Zoom meeting.<sup>92</sup> They cannot take on internships with international organizations.<sup>93</sup> They cannot accept invitations to speak on panels (if they even receive them). They cannot even watch the panel afterwards on YouTube.<sup>94</sup> Even publishing their work often involves the journal undertaking a legal review to determine if the editors or publisher would be violating sanctions regulations by publishing work flowing from the Islamic Republic.

The idea that I, from however well-meaning a place, would be in a position to speak for Iranians’ views or represent their perspectives on international law *merely because we share a nationality* is, in some very basic way, preposterous. It is as though my Iranian body somehow allows me to *feel* the lived experiences of those in Tehran or Mashhad.<sup>95</sup> This does not mean that I do not have a right to speak about my own lived experiences,<sup>96</sup> but it does mean that I have the responsibility to be exceptionally careful about how the West is more than willing to have me take the seat of “representation.” I am, in many ways, presumed to be a “palatable,” user-friendly Muslim who is employed by a wealthy, elite academic

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91. Iran Passport Visa Free Countries List 2023, VISAINDEX.COM, <https://visaindex.com/visa-requirement/iran-passport-visa-free-countries-list> [https://perma.cc/R9AH-BTME] (last visited Nov. 11, 2023).

92. *Restricted Countries or Regions: Zoom Support*, ZOOM, <https://support.zoom.us/hc/en-us/articles/203806119-Restricted-countries-or-regions> [https://perma.cc/DEM8-SEGF] (last visited Nov. 14, 2023) (“Iran: For regulatory reasons, users in this country are currently unable to access Zoom services.”).

93. See generally Amin Parsa, *Logistics of Participation in International Law*, in BACKSTAGE PRACTICES OF TRANSNATIONAL LAW 108 (2019); Julia Emtseva, *Practicing Reflexivity in International Law: Running a Never-Ending Race to Catch up with the Western International Lawyers*, 23 GERMAN L.J. 756 (2022).

94. See *Iran: Freedom on the Net 2021 Country Report*, FREEDOM HOUSE (2021), <https://freedomhouse.org/country/iran/freedom-net/2021> [https://perma.cc/945Z-SVHY] (last visited Nov. 11, 2023).

95. This would be very different if I happened to be Iranian-American but had *also* done the hard work required to develop expertise on a subset of Iran-specific concerns, for example by engaging in extensive anthropological fieldwork in Iran. Thank you to “S” for the observation that “Being a child of the post-colony doesn’t mean that you don’t have to [do the work].”

96. For example, as an Iranian-American, an Iranian living in America, or as a member of the Iranian community around the world.

institution in the Global North.<sup>97</sup> My presence in academic and professional settings makes my hosts look and feel good about themselves but without having to bridge too much actual difference—a thick accent, “funny” clothes, an inability to understand what it means to “flip” things or “excavate” them.<sup>98</sup>

Part of my responsibility, then, is to be extremely clear about who I am and who I am not, what I can speak for and what I cannot. I have a responsibility to be mindful about how I use the first-person plural and to be conscious that I benefit from using it too loosely. I also have a responsibility to be clear that, in some important respects, I materially benefit from the fact that Iranian international lawyers, community leaders, and government representatives are almost completely prohibited from participating in the discipline.

This would be a relatively small point—and relatively easier to address—if it were just about representation.<sup>99</sup> But the stakes are much higher. I want to suggest that the diaspora disposition is intimately tied up with contemporary TWAIL's identity, with the content of the work, and with its stymied programmatic vision. Perfunctory disclaimers at the beginning of presentations or scholarly works are insufficient. Further, I contend that this concern is essentially impossible to address unless diaspora scholars themselves are willing to admit that they operate from a highly privileged and sometimes problematic position, and that their material benefits are at stake here.

#### 4. *Critique as Detachment and Critique as Wellness*

Contemporary TWAIL sees its most natural “fellow-travelers” in critical international legal scholars. I briefly focus here on some tendencies within that academic culture, particularly in two generations that I define as “critique-as-detachment” and “critique-as-wellness.” I aim to elucidate a specific set of scholarly styles, approaches, and aesthetics common in contemporary Left international legal academia that I believe have contributed to TWAIL's current

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97. Indeed, in the years after 9/11, I often felt that my presence (and that of the few other brown female speakers on the terrorism/Islam/law circuit) elicited powerful emotional responses from Western liberal audiences. It was almost like they thought, “Well, we got some things right! Look at her! She's so vivacious! She's so assertive! We did that! Think of all the Iraqi and Afghan women who can be like her now!”

98. One element of the awkward reality that is not currently being addressed in scholarship is how much TWAIL—and its associated critical schools of thought—actually even *want* to involve international lawyers and government officials from the Global South in their projects. Other than those who have been trained in elite Western institutions (and have therefore adopted the vocabulary, aesthetics, linguistic idioms, and mood of TWAIL and CLS), one wonders what TWAIL scholars would do with international legal scholars and practitioners who may know the law very well but who cannot (and do not wish to) engage TWAIL on its current discursive terms. For example, it is not clear whether—and, if so, how—the current TWAIL community would seek to engage with the man with the Nehru collar and pointy leather shoes who is going to speak twenty minutes over his time to lecture them on what the “real” Iran thinks.

99. When TWAIL scholars *do* recognize dilemmas around representation, it is often in reference to conferences or edited volumes where organizers lament that there could not be more people from the Third World present or dutifully recognizing that much of the discipline remains centered in the Global North. See, e.g., Natarajan et al., *supra* note 58, at 1953.

foundering and that I believe are at odds with TWAIL's political promise. The goal of this section is not to deplore "critique for critique's sake" and repeat the oft-rehearsed accusation that critical approaches necessarily hinder the development of constructive proposals. It is not even to say that postcolonialism or post-structuralism *as theories* or as ideas are counterproductive for TWAIL or make it impossible to put forward a political program. Rather, I seek to show how certain styles that have tended to dominate these TWAIL-adjacent spaces are proving harmful to the articulation and realization of the promise of a critical movement with anti-imperialist politics.

My sense is that there is a correlative connection between TWAIL's failures and its ongoing relationship with certain Western critical academic cultures. Since its beginning, TWAIL has had a close and somewhat troubled relationship with Critical Legal Studies ("CLS") as well as with postcolonial and post-structural theory more broadly.<sup>100</sup> There have been some quiet whisperings and gentle suggestions that this relationship has been generally bad for TWAIL.<sup>101</sup> There is no doubt that there are strong interpersonal and professional bonds between TWAIL and CLS, most strikingly in the significant influence of Harvard Law School Professor David Kennedy.<sup>102</sup> As has been noted by a number of observers, all the initial founders of TWAIL were students of Kennedy (with the exception of B.S. Chimni). More recently, Kennedy's Institute for Global Law and Policy has acted as the convenor and incubator for a generation of TWAIL gatherings.<sup>103</sup> Further, many who identify as TWAILers frequently write in the same edited volumes and journals and speak at the same conferences as those who associate themselves with critical international legal approaches.

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100. See, e.g., Eslava & Pahuja, *supra* note 15, at 197 ("Using a creole vocabulary derived from Marxism, World System Theory, Critical Legal studies, Foucault and more recently from Subaltern and Postcolonial Studies, TWAIL scholars have been able to trace the relationship of international law to the hegemonic concepts of colonialism and neocolonialism."); Natarajan et al, *supra* note 58, at 1948 (noting that Critical Legal Studies is "a movement strongly influential on TWAIL scholars but sometimes subject to critique for its disconnection from material realities"); Anghie & Chimni, *supra* note 8, at 207 ("Many of the insights that CLS developed have been important and useful to TWAIL scholarship.").

101. See Georges Abi-Saab, *The Third World Intellectual in Praxis: Confrontation, Participation, or Operation Behind Enemy Lines?*, 37 *THIRD WORLD Q.* 1957, 1958 (2016) ("But I am with two minds about the label TWAIL. If taken literally—Third World Approaches to International Law—then, of course, I am a TWAILer or TWAILian. But if it is taken, as presented by some or perceived as some, as an off-shoot of the Critical Legal Studies school, I am not."); see also Sunter, *supra* note 1, at 477 (arguing that the mainstream international law scholarship "seems to dismiss the TWAIL project outright because of its perceived alignment with CLS and post-modernism"). *But see* Okafor, *supra* note 23, at 178 ("[C]ontemporary TWAIL scholarship has benefited much from sustained engagement with other critical schools of international legal scholarship such as . . . Critical Legal Studies.").

102. On the significant influence of David Kennedy and Harvard Law School in the incubation of the TWAIL project, see Gathii, *supra* note 2, at 28. See also Eslava, *supra* note 23; Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 *AM. ANTHROPOLOGIST* 53, 55 (2006) (referring to TWAIL as a subgroup of Kennedy's project).

103. See, e.g., Vasuki Nesiah, *Critical Legal Studies: A Curious Case of Hegemony Without Dominance*, in *THE ROUTLEDGE HANDBOOK OF LAW AND SOCIETY* 19 (Mariana Valverde et al. eds., 2021) ("Here, there is no figure more significant than David Kennedy and the work that unfolded . . . since 2010, under the institutional sponsorship of the Institute for Global Law and Policy.").

Critique-as-detachment culture focuses almost exclusively on liberal internationalism and liberal-international scholarship as its primary targets. Informed by its founding in the 1990s and, in some ways, still fighting the battles of that era, this culture is primarily fueled by revealing the ways that international law is "part of the problem," unveiling its "blind spots," demonstrating that it is riddled with paradoxes, and illuminating how it is not what it claims to be.<sup>104</sup> The individual disposition of the scholar—usually older, White, male, and tenured at a prominent Global North law school—is often a kind of ironic insouciance and aloofness. A mischievous unwillingness to become overly invested in anything suffuses the culture: Everything is up for grabs; earnestness is for chumps.<sup>105</sup> This style of critique often stays at a high level of abstraction in terms of doctrine, legal norms, and the people and situations that might be shaped or affected by law. Virtually any political program or set of policy recommendations is problematic, not (merely) because normativity itself is problematic but because it is doomed to be unworkable in the way that all other projects of international law are irretrievably problematic.<sup>106</sup>

Importantly for those TWAILers who are influenced by it,<sup>107</sup> a critique-as-detachment ethos is committed to certain ideas of indeterminacy that make it almost constitutionally impossible to develop and sustain a coherent project of *using* legal doctrines or institutions to make change in the world.<sup>108</sup> In this mode, international law is politics, but it does not necessarily help us to *do* politics. In its rejection of international law formalism and doctrine, and in its deeply pessimistic account of law, legal process, and legal institutions, critique-as-detachment culture leaves three pathways for those who remain within the

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104. See Elizabeth Anker, *The Architecture of Critique*, 31 YALE J.L. & HUMANS 362, 388 (2021) ("This essay has argued that a worship of paradox, contradiction, indeterminacy, antagonism, and a matrix of such qualities has unified the theory canon, harmonizing otherwise discordant schools of thought. This is in part because those intellectual tools have not only been enlisted to diagnose and to critique but also been celebrated as *the* recipe for a transformative politics. The manifold functions fulfilled by that web of critical terms surely make it understandable that so many diverse thinkers would gravitate toward such reasoning. But this essay has foremost sought to raise a number of worries about that methodological privileging of paradox and contradiction, among others asking about the colonialist underpinnings of such a conceptual architecture. Yet perhaps most alarming is *not* how such thought can seem rote and predictable. Rather, dedication to such styles of theory can increasingly serve—with great irony—to neuter real difficulty, sterilizing real dilemmas that cannot be thus digested.").

105. See Riles, *supra* note 102, at 59 (describing the positioning of critical legal scholars towards the "technocratic instrumentalist understanding of law").

106. This need not necessarily be a bad thing on CLS's own terms. That is, if one's stated scholarly project is to break things and make powerful people uncomfortable, particularly when that project is being conducted in parts of the world where people are confident that they will remain in power and like to be comfortable, then this is an honorable project. My goal here is not to argue that critique is useful only if it is programmatic. That is, as I understand it, the critique that TWAIL had of CLS at the outset, and what propelled TWAIL to do things very differently.

107. See, e.g., Haskell, *supra* note 74, at 394; B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER 246 (2017); Natarajan *supra* note 16, at 223.

108. See generally Talha Syed, Legal Realism and CLS from an LPE Perspective (unpublished manuscript) (on file with author) (on the evolution and reimagination of the "indeterminacy" thesis).

discipline of international law after accepting its arguments. One can endeavor to take the analytical tools offered by this mode and apply them to ever more areas of international law, especially by unmasking more paradoxes, binaries, and blind spots. One can insist that the re-articulation of there being no way out is *itself* the only honorable activity for a right-minded international lawyer. Or one can exercise agency in relation to the choices involved in any interpretation of law.<sup>109</sup> In such an argument, as Anne Orford writes, “the recognition that international law is politics all the way down is not the end of the story, but the beginning of a new chapter.”<sup>110</sup>

This mode often sees most international legal efforts—whether scholarly or in the practice of international law and lawyering in connection with governance institutions—as fundamentally meaningless. It refuses to provide a conception of utopia as such, let alone a vision of how international lawyers might be involved in finding the pathway there. At its best, the force of this scholarship is exactly that it does not give one an easy way out. It does not try to make the scholar feel better, nor does it try to instruct the international lawyer on how to fix the identified structural problems. It compels you to sit with your own meaninglessness and the fruitlessness of any potential interventions. Yet once the founders are dethroned, the sources are revealed as predatory, the rhetorical patterns of argument are mapped, and the paradoxes and hypocrisies and forced binaries are shattered, a kind of natural end-point seems to emerge. This sort of critique was not meant to build a scholarly empire or self-perpetuate in law programs for decades hence—it was meant to smash and break things and create space for something *else*.

Out of this context emerges critique-as-wellness culture. Where the critique-as-detachment elders are mostly older White men, this scholarly ethos is practiced by mostly younger White women.<sup>111</sup>

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109. For a close examination of the development and application of such legal reasoning, see ANNE ORFORD, *INTERNATIONAL LAW AND THE POLITICS OF HISTORY* 287–94 (2021) (“[M]ost international legal scholars and practitioners today would barely raise an eyebrow at the claim that international law is political.”). Orford writes that legal realism in the American tradition involved arguments that “legal rules or principles ‘are not inherent in some universal, timeless logical system’ . . . [Rather], [r]ules . . . could be interpreted in different ways, meaning that such rules could not be applied mechanically. Broad concepts such as property, rights, or freedom of contract encompassed competing values and choosing between those values when interpreting such concepts meant that law was a site of struggle.” *Id.* at 289.

110. See *also id.* at 320 (“All that is available [to international lawyers] is to construct an argument and commit to the premises or values underpinning it, knowing and fully accepting that everything about that is contingent. We need to take responsibility for those choices and their implications, and to realise that doing so is an ongoing, evolving process.”).

111. This Subsection does not include any citations. The scholarship and academic performances that inform this section are almost exclusively by untenured scholars in the Anglo-American university setting (particularly in the United Kingdom and Australia), and I have made the judgment call that it is not necessary to reference particular works or presentations. Rather, I invite readers, particularly those who have spent time in Left intellectual circles, to decide whether my portrayal rings true. I understand that this is suboptimal as a matter of scholarly method.



For many early-career scholars who had encountered Critical Theory in their doctoral studies or who had been exposed to critical international legal thinking, the conclusion of meaninglessness and hopelessness for international law makes them feel sad. They agree that international law is part of the problem—that international law has been and is “co-constituted” with violence, colonialism, empire, and domination. But they do not want to accept the detached critics’ conclusion. They wish instead to find a way to remain within the field of international law but to do so in a way that feels like it has meaning. Unlike the earlier generation, these scholars may never have developed expertise in doctrine or practiced international law. Yet they are dissatisfied with the idea of creating a life in law based primarily on the activity of unmasking what is wrong with international law and legal institutions.

Indeed, in a way, the elders also rob the next generation of Western critical scholars of the ability to follow in their footsteps. What gave so much critical bite and vitality to the elders’ writing was that they did international law and then wrote about it—they went on human rights missions, they acted as legal advisers to states, they negotiated and wrote international treaties, they worked for U.N. agencies.<sup>112</sup> Their work is exciting, moving, and compelling in part because it is borne of human experience and because it narrates the story of grappling with the experience of doing law. They experienced international law in all its complexities: sometimes exciting and empowering, sometimes terrible, sometimes inspiring. But this same path is not available to their students and followers.<sup>113</sup> To be seen as legitimate and “critical” to these same elders, their students are encouraged to focus on writing about what is problematic or paradoxical in their early-career research engagements. The elders made the mainstream angry in some ways because they were both legible to the mainstream and they had worked to earn some international law credibility that they could turn on the mainstream. The next generation is much more comfortable in being critical in part because critical work is now much less dangerous to the mainstream.

Because the field keeps re-running the same script—“Look, here is imperialism! Look, here is hypocrisy! Look, here is where liberal international law believes its own metaphysical story and actually lies about what it is doing!”—critique-as-detachment culture can also create a sense of shame-inducing collusion. That is because these scripts are also a way of saying, “Look how hypocritical *we* are! Look how we have lied to ourselves! Look how we have believed things that are not true!” The problem with working through shame in scholarship that claims to be a form of resistance is that it centers the individual

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112. See BIANCHI, *supra* note 5, at 210–11.

113. See *id.* at 215–17.

scholar of international law and their own experience in managing their feelings of disappointment or disenchantment.

It is thus a turn towards the self, a kind of emotional response to a dominant preceding generation of critical legal intellectuals, that shapes the work of scholars in self-care. Trapped between the irreversible knowledge that international law is (perhaps fatally) problematic, and not wishing to join in the conclusion that nothing can be done or that there is no hope for redemption, these scholars turn inward to identify a vague, amorphous kind of hope that can stand against pessimism. This group does not craft high-octane critique that can be used as a weapon against law or legal institutions. Indeed, it is not clear that this group sees any actual enemies against whom they are fighting, other than perhaps despair, hopelessness, and “hegemonic thinking.” If the preceding generation mobilized critique to unmask, destabilize, and pillory mainstream international law, this group is primarily concerned with making its members feel better about *themselves* in international law.

Critique-as-wellness scholars are concerned about the personal and spiritual well-being of the critical academic self. Without doctrinal edge or practice-derived credibility, these scholars look beyond law to find the language to address their yearnings. This creates a much gentler ethos of writing and academic presentation and engagement but also a gestural, symbolic, inherited political syntax. Reading this scholarship and watching these presentations, one comes away with the sense that the enemies of this version of critique are conceptual and imaginary. There are intimations that these scholars are against “dogma,” “doctrine,” “liberalism,” “sovereignty,” “the State,” “injustice,” “imperialism,” or “orthodoxy.” One struggles to know what people—beyond themselves—those scholars view as actually harmed by these concepts.

One way that these scholars seek to fight against meaninglessness is to embrace uselessness. That is, they take an approach to international legal scholarship that is skeptical of utility or service. Instead, they think of scholarship as an arena for “play” and imagination, to “create” and “make” discourse as a way of self-expression. They seek out a “safe space” for critical scholars to create intellectual environments that will allow them to nourish themselves.

Methodologically, much of this work focuses on how to “see” or “unsee” or “make visible” or “make strange.” Sometimes, this might be in the form of “seeing” international law through, or in, material objects, or in “hearing” international law through music. It often involves a kind of disciplinary free-for-all—which I distinguish from structured interdisciplinary work involving expertise in multiple fields—wherein scholars draw from art criticism, literary theory, cultural studies, television and film critique, musicology and music theory, architecture, and psychoanalysis. This approach sometimes reads like an anti-method, a way of moving beyond discipline entirely in an effort to

find ways of being interesting and hopeful beyond the confines of law and legal institutions.<sup>114</sup> Unlike the elders' work, the concluding paragraphs of this mode tend to end with unfounded and vague optimism. Often, this involves one or two paragraphs suddenly introducing the idea of a post-sovereignty world or an international law that enchants new sources or thinks a new world into being.

The logic, aesthetics, and mood of this critical subculture are strikingly similar to what one might find at an expensive wellness retreat. There is a general sense that mere presence and participation in the event are acts of "resistance" (against "Western medicine," against "patriarchy," against "environmental harm").<sup>115</sup> In these contexts, references to "traditional practices" and the "wisdom of the other" could be posited as ways of knowing and ways of being that assure attendees that they are paying to participate in some kind of challenge to orthodoxy or dogma. Yet, similar to how the promotional materials for a yoga retreat or a wellness conference might offer customers an opportunity to remake their perception of a complex world, the vast majority of the projects seem to be about how different interdisciplinary lenses helped the authors to "see" international law in a different way or helped them to navigate their own relationship to the disenchantment of critique. This is scholarship as a kind of self-care, an approach that adopts certain modes or aesthetics of critique but disavows any of the difficult kinds of conflict and antagonism that would arise if their projects had meaningful stakes.

The idea of a group of people traveling to conferences around the world, celebrating the heterodoxy of the community, relishing in affirmation, focusing on projects that attend to their psychic well-being in a world of mainstream doctrinarism and academic drudgery can definitely be a fun one. So are, I imagine, wellness retreats, for a certain kind of consumer.<sup>116</sup> But these activities do

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114. See GERRY SIMPSON, *THE SENTIMENTAL LIFE OF INTERNATIONAL LAW: LITERATURE, LANGUAGE, AND LONGING IN WORLD POLITICS* 29 (2021) ("[W]e might see history more imagistically and suggestively, perhaps by deploying an anti-method.").

115. See, e.g., James Hamblin, *The Art of Woke Wellness*, *THE ATLANTIC* (Nov. 19, 2018), <https://www.theatlantic.com/health/archive/2018/11/wellspring-festival-woke-wellness/576103/> [<https://perma.cc/5Q2S-FEDG>]; Olga Khazan, *The Baffling Rise of Goop*, *THE ATLANTIC* (Sep. 12, 2017), <https://www.theatlantic.com/health/archive/2017/09/goop-popularity/539064/> [<https://perma.cc/E9BY-C353>] ("To help readers reap these supposed health benefits without having to touch their bare feet to the ground, the Goop article provides a link to bedsheets and mats that can be plugged into the grounding port of an electrical outlet. One queen-sized sheet goes for \$200 . . . [The] "In Goop Health" summit, crammed with crystals and aura photographers, sold out of its \$1,500 tickets, and there are two more like it scheduled."); Dianne Bondy, *Foreword*, *PRACTICING YOGA AS RESISTANCE: VOICES OF COLOR IN SEARCH OF FREEDOM* xx (Cara Hagan ed., 2021) ("*Practicing Yoga as Resistance: Voices of Color in Search of Freedom* is a collection of lived truths, experiences, and research . . . . These stories demonstrate how yoga can strengthen, uplift, and empower, [sic] underestimated and underrepresented communities.").

116. See MCKINSEY & COMPANY, *THE FUTURE OF WELLNESS: CONNECTED AND CUSTOMIZED* (2021); see also Shaun Callaghan et al., *Feeling Good: The Future of the \$1.5 Trillion Wellness Market*, MCKINSEY & COMPANY (Apr. 8, 2021), <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/feeling-good-the-future-of-the-1-5-trillion-wellness-market> [<https://perma.cc/QT4B-SRTC>].

not contribute to resistance to anything, much like attending a wellness retreat is not actually a way of dismantling the patriarchy or undermining the grip of pharmaceutical companies on medical research. I do not mean to suggest that academic scholarship cannot be a form of resistance because it is not engaging “the real world.” I mean that this is not even a form of resistance *within academic scholarship*.

While I am sympathetic to their desire to find meaning or offer creative concluding observations, the move to hope also strikes me as consonant with contemporary Western approaches to wellness. Here, the approach of this scholarship brings to mind the creation of “vision boards” that help creators “manifest” the transformation that they wish to see in the world.<sup>117</sup>

The typical gestural and empty prescriptions offered by this style of critique seem to imagine a kind of political engagement where saying things over and over again in a room full of those who agree, or including particular stock phrases in one’s scholarship, will somehow, over time, result in transformation of the world around us. But the thing with “seeing beyond the State” (or, even worse, “unthinking sovereignty”) is not that these are necessarily *bad* ideas. It is that, when articulated in this particular mode, they are hardly ideas at all.

### III. ALTERNATIVE OPTIONS

One of the purposes of legal scholarship is to tell us something new about the world in which we live.<sup>118</sup> In turn, a function of legal scholarship meant to be in service of a political objective—which TWAIL purports to be—is to illuminate that world while putting forward an argument that persuades others to support those political goals. As currently constituted, TWAIL is incapable of being a political movement in the ways that it purports to be.<sup>119</sup> Indeed, the structure, modalities, and style of contemporary TWAIL have not made it possible—and arguably make it impossible—to strategize around building political programs. TWAIL, in short, is not living up to the aspirations of its founding. Alternative options should be considered.

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117. See, e.g., Britt Earley, *Here’s How to Make a Vision Board for Manifestation*, OPRAH DAILY (Mar. 24, 2021), <https://www.oprahdaily.com/life/a29959841/how-to-make-a-vision-board> [<https://perma.cc/XH92-T7V8>] (“Some of the world’s most influential thought leaders—Deepak Chopra, Gabrielle Bernstein, and Oprah, for starters—all agree: It’s wholly possible to turn your dreams into reality. It’s called manifestation.”).

118. See Danielle K. Citron & Robin West, *On Legal Scholarship*, CURRENT ISSUES LEGAL EDUC. 1, 3–4 (2014).

119. See Eslava & Pahuja, *supra* note 15, at 203–05 (discussing TWAIL’s claims of “resistance and reform”); see *id.* (“TWAIL’s dynamic of resistance and reform moves across . . . three common attitudes [that is, (i) Conservation; (ii) Reform; and (iii) Revolution]”); ANGHIE, *supra* note 83, at 318 (2005) (discussing TWAILers’ hope to “transform[]” international law). On the contributions and “utility” of contemporary TWAIL scholarship, see also Gathii, *supra* note 2, at 39–42.

TWAIL has built its academic authority partly on the basis of unsubstantiated claims about people in the Third World and their experiences. In doing so, TWAIL has avoided answering some key basic questions: What kind of global governance through international law does TWAIL want? What kinds of global, regional, and national politics would provide meaningful justifications for international law in the future? If the legal scholar's answer to these questions is, "I am showing that law is part of the problem," then they might be congratulated on that important first step. But that cannot be the end of the conversation.<sup>120</sup> TWAIL cannot develop a political program or put forward a programmatic strategy for reversing underdevelopment because it has yet to theorize or articulate a vision of such governance that would sustain a just and emancipatory international law. TWAIL cannot turn, as some domestic scholarly movements have, to democratic politics.<sup>121</sup> TWAIL cannot turn, as positivists would, to a redoubled commitment to the rules and institutions as they are.

TWAIL, in brief, has a politics problem, and the discipline as currently constituted has very few incentives to do anything about it. Outside this strand of scholarship, few are energized, aggravated, or enraged enough by TWAIL to criticize or force it to answer basic questions about its goals and methods.

Instead, to attempt to meet TWAIL's ambitions, TWAILers must elaborate a bold, resonant, and powerful vision of what victory looks like, organize a movement around this vision, and persuade those engaged in scholarly, programmatic, and political projects to work to make this vision a reality. There are ways to better address the tremendous global challenges for the *next* twenty-five years. In this section, I hope to drive a call for those concerned with the Third World to shift from TWAIL's loose big-tent "sensitivity."<sup>122</sup> Those who engage international law in support of the Global South might initiate a move at three possible levels, among other options: with respect to Global South peoples; with respect to Global South states; and with respect to Global North

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120. See Tom Keenan, *The "Paradox" of Knowledge and Power: Reading Foucault on Bias*, 15 POL. THEORY 5, 13 (1987) ("If I had said, or meant to say, that knowledge was power, I would have said it, and having said it, I would have had nothing more to say.").

121. Katharina Pistor, *Saving US Democracy from Corporate America*, PROJECT SYNDICATE (Jan. 12, 2021), <https://www.project-syndicate.org/commentary/american-business-still-no-friend-to-democracy-by-katharina-pistor-2021-01> [https://perma.cc/8SBB-LGTY] ("If democratic constitutionalism is to survive, democratic governance must prevail over business interests. Corporate America can hardly be trusted to stand in for democracy after it has once again demonstrated its lack of interest, if not outright contempt for, the democratic order."); David Singh Grewal et al., *Toward a Manifesto*, L. & POL. ECON. PROJECT: BLOG (Nov. 6, 2017), <https://lpeproject.org/lpe-manifesto> [https://perma.cc/Q4YM-HGGA] ("The approach we call law and political economy is rooted in a commitment to a more egalitarian and democratic society."). See generally K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329 (2016); Akbar, *supra* note 88.

122. Obiora Chinedu Okafor, *Globalism, Memory and 9/11: A Critical Third World Perspective*, in EVENTS: THE FORCE OF INTERNATIONAL LAW 234, 239 (Fleur Johns et al. eds., 2010); Michelle Burgis-Kasthala, *Scholarship as Dialogue? TWAIL and the Politics of Methodology*, 14 J. INT'L CRIM. JUST. 921, 922 (2016).

states and institutions. In exploring these options, I do not claim originality in terms of the substantive options but rather seek to illustrate three of the many alternatives available to students, new lawyers, and scholars. The central point of presenting these options is to foster a discussion about organization and catalyze decisions around who is in and who is out.

#### A. *Global South Peoples*

A first option is to build, organize, and mobilize a scholarly and political movement that tells a new story about the legitimacy of international law and global governance in relation to Global South peoples. This pathway would require an actionable blueprint for a new political system of global governance and international law. It could focus partly on what TWAIL *says* it is doing but fails to deliver.<sup>123</sup> This approach could also lean on the so-called “TWAIL II” and “TWAIL III”<sup>124</sup> strands and orient itself towards individuals, social movements, indigenous communities, and other voices of the Global South.<sup>125</sup>

This pathway would begin with the claim that there is no possibility for legitimate global governance or international law under the current conditions of domination. That domination would be seen as sustained not only by the West but also by many (if not all) Global South states to the benefit of autocrats, cronies, and corporations. And, that domination would be recognized as facilitated and justified through international law as it is currently constituted. This option would clearly articulate to the movement that the *only* way to build a new system of international law is to first ground the legitimacy of global governance in the peoples of the Global South. The only way to even begin to create such a system would be to actually understand what communities in the Global South experience and what they desire.

This option would involve a period of radical honesty. As a first and necessary step, those on this pathway would need to acknowledge that TWAIL stands on shaky authority, morally and intellectually, to discuss the “voice” of the Global South. They would also need to recognize that TWAIL’s reliance on the concept of “lived experience” as a stand-in for “I know what people in the Third World think and want” is both outdated and, as discussed above,<sup>126</sup> lacking scholarly

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123. See Natarajan, *supra* note 58, at 1946 (“The scholarly agendas associated with TWAIL are diverse, but the general theme of its interventions is to unpack and deconstruct the colonial legacies of international law and engage in efforts to decolonise the lived realities of the peoples of the Global South.”). See generally Mickelson, *supra* note 6.

124. I have avoided using these internally crafted periodizations for the movement because they strike me as deeply distracting and seem to have kept the movement more focused on thinking about themselves and their own personalities as opposed to thinking about their politics and their utility.

125. See RAJAGOPAL, *supra* note 8, at 295 (“[O]ne could imagine a history from below leading to a theory of peoples, cultures, and power. This theory would need to transcend the limitations of realist statism and liberal individualism, and build on the radical cultural politics of social movements to enable alternative visions of governance that do not privilege particular social actors.”).

126. See *infra* Section II.C.3.

grounding. A premise of this option is that there can be *no* programmatic or political proposals put forward *until* deep wells of knowledge—of the needs, experiences, and desires of specific Global South communities—are created and distributed. Then, and only then, would the movement call upon international legal scholars and lawyers to serve in a new system of global relations. Until that moment, all international law and institutions are considered illegitimate because they are tools of domination all the way down. As such, they do not merit any further investment from the movement, and they will cease to be referred to as holding a kind of “emancipatory” potential. The political goal of this pathway would be nothing short of a reimagined global community, rooted in Global South democratic legitimacy.<sup>127</sup>

The strategy to achieve this goal would rely heavily on scholarship, but a kind of scholarship that is very far from the skillset of most current legal academics. Legal scholars would need to retrain themselves in the way that such disciplines as anthropology, ethnography, and area studies seek to know how people live and think.<sup>128</sup> Some international legal scholars would need to move out of the West. Many scholars would need to learn new languages and build alliances with researchers working in other fields. Those serious about this pathway would understand that, for at least the next generation (if not longer), the work would be to learn, observe, listen, and write descriptive scholarship, telling us things we do not know about the world we live in.<sup>129</sup> Any criticism that the movement is not adequately constructive or programmatic would be met with: “Yes, that’s right. We cannot be programmatic or normative under the current conditions of global domination of the majority of the world’s peoples. International law and international governance institutions today will only ever produce more domination. We *will* produce a program, but only *after* we have built a new politics.”

At the outset, this option would eschew any claims about solidarity. The movement would thereby confront the fact that TWAIL has never articulated any coherent politics of solidarity encompassing eighty percent of the world’s population. Indeed, this pathway would even need to leave its conceits around the notion of “Third World” to one side and be open to reframing a global

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127. Note that this option would also jettison any deconstructionist scholarship or institutional destruction projects in the material world: These would be a distraction from the core commitments and purpose of TWAIL, which would be to build a new system of global democratic legitimacy and to document and understand the experiences, views, and desires of those actually living in the Global South regarding questions of international law and governance.

128. Luis Eslava’s scholarship comes closest to this vision and offers TWAILers interested in following this pathway a good starting place. See generally LUIS ESLAVA, *LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT* (2015); Luis Eslava, *Istanbul Vignettes: Observing the Everyday Operation of International Law*, 2 *LONDON REV. INT’L L.* 3 (2014).

129. See generally Anne Orford, *In Praise of Description*, 25 *LEIDEN J. INT’L L.* 609 (2012).

political community defined and led by those living in the Global South.<sup>130</sup> Movement members would be discouraged from making casual observations about the “voices” or “experiences” of others unless and until those members are able to produce serious accounts of these stories.<sup>131</sup> This is a long-game, multi-generational approach to transformation, and an exceptionally ambitious one, but one that will ultimately be grounded in a meaningful and fully articulated theory about international law and emancipation generated in and from the Global South. Indeed, this pathway would be clear that it is absurd to discuss “justice” or “emancipation” before we have a system that allows people to express what these ideas mean for them.

This pathway would need to be clear that it has a methodology regarding who can speak for the “Third World” experience and who cannot and why. Learning to utilize and adopt methods from other disciplines would mean encountering and needing to engage with the internal critiques and contestations of methodology, representation, and subjectivity in those disciplines.<sup>132</sup> By having such discussions openly and being clear about their political implications and potential downsides, those on this pathway would move away from countenancing the current approach to the “voices” of the subjugated.

While part of the scholarly research agenda here would involve a dramatic shift towards the rigorously descriptive, another part would need to focus on proposing and detailing the kinds of new international institutions that would create a meaningfully responsive politics across and through contemporary national borders. This might mean, for example, researching and proposing models for global referenda to take place around key questions of international governance. It might mean proffering new ideas for how to structure international organizations such as the United Nations. Or, it might mean proposing new institutional formations that would serve to deliver people power at a global level. This pathway would be much more honest (and evidentially grounded) than TWAIL about its disavowal of the state as the appropriate or legitimate subject of international law and participant in global governance. Therefore, those pursuing this option would need to be very clear about the

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130. Okafor, *supra* note 23, at 236 (“And so for me, and almost all other TWAIL scholars, the ‘Third World’ remains an important, indeed crucial, analytic category; one which suffices to ground a scholarly perspective.”); Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 *THIRD WORLD LEG. STUD.* 1, 20 (1999) (“Viewing the category ‘Third World’ as a counter-hegemonic discursive practice liberates it from its geographical ‘national’ moorings while at the same time insisting on the hegemonic power formation of the colonial encounter.”).

131. See, e.g., Eslava & Pahuja, *supra* note 15, at 197 (claiming that TWAIL scholars “have learnt *first-hand* of the material consequences and psychic repercussions of the expansion of a normative regime that originated from, and sustained, the colonial venture”).

132. See generally Ian McIntosh & Sharon Wright, *Exploring What the Notion of ‘Lived Experience’ Offers for Social Policy Analysis*, 48 *J. SOC. POL’Y* 449 (2019) (examining the notion of “lived experience” as deployed in phenomenology, ethnography, and feminist writing); WING-CHUNG HO, *ETHNOGRAPHIC INQUIRY AND LIVED EXPERIENCE: AN EPISTEMOLOGICAL CRITIQUE* (2019).



threats that this movement's ideas pose to existing Global South states. Importantly, those on this pathway would not be able to articulate in advance its substantive agenda, including whether it will be more focused on war, on trade, on climate, on migration, or on a hitherto unforeseen something else.

Those pursuing this option, in sum, would seek to be *of service* in the creation of a collective, cross-national political movement that represents the world's peoples and their demands in, of, and for global governance.

Members of such a movement would not be encouraged to work inside government ministries or to develop the capacity to communicate to audiences in the predatory West. All such power would be seen as contingent, illegitimate, unjust, and targeted for political contestation in the future. Instead, this pathway would focus on building up the intellectual resources required to identify and engage Global South peoples. In many cases, international legal academics would not be central to the project and would need to step aside to allow those in other disciplines to lead projects and initiatives. Those pursuing this option would have a great deal to learn from movement lawyering (in its practice mode) and movement law (in its scholarship mode),<sup>133</sup> taking a much more modest and humble approach to the role and importance of lawyers to political movements.

In terms of recruitment tactics and communication skills, this option would require the movement to reorient away from a disposition of authority to one of offering and serving. This pathway would be possible only if political communities in specific Global South locations were willing to engage and could be persuaded to collaborate and participate with the movement in its intellectual and political projects. Scholars would need to become adept at stepping back and stepping aside, becoming comfortable with articulating again and again how little they know and understand.

Finally, this option would also entail clearly articulating and upholding the moral responsibility of making choices about *which* Third World voices will lead and build a new global democratic governance. I am often struck, in reading TWAIL scholarship, by just how *nice* and *sad* everyone in the Third World is portrayed as being. There is rarely a mention of the intense contestation that often occurs *within* specific Global South states regarding attitudes about Western intervention, about aid dependency, or about accountability or justice.<sup>134</sup> This option would need to contend with the reality that Global South communities have sophisticated, astute, and often unexpected standpoints on the current systems of international governance.

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133. See generally Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821 (2021); HUMAN RIGHTS ADVOCACY STORIES (Deena R. Hurwitz & Margaret L. Satterthwaite eds., Foundation Press 2009).

134. See ADOLPH L. REED JR., THE SOUTH: JIM CROW AND ITS AFTERLIVES 32 (2022) ("By definition, people who are oppressed know it. It strains logic to imagine how one could not notice being brutalized, demeaned, and denied effective recourse.").

### B. *Toward an Emancipatory Global South State*

A second approach would entail a wholesale reorientation toward intellectual and political projects in support of Global South states as states. Recognizing that much TWAIL and critical scholarship has convincingly argued that the notion of contemporary statehood is (at least in some ways) a European invention,<sup>135</sup> this approach would clearly and assertively take the contemporary system of global governance and international law as it is and would seek to use the Third World state as the primary engine for transformation. As such, this approach would reject the bulk of TWAIL scholarship since at least the 1990s—and much common-sense wisdom in left/liberal international legal spaces—concerning the disavowal of the Third World state.

The legitimacy story here is rooted in sovereignty. In that way, it is perhaps the closest to positivists' account of legitimacy, but it wears this legitimacy lightly and strategically. This is not a deep philosophical account of why the way things are is *just*. It is an acceptance that the way things are is the starting point, and that it is time to stop lamenting what cannot be changed and begin recruiting, training, and organizing for power. That is, this pathway recognizes that the current system is not fully legitimate, but it presumes that it is legitimate *enough* to support the ability of the Global South state to exploit and instrumentalize each and every opportunity to turn sovereign equality into a democratic mobilizing tool to counter Western hegemony enough to create space for a new international legal system. In a sense, this option takes the “co-constituted with colonialism” account seriously in claiming that substantive justice projects cannot be legitimately conducted in a transnational (especially West to Global South) manner until global power is reoriented in favor of Global South sovereign agency.

This approach might reclaim the anti-colonial scholarship and activism of the 1950s–1970s, seeing the failure of their international legal projects<sup>136</sup>—so regularly lamented and documented within TWAIL scholarship—as a bump in the road, not the end of a struggle.<sup>137</sup> Indeed, this approach could cast virtually all engagement on the terrain of international law and governance in the register of anti-imperialism.

Under this option, it would be a just result for eighty percent of the world's population to control more of the world's resources, to write more of its laws, and to make more decisions about how the international system should operate. While this option does not necessarily view *existing* Global South political

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135. Or even, for Gevers, a white supremacist model. See generally Christopher Gevers, “Unwhitening the World”: *Rethinking Race and International Law*, 67 UCLA L. REV. 1652 (2021).

136. See, e.g., Mickelson, *supra* note 6, at 373 (“[I]t was clear that the NIEO initiative had stalled . . . What Bedjaoui could not have anticipated, of course, was that the NIEO was doomed . . .”).

137. See Moyn, *supra* note 65, at 261–62.

leaders as ideal representatives for this transformation, it views them as comparatively more legitimate than Western publics and governments for the purposes of determining how those in the Global South should live. This approach would have a thick and coherent theory and definition of imperialism that would align closely with the experience of many Global South states today: the denial of agency, the denial of autonomy, the denial of the core concepts of sovereignty to the vast majority of states representing the vast majority of people. It would confront the illegitimate use of power, coercion, financial dependency, predatory lending, human rights, and the like, by one group of states to tell another group of states how to behave, how to make decisions for their own peoples' lives, how to use their own resources, and how to govern their own territories.

In this approach, scholars could craft a research strategy with two central aims. The first would be to document rigorously and meticulously *how* international law and institutions work today to perpetuate Global South states' dependency and disenfranchisement. This type of scholarship would be distinct from today's TWAIL register: It would not be an invitation to continue to produce another fifty articles about the colonial origins of any given substantive body of international law in the abstract, or to produce ungrounded reflections on domination, racialization, or co-constitution. This pathway would instead assume that Global South states are well aware that they were subjected to colonial domination and, indeed, are well aware that international law and institutions currently serve to maintain Western power and control over them. It would further assume that this idea is saturated and that it is not (or, at least, is no longer) of tremendous use as an abstract idea to Global South states.

Instead, this pathway's research agenda would seek to illuminate and describe *how international law and institutions work to dominate*. How does money flow from the Global South to private equity firms and banks in the West? How do those contracts operate? How do international institutions, at a granular level, wield experts and technocrats using compliance monitoring, grey-and-black listing, and other tools to control Global South states and rob them of meaningful governance agency? In what ways have doctrinal concepts such as *domaine réservé*, the principle of non-intervention, and sovereign equality been weakened and by whom, and what doctrinal options exist to rethink these norms in concrete terms?<sup>138</sup> How are

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138. It is easy to observe that international law and power are co-constituted or that Western states engage law in a manner that does not match their promises. But it may be more useful to map out exactly how the everyday "work" of domination occurs and the bureaucracies that are at play. See, e.g., Naz K. Modirzadeh & Pablo Arrocha Olabuenaga, *A Conversation Between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021 'Arria-Formula' Meeting Convened by Mexico*, 8 J. ON USE FORCE & INT'L L. 291, 293 (2021) ("I didn't know about these issues — namely, the fact that Article 51 was being invoked to use force against non-state actors in a third country without that country's consent based on an interpretation of it being 'unwilling or unable,' and I was pretty sure that my colleagues in Mexico City also didn't know about this. Very quickly, I learned also that most colleagues from other Missions here in New York didn't know about this practice either. And the reasoning in that informal meeting seemed to be that the interpretation of the rule is changing not only because of this very

Security Council resolutions decided? What happens in closed-door negotiations between the “P3”? What set of norms and unwritten policies were involved in leading to the current context, where more than 75% of resolutions are drafted and decided by three states?<sup>139</sup> How has international law been utilized to strengthen the hand of “civil society” in ways that permit Western experts and professionals to roam freely across the Global South, writing reports, condemning local governments, calling for Western states and publics to exercise their leverage and illegitimate power to coerce Global South states into submission?<sup>140</sup> How have scholarly arguments, including in the critical and TWAIL spheres, contributed to the loosening and permeability of sovereignty in ways that have ultimately benefited the West?<sup>141</sup> There is a tremendous amount that we do not know and understand about the way global governance and international law actually work today, and there is significant politically valuable work to be done in scholarship that helps us to understand how to take sovereignty seriously.<sup>142</sup>

A second branch of programmatic scholarship would focus on the doctrinal and institutional reforms, interpretations, and inventions that are required for Global South states to assert autonomy and agency in global governance and to empower themselves against Western intervention and control.<sup>143</sup> The key here is

small practice by a small number of states but also because that practice is accompanied by the fact that apparently no one else is saying anything or doing anything about it. It made me think right away about the assessment of general practice, since you can't expect all 193 UN member states to engage in these type of military activities.”)

139. WILL OSSOFF, NAZ K. MODIRZADEH & DUSTIN A. LEWIS, PREPARING FOR A TWENTY-FOUR-MONTH SPRINT: A PRIMER FOR PROSPECTIVE AND NEW ELECTED MEMBERS OF THE UNITED NATIONS SECURITY COUNCIL 36 (2020).

140. Abi-Saab, *supra* note 101, at 1966 (describing his role as legal advisor or advocate for Third World states); *id.* (“[A] good part of the cases I dealt with were delimitation cases where the public interest was to make legality prevail over effectivity, which in general serves the stronger party who usually imposes a status quo of her or his own doing, or rather often her or his misdoings.”).

141. To be clear: an approach focused on Global South states would radically depart from efforts to focus on “social movements” or the idea that international law should be built around the “everyday lives” of individuals in the Third World. Indeed, such an approach would likely seek to demonstrate how such arguments ultimately serve neo-liberal ends and play into Western narratives about the contingent and malleable nature of Global South state agency and autonomy. Those who hold such positions or make such arguments would need to defend them on expressly political grounds in the context of the contemporary landscape of global power.

142. See Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 45–65 (2020). Rather than repeating the oft-made point concerning the Republican party’s increasing authoritarian bent, Klarman painstakingly documents *how* the U.S. Republican party has waged an “assault on democracy” through specific machinations, including partisan gerrymandering, voter identification laws, impeding voter registration, and the like. See *id.* But see Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. 90, 97 (2020) (calling for “a vision of democracy that does not separate politics from the economy and that is committed to grassroots power and a more ambitious program of reform” than Klarman’s proposed electoral reforms). For an example of the types of questions that international advocates may wish to ask in order to create “cartograph[ies] of power,” see DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 60–72 (2018).

143. Kwadwo Appiagyei-Atua, *Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review*, 8 AFR. J. LEGAL STUD. 209, 234 (2015) (“[T]here is the need for Africa and other regions to become more insular and develop regional international law to regulate their relations

that this would mean *all* kinds of intervention, including those that some current TWAILers may like. So, for example, adherents of this approach would argue that doctrines and institutions that erode and undermine Global South sovereignty are problematic under present-day conditions of power inequality. This includes instances in which interventions might result in the short-term protection of particular individuals or communities, or enhance accountability for particular violations that would not be subject to redress in existing domestic institutions.

Consider, for example, the issue of sanctions (in the sense of unilateral coercive measures) frequently deployed by Global North states and institutions as a "protective" tool in response to perceived or actual violations of human rights in or by Global South states. Programmatic scholarship under this option would push back against sanctions on the ground that they erode Global South sovereignty, irrespective of sanctions' potential benefits, including benefits that may be entailed for the communities discussed under the prior option. For example, Venezuela's claim at the ICC in 2020 that sanctions constitute a crime against humanity<sup>144</sup> might have provided opportunities to mobilize international law to formulate arguments against unilateral and, perhaps, multilateral sanctions.<sup>145</sup>

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away from the over-reliance on Europe and America. The development of well-structured and workable regional mechanisms could then be used to negotiate for an integrationist, polycentric international law bereft of its imperialist and hegemonic appendages."); Abi-Saab, *supra* note 101, at 1963 ("I consider it of the essence, if one really wants to transform his ideas, once operationalised, into current social practice, to make every effort to insinuate these ideas into the decision-making process. This can be done either directly, if he finds himself in the decision-maker position, for example as a negotiator or a member of a country's negotiating team of a multilateral normative treaty, or as a judge or arbitrator; or indirectly by situating herself or himself in a position that allows transmission of ideas to the decision-maker, for example by preparing reports for the UN Secretary-General.").

144. See Press Release, Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, on the Referral by Venezuela Regarding the Situation of Its Own Territory (Feb. 17, 2020), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-mrs-fatou-bensouda-referral-venezuela> [<https://perma.cc/FF3X-BSZD>]; see also ICC-01/20-4-AnxI, Referral Pursuant to Article 14 of the Rome Statute to the Prosecutor of the International Criminal Court by the Bolivarian Republic of Venezuela with Respect to Unilateral Coercive Measures, ¶ 1 (Mar. 4, 2020) (stating that Venezuela submitted the referral regarding "concerns the unilateral coercive measures mainly dictated by the government of the United States of America whose effects negatively impact the Bolivarian Republic of Venezuela"); *id.* ("These measures, dictated in contravention of international law that protects States from foreign intervention in their internal affairs, have caused enormous hardship for the people of Venezuela . . . This submission explains that such unilateral coercive measures constitute a widespread or systematic attack upon a civilian population. They are properly described by sub-paragraphs of Article 7(1) of the Rome Statute and thereby amount to crimes against humanity."). For an analysis of Venezuela's claims by leading mainstream international legal scholars, see Dapo Akande, Payam Akhavan, & Eirik Bjorge, *Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral*, 115 AM. J. INT'L L. 493, 512 (2021) ("While the right to adopt sanctions is not unlimited, international law allows considerable freedom of action in respect of unilateral measures of [the] kind [imposed on Venezuela]. Unilateral economic sanctions are not permitted by international law when they threaten starvation of the people of a state, by depriving a people of its own means of subsistence; but that will only be the case in extreme circumstances."). It is noteworthy that there is no doctrinal TWAIL response to this argument.

145. See, e.g., Aziz Rana & Asli U. Bâli, *Sanctions are Inhumane—Now, and Always*, BOS. REV. (Mar. 26, 2020), <https://bostonreview.net/articles/aziz-rana-asli-u-bali-sanctions-are-inhumane-now-and-always> [<https://perma.cc/9BUV-6M68>] (arguing that more than "half a million preventable deaths of children [could be] attributed to the Iraq sanctions in the 1990s" as well as "40,000 civilian deaths in Venezuela . . .

This kind of scholarship would ask and, crucially, attempt to *answer* various questions, such as: What are the kinds of international legal rules that would serve to provide powerful shields against the assertion of extraterritorial jurisdiction by Western states?<sup>146</sup> What international legal institutions should be abandoned by Global South states, and what tactics should they employ to abandon them? How can Global South states mobilize formalist tools, such as the doctrine of sources, to use their greater numbers to their advantage, for example, by strategizing in collective blocs to articulate *opinio juris* in developing areas of customary law, and sharing information about emerging areas of doctrine where Western states' practices currently outpace others (e.g., with respect to outer space and cyber sovereignty)? What international legal tools and strategies are available for disobeying the Security Council and for marshaling prescriptive and enforcement authorities of the U.N. General Assembly? How can international law and institution-building be used to empower south-to-south trade, interaction, and security so that Global South states can diminish their reliance on the West?

This option need not mean suspending moral judgment or good sense. Those pursuing this pathway would not become legal advisers for genocidaires. Yet, this approach would push its adherents to openly define their constituency in politically astute ways, as opposed to the vague, incoherent, and apolitical conception of the "Third World" that remains popular in TWAIL literature today. This option would make clear that sovereignty for its own sake is not seen as the end goal of the project. Rather, complete transformation of the contemporary conditions of global governance is the end goal, *through* the strategy of enhancing and strengthening Global South sovereignty, agency, and collaboration against Western domination, control, and coercion.<sup>147</sup>

There is no question that this option will strike many as deeply unsavory, possibly even horrifying. It could involve what many on the Left would see as distasteful bedfellows. One would need a strong stomach for this kind of strategy. But such a reaction, if it arises, should already illuminate one's (lack of) conception of what TWAIL's project is, who it is for, and what it is against. The positioning of those pursuing this option vis-à-vis the Global South state needs to be discussed and contested *on political terms* within the movement, not simply assumed as a common-sense shift over time. Given the existing structure of international law and institutions, it is politically irresponsible to talk loosely about the "Third World," to sometimes be in favor of human rights

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[to] unilateral U.S. sanctions" on that country; and concluding that "[g]iven the largely civilian toll, the claim that [sanctions] are a humane way to impose costs on a regime rings hollow").

146. For an excellent starting point for this kind of scholarship, see generally B.S. Chimni, *The International Law of Jurisdiction: A TWAIL Perspective*, 33 LEIDEN J. INT'L L. 29 (2022).

147. A key task for TWAIL in Option 2 would be to identify and work with Global South states to build meaningful twenty-first-century alliances across a range of interests and power inequalities.

interventions by the West into the "Third World," to sometimes appear to be marshaling arguments in favor of traditional notions of sovereignty and to sometimes appear against them, without clearly articulating the political costs of such approaches. If you think that human rights law as currently constituted is fundamentally illegitimate and a tool of Western domination, but you also sometimes think that human rights institutions and bodies should leverage that very domination for outcomes that you happen to like, that *might* be politically defensible. But as long as you claim that you are a member of a movement that serves others, you have a responsibility to provide an account of that politics. This movement cannot be politically organized around any individual scholar's internal intuitions about when Western hegemony is a force of death and destruction and when it is useful.<sup>148</sup> A political movement organized against centuries' worth of domination and exploitation must understand that actual resistance to that kind of entrenched power will involve painful sacrifices and difficult—and publicly defended and contested—judgments about which battles come first.

In terms of skill-building and training, this pathway would focus not only on deep doctrinal and institutional knowledge aimed at telling Global South states more about the world, but also on legal diplomacy.<sup>149</sup> Some pursuing this option would need to know how to draft treaties, how to formulate and express *opinio juris*, how to counter the efforts of some international institutions and strengthen the hand of others, how to negotiate collective positions on resolutions, how to craft domestic law to block jurisdictional claims from the West, and how to influence statecraft. Here, the goal would be to place those on this pathway into every possible leadership position in Global South government ministries, international legal institutions, institutions of global governance, global finance, arbitration, and others.<sup>150</sup> This option would organize like other successful political movements: utilizing labor-sharing, mutual aid, assignment

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148. See *supra* note 50 and accompanying text.

149. See Rasulov, *supra* note 43, at 254 ("[W]here some three or four generations ago most of the practical momentum in the leftwing international law project was concentrated in the fields of international diplomacy and political activism, the vast majority of all leftwing efforts in international law today are limited to the field of academic practice.").

150. When recent TWAIL scholarship has delved into practical visions for transformations of international law, the resulting proposals have belied a pronounced distance from the actual work of international institutions. In a recent piece, Mohsen al Attar proposes a series of "nonsense, radical counterfactuals" as a thought exercise, designed to "operate outside the confines of good sense." Mohsen al Attar, *Subverting Eurocentric Epistemology: The Value of Nonsense When Designing Counterfactuals*, in *CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES* 16–17 (Kevin Heller & Ingo Venzke eds., 2021). However, the nonsensical examples that al Attar points to are, in practice, far from it: He cites, among others, "a democratic Security Council, [and] an IMF whose president is selected by African states." *Id.* at 16. In reality, these issues are precisely the type that Global South states (aided by competent lawyers and diplomats) are pushing for in multilateral fora.

of responsibilities and tasks according to skills, positioning, identity, and access to power and resources.<sup>151</sup>

This option has a relatively obvious and coherent academic and political constituency. Those pursuing this pathway also have the most immediately available possibilities for recruitment and training. In a sense, this option is ready to start as soon as scholars commit to it. Because this option takes Global South states as they are and tackles international institutions as sites of potential power redistribution, the movement would be able to quickly identify a research, programmatic, and political agenda in direct consultation and conversation with its intended audiences. In addition to scholarly insights and discoveries delivered in academic forums, this option would also be able to serve Global South states through other kinds of international lawyering: providing legal advice, briefings to governments, *amicus* briefs to international courts and tribunals, and research inputs for states preparing to engage international institutions or developing positions for diplomatic conferences. Global South international lawyers—some in government, some in international institutions, some in private practice—could be recruited to provide insights, scholarship, and programmatic advice. Much of this work is currently being done by expensive private law firms in the West, which provide Global South states with the kind of public international law advice and strategic thinking that many Western states maintain in-house.<sup>152</sup> This pathway would undermine this market, seeking to make new knowledge, analysis, and tactical advice available to all or, at least, to many Global South states.

### C. *Transforming from the Metropole*

A third option would articulate its goals as focused on utilizing international law and institutions to transform *the behavior of the West vis-à-vis the Global South*. Those on this pathway would *embrace* the fact that the bulk of its intellectual and political capacity is located in the West and use this to empower a revived and robust approach to how international law can regulate and reimagine the relationship between the West and the Global South.<sup>153</sup> This

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151. To put it differently, not everyone is good at everything. Some scholars will be exceptionally strong doctrinally but not programmatically. Others will be inspiring institution-crafters but not as interested or useful at illuminating how Western institutions subvert Global South agency. The advantage of taking a movement-wide political approach to organization is that it would allow for certain theories, findings, and assertions to be stipulated and built upon rather than repeated and relitigated over and over again.

152. Cf. Chimni, *supra* note 3, at 4 (discussing “the problems of doing research in the poor world”).

153. For an approach that argues for a renewed foreign-policy perspective for the American left, see Rana, *supra* note 42, at 19 (calling for a similar shift in relation to domestic American left politics and urging “American leftists to develop the type of internationalist vision and politics that universally and effectively joins anti-imperial and anti-authoritarian ethics”).



option is, in many ways, much closer to what TWAIL is currently doing and much further from what TWAIL claims it is doing.<sup>154</sup>

Ultimately, this option's story about international law's legitimacy and about global governance accepts the fundamental elements of the system as they currently exist. Yet it contends that the only way to *utilize* international law as a tool for emancipation is to radically alter the outlook, policy assumptions, and behavior of the powerful; to take seriously how international law and institutions can be vehicles for substantive justice projects in the West; and to turn "co-constitution" into a tool against its beneficiaries.

This option would accept the positivist account of international law's political legitimacy and use that legitimacy to build a scholarly and political movement around bringing international law and institutions to bear on its most powerful subjects. It would see a radical alteration of Global North conduct as a primary and key step toward building a new edifice of global governance that better serves the Global South, if not always directly. This pathway would derive its political power from its ability to recruit, organize, and influence: identifying its targets as Western political decision-makers, judges, politics, and mainstream international-law scholars. It would not base its political program on any justification rooted in the imaginary Third World of today's TWAIL. There would be no "exhumation and recovery of subjugated knowledges"<sup>155</sup> or excavation of Third World voices. This approach would not root *any* of its claims in what the Global South wants. Rather, it would focus on what it does know and what it can do well. It would seek to persuade Western elites and publics to rethink their roles and responsibilities in the domain of Western politics.

This approach would set a strategic research agenda around the kinds of questions that would feed into relevant programmatic and political engagements: What elements of international law today are necessary for neo-imperialist projects? What kinds of knowledge or what modes of interpretation are most readily utilized by those who seek to subjugate and dominate the Global South? What ideas and stories of international law most animate neo-liberalist domination today? What are the dominant moves of mainstream scholarship, and what are its weak points? What kinds of doctrinal claims are being made, and how can they be challenged? Scholars would accept that, in Antony Anghie's words, "[t]he claims that imperialism is central to the making

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154. For an example of such a Global North-focused argument, see generally E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019) (proposing a system of "decolonial migration"). Achiume's embrace of an individualized form of self-determination as a "non-ideal" path to empowerment (through migration to the First World) presents a move away from the values and politics of the anti-colonial movement. *Id.* at 1522–23 n. 45.

155. Pooja Parmar, *TWAIL: An Epistemological Inquiry*, 10 INT'L CMTY. L. REV. 363, 365 (2008) (citing UPENDRA BAXI, *HUMAN RIGHTS IN A POSTHUMAN WORLD* 19 (2007)).

of international law and that the effects of imperialism continue to shape the present . . . are now commonplace, if not trite, observations, only the beginning point of a deeper analysis.”<sup>156</sup> Rather than relitigating claims about international law as co-constituted in the immiseration of the Global South—or continuously asserting that international law is “part of the problem”—this approach would see these insights as the accepted baseline, the “beginning point,” for focusing on how to remake, reinterpret, and construct international law and institutions in ways that would create meaningful change *in the West*.

Those pursuing this option would build upon scholarship describing and documenting the ways in which trade laws, investor-state relations, refugee laws, and environmental laws facilitate the ability of Western states and Western corporations (and the latter’s Western investors) to pollute the planet, plunder others’ resources, endanger foreigners, and arm and bolster the rule of autocrats and warmongers.<sup>157</sup> In a sense, this descriptive heavy-lifting would be similar to the documentation of Global North domination tactics in Option II. Those transforming from the metropole would carry out deep, rich analyses of how law works in these encounters and how legal and political institutions move material benefits from one group of people to another. Crucially, they would also elaborate a theoretical and political account of why this is wrong *in Western political contexts*.

Alliances here would be far more instrumental than those envisioned by TWAIL. In some cases, it is likely that they would be made with liberal internationalists. These scholars might disagree about TWAIL’s fundamental diagnosis of *why* global governance is the way that it is or whether Western states are fundamentally predatory or beneficent. Yet this would not matter for purposes of building common cause around certain specific projects—for example, seeking to subject members of Western militaries to international criminal law, or opening Western borders.

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156. Anghie, *supra* note 4, at 111.

157. See, e.g., Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fuelling an Investment Arbitration Boom*, COUNCIL EUR. OBSERVATORY (Nov. 2012), <https://www.tni.org/files/download/profitfrominjustice.pdf> [https://perma.cc/9WAW-CTEU]; Henok Gabisa, *The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage*, 48 INT’L LAW. 153, 165 (2014) (“The foreign investor will always try to protect their foreign investment and the State often acts in a regulatory manner to protect the public interest. Not surprisingly, these interests usually collide when the government’s regulatory action is in areas of public services, such as the provision of water, electricity, waste disposal and sanitation services and other social and environmental impacts more generally. The human rights issues arising out of this small but powerful world of private investment arbitration . . . present complex questions around the success of the system to meet its purported goal to spur sustainable and fair economic growth in developing countries.”); *Tunisia: No Safe Haven for Black African Migrants, Refugees*, HUM. RTS. WATCH (Jul. 19, 2023), <https://www.hrw.org/news/2023/07/19/tunisia-no-safe-haven-black-african-migrants-refugees> [https://perma.cc/4KG3-MMNM] (“The EU has already dedicated at least €93-178 million in migration-related funding to Tunisia cumulatively between 2015 and 2022, including by reinforcing and equipping security forces to prevent irregular migration and stop boats heading for Europe.”).

Contemporary TWAIL's emphasis on epistemologies of international law and on diversification of international law as an academic profession would fit nicely into this option, insofar as they are largely already projects about making *Western* institutions and universities better. That is, calls for things such as "decolonizing" Western international law syllabi would be more appropriately portrayed as being largely centered around and benefiting international law *in and by the West*. Such calls would enhance and support the legitimacy of international law and legal institutions, such as the International Court of Justice, the U.N. General Assembly, and other bodies, and this would in turn support the efforts of those pursuing this option as they seek to engage Western politics and politics to utilize and expand international law, its scope, and its enforcement.

This option would also help to reorient and marshal the current TWAIL movement's uncomfortable embrace of fields such as international human rights.<sup>158</sup> Scholars in this mode would fully and aggressively pursue all avenues for expanding and empowering human rights norms and institutions in order to restrain Western conduct and actors.

In terms of recruitment and training, this option would likely appeal to many more students and young scholars in the West by providing them with a vision and a language to summon their cosmopolitanism, activism, and political commitments through careers in international law. It would need to train its members not only to engage in clear, accessible, and connected research and writing, but also to learn to communicate with domestic constituencies in Western states. Those on this pathway would be more prominent not only in mainstream law journals and conferences and in international institutions, but also in the halls of parliament, in local government, and on the pages of national newspapers.

The movement would likely take on more recruits and persuade more adherents as it achieves successes in the material world: changing laws, shifting foreign policy perspectives, and placing its adherents into positions of power in ministries of foreign affairs, defense, and finance in Western states. Those on this pathway would learn to work with journalists, editors, and media leaders to shape new accounts of how Western publics understand their countries' actions in the world and new understandings of what international law is and to

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158. See, e.g., Chimni, *supra* note 3, at 17 ("Few would deny that the globalization of human rights does offer an important basis for advancing the cause of the poor and the marginal in third world countries. Even the focus on civil and political rights is helpful in the struggle against the harmful policies of the State and international institutions."); *The Sovereignty of Sharing: An Interview with Michael Fakhri (Part I)*, OPINIO JURIS (Jul. 6, 2023), <http://opiniojuris.org/2023/07/06/the-sovereignty-of-sharing-an-interview-with-michael-fakhri-part-i> [<https://perma.cc/MSS7-4VHZ>] ("Because I come from a tradition of TWAIL which is inherently suspicious of human rights, I want to advance human rights as one way of doing things, amongst a lot of other different ways, but still take human rights very seriously, because that's my mandate. To do this, I introduce more ingredients like political economy and trade [in working as a U.N. Special Rapporteur].").

whom it speaks. Those undertaking this option would seek to not only research and write in ways that inform fellow scholars and international legal practitioners, but also to use their work to make global governance more transparent and to better inform Western polities.<sup>159</sup>

For the minority of the current TWAIL movement that is based in the Global South, this option would provide a much clearer and more honest description of what TWAILers do, and it would allow them to decide whether they wish to commit their resources and energies to transform how the West thinks and behaves—sometimes willingly passing as native informants in service of the cause, sometimes doing “fieldwork” in the West and Western institutions to better shape Western approaches. Those on this pathway would not contend that they are re-centering the subaltern in international legal discourse; they would therefore also free those in the Global South who have no interest in participating in a Western-centric approach to remaking international law and institutions. That is, unlike TWAIL, this pathway would not make promises to Global South students and young scholars who come to the movement believing it is one thing, only to find out that it is quite another. Solidarity with scholars in the Global South would be possible in this option, but it would be on very different—and much more candid—terms than today’s conception of the Third World as everywhere and everything. Solidarity would need to be earned, demonstrable, and backed up by organized political projects.

#### CONCLUSION

In my engagements with states, government lawyers from the Global South, international legal activists, and NGO organizers around the world, I sense that we are on the precipice of a transformative era in international law and global political institutions. The long 1990s are over. Western liberal internationalism, particularly in its legal form, is far more salient an adversary in university classrooms and the pages of academic journals than in the chambers and negotiating rooms where states battle over power and resources. In the spaces where international law is made, interpreted, and given institutional form, few believe that the law and institutions we have today will help to solve climate change, ensure peace, or facilitate the agency of poor states to determine their own economic and political futures. The scope and severity of the crises facing humanity and the faltering of Western hegemony will lead to a remaking of the

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159. This option is likely to provide a much more coherent and theoretically grounded home for a subset of current TWAIL scholarship that examines, without adequately explaining its nexus to the service of Global South communities, how empire has “come home” and how imperial practices are “now at large in the Global North.” See Independent International Legal Advocates, *supra* note 54.

financial, military, and governance structures upheld by current international law.

For the states and peoples of the Global South, the era to come provides an opportunity to negotiate alliances, economic autonomy, redistribution, and lawmaking and law-enforcing power in ways that we have not witnessed since decolonization. The kind of contestation and opportunities for doctrinal, institutional, and political creativity in the decades to come may look very different than what has come before. Part of this contestation will include determining what political collectives comprise the "Global South" and what kinds of geographic, economic, or military alliances best serve those who have been shut out of multilateral decision-making in the present order.

Many students from the Global South come to the study of international law looking for the tools to shape and lead these transformations. The potential for a potent, well-theorized, grounded scholarly movement to serve and empower those who seek to create law and institutions for this newly configured global community is thrilling. Emerging scholars like Soraya and dynamic practitioners like Hassan (whom we met in the Introduction) are the international lawyers who will be present at the new battle lines, who will want training and scholarship for achieving victories.

TWAIL scholars have claimed for twenty-five years that despite the fact that international law is a system of Eurocentric domination to its very core, it can be marshaled and rebuilt for emancipation. TWAIL has spent much of this time rehashing what such a proposition might mean in the abstract. The next generation of international lawyers is ready to move beyond this insular conversation and is eager for scholarship that takes meaningful positions, connects with specific places and people, and proposes useful ideas that they can take into those arenas where international law is devised, adjudicated, and given institutional power.