

Mark Toufayan, Emmanuelle Tourme-Jouannet and H el ene Ruiz Fabri (eds). ***Droit international et nouvelles approches sur le tiers-monde: entre r ep etition et renouveau [International Law and New Approaches to the Third World: Between Repetition and Renewal]***. Paris: Soci et e de l egislation compar ee, 2013. Pp. 452.  42. ISBN: 9782365170178.

The volume under review publishes the proceedings of a colloquium held at the University of Paris in July 2010. The aim of this colloquium was to fill a lacuna that characterizes the contemporary francophone international legal scholarship. Indeed, as noted by the editors in their foreword to the book, after a prolific period during the 1970s and 1980s, French and francophone scholars have gradually lost interest in Third World-related issues and ignored this topic in their research and teachings.<sup>1</sup> This trend is regrettable and unfortunate because despite some progress and improvements, international relations are still marked by significant inequalities and disparities between rich and poor countries, while several regions of the world remain in a situation of extreme poverty. Therefore, there is an urgent need to renew and revive the reflection of French-speaking international lawyers on their discipline by inciting them to critically question the present existence and effects of the rules of international law relating to the Third World in the current globalized context. To achieve this goal, Mark Toufayan, Emmanuelle Tourme-Jouannet and H el ene Ruiz Fabri had the idea of bringing together, in Paris, francophone and anglophone scholars and prominent representatives of the critical Third World Approaches to International Law (TWAAIL). TWAAIL scholars were invited to expose their ideas and thoughts, and their French-speaking counterparts were asked to react and comment on these thoughts.

The book under review collects the contributions in French or English of the scholars who participated in this debate. It is divided into five main chapters. The first chapter consists of a general introduction to TWAAIL written by Bhudincer Chimni, while the four others deal respectively with the following topics: the reinterpretation of the history of international law, the adoption of a new approach to human rights, the Third World and development, and, finally, the rethinking of the modes of diffusion of international law and teaching methods. In line with the editors' intent to generate a debate on TWAAIL, each chapter has the same structure, namely one or two essays written by prominent representatives of this current debate, which are followed by commentaries formulated either by francophone scholars or by anglophone authors who do not define themselves as members of TWAAIL but who have shown a peculiar interest in the question of the impact of international law on Third World countries and populations in their writings.

It would be unfair to consider the latter to be mere commentaries. Indeed, a large number of the published essays constitute enriching, insightful, comprehensive and well-documented studies that go far beyond the scope of simple reactions and observations to the thoughts exposed by the TWAAIL authors. Nevertheless, for the sake of clarity and knowing that this volume is conceived by its editors as a debate on TWAAIL's thoughts and ideas, the various commentaries can be classified into two categories even though this classification does not give full and fair account of the quality, complexity, and originality of their content.

The first category comprises the contributions of authors who decided to endorse the ideas and thoughts exposed by the representatives of TWAAIL and to further develop these thoughts by providing the readership with additional elements, examples and arguments in support of the position advocated by this critical group. In the second chapter of the volume under review, Antony Anghie, one of the leading TWAAIL scholars argues that the historical evolution of

<sup>1</sup> One of the more recent initiatives from the Francophone world comes from Emmanuelle Tourme-Jouannet through the *Global Justice/Injustice* Project. For more information on this project, see Justice Globale, available at <https://justiceglobale.wordpress.com> (last visited 7 August 2015).

international law shows that it has always served as a vehicle for colonialism and imperialism.<sup>2</sup> To support his view, Anghie draws upon several examples related to different decisive steps of the expansion of international law. He explains how the acknowledgment of the humanity of Indians of the New World by Francisco de Vittoria had paradoxically led to a legitimization of the Spanish colonization, since it resulted in the application of a supposedly universal natural law to the Indian peoples that was in reality derived from the European identity and view of the world. Indeed, the Indians' cultural practices and way of life were considered to be inconsistent with this natural law, and the Spanish government over the American territories was proposed as a remedy to this unlawful situation.

According to Anghie, a similar dynamic of intertwining between international law and colonialism can be observed in the 19th century. At that time, the test of civilization according to which sovereignty was conferred or refused to non-European societies was exclusively based on European standards of life and government. Moreover, in the cases where native chiefs were granted legal personality by international lawyers, it was done for the unique purpose of enabling them to enter into treaties that provided for a transfer of sovereignty to a European power. Moving on to the decolonization process, Anghie argues that the acquisition of sovereignty by Third World states served as a legal basis to bind them to prior international economic law rules to which they had not consented. These rules contributed to the perpetuation of the economic dependence and subordination of the newly independent states to the former colonial powers.

Finally, turning to the present period, the author contends that international law remains an instrument of imperialism. According to him, the demands of internal reforms imposed on Third World countries through the conditionality of international financial institutions (IFIs) can be compared with the system of capitulations that had previously been used by European states to demand the reform of non-European states. Furthermore, the current 'war on terror', which has justified the military occupation and administration of a number of Third World states, recalls the concept of a 'civilizing mission' that was developed in the context of the League of Nations. In sum, for Anghie, since its Vittorian beginnings until the present time, international law has always been animated by the project of governing and transforming the peoples of the non-European world.

In his commentary on Anghie's article, Ki-Gab Park from the Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg affirms that he shares the thoughts expressed by the author. He also adds that by relying, in the name of the theory of inter-temporal law, on treaties and practices of the former colonial powers to solve the disputes between states born out of decolonization, the International Court of Justice (ICJ) is somewhat contributing to the perpetuation of imperialism.

In the third chapter, which deals with TWAIL's approach to human rights, Vasuki Nesiah, another prominent figure in this critical school of thought, explains how the recourse to human rights may sometimes entail significant perverse effects. Drawing upon the transitional justice processes that took place in Chile and South Africa, she argues that the human rights' technicalities operated in these two countries were used as mechanisms of exclusion. Indeed, the convictions were limited to the crimes that constituted physical assaults (murder, torture, rape, and so on), while the claims of victims of the macro-economic policy of Pinochet and the daily racist abuses and humiliations of the apartheid system were ignored. In the conclusion of her contribution, Nesiah adds that the situation of violence in some failing Third World countries, which are generally accompanied by serious violations of human rights, have the effect of

<sup>2</sup> These ideas were developed in A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007).

turning these states into political *terra nullius*, where external interventions are considered to be legitimate.

In his contribution to the fourth chapter of the present volume, Balakrishnan Rajagopal, another prominent TWAIL scholar, echoes the last idea exposed by Vasuki Nesiiah as he argues that the human rights discourse is of a hegemonic nature because it is often used to legitimize hegemonic military interventions. According to him, the same can be said of the discourse on development, which contributes to the legitimization of the liberal commercial policy promoted by the World Trade Organization and the institutional reforms imposed on developing countries by IFIs. Therefore, in order to achieve their objective of a 'counter-hegemonic international law', Third World countries should find alternative strategies to the human rights and development discourses on which they are currently relying and which have proven to be ineffective and counter-productive. Among the alternatives proposed by Rajagopal in the conclusion of his study are the growth of regional international law, which provides a counter-balance to the hegemonic international law; the replacement of the current multilateral system with an alliance of hegemonic powers from the North and the South, acting in concert; the emergence of a new front of Third World states; the emergence of coalitions of small and poor states with social movements and the development of a critique of the fetishism of institutions at the international level.

Several commentators have expressed their agreement with the ideas and thoughts of Vasuki Nesiiah and Balakrishnan Rajagopal and have undertaken to further develop some aspects of the arguments that were exposed. In her commentary on Nesiiah's contribution, Vera Gowland-Debbas argues that as in the context of transitional justice, international human rights law also operates as a mechanism of exclusion in the field of refugees' protection. She shows how by linking the definition of the term 'refugee' to the notion of persecution, international law rules provide European states with an authoritative tool, allowing them to reject the demands of certain categories of asylum seekers on the basis of their origins, thereby undermining the universal character of human rights. Similarly, in her contribution to the third chapter of the book under review, Ratna Kapur highlights the limitations of the development of women's rights at the international level. She explains that the co-optation of feminist concerns within international human rights law through the adoption of the UN Security Council resolutions has had the effect of excluding certain categories of women from the protection of the law. Indeed, according to Kapur, this co-optation has been carried out on the basis of a victim-centred approach that is limited to armed conflict contexts. Therefore, in post-conflict situations, such as the one in Nepal in the aftermath of the 'People's War', the female ex-combatants of the People's Liberation Army who could not be considered to be victims had no other choices but to return to their homes where they are expected to go back to the traditional female role that they hoped to change through the insurgency.

Mohamed Mahmoud Mohamed Salah shares the idea advocated by Rajagopal of using development discourse as an instrument of hegemony and domination. In his study, which has been included in the third chapter, he underlines the fact that the concepts of 'sustainable development' and 'right to development' lack normative content. Therefore, their impact at the legal level, notably their application by international courts, and their effect on the reality on the ground, is quasi-inexistent, which turns them into mere elements of language that are aimed at legitimizing the actions of IFIs. Interestingly, Mohamed Salah compares this reference to the development in the international legal discourse to the semantic shift lately operated by the IFIs. This shift has consisted of replacing the reference to 'structural adjustments programs' with the reference to 'poverty reduction strategies', while the policy of imposing reforms to Third World countries in the economical interest of Western countries remains unchanged.

The fifth chapter of the book under review is dedicated to rethinking the modes of diffusion, research and teaching of international law in light of the reflections of the TWAILers on their

discipline. In her contribution to this chapter, Karin Mickelson underlines the necessity of teaching TWAIL's theories in undergraduate, professional and graduate programs due to the importance of enabling students to confront the hypocrisies and inconsistencies of international law. Her essay is followed by the contribution of James Thuo Gathii, who presents TWAIL as a decentralized network of scholars sharing common concerns about the Third World, which is characterized by its openness to a variety of approaches (critical, feminist, post-colonial, modernist, Marxist and so on) and by its lack of any structure of hierarchy and authority. This contribution ends with an exhaustive bibliography of TWAIL scholarship, which is of great interest for international law scholars, students and researchers interested in furthering their knowledge of the theories of this school of thought.

Both Mickelson and Gathii also address one of the main criticisms levelled against the TWAILers, namely the nihilism of their works and thoughts. Indeed, as critical approaches to international law, TWAIL is often accused of engaging in critique for the sake of critique, destroying the existing edifice without presenting alternatives to replace it. However, for Gathii, this accusation is misleading. Relying on the works of feminist TWAILers, he shows how the writings of TWAIL scholars are usually accompanied by action and normative reform proposals aimed at promoting justice and equality in international relations. Mickelson highlights the fact that TWAILers are driven by their hope and faith in the transformative potential of international law. Therefore, they cannot easily be accused of nihilism since their critique is motivated by the will to transform international law and not by any kind of complacency or pleasure derived from deriding the system. Hence, TWAIL scholarship is useful, and its expansion through teaching necessary in that it could boost the transformative potential of international law by pointing out its flaws and shortcomings.

In a short but insightful contribution in the concluding part of the book, ICJ Judge Mohamed Bennouna also links the usefulness of the TWAIL scholarship to the transformative potential of international law. He argues that when the application of a rule of international law leads to patently unfair solutions, the rule in question is often subsequently modified in order to meet the requirements of justice and equity. To illustrate his assertion, Judge Bennouna gives the example of the evolution of the *jus standi* rule in the jurisprudence of the ICJ. He shows how, as a result of the criticisms charged against the Court's judgment of 1966 in the *South West Africa* case, which had limited the right of standing of states to the defence of their subjective interests, the ICJ recognized, in its 1970 judgment in the *Barcelona Traction* case, the existence of *erga omnes* international law obligations, which allow states to institute proceedings in the interest of the international community as a whole.<sup>3</sup>

The necessity of teaching TWAIL as part of law curriculums is endorsed by Eleftheria Neframi in her commentary on the texts of Mickelson and Gathii. Interestingly, Neframi argues that TWAILers' thoughts and theories should also be taken into account in the teaching of the law of the European Union (EU). According to her, the institutional rules that regulate the external action of the EU are driven by the objective of turning it into a prominent global actor. However, this goal cannot be reached if the EU is not accepted and recognized as such by its Third World partners. Therefore, since the TWAILers express the concerns and aspirations of Third World countries and peoples, their thoughts and ideas may be helpful to redefine and clarify the European law rules applicable to the relations of assistance and cooperation between the EU and southern countries.

<sup>3</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 12; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application, 1962) (Belgium v. Spain)*, ICJ Pleadings (1962), vol. IX, 507.

Unlike the scholars whose contributions and commentaries are mentioned and briefly summarized above, a second category of contributors to the volume under review has adopted a less laudatory and more critical position *vis-à-vis* the ideas and thoughts exposed by the representatives of TWAIL. The critiques levelled by these commentators either concern specific arguments exposed in a peculiar contribution to the book or go beyond the commented article to address one of the general characteristics of TWAIL. For instance, in his commentary on Anghie's text, Judge Mohammed Bedjaoui, who is one of the leading francophone figures of the first generation of Third World international lawyers, considers that the view advocated by the author of an intrinsically colonial and imperialistic international law is too reductive. For him, contrary to Anghie's contention, international law was not created for the unique purpose of legitimizing colonialism and regulating the relations between European states and non-European peoples. He explains that international law has always been meant to govern inter-state relations and that its scope was expanded to colonial questions in order to regulate the competition between the European colonial powers. Turning to the present and the possible future of the discipline, Judge Bedjaoui argues that international law reflects the balance of power within the international political order. Therefore, he believes that the current transition towards a 'multi-polar' world will result in the emergence of an international law freed from its imperialistic and hegemonic aspects.

In what seems to be an indirect and rather hidden critique of the TWAIL scholarship, several contributors to the volume under review have questioned the notion of 'Third World' and the relevance of opposing Northern and Southern or developed and developing countries in today's international context. For example, in his commentary on Rajagopal's text, Rahim Kherad underlines the appropriateness of the notion of 'Fourth World' proposed by Father Joseph Wresinski, which includes not only the countries known as the Third World but also some under-developed and poor regions located in industrialized and developed countries. In the same vein, Jean Salmon explains that the main issues addressed by TWAIL, such as the protection of the environment and the fight against poverty, are not unique to Third World countries. According to him, these are universal problems caused by globalization and liberalism.

The unity and homogeneity of the Third World have also been called into question. For instance, Kherad argues that Third World countries are today fragmented into three categories, namely the least developed, the developing and the newly industrialized countries. Drawing upon the example of the purchase and leasing of agricultural lands in Africa by emerging countries such as China and its dramatic consequences on local populations, Kherad demonstrates that the neo-colonial and imperialistic attitude criticized by TWAIL is no longer unique to Northern countries. It can also be adopted by states formally belonging to the Third World bloc. This view is echoed by Jean Marc Sorel, who argues that the rebalancing of the international political order is being realized through the emergence of new imperialisms such as the Chinese one.

The TWAIL approaches to human rights and development are also subject to criticism. In a very rich and informative essay in the concluding part of the book, Rémi Bachand blames the TWAILers for their lack of an in-depth analysis of political economy, in general, and of the functioning of capitalism, in particular. He explains how this lacuna impairs the quality, comprehensiveness and radicalism of their critique of international law rules. For instance, Bachand notes that if TWAIL scholars stress the political 'instrumentalization' of human rights by imperialistic powers, they fail to mention that the characteristic of human rights is not to abolish the structures of domination and exploitation but only to mitigate their adverse effects in a way that is acceptable to those who benefit from the system. To substantiate his argument, the author gives the example of the rules prohibiting forced labour and underlines their illusory nature by explaining that since capitalism separates the workers from the means of production, the former do not have any choice but to sell

their labour force to capitalists and accept the working conditions imposed on them. In addition, Bachand underlines the relevance of the Marxist theory of the tendency of the rate of profit to fall for the analysis and comprehension of international law rules. He explains that a substantial number of the norms of international law that are detrimental to Third World countries, such as the rules relating to the 'conditionalities' of IFIs, international trade, the protection of international investments and the regulation of the use of force, can be analysed as instruments established by Western countries in order to counter the earlier-mentioned tendency, which has been caused by the over-accumulation of capital in their territory. In sum, Bachand argues that in order to achieve their objectives, TWAIL should rely more on classical and modern critical economic literature.

Finally, in the fifth and last chapter of the volume under review, which deals with the modes of diffusion and teaching of TWAIL, some contributors question the appropriateness of including courses, seminars and master programmes that are exclusively dedicated to TWAIL in law curriculums. For Jean Salmon, this teaching strategy is not feasible for financial reasons due to the lack of attractive professional opportunities offered by such formation and the unwillingness of private companies to fund research projects aimed at denouncing the current liberal economic system. Instead, Salmon proposes to discuss the ideas and thoughts of TWAIL within the framework of classical international law courses (international environment law, human rights law, EU law and so on), thereby inviting international law professors to adopt a teaching method that combines critical and positivist approaches to the discipline. Salmon's position is echoed by Olivier Corten, who argues that the incorporation of courses on TWAIL in academic law programmes entails the risk of confining their theories to the courses in question. Drawing upon the experience of francophone law faculties, he explains that the creation of such courses usually lead law professors to stick to a positivist approach in their teachings and to use as an excuse the existence of other courses dedicated to critical theories.

In addition to these reflections on teaching, Corten's commentary contains a critical appraisal of TWAIL's legal methodology. Indeed, Corten starts his article by arguing that TWAIL is neither original nor innovative. He explains that its methodology is similar to the sociology of law tradition (*la sociologie du droit*) in that it consists of placing international law rules in their social, political and historical context and understanding the rationale of their emergence at a specific point in history. Moreover, he adds that since they describe international law as a product of the will of the ruling class, namely the colonial and imperialistic states, and as a tool used to perpetuate the domination of this ruling class over the Third World, TWAIL can be considered to be a neo-Marxist current. Corten then argues that TWAIL's objectives can effectively be pursued through a traditional formalist methodology without the need of adopting a critical posture. For instance, he demonstrates how certain legal interpretations advocated by Western states, such as the one that confers a decisive weight to the practice of the so-called major states in the establishment of customary rules or those aimed at asserting the legality of the war on terror, can be easily challenged on the basis of positivist legal concepts and reasoning (sovereign equality of states, ICJ jurisprudence, UN Charter rules and so on).

In summary, two general conclusions can be drawn from the debate and exchange of ideas described above between anglophone TWAILers and francophone international law scholars. First, despite some criticisms expressed with regard to the methodological posture of TWAIL, it is clear that there is a quasi-consensus among the different contributors to the volume under review on the importance and the usefulness of the existence of a critical legal approach aimed at analysing the impact of international law rules on Third World peoples and countries. Indeed, several scholars, including Francisco Meledje, who authored the concluding article of the book, assert that it is the ethical responsibility of international law scholars to shed light on the rules that contribute to the perpetuation of poverty and violations of human dignity in the Third World. Moreover, many other commentators underlined the political potential of TWAIL as a means of inducing a transformation of international law into a just and non-hegemonic legal order. As for the second conclusion, it emerges from the debate that TWAIL objectives (more equality, more diversity, more democracy and more representativeness in the international legal

system) might be better furthered by formalist and positivist approaches that allow international scholars to defend the interests of the Third World from within the current system.

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## **Individual Contributions**

- Emmanuelle Tourme-Jouannet, Mark Toufayan and H el ene Ruiz Fabri, Avant-propos: Nouvelles approches sur le tiers-monde: entre r ep etition et renouveau;*
- Yves Daudet, Introduction g en erale;*
- Bhupinder Chimni, Le pass e, le pr esent et l'avenir du droit international: une approche tiers-mondiste critique;*
- Mohammed Bedjaoui, Propos introductifs: Les 'TWAIL' et le sort des  tudes juridiques postcoloniales;*
- Antony Anghie, L' volution du droit international: R alit es coloniales et postcoloniales;*
- Mohammed Bedjaoui, Observations sur le texte d'Antony Anghie;*
- Ki-Gab Park, Commentaire;*
- Anne Orford, The Past As Law or History? The Relevance of Imperialism for Modern International Law;*
- Ineta Ziemele, A Reinterpretation of the History of International Law? A Comment;*
- Vasuki Nesi ah, Proc es de l'histoire: les droits humains aujourd'hui;*
- Habib Gherari, Observations sur le texte de Vasuki Nesi ah;*
- Vera Gowlland-Debbas, Comments on 'The Trials of History: Human Rights Today' by Vasuki Nesi ah in Light of International Refugee Law;*
- Ratna Kapur, 'Girls will be Girls': Peace and the Gender Politics of Security Council Resolutions 1325, 1820;*
- Mohamed Mahmoud Mohamed Salah,   propos de la rencontre des droits de l'homme et du d veloppement;*
- Balakrishnan Rajagopal, Droit international contre-h g emonique: repenser les droits humains et le d veloppement comme strat egie pour le tiers-monde;*
- Paulo Borba Casella, International Development Law and the Right to Development in Post-Modern International Law;*
- Rahim Kherad, Trois observations;*
- Jean-Marc Sorel, Quel tiers-monde pour quel d veloppement? Br eves remarques;*
- Jean Salmon, Propos introductifs;*
- Karin Mickelson, Rethinking Modes of Diffusion and Research and Teaching Methods: A TWAIL Perspective;*
- James Thuo Gathii, TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography;*
- Olivier Corten, Les TWAIL: approche scientifique originale ou nouveau label f d rateur?;*
- Eleftheria Neframi, Le tiers-monde et la recherche et l'enseignement du droit de l'Union europ enne;*
- Jos e E. Alvarez, What Is to Be Done?;*
- R emi Bachand, Les Third World Approaches to International Law: Perspectives pour une approche subalterniste du droit international;*
- Mohamed Bennouna, Le tiers-monde aujourd'hui: Bilan et perspectives;*
- Francisco Meledje, Nouvelles approches sur le tiers-monde: Qu'avons-nous retenu? Que devrions-nous faire?*