Ethical Dimensions of Third-World Approaches to International Law (TWAIL): A Critical Review

Kwadwo Appiagyei-Atua
Department of Law, University of Ghana, Legon, Accra, Ghana
kappiagyeiatua@ug.edu.gh

Abstract

Third-World Approaches to International Law (TWAIL) represents an intellectual movement devoted to exposing the injustices, imbalances and contradictions inherent in international law that work against the interests of the Third World, especially Africa. As a deconstructive tool, it seeks to question the assumptions and claims of neutrality, fairness and orderliness that law is supposed to embody and thereby decentre the garb of coloniality, hegemony, eurocentricity and universality that defines and dictates the discourse and praxis of international law, especially international economic law. As a reconstructive tool, TWAIL has the underlying commitment of developing and embedding the democratic ethos and norms that should regulate relations within and between the so-called developing and developed worlds and thus provide a new way of understanding and practising international law. TWAILism therefore represents an attempt to promote and inject an ethical dimension into international law that will ensure a fair playing field for all actors. However, placing the discourse of TWAILism within a global ethics context for analysis has not been the direct concern and focus of TWAILers. The contribution of this article, therefore, is to immerse the discourse of TWAILism into a global ethics matrix with the goal of measuring the extent to which its substantive elements, goals and ambitions match up to a well-founded standards of global ethics; and to fill in the gaps by proposing a theory. The theory of community emancipation seeks to support the need for a global distributive justice approach to addressing the inequities and injustices plaguing the international order.

Keywords

ethics – imperialism – international law – TWAIL
1 Introduction

The paper seeks to draw a relationship between ethics and international law as a way of exposing the injustices and contradictions inherent in international law, which has been the burden and focus of Third-World Approaches to International Law (TWAIL).

It sets off by exposing some myths that a doctrinaire and formalistic approach to international law assumes, followed by a methodological approach by TWAILers to dismantle the garb of rationality, neutrality and universality that these assumptions hold. This reaction by TWAILers lays bare the exploitative and illegitimate character of international law as it is. The work also, in this context, looks at the pre-TWAILing school, the contributionists, who initiated the process of questioning the monopolisation of knowledge and ideas by Europe in claiming to be sole contributors of the concepts and precepts informing international law.

The next stage of the work identifies some gaps in the work of TWAIL, the key one being the fact that it is not forthrightly grounded in a global ethics perspective, which for the sake of this work adopts the definition of Dower as “an area of critical ethical enquiry into the nature and justification of values and norms that are global in kind and into the various issues that arise such as world poverty and international aid, environmental problems, peace and security, intervention and human rights.”

It then examines the real contribution of Africa and other Third-World states to international law, which the paper contends is only a post-decolonisation phenomenon done through the UN and is weak and marginal only. This is followed by the ethical discussion to determine how TWAIL can move forward by benefitting from a more critical and organic engagement with the ethics of global distributive justice. This part of the work involves a critique of John Rawls’ notion of social justice and its limitation to internal, but not international, politics. As a contribution to TWAILism, the work propounds a theory to support the critics of Rawls, such as Pogge, in favour of linking the global to the local and thinking ‘glocally.’ The theory of Community Emancipation is subjected to some factual analysis to supports its viability and the need for the First World to support a radical reform of international law for its own good.

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2 What Triggered TWAIL?

TWAIL is a critical intellectual movement that started in the 1990s among a group of students and scholars from Harvard University who wanted to find “new ways of thinking about the relationship between international public law and international economic law, and issues of global wealth and poverty.”

Since then, TWAIL has grown to generate a

[V]ibrant ongoing debate around questions of colonial history, power, identity and difference, and what these mean for international law. It has also considered possibilities for egalitarian change in a broad variety of areas in the fields of public international law and international economic law.

It has come to challenge certain assumptions that the liberal conservative approach to international law has wrapped itself in, creating the image of neutrality and universality but in essence expressing international orthodoxy and eurocentricity.

Among these assumptions is that issues of under-development should be internally situated and attributed to failed leadership of post-colonial states, rather than the effects of a historically-constructed global political and economic system.
Second is the assumption that, having entered the post-decolonisation phase and even with the establishment of self-determination as a *jus cogens* norm, international law has now been truly internationalised and assumed an essentially anti-colonial character. Malcolm Shaw, for example, directly or indirectly, supports such a position as he notes that “[t]he foundations of international (or the law of nations) as it is understood today lie firmly in the development of Western culture and political organisation.” This “European-based homogeneity” which “enshrined the power and domination of the West”, according to Shaw, has been dismantled following the internationalisation of international law in the last fifty years, thereby affirming its “universalist scope.” Therefore, the contention is that the real political question should now be how this truly universal international law can best be used to end human suffering.

Third, the liberal conservative approach asserts the immutability of international law and contends that a re-imagining or revision of international economic and legal relations will unduly destabilise the international legal order and society and subject it to the whims of the developing world. Therefore, the *status quo* needs to be maintained. This argument was sharpened and used as a weapon to resist attempts by developing countries to restructure the unjust international economic order through the call for a New International Economic Order (NIEO). Related to the previous assumption is the claim of neutrality, objectivity and fairness that international law supposedly holds which claim masks prominent historical and conceptual distortions of international law located in its imperial and colonial character.

5 *Case Concerning East Timor (Portugal v Australia) Merits, Judgment, ICJ Reports 1995/4*, at 102, para 29.
6 M. Shaw, *International Law*, 5th edn. (Cambridge, Cambridge University Press, 2003), at p. 13. Although he admits that the origins of international law go deeper into history, this recognition does not go beyond Indian and Chinese civilisations. The rich civilisations of Africa, North and South America, etc. are disregarded.
Fourth, the assumption that obligation in international law could be taken for granted by viewing it “simply as the legal consequence of formal validity or state consent.” This argument, couched in a realist or rationalist tone, overlooks the fact that “[l]aw is a site not only for the creation of new obligations but also for the transmission of inherited obligations.”

3 TWAIL Reaction

This formalistic and doctrinaire approach to international law is confronted by TWAIL scholarship as being divorced from the social, historical and political context within which international law operates.

TWAIL thus seeks to assail the structure and framework of international law as representing the provincial ideas and economic interests of the developed world to the detriment of the so-called ‘Third World.’ In other words, that international law is overtly biased against Third World countries, for while it guarantees sovereign equality and self-determination, it carries forward the legacy of imperialism and colonial conquest. TWAIL scholarship asserts strongly that imperialism has constructed international law and that it is not a matter of past history but of present obligation. Thus, Anand contends that in order to assess “what should be done” to make international law more ‘effective and acceptable’, it was necessary to “look at the problem historically.” Bedjaoui also contends:

Before the First World War there was an ‘exclusive club’ of State which created what has been called a ‘European International Law’ or a ‘European public law,’ which broadly speaking, governed relations not only among

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11 J. Brunnée and S.J. Toope, Legitimacy and Legality in International Law (Cambridge: Cambridge University Press, 2010).
14 Orford, supra note 4, at 9.
16 James Gathii, Imperialism, Colonialism and International Law (Bepress Legal Series Year 2006 Paper 1262); Orford, supra note 4, at 8.
members of the ‘club’ but also between them and the rest of the world. If the scope of this law, which was geographically specific, had a universal character, it has nevertheless been conceived simply for the use and benefit of its founders, the states that were called ‘civilized’.

In other words, international law is “Eurocentric in its geographic origin, Christian in its religious basis, imperial in its political objectives and mercantilist in its material underpinnings.” Further, that international law is a “crucial site for the production of ideology and the perpetuation of social power.” That is to say, states advance their interests, in part, through the medium of international law and that international law is not constitutive but rather, a reflection of the hierarchical character of international society. As an example, Appiagyei-Atua notes that the “NIEO identified traditional concepts of international law as being supportive of capitalism, and responsible for provoking the injustices of the international economic order.”

Additionally, TWAIL insists that issues of material distribution and imbalances of power affect the way in which international legal concepts, categories, norms and doctrines are produced and understood.

To the claim of immutability attached to law, Bedjaoui, for example, responds that it constitutes “legal paganism.” That is, the assertion perpetuates “the supremacy of developed states” by focusing on the form of the legal concept while ignoring “the social reality of developing countries [especially in meeting their ‘survival’ needs].”

To capture the essence of the TWAIL message, Makau Mutua notes:

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. Neither universality nor its promise of global order and stability make international law a just, equitable, and

18 M. Bedjaoui, ed., supra note 9, at 5.
20 Gathii, supra note 15, at 1.
21 Ibid.
22 Appiagyei-Atua, supra note 4, at 530.
legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination... The broad dialectic of opposition to international is defined and referred to as... TWAIL.25

However, TWAIL is not only a deconstructive, resistance tool vis-à-vis international law and scholarship. It is also has the underlying commitment of developing and embedding the democratic ethos and norms that should regulate relations within and between the so-called developing and developed worlds and thus provide a new way of understanding and practising international law.26 For that reason, TWAIL scholars argue in favour of an egalitarian international economic order that would among other things, subject foreign capital to domestic laws; abolish discriminatory trade practices in international economic relations and ensure stable and fair price guarantees of primary commodities.27

4  TWAIL Versus Contributionism

The TWAIL project brought it into conflict with the earlier generation of scholars who sought to challenge the hegemonic paradigm held by the West over the origins of international law. These scholars, led by Taslim Elias and referred to as the contributionists, had a dual mandate. The first was to reclaim and reconstruct Africa’s past which was neglected, rejected and denigrated by Europe and put it on an even footing with the latter. It seeks to do so by questioning the grand theory woven around the image of a civilised Europe that, based on its proclaimed superior knowledge and intellectual prowess, embarked on a unilateral enterprise of developing the concept of international law, minus all other non-European civilisations.28

26  Eslava and Pahuja, supra note 23, at 105.
27  Gathii, supra note 2.
The second mission is to insert Africa and its contributions into the history of international law in order to challenge the claim of inferiority, backwardness and lack of history attributed to Africans.29 As a result, evidence has been mobilized to argue that Africa and other non-European kingdoms and societies participated in the formulation of customary international law and were not therefore newcomers to it. In sum, contributionism seeks to have Africa recognized as “an innovator and generator of norms of international law.”30

Mutua refers to the contributionists as minimalist assimilationists as opposed to affirmative reconstructionists for TWAILers.31 Gathii also labels the contributionist project as constituting the weak form of anti-colonial scholarship which is basically integrationist, meaning that

[I]t is largely complimentary of the liberatory claims of principles such as self-determination as uncompromising tenets of world peace and indicators of the rejection of the colonial experience and specifically as an expression of the value these principles uphold against the unacceptable repression of non-European humanity under colonialism, slavery and other forms of discrimination and repression of the non-European personality.32

A major theme explored by the contributionists was that of the existence of trade, commercial and diplomatic links between pre-colonial African and Asian kingdoms and European societies prior to colonial conquest late in the eighteenth and early nineteenth centuries. However, the contributionists did not question the nature of the trade and diplomatic relations that existed which were skewed in favour of the Europeans.33 They thus ended up overlooking the ethical loopholes embedded in the imperialist and mercantilist character of international law that foreground the Eurocentric paradigm of international law and for which the justifications they gave could not cure.34 For example, Montesquieu justified European adventurism thus:

29 Elias, ibid.
30 Gathii, supra note 24, at 1.
31 Mutua, supra note 25.
32 Gathii, supra note 19, at 189.
Most of the people on the coast of Africa are savage or barbarian, they are lazy, they have no skills, they have an abundance of precious metals which they take straight from nature. All civilised people therefore are in a position to trade with them to their advantage. They can get them to value many things which are of no value, and get a very high price for them.35

Thus, Gathii critiques the contributionist project as outlined by Elias in these terms:

Elias has little to say about how international law was implicated in the history of slavery under international law in the eighteenth and nineteenth centuries. Elias does not also address or make any observations with regard to the ways in which images of backwardness and barbarism ascribed to Africans under international law justified colonial expropriation of African lands.36

Furthermore, the contributionists seem to give pride of place to the so-called treaty relations which the Europeans entered into with African chiefs as proof of recognition as sovereigns or co-equals with the Europeans. However, this analysis is bereft of the “chicanery, the intrigue and back-hand dealings that went into these treaty arrangements.”37 Having initially contended that Africans were inferior to Europeans, not socially and politically organised38 and not possessing sovereignty, it was technically impossible for the two entities who were not operating as equals to enter into treaty relations, since consent could not be obtained. The unethical approach postulated to resolve this conundrum was for the European powers to grant some degree of “legal personality”

36 Gathii, supra note 24, at 5.
to the Africans. The original notion of recognition as proposed by Hall, for example, was a process whereby an uncivilised state was, through increasing civilisation, brought within the realm of law; while, for Westlake and Lorimer, “quasi-sovereignty” was used to temporarily admit non-European peoples as partial members of international community. Agreement over an ‘unequal treaty’ would constitute recognition of a “sphere of influence”, or an instrument of jurisdictional capitulation – both alternatives consequently becoming possible precursors to ultimate annexation. After the acquisition of their lands, their status were degraded to subjects and non-sovereigns again. As noted by Grovogui:

Sovereignty belongs to European nations, quasi-sovereignty to European trading companies, while Africans were just that, Africans, since they were incapable of becoming bearers of sovereignty.

In conclusion, it can be said that contributionism is devoid of ethical analysis in its critique of the Eurocentric approach to international law and the use of international law to further European hegemony.

Gaps in TWAIL Analysis
In spite of TWAIL’s ability to expose the ethical gaps in the work of their predecessors, their analyses expose some gaps of their own. First, TWAIL fails to examine how European international law became global international law. Second, though covering other fields, TWAIL is generally limited in scope to the relationship between international law and international economic law. However, the issue goes beyond that. Third, there is a contributionist and integrationist dimension associated with the contributionist debate which needs to be brought in. Finally, the entire TWAIL project is not fully grounded in a critical ethical perspective.

Analysis of these gaps calls for conceptualising a holistic approach towards foregrounding and historicising the origins of international law from an African perspective before reconstructing its annihilated past to promote a just and equitable international order.

The relevance of tracing the historical origins of international law and fill the gap left by TWAILers is that as things stand now, TWAIL indirectly or

40 N’Zatioula Grovogui, supra note 37, at 49.
41 Gathii, supra note 24.
unconsciously lends support to the Eurocentric perspective that it is the originators of international law. But in reality, that is incorrect. There is a fundamental ethical issue associated with this as the whole process through which Europe came around to claim to be the originators of international is flawed and mired in intrigue, underhandedness and forgery.

A good starting point for engaging in this analysis is to adopt Yasuaki Onuma’s thesis that:

[To] see the process of European domination and unification of the world solely from the European perspective has the proclivity to impoverish the academic undertakings which should take diverse perspectives into account.42

According to Onuma’s analysis, different regions developed notions of primitive international law within their own limited geographical spaces before contact with Europe. These spaces were occupied by political entities he refers to as “human groups” or “bodies politic”. They are identified, inter alia, as sharing spheres of civilizations, having a common world image, or as “regional international systems, societies or orders.” They shared a normative consciousness which provided some form of legitimacy among these different bodies politic.43

Thus, in the African context, concepts and praxis of international law existed independent of other international laws and served as the normative framework to regulate inter-Africa relations. This notion of international law shared similar ideas with Europe and other civilisations, regarding concepts which, among others, expressed respect for the rights and freedoms of bodies politic (or “states”), sanctity of treaties and other forms of agreement, laws of war and the right of access to natural resources found on one’s territory.44 This event is confirmed by the practice of indigenous diplomacy in Africa among African bodies politic.45

43 Ibid.
44 Ibid.
45 That is, ‘international relations conducted among states that were not in contact with, or in this respect affected by, the outside world,’ according to G. Irwin, ‘Precolonial African Diplomacy: The Example of Asante’, 8 International Journal of African Historical Studies (1975) 81–96, at 83. See also J.K. Adjaye, Diplomacy & Diplomats in Nineteenth Century Asante (Trenton, NJ: Africa World Press, 1996).
When contact between Africans and Europeans began, diplomatic relations were conducted largely on the lines dictated to by the host, as at that time Europe did not have the means or power to impose its imperial authority on African states, hence its designation as Afro-European diplomacy by Irwin.\(^4\) The same happened in other places. For example, history has it that Emperor Ch’ien-lung of the Ch’ing dynasty rebuffed a suggestion by Lord McCartney in 1793 who paid a visit and asked that China respected the rules of international law and diplomacy as practised among European nations. China argued it had its own international law to follow.\(^4\)

However, a century later things had turned around and China and other countries had succumbed to European international law. This change of circumstances was caused by the military and economic power gained by European states through the bourgeoning of science and technology and which fostered the Industrial Revolution.\(^4\) The urge to find markets for their industrial products occasioned by the accumulation crisis and the need to find raw materials led to the urge to impose European international law on extra-European spaces.\(^4\)

Consequently, the normative values embedded in the regional international laws at the time were rejected and replaced by concepts and principles propounded by European scholars and rulers which were racially-biased and aimed at promoting European hegemony over Africa and other non-European spaces. This notion of international law was designed to promote empire-building, justify slavery and the slave trade and colonialism. Out of it concepts such as recognition, discovery, annexation, *terra nullius*, sovereignty, jurisdiction, etc began to evolve.\(^5\) The then existing norms of international law did not allow for such dehumanising and exploitative practices which resulted in the trans-Atlantic slave trade, imperialism and colonialism. Those

\(^4\) This occurred ‘when a European diplomatist, who might be a trader, missionary, hunter, or traveler as well as an official, sought benefits from an African ruler.’ Irwin, *ibid*.

\(^5\) Ibid.

\(^3\) Rodney, *supra* note 33.

inter-civilisation primitive international laws had the potential to defeat or dilute the imperialist/colonialist mission of acquiring commercial interests and territories and therefore had to be suppressed. In support, Schweickart remarks:

Early capitalist accumulation derived from the theft of common land, the slave trade, the extermination of native peoples, and other assorted horrors. Just acquisition and voluntary exchange had little to do with it.51

This explains the lack of ethical foundation for the contributionist claim of African contribution to international law. However, as is argued below, Africa has still contributed to international law but in more recent times and on the margins.

5 Weak Contributionism, Other TWAIL Targets

In spite of the wiping out of the possible contribution of Africans and other non-Europeans to international law, Africa and other developing countries have made some contributions to international law. However, these contributions are only piece-meal, marginal and have only come in the decolonisation phase mainly through the UN system. These are in areas where piece-meal concessions to reforming international law was allowed by the developed world because the changes would not radically affect their influence and fortunes and which changes would not profoundly shake the status quo. We can term this weak contributionism. A good example is the right to self-determination, which some TWAILers describe as a betrayal as it has not brought any real benefits to developing countries because the real wielders of power remain big capital. In this regard, Chimni expresses the frustrations of Third World countries in the continued attempt by the so-called First World to “recolonise” the Third World by subverting its autonomy through political, economic, ideological and legal machinations.52 Another example is the NIEO which only resulted in limited concessions for developing countries.53

53 Appiagyei-Atua, supra note 4.
Then there is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)\textsuperscript{54} where the treaty-making negotiations were dominated by the developed countries, backed by big pharma.\textsuperscript{55} Consequently, UNCTAD notes that an overwhelming 84\% of the patents in developing countries are owned by mainly multinational corporations of 5 developed market economies as opposed to less than 1\% by nationals of developing countries. Also, in the post-TRIPS era, attempts made to respond to the concerns of developing countries, particularly by organizations such as WHO, UNCTAD, the United Nations Development Programme (UNDP) and the World Intellectual Property Organisation (WIPO) were only piece-meal because the resolutions passed by these organizations to support developing countries are not binding on WTO.\textsuperscript{56}

Another gap that this work seeks to fill is the contention that TWAILism applies not only or specifically to the economic sphere but the entire gamut of international law. It is only when these areas are examined, in tandem with international economic law that a holistic picture of the monstrosity of the atrocities that international law has unleashed on Third World will be unveiled. These include but are not limited to the capitulation system, the international minimum standard, humanitarian intervention, diplomatic protection, state succession, use of force, commercial freedom, just war (\textit{jus ad bellum, jus in bello}), recognition, secession, etc.

6 Ethics and TWAILism

Ethics and international law do not seem to mix though there is a complementarity between the two. The result, according to Ratner, is

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\textit{Ibid.}
international law loses out on theoretical frameworks for prescribing, interpreting, and implementing international norms.\(^{57}\)

Ratner claims that much of international law scholarship is less focused on questions of moral reasoning or ethical theory due to its fixation mainly with positivism, which remains the lingua franca of international law.\(^{58}\) However, there are some exceptions, such as the application of *jus cogens* norms and their corresponding *erga omnes* duties.\(^{59}\) Ratner also identifies some strands of international legal theory as having some partnership with ethics. Among these are the “enlightened” positivists who seek to soften positivism’s formalistic light through subtle recourse to moral argumentation and the New Haven School.\(^{60}\) In addition, Ratner mentions the critical methodologies perspective which

[S]eek to engage with morality and put it at the centre of the agenda in order to give a voice to the marginalized. This voice seeks to identify hidden agendas and biases within international law – including its norms, institutions, practitioners, and methodologies – and reform it.

Ethics and global justice is the agenda of these critical methodologies. Each sees power as having both constituted and corrupted international law and argues for reform that takes into account voices marginalized for centuries. Yet Ratner laments that the ethics seems to end with this agenda.

Further, Ratner makes the point that critical scholars generally do not make a significant effort to engage with contemporary ethical theory by philosophers, especially on the issue of global distributive justice. His critique on this is poignant as he laments:

While lawyers talk and write about aspects of distributive justice, for example, the place of economic rights within the pantheon of human rights, or the balance between the rights of the foreign investor and those of the host state international investment law, most shy away from

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58 Ibid., at 3.
59 Ibid., at 5.
60 Ibid.
scholarship or concrete proposals to alter radically the global distribution of wealth.\footnote{Ibid., at 14.}

He singles out for exemption, however, some scholars in international environmental law, TWAILers and Thomas Franck’s in his book, \textit{Fairness in International Law and Institutions}.\footnote{T. Franck, \textit{Fairness in International Law and Institutions} (Oxford: Clarendon Press, 1998).} Ratner argues that international law does not have strong norms in favour of distributive justice and ultimately global justice. Those available are simply weak.\footnote{Ratner, supra note 57, at 26.} Altinay makes a similar observation:

We are increasingly becoming aware of a growing need for global public goods. Yet, one category of such goods, global norms, is missing from our lists, essentially because we rely on an overly statist conception of public goods. Smith, Weber, Elster, Putnam, Williamson, Fukuyama and others have demonstrated that a society and an economy need not just enforceable contract, but also norms, predictability and trust.\footnote{H. Altinay, ‘Global Norms as Global Public Goods’, \textit{Global Policy Essay} (April 2013), available online at http://www.globalpolicyjournal.com/sites/default/files/pdf/Altinay%20-%20Global%20Norms%20as%20Global%20Public%20Goods%2004.13.pdf.}

For TWAILers themselves, they have not directly associated themselves with any ethical perspective. Okafor, for example, asserts that “TWAIL scholars (or “TWAILers”) are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order.” However, in aligning themselves with other critical scholars, ethics is left out.\footnote{Among those mentioned are ‘feminist, Critical Legal Studies (CLS), New Approaches to International Law (NAIL), Marxist, poststructuralist, and critical race approaches to international law and global politics.’ Okafor, supra note 2, at 178.}

In what ways then, can a resort to global ethics help to enhance the work of TWAILers? We begin with a critique of Rawls.

\section{Critique of Rawls}

Building on Franck’s work, I lay the foundation for developing an ethical theory in support of TWAILism on Rawls’ concept of distributive justice.
The “difference principle,” one principle of social justice that forms the fulcrum of Rawls’ moral philosophy, rests on the premise that social and economic inequalities are permissible if and only if the arrangements generating them work out better for people in the “worst-off” position than would any more equal structure.66

The difference principle requires that all inequalities of social primary goods must be justifiable to the representative worst-off party within society. This principle only describes the nature of justice within the political society represented by a territorial state which structures the rules of association and allocate the advantages of cooperation.67

Rawls therefore does not deal with the issue of international justice because he feels the form and structure of international law as it is are enough to deal with issues of distributive justice. He also feels limited by the fact that international law is based on consent and the absence of coercive force to enforce compliance. He is also insistent on preserving sovereignty and non-interference.68 To him, therefore, there is no space for distributive justice in international law.

By so arguing, Rawls’ critics argue that one cannot help but notice the apparent contradiction between the universalism of his moral theory and the localism of its realm of application.69 For Pogge, for example, the well-being of the worst-off representative member of the global society, rather than the domestic, ought to be our starting-point for the justification of inequality.70

The notion of the basic structure is found internationally as well as locally. That is, the international and the internal are intricately and intimately connected and what happens internationally affects all domestically. Thus, it is contended that the modern system of international trade is similar to the basic structure. Therefore, Rawls’ distributive principles should apply to the set of persons in the world as a whole, so that global institutions should be arranged to maximize the expectations of the globally worst-off representative individual.

In his effort to extend the basic structure to the global scale, Pogge breaks the basic structure down into 3 components: first, an economic order, represented by the big international financial institutions μ IMF, World Bank, WTO, etc. Second are the procedures for decision-making by the economic order, which are fundamentally tilted against the Third World in favour of the rich

67 Ibid., at 7.
68 Ibid., at 378.
and powerful Western states. The third are the structures of interpretation and enforcement, which, because of the decentralised nature of international law, lack effective structures to respond to the needs of the impoverished and marginalised. In support, Chimni laments the legitimisation of undemocratic or counter-democratic practices of these institutions. In fact, the First World uses these institutions as smoke screens to perpetrate and perpetuate their hegemonic ideological practices.

Pogge’s analysis ties in with the concept of poverty production which Oyen has developed. In her view,

Poverty production is an emerging concept in poverty studies which captures the roles actors play, and the kind of activities they engage in, that result in poverty or contribute to poverty formation…The ‘actors and actions’ model espoused in the poverty production approach enables us to directly identify ‘where those [destructive poverty producing] forces are born, in what kind of context they thrive, their direct and indirect impact on poverty formation, and the means by which they can be suppressed or done away with.’

Thus, the international final institutions and the economically advanced states, working together, are the poverty producers. They should therefore be held responsible for poverty production which is escalating to alarming heights. This is in spite of the promise of “instant capitalism, instant democracy, instant prosperity” which capitalist triumphalism over communism preached to the Third World with the fall of the Berlin Wall. Even in the face of contrary results, the same message continues to be preached. Thus in 2010, the then World Bank President Robert Zoellick announced that the Third World was passé by proclaiming: “If 1989 saw the end of the “Second World”
with Communism’s demise, then 2009 saw the end of what was known as the “Third World.”

However, the figures tell a different story. Ricardo Gomez paints this graphic picture of the widening gap of inequality between the haves and have-nots:

In 1992, one fifth of the wealthiest world population (the wealthiest 20%) received 82.7% of the total world income. More graphically, 1/5 of the world population received 4/5 of the world’s income. More tragically, the one fifth poorest population got a little bit more than 1% of the global income. Here we have the statistical manifestation of the globalization of inequality and exclusion… In 1960, the difference in economic income between the wealthiest 20% of the world population and the poorest 20% was 30 to 1, whereas in 1994 that relation was 78 to 1. In 1996 the net value of the wealth of the ten richest individuals in the world was 1.5 greater than the total national income of all the underdeveloped countries. From 1996 to 1998 the number of multimillionaires increased from 145 to 447. In 1998 one billion people lacked appropriate shelter, and 800 million had no access to health services. Almost two billion people lived under the line of poverty, and almost one billion had to survive earning one dollar a day.

By 2014, the situation has not got better. Oxfam records that the richest 85 people across the globe share a combined wealth of £1tn, as much as the poorest 3.5 billion of the world’s population. The wealth of the 1% richest people in the world amounts to $110tn (£60.88 tn), or 65 times as much as the poorest half of the world. This concentration of economic resources, according to Oxfam, is threatening political stability and driving up social tensions. The report also states that growing inequality has been driven by a “power grab” by wealthy elites, who have co-opted the political process to rig the rules of the economic system in their favour.


77 R.J. Gómez, Globalized neoliberalism: refutation and debacle, Keynote address given at Whittier College PCCLAS Conference, 8 November 2003, available online at http://web.whittier.edu/academic/facultymasters/PCCLAS/DrGomezPCCLASlecture.pdf.

Rawls’ response to some of the concerns raised, however, does not offer any reformist agenda, neither does he make any serious attempt to link the international to the local. For example, in his *Law of the Peoples*, Rawls defines “the law of peoples” as referring to “a political conception of right and justice that applies to the principles and norms of international law and practice” which includes an account of the role of human rights. However, he only goes as far as to suggest placing his trust in the creation or setting up of international organisations to regulate inter-state relations. Distributive justice, which is the cornerstone of his theory on justice, is still left out.

On the role of human rights in international affairs, he identifies 3 roles for it. First, that their being fulfilled is a necessary condition of a regime’s legitimacy and of the decency of its legal order. Second, their fulfilment is also sufficient to exclude justified and forceful intervention by other peoples, say by economic sanctions or, in grave cases, by military force. Third, “They set a moral limit to pluralism” among peoples. However, a gaping gap left in this analysis is what happens when the abuse is generated and provoked from outside. This is where distributive justice on the international plane becomes important and that is what the theory of community emancipation, from the TWAILing perspective, seeks to resolve.

8 The Theory of Community Emancipation

The social context of the theory is the political community which is in a continuous struggle for emancipation, not only from external marauders but also internal predators who have invaded the development structure of the community and turned it into a dependence structure. The community is composed of an interactive group of people who seek to meet their everyday needs by pooling their diverse resources and talents together and engaging in a transformative process to regain their emancipation from the two oppressors, the joint ruling elite. Each community links up with a neighbouring community to discover the presence of another and through this means establish a community of communities with a set of rules to regulate their relations.

In its process of metamorphosis, the community passes through three stages – the communal, political and advanced political – which commensurate with the pre-colonial, colonial and post-colonial history of Africa.

The paradigmatic construct within which the theory of community emancipation is posited is the needs-capacities-duties-rights framework of analysis. The paradigm postulates that the community has needs the satisfaction of which lies in the ability of its constituent members to enjoy some rights that will enable them, without any constraints, to define such needs, assess their capacities and assign duties among themselves to be performed to meet these identified needs. The exercise of rights is made possible by the members placing duties on themselves to accommodate each other’s interests and needs and cooperate to help the others realise their potentials and talents. The ability of the community to meet its needs results in the attainment of development for the community.

The needs of the community are dictated by its particular socio-economic, historical, political and cultural circumstances. The capacity that a person possesses determines the type and extent of duties he or she can perform and also what he or she can create and achieve, thereby establishing a correlation between capacities and duties. Duties on their part are to facilitate the exercise and enjoyment of rights, to promote good neighbourliness and peace, as well as to meet other needs of the community.

Duties are owed to four entities who compose the community’s development structure – a divine/moral/ethical and/or political authority, the individual, group affiliations and the community (or entire state). These entities also constitute the community’s economic, socio-cultural and political networks. So long as this structure remains undisturbed, in the sense that no new entities are introduced, the traditional ones not taken away, or divided into groups or classes, development proceeds smoothly, only hindered by the immediate environmental and internal constraints.

The theory recognises three types of contribution to development: active, passive and negative. Active contribution occurs where the citizen is placed in an environment where he is able to enjoy all or substantial amount of the ensemble of rights that is entitled him/her as a member of the community. Where there is partial deprivation of a citizen’s right, the member will be inhibited from fully performing his or her duties. He or she can be coerced, directly and indirectly, to contribute actively to development. But the contribution would not lead to the full development of all the four entities of the community, except the power brokers. Such development is unsustainable and does not offer a sense of fulfilment for the deprived person. The result is passive contribution. When a member of the community is denied a substantial
part or all of his/her rights – substantial or total deprivation – the contribution of such a person to the development of the community would be negative.

The contributions to development help to establish the relationship between rights and development, which are 3 in kind: positive, passive and negative relationships. Active contribution results in the positive relationship between rights and development and ultimately, the attainment of sustainable holistic development. Passive contribution in turn yields passive relationship; and negative contribution, negative relationship approach.

Against this backdrop, rights, in the context of the theory of community emancipation, is defined as socio-economic and political claims and entitlements which are exercised and enjoyed by human beings qua human beings to enable the realisation of potentials, the utilisation of capacities and performance of duties that will lead to the meeting of needs and the attainment of development.

The arrival of the external marauders precipitates the forced graduation of the communities from the communal to the political stage of metamorphosis. This unnatural mutation upsets the development structure of the community, turning it into a dependence structure and occasioning the destruction of their local institutions and customs, considered inferior and passé by the forces of imperialism. Negative relationship approach to rights and development is the result. Where the situation gets dire and the oppressors are unable to maximise the benefits of exploitation, it switches to a passive relationship approach and introduces a new relationship with the community members, followed by a return to the negative when the situation is brought under control.

The struggle for community emancipation to restore the development structure, active contribution to development and the positive relationship between rights and development results in pseudo or caricatured emancipation because of the unwillingness of the external marauders to give up power. The solution, as usual, is to resort to negative relations approach through the granting of pseudo or caricatured emancipation. Pseudo emancipation results in emergence of a new ruling elite but who are forced to enter into an antagonistic-collaborative interdependent relationship with the physically departed forces of imperialism who remotely remain on the dependence structure to dictate policies for the community. This situation ushers the communities into the advanced political stage. The communities therefore have to wage a fight to displace the joint ruling elite. The external marauders are able to maintain their stranglehold on power within the pseudo emancipated communities by granting them sovereignty after their pseudo emancipation and allowing them to join some supposedly independent inter-community institutions as co-equals which exits in name only.
In such a situation, civil and political rights as introduced by the external marauders from their perspective and background – and enjoyed by them (and later with the local ruling group) – are found to be inadequate to re-establish the needs-capacities-rights-duties framework necessary to promote sustainable holistic development. To realise this objective, that is, to create conditions approximating those of the communal stage, economic, social and cultural rights need to be re-introduced as the “third generation” of rights. They are to make up for the lost opportunity denied the deprived to achieve their self-development and contribute positively to general development. It is also not to be seen as a call for redistribution of wealth as such but the granting of space and opportunity for the late-starters to make up for their lost opportunities.

9 Conclusion, Analysis of the Theory and Recommendations

The paper has sought to address the issue of global distributive injustice perpetrated through international law, which is portrayed by the doctrinaire formalistic conservative liberal ideology as immutable, neutral and universal but in reality is hegemonic, Eurocentric, imperialist, colonialist and arbitrary.

Among the assumptions that the formalistic ideology adopts are the fact that issues of under-development are internal and attributed to failed leadership of post-colonial states, rather than the effects of a historically-constructed global political and economic system. Second, that the post-decolonisation phase has ushered international law into an internationalised phase and assumed an essentially anti-colonial character. Third, the claim of neutrality, objectivity and fairness that international law supposedly holds which claim masks prominent historical and conceptual distortions of international law located in its imperial and colonial character. Fourth, the urge to take obligation in international law for granted. The reaction of TWAIL is summed up in Mutua declaring international law as “illegitimate” and predatory.

The work did not only identify the TWAIL critique of the formalistic international law ideology but also its predecessor critics of Eurocentric international law, contributionism or integrationism, which it portrays as representing a weak form of post-decolonialisation international legal anti-colonial critique of international law. In so doing, the work provides an ethical critique of the violations of the rights and dignity of Third World by the external marauders.

The work identified TWAILism as one of the few works in international law that adopts a critical methodology which combines ethics with law to expose the injustices inherent in the international economic legal network. However, this TWAIL approach is not considered as going far enough. The
present work seeks to plug some of the loopholes by identifying some gaps identified in the work of TWAIL. These are first, that TWAIL fails to examine how European international law became global international law. Second, that though covering other fields, TWAIL is generally limited in analysis and critique of international law to international economic law, though the issue goes deeper. Third, there is a contributionist and integrationist dimension associated with the contributionist debate which needs to be brought in. Finally, the entire TWAIL project is not fully grounded in a critical ethical perspective.

To place the TWAIL debate in its proper global ethical context, the work briefly examined John Rawls’ theory of justice and contributes to the critique linking the local to the global after which the work introduced the theory of community emancipation to fill in the gap identified in Rawls’ work.

The social context of the theory is the political community which is engaged in a continuous struggle for true emancipation, not only from external marauders but also internal predators who have invaded the development structure of the community and turned it into a dependence structure. The struggle for community emancipation results in caricatured emancipation as the new ruling elite is forced to share power with the physically departed external marauders. The community therefore has to wage a fight to displace the joint ruling elite. The external marauders are able to maintain their stranglehold on power within the pseudo emancipated communities by granting them sovereignty after their pseudo emancipation and allowing them to join some supposedly independent inter-community institutions as co-equals. The joint ruling elite enters into an antagonistic-collaborative interdependent relationship.

The theory of Community Emancipation aims at creating a new paradigmatic construct that moves the debate “from a formal regulatory regime to a substantive emancipatory paradigm, from a purely Eurocentric endeavour to one representative of the multitude of global society.”82

It clearly establishes the need to link the global to the local and think globally over issues of distributive justice. In essence, the theory helps to foreground and historicise the experiences of the Third World and to conclude that the solution to the problem is not simply a restructuring of the domestic but more fundamentally the international. It calls for a re-imagining and reconfiguring of imposed Western concepts and practices such as human rights and

democracy which are out of sync with the cultural, historical, political and developmental circumstances of developing countries.

While the Third World bears the brunt of the negative policies, it has not left the West free. This is exemplified by the negative contribution that the thousands of people who are finding all ways and means, fair or foul, to migrate to Europe is unleashing on the continent. According to statistics, illegal immigration has cost Europe, between 1999 and 2003, a total of €3.2 trillion, €1.9 trillion for transportation and €1.3 trillion for provisioning and accommodation, for illegal migrants who want to taste some of the good life their exploitation has reaped for the people of the First World to enjoy. This amount could have been spent profitably if it has been used to create a fertile environment for job creation in the Third World.

Another situation exposed by the theory is the use of the negative and passive relationship approach by the developed world for the Third World without ever crossing to the positive. The trend has continued from historical times. Examples include the denial of sovereignty for non-European states after the imposition of European international law (a negative relationship) and the granting of “quasi-sovereignty” (denoting a passive relationship) in order to justify the treaty relations that would allow for land-grabbing but returning to the no-sovereignty status after obtaining the lands. One can also talk about abolishing slavery and the trans-Atlantic slave trade but replacing it with colonialism; replacing colonialism with neo-colonialism; replacing support for dictatorship with support for nominal or “market” democracy. In all these, only piece-meal concessions are granted.

The solution to enabling Third World citizens to enjoy the positive relationship between rights and development and to attain active contribution to development for themselves and their communities, is to either dislodge the local elite, who I term as minimalist assimilationists or convert them to become affirmative reconstructionists so that they can combine forces with the rest of community to in turn dislodge the external marauders from the dependence structure and convert it once more into a development structure.


84 These terms are borrowed from Mutua who actually uses them to refer to the contributionists and TWAILers, respectively. See Mutua, supra note 25.

85 Ibid.
The reason advanced by Mutua is simply because

Politicians “often act in ways which are against the interests of their peoples”86 so rules of international law ought to be evaluated from the “actualized experience of these peoples” rather than those of the states.86

In sum, it is about a radical divorce from the Western rhetoric of human rights, democracy, good governance and other deceptive mantra and the adoption of a cultural relativist approach to human rights exercise and enjoyment, as espoused by the theory of Community Emancipation, as the first step towards true emancipation.87 The relevance of cultural relativism

[S]hould lie in using it as a tool to make rights exercise more effective and relevant to the people, not for those who tread the corridors of power. Integrating an African perspective would make human rights a concept accessible and meaningful to Africans. This perspective should genuinely reflect the aspirations and input of the oppressed people; be actually grounded in their lived experiences; and, a practical application of rights should likely contribute towards the attainment of sustainable holistic development for themselves.88

In addition, there is the need for Africa and other regions to become more insular and develop regional international law to regulate their relations 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.

Dislodging the external marauders calls for adopting Dower’s postulation: “three types of considerations that do affect the allocation of economic goods but can only operate on the background of a prior distribution

86 Ibid.
of just entitlements.”89 That is, first, restitution or reparation “where some legitimate entitlements of at least some members of a particular society were transgressed in the past by members of another society, typically in the form of enslavement, occupation or colonization.”90 Second, promoting “fair” trade; and third, fostering “cooperation between or across countries which does not take the form of trade, but of the production of global public goods, such as world peace, the prevention of damaging climate change, the guarantee of mutual aid in case of natural disasters, or the availability of a global lingua franca.”91

According to Dower, the goals of fulfilling human needs and achieving security, sustainable development, and conservation cannot occur effectively without mutual restraint and cooperation based on moral norms in an ordinary social setting. Thus, the challenges of non-violation, cooperation/coordination and positive intervention are at the core of realising the goals of global sustainable development and global security as an ethical requirement or acceptance of global responsibilities.92

90 Ibid.
91 Ibid.
92 Dower, supra note 1, at 3.