The TWAIL Discourse: The Emergence of a New Phase

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Abstract
One of the most important discourses to have emerged in opposition to mainstream international law has been the third world approaches to international law (TWAIL). This discourse may be divided into two historical phases: TWAIL I and TWAIL II. While TWAIL I was characterised by a focus on colonisation and the hegemonic use of international law by powerful nations, TWAIL II has concentrated on international institutions and the impact of globalisation. It is posited that the TWAIL discourse is in the process of entering into a new phase post 9/11. This phase can be understood as one in which TWAIL scholarship must respond to a series of new challenges in a world where terrorism is a serious concern. Such a response shares many common characteristics with TWAIL I and will involve a focus on the inconsistent and untenable use of international law by certain nations. Yet the scholarship in this phase must also draw greatly from TWAIL II. The challenges and responsibilities that TWAIL scholars face during this phase are far greater than those experienced during the first two phases of this discourse. For this crucial approach that enables us to rethink our understanding of international law, this phase will mark one of its most important periods.

Keywords
Third world approaches to international law; TWAIL; international law and terrorism; international law and 9/11.

A. Introduction

The present situation is characterised by the decline of Europe and the total crisis of our Occidental culture... There is finally the fact that the international community has today for the first time become, so to speak, really international through the definitive emergence and the great activity on the international stage of states of non-Occidental legal and value systems.

Josef L. Kunz (1955)

It is perhaps the misfortune of international law that it remains fiercely critiqued as ineffective in practice, and passionately opposed as unfair in

2) I use the word ‘misfortune’ with caution, not to suggest that international law does not deserve the criticism it has attracted (or to suggest that it does), but rather to mean that international law has always faced opposition both in theory and in practice.
3) Hart too accepted that “the question ‘Is international law really law?’ can hardly be put aside”. See H.L.A. Hart, The Concept of Law (2nd ed., 1994) p. 214. According to Lloyd, the ineffectiveness of
Arguments for an alternative system to mainstream international law have, by no means, recently appeared in academic literature. Kunz’s statement above is evidence of the fact that a changed international community was acknowledged over five decades ago. As early as 1964, Fatouros powerfully argued that Western nations should undertake a change in the approach of international law. Fatouros believed the objectives of international law should be reassessed since “the present situation of international law is so dissimilar to that in which the law evolved”.5

One of the most important discourses to have emerged in opposition to mainstream international law is the third world approaches to international law (hereinafter referred to as “TWAIL”). Importantly, TWAIL is not unique as being the only discourse of the nature that argues that international law reflects the interest of a select few and ignores certain marginalised groups.6 TWAIL scholars emphasize the fact that although the subjects of international law have greatly increased and there exists a wide cultural diversity amongst its subjects, international law has not responded to this phenomenon.7 Despite its basis firmly ground in the opposition to international law, and a common origin in the decolonisation era,8 TWAIL is an extremely diverse discourse. This diversity is demonstrated in two ways. First, TWAIL scholars disagree, at times profoundly, over the aims of TWAIL and the manner in which these aims should be achieved. Second, the international law was inevitable: “In a world containing a variety of conflicting ideologies, some of which are entirely or in important respects diametrically opposed, it is not surprising that international law is likely to be ineffective in many fields, and also to reflect the basic uncertainties and divergences of outlook of the countries which nevertheless acknowledge its authority.” See D. Lloyd, The Idea of Law (1964) p. 225. Brownlie, on the other hand, strove hard to demonstrate the effectiveness of international law and concluded that if international law was in fact ineffective, it was not a consequence of any inherent qualities of international law: “Whether in a given situation the law is ultimately ‘effective’ is a question of taste, in order words it is a matter of political and moral evaluation. When the law is seen to be ‘ineffective’, the cause is not ‘the law’ but the absence of organization, political will, sufficient personnel or funding, and so forth. Law, whether national or international, is not a source of alibis for politicians and administrators.” See I. Brownlie, “The Reality and Efficacy of International Law”, 52 British Year Book of International Law 1 (1981) p. 8.

Scholars have long contended that international law is unfair in theory and does not accurately represent the world to which it is applicable. TWAIL scholars are an important part within this group.


Certain feminists argue that international law does not take into account the voices of women. This view is excellently brought out in H. Charlesworth et al., “Feminist Approaches in International Law” 85 American Journal of International Law 613 (1991). See also H. Charlesworth, “Feminist Methods in International Law”, 93 American Journal of International Law 392 (1999). Another approach to have recently emerged is the race approach to international law, that argues that the issue of race has not been given the importance it is due in international law, see E. Roman, “A Race Approach to International Law (RAIL): Is There a Need For Yet Another Critique of International Law”, 33 U.C. Davis Law Review 1519 (2000).

A.A. Fatouros, supra note 5, pp. 785−794.