NOTES

TWAIL PARADOX

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The author via his scholarship tries to firstly, map Third World Approaches to International Law (TWAIL), elaborating on it genesis and the causes for its development, post which he tries to show the dichotomy existent within the system, i.e. its Eurocentricism; the very paradox it set out to escape.

I. INTRODUCTION: A PARADOX

A curious paradox animates Third World Approaches to International Law scholarship (TWAIL). On the one hand, the literature demonstrates that international law developed out of and perpetuates the colonial experience. International law, writes Makau Mutua, "is a predatory system that legitimizes, reproduces, and sustains the plunder and subordination of the Third World by the West."[1] On the other hand, however, its authors claim international law to be a source of future emancipation. "Rather than replacement," explain Eslava and Pahuja, "TWAIL scholarship is more interested in overcoming international law's problems, while still remaining committed to the idea of an international normative regime largely based in existing institutional structures."[2] In this brief essay, I wish to first map out TWAIL's predominant critiques against international law, and second, to highlight some blind spots within TWAIL literature. My

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[1] Makau Mutua, *What is TWAIL?*, 94 American Society of International Law Proceedings *31* (2000).

[2] Luis Eslava and Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45(2) Journal of Law and Politics in Africa, Asia and Latin America 206 (2012).

argument is that while TWAIL offers important corrections to mainstream international legal theory, it ultimately reinforces the Eurocentric liberal tradition it sets out to escape.

II. MAPPING TWAIL

At the most general level, TWAIL literature follows two interrelated critiques concerning the formal distinctions established by liberal theories of international law: the first concerning law and politics, the second related to economics and politics. In regards to the law/politics distinction, TWAIL scholars argue that formal sovereign equality alienates subaltern populations from participation in domestic or global governance. Likewise, scholars claim that the economics/politics distinction also disenfranchises former colonized populations from meaningful control over the distributional effects of exchange and production. Through historic and contemporary analysis of these two modes of alienation, TWAIL scholarship constructs methodological and normative alternatives meant to transcend the colonial inequalities structured within the discipline. In this section, I briefly map out the predominant critiques and reforms advanced through TWAIL scholarship.

The mainstream narration of international law claims that the discipline grew out of the question concerning how to maintain stability between formally equal sovereign states.[3] Though acknowledging that the international legal system only pertained to the 'family of nations' in Europe, its expansion in terms of geographical reach (e.g., decolonization) and range of actors (e.g., corporations, individuals, non-governmental organizations), as well as its prioritization of humanitarian and other 'non-political' objectives (e.g., environment), is posited to be indication that international law has transitioned from being the handmaiden of empire to serve the progressive interests of the international community at large.[4] Distinct from powerful political agendas and pluralistic in orientation, the international rule of law thereby offers an egalitarian, universal structure of governance for all people and countries alike.

TWAIL scholars contest the formal distinction between politics and law that undergirds this liberal cosmopolitan description of international law. First, drawing upon the 20th century jurisprudence of Critical Legal Studies and New Approaches to International Law, the literature

[3] *See* Antony Anghie, *The Evolution of International Law: colonial and postcolonial realities*, 27(5) Third World Quarterly 740 (2006).

[4] For a provocative description of how this argumentative logic operates in mainstream international law, *see* Nathaniel Berman, *In the Wake of Empire*, 14 *American University International Law Review 1515 (1999).*

argues that legal norms are fundamentally indeterminate, and thereby inescapably bound to political biases. From any "relatively specific statements of social goals can be elaborated an infinite series of normative propositions", which in turn requires subjective, interpretative choices to be selected concerning what specific regime of law to apply to a given set of dynamics (e.g., international economic law versus national security interests, international trade law versus human rights law) and what specific doctrine or remedy to privilege in balancing various interests (e.g., domestic labor sectors versus foreign direct investment).[5] To claim international law is somehow 'outside' arbitrary, distributional choices only suppresses its deeply political character.[6] This de-politicization of international law is especially troubling in light of the unequal political and economic relationships that currently exist between 'first' and 'third' world states, because in the 'free competition' of legal interpretation, the more powerful party tends to prevail – as Marx once explained, 'between equal rights, force decides'.[7]

Second, on a more subtle level, TWAIL scholarship argues that the actual conceptual vocabulary and background sensibilities that structure progressive international law are embedded in European prejudices concerning the legitimate organization of culture and politics. On the one hand, scholars emphasize the colonial legacy attached to the fact that the administrative centralized state is held out to be the sole political mechanism to full international legal personality.[8] This mode of governance arose specifically in the context of Western Europe, but was often foreign to former colonialized populations who historically and sometimes continue to favor alternative political forms of organization (e.g., clan, intergenerational, kinship, tribal). The insistence that newly formed postcolonial states adopt the territorial boundaries drawn up by colonial administrations (e.g., *uti possidetis juris*) therein frustrates the possibility of authentic, legitimate foundations for these states because the national populations often lack a

[5] *See* Harold Dwight Lasswell, LEGAL EDUCATION AND PUBLIC POLICY 31 (2012).

[6] This theme has been rigorously developed by scholars in the Critical Legal Studies tradition. *See e.g.*, David Kennedy, *New Stream of International Legal Argument*, 7(1) Wisconsin International Law Journal 1 (1988); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 Legal Studies Forum 327 (1991); Martti Koskenniemi, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

[7] For the perhaps most thorough Marxist analysis of international law, *see* China Mi*é*ville, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW (2004); *see also* Bill Bowring, LAW, RIGHTS AND IDEOLOGY IN RUSSIA: LANDMARKS IN THE DESTINY OF A GREAT POWER (2013); Akbar Rasulov, *The Nameless Rapture of the Struggle*, 19 Finnish Yearbook of International Law 243 (2008). For a useful explanation of Mi*é*ville's argument, *see* Rob Knox, *Marxism, International Law and Political Strategy*, 22(3) Leiden Journal of International Law 412 (2009).

[8] *See* Vasuki Nesiah, *Placing International Law: White Spaces on a Map*, 16 Leiden Journal of International Law 18 (2003).

common heritage and in fact maintain pre-colonial alliances and tensions, which manifest themselves in violent outbreaks and require non-democratic suppression because they continue to be unrecognized in the statist model of international law.[9] Moreover, the preoccupation with the state model (and to a lesser extent, international institutions) privileges financial and political elites (e.g., transnational corporations, local co-opted leadership) that have easy access and technical knowledge to navigate official bureaucratic channels, all at the expense of mass social movements and traditionally marginalized identities (e.g., environmentalist coalitions, gender struggles, peasant movements).[10] On the other hand, the growing proliferation of humanitarian aid, human rights law, and focus on 'third world' poverty indirectly reproduces the imaginative and real inequality of European and non-European populations. Since international law denies its historic and ongoing complicity, responsibility for the problems that haunt former colonized states is attributed solely to the 'backwardness' and 'corruption' of local populations and their political leaders.[11] As such, the category of 'third world' becomes the repository for a set of images – "of poverty, squalor, corruption, violent calamities and disasters, irrational local fundamentalisms, bad smell, garbage, filth, technological backwardness or simply lack of modernity" – that demands Western international institutions to step in as their managers or saviors to lift foreign people from their economic, moral and political depravity.[12] When these efforts are disappointed, their failure is again located with the 'third world', which leads to competing feelings of cynical exhaustion and renewed paternalism by traditional power centers that are in turn reflected in new waves of international legal debate and policies that exclude those most affected.

In a related set of critiques, TWAIL scholars cast suspicion on the formal splitting of economic and political regimes within global governance. First, by founding 'economic' principles (e.g., non-preferential trading, qualitative easing, private property rights, investment arbitration dispute resolution) on the conceptual basis of a non-political market of free state

[9] *See* Makau Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Michigan Journal of International Law 1118, 1135, 1144 (1994-1995).

[10] *See* B.S. Chimni, *Third World Approaches to International Law: A Manifesto,* 8 International Community Law Review 18 (2006); *see also* Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 Columbia Journal of Transnational Law 401-405 (2003).

[11] *See* Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42(1) Harvard International Law Journal 201-209 (2001).

[12] *See* Keith Aoki, *Space Invaders: Critical Geography, the 'Third World' in International Law and Critical Race Theory*, 45 Villanova Law Review 925 (2000).

personalities following their individual interests on a 'level-playing field', international law distorts the fact that most 'developed' countries implemented rigorous protectionist measures for domestic industry, and perhaps more importantly, hides the reality that former colonized states do not interact on equal terms in commodity exchange and production with a range of foreign actors, such as developed countries, financial investors and transnational corporations.[13] "The distinction between public and private as a way of conceptualizing resolving the problems associated with economic reform is unsatisfactory," Gathii writes, since it "tells us nothing about the substantive questions, which are the scope, type and structure of private interests and power which should be configured … [and the] redistribution of power among different social groups that the state is prepared to back."[14] Second, the de-politicization of the market not only masks the new face of colonial inequality, but results in the 'naturalization' of the architecture and principles of the international economic system whereby any attempt by subaltern states to alter the terms and conditions of the market are seen as unduly 'political' interventions, or at best, political appeals to the charity of Western-based institutions. Just as the narrowing of political possibilities to the statist model castrates former colonized populations to adopt their own traditional or innovative modes of political governance, the naturalization of the economy results in a unitary model of development that imposes constraints on subaltern states to experiment with alternative principles of distribution and production or to contest European consumer society as the objective place-mark of economic progress.[15] The postcolonial order "may in principle no longer have been serving political colonization," explains Bedjaoui, but "it did not cease for all that to be a means of economic domination and an excuse for it. In actual fact, it modified only the form, not the substance of domination."[16] In other words, rather than the liberal view that held the grant of statehood to 'third world' populations and full entrance into market relations to demonstrate the move within the discipline towards a more tolerant and universal global order, TWAIL scholars emphasize that the requirement of independence be

[13] *See* Chimni, *supra* note 11, at 14.

[14] James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 Michigan Law Review 2025 (1999-2000) (quoting Kerry Rittich).

[15] *Id.* at 2012-2013; *see also* Sundhya Pahuja, DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERALITY 86, 96, 134 (2011).

[16] Mohammed Bediaoui, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 59-60 (1979). For a discussion of arguments by 'third world' scholars and policy makers in the decolonization era, *see* Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16(2) Wisconsin International Law Journal 353 (1998).

modeled on social and territorial configurations set during the colonial era coupled with the subjection of these states to market conventions that depicted newly independent and industrialized Western countries to possess 'equal bargaining positions' was merely the transition within the international legal order from a 'formal' to 'informal' mode of imperialism.[17]

The central critique in TWAIL literature is that contrary to liberal claims about the inclusive, progressive nature of the discipline in the wake of decolonization and the end of the Cold War, international law in fact developed and perpetuates European oriented imperialism across economic, political and social terrains. Beneath the philosophical debates and formal doctrines of law is the silent hegemonic struggle of cultures.[18] The paradox in this argumentative logic, however, is that TWAIL scholars also hold that international law contains a fundamentally emancipatory potential whereby its colonial predispositions may be reformed on behalf of subaltern interests. "The point is not to condemn the ideals of [international law] as being inherently imperial constructs," explains Antony Anghie, "but rather to question how it is that these ideals have become used as a means of furthering imperialism and why it is that international law and institutions seem so often to fail to make these ideals a reality … and in doing so, power us to make, rather than simply replicate, history."[19] The critical impulse, in other words, is not to do away with the institutions and vocabulary of the liberal cosmopolitan project that is claimed to animate international law, but rather to make good on its democratic, universal promise.

To do so, the literature calls for a reprioritization of the method and subject-matter of international law. On the one hand, the discipline must internalize that all truths are "local… contextual, cultural, historical and time bound", and can never be in a practical sense truly universal in scope.[20] Since truth is always located in a cultural context and has tended to be captured by elite interest groups, international legal analysis must therefore transition away from the traditional doctrinal preoccupation with states and international institutions to embrace a more "legal-ethnographic method" that incorporates "social movements" and "engage[s] with the

[17] *See* James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54(4) Buffalo Law Review 1019 (2007).

[18] *See* Anghie, *supra* note 4, at 740-741.

[19] *See* Antony Anghie, SOVEREIGNTY, IMPERIALISM AND THE MAKING OF INTERNATIONAL LAW 320 (2007).

[20] *See* Makau Mutua, *The Complexity of Universalism in Human Rights*, in Andras Saja (ed.), HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 51 (2004).

everyday complexities of law facing ordinary people".[21] On the other hand, this 'cultural turn' does not mean that international law should reject its universal aspirations because this would simply re-instigate hegemonic struggles. Balancing the local and universal claims to truth, TWAIL scholars advocate a "quasi-transcendental" normative commitment whereby international law simultaneously seeks shared meaning (e.g., universalism) and maintains a critical awareness of the inherently particular foundations to any universalizing claim.[22] As such, international legal reform would be required to more fully seek to open its doctrines and practices to previously marginalized subaltern forms of economic, legal and political governance – whether recognizing new socio-political organizations (e.g., clans, tribes), or incorporating alternative economic conceptions regarding the use and distribution of property (e.g., communal), or acknowledging innovative legal techniques that address the unequal bargaining position between 'first' and 'third' world states (e.g., non-reciprocal terms of trade). The liberal international rule of law can only be achieved, in other words, through the embrace of a cultural 'particularism' and a robust 'universalism'.

III. CRITIQUING TWAIL

It is difficult not to be sympathetic to the historical and theoretical insights within TWAIL literature: the emphasis on the colonial encounter as an important dynamic in the development of contemporary international law, the resurrection of subaltern scholars in the wake of post-colonialism (e.g., dependency theory), as well as the transmission of insights from Critical Legal Studies (CLS) and New Approaches to International Law (NAIL) concerning the indeterminacy of law and the postmodernist prioritization of marginalized identities and peripheral social movements over traditional locations of power (e.g., states, international institutions). Moreover, the regulative challenge to the liberal cosmopolitan pretensions of international law whereby TWAIL scholars attempt to reclaim the promises and techniques of the system itself to hold it accountable seem both pragmatic and progressive in their orientation. My argument here, therefore, is not that TWAIL does not offer valuable proposals, or at least intellectual space to make interventions into international legal scholarship, but rather that its argumentative logic and

[21] *See* Luis Eslava and Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3(1) Trade, Law and Development 126 (2011).
[22] *Id.* at 120-122.

theoretical concerns ultimately betray its foundational critique about the imperialist character of international law, and thereby restore the very conditions the literature set out to transcend.[23]

My first concern is that whatever its commitment to advocating on behalf of subaltern interests, TWAIL perspectives look strikingly Eurocentric. Perhaps a banal point, but the intellectual community in the European tradition (of which, in many respects, TWAIL literature participates in) has expressed a long-standing fascination with the image of non-European ideas and populations as a source for institutional renewal.[24] A significant motif in Orientalist thought is to identify whatever is 'non-Western' as somehow more authentic, closer to nature, more communal and holistic. These sentiments often find their way uncritically into TWAIL scholarship, either in calls for international law to reinstate "pre-colonial identities" or in characterizing 'third world' ways of life in ways that look remarkably similar to romanticized memories of ancestral European communities before the advent of capitalism (e.g., communal over individual values, respect for intergeneration familial ties, authentic relations to the land).[25]

Moreover, the majority of reforms to human rights and international economic law proposed by TWAIL scholars do not look all that different from their liberal European peers. On the one hand, economic inequalities are met with calls to a more 'gradualist' approach to the 'timing' and 'extent' of trade liberalization, international economic law is recommended to become more open to democratically led developmental experimentation and a more nuanced accounting of the social costs involved in production and commodity exchange, and international institutions are called upon to shore up regulation on excesses of financial speculation to promote abstract liberal principles such as 'accountability' and 'transparency'.[26] On the other hand, in relation to human

[23] For a brief discussion of how the argument collapses upon itself as 'restoration anxiety', *see* John D. Haskell, *The Strategies of Rupture in International Law: The Retrenchment of Conservative Politics and the Emancipatory Potential of the Impossible*, 13(5) German Law Journal 472-481 (2012).

[24] *See* Michel Foucault, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE, 1975-1976 194 (English ed., 2003). For a discussion about how the 'masses' were formulated as the source of inspiration to renew and legitimacy to regulate for the discipline in the context of the post-World War 1 era, *see* Nathaniel Berman, *But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law*, 106 Harvard Law Review 1792 (1993). The focus on European populations in the development of international legal institutions and doctrines to structure inequalities, though not addressed by Berman, seems to suggest that the colonial encounter emphasized within historical studies of TWAIL was itself part of a broader system of distribution and production.

[25] *See e.g.*, Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 Oregon Review of International Law 131 (2012).

[26] *See e.g.*, B.S. Chimni, *Developing Countries and the GATT/WTO System: Some Reflections on the Idea of Free Trade and Doha Round Trade Negotiations*, in Chantal Thomas and Joel Trachtman (eds.), DEVELOPING COUNTRIES IN THE WTO SYSTEM 24-43 (2009). For a discussion of the false distinction between post-Keynesian economic 'gradualists', such as Joseph Stiglitz, and neo-liberal 'shock therapists', such as Jeffrey Sachs,

rights law, TWAIL scholars challenge the international legal order to liberalize its notions of the 'human' to account for alternative conceptions of legitimate social relations and personal meaning, yet do not provide anything that might smack of being unconventional to yoru average upper-West side New York progressive intellectual. For instance, addressing the phenomena of female genital mutilation, Mutua proposes a more culturally integrated approach that moves past condemnation at first blush to seek to understand the cultural nuances that lead to the practice and, through cultural exchange, to develop a minimum standard of agreement that can begin to mitigate its occurrence.[27] Whether in terms of economic or human rights reform, the core logic of the international legal order is never questioned as part of the problem: Chimni assumes capitalist-oriented development and economic integration is a good thing, Mutua does not contemplate why certain occurrences are the focal point of human rights or if there are more fundamental problems with ideas like 'human' and 'rights' in the first place.

In fact, though the dual advocacy of an anthropological or cultural turn in international law and more egalitarian terms to guide economic integration is not without merit, TWAIL scholars tend to overestimate its innovative or emancipatory effect on global governance. Since the fall of the Soviet Union, the capitalist system has reorganized to subdivide traditional political units along "local, ethnic, religious, and other identities" and, at the same time, increasingly pushed for a more fully integrated global economy where "no state or local society can reproduce itself and develop materially without becoming increasingly implicated in the market economy".[28] In other words, the transnational capitalist class relies on a mixture of more closely tailored political management according to accurate localized data and a flexible economic approach that facilitates market entry regardless of social particularities. The scholarly documentation of subaltern aspirations and political solidification of 'third world' communities with the intent to integrate them into the global economy will ultimately lead to readily available information and convenient institutional structures to exploit for vested capitalist interests, most often linked to Eurocentric centers of power. The language of eclecticism and innovation, with its grassroots sensibility, is itself the new imperialist tactics of cooption and management.

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in the post-Soviet regimes, *see* John D. Haskell and Boris Mamlyuk, *Capitalism, Communism… and Colonialism? A Critical Colonial Reading of 'Transitology' in the Former Soviet Union*, 9(1) Global Jurist (2009).

[27] What is especially curious is how similar his argument looks to American liberal theorists, such as Rawls and Rorty. *See* Mutua, *supra* note 21, at 62.

[28] *See* Maurice Godelier, IN AND OUT OF THE WEST: RECONSTRUCTING ANTHROPOLOGY 9 (2009).

My second concern is that TWAIL scholarship under-theorize the actual dynamics of imperialism due to the (general postmodern) aversion to Marxist theory. TWAIL scholars tend to discount the Marxist tradition by only focusing on early Marxist theorists[29] or critiquing the theory on grounds that it is overly nihilistic in its condemnation of law as purely a technique of ruling class interests,[30] that it is too Eurocentric in its preoccupation with the party/state model of governance and a linear notion of development,[31] and that it thereby reduces the complexity of lived experience and meaning to the rubric of 'class' interests.[32] "In short," writes Rajagopal, summing up this general sentiment, "Marxism [is] simply unable to supply the theoretical tools to comprehend and respond to … globalization [and] the new forms of economic arrangements and new forms of struggles that accompanied them, not only in advanced industrial societies, but also in the Third World."[33] The lost opportunity cost of dismissing Marxist theoretical insights becomes especially clear when analyzing the TWAIL literature's theory of the interaction between subaltern subjects and imperialism in relation to international law.

To recall their central claim, imperialism is a central dynamic in the historic and ongoing development of international law, though it has mutated over the course of the 20th century in relation to changing external and internal dynamics from 'formal empire' (e.g., explicitly coercive forms of political control over territory) to 'informal empire' (e.g., formal political sovereignty coupled with economic domination), which thereby reinforces the uneven development and distribution of resources. Beneath the mainstream narratives of international law, therefore, is the silent hegemonic struggle between different societies (e.g., culture), and which is driven ultimately by the human desire for expansion and control (e.g., imperialism). What is interesting here is that both 'culture' and 'imperialism' operate within TWAIL literature on a pre-political, or naturalist framework: on the one hand, cultures not only shape and direct colonialism, but are said to pre-exist the colonial encounter as the actors that 'make' the history of international law; and on the other hand, imperialism is not tied to a particular political-

[29] Gathii addresses the Marxist theory of imperialism in less than two pages, and draws solely upon Lenin and Luxemberg to make his claims. *See* Gathii, *supra* note 18, at 1018. The lack of academic rigor here is apparent if we were to imagine a scholar adopting a similar approach to critiquing liberal claims about the 'individual' – to limit analysis to a single turn of the century author over the course of a page or two would seem perfunctorily unsatisfying. In particular, this sentiment misses the rich and often conflicting theories within the tradition that might offer useful analytic tools. *See e.g.*, Giovanni Arrighi, GEOMETRY OF IMPERIALISM (1978).

[30] *See* Chimni, *supra* note 11, at 19-21.

[31] *See* Rajagopal, *supra* note 11, at 413-417.

[32] *Id.*

[33] *Id.* at 413.

economic system, but is itself something intrinsic to humanity, a deep innate drive that exists not above but within the depths of human desire and that expresses itself across space and time (an almost inverted Hegelian Geist).[34]

The problem with this analysis, from a Marxist perspective, is that it projects the failure of international law in overly 'naturalistic' terms and does not incorporate any evaluation of its historically specific form. For the Marxist scholar, there is no 'subject' that can pre-exist their historically situated context: there is no 'real human nature' to be discovered, but rather the organization of individuals are always born and made into the subjects of specific constellations of meaning and organization. Since this locally or globally structured environment is itself always organized around a specific set of historical conditions, we must construct and employ a sociology of how these conditions of knowledge are produced rather than take the knowledge itself at face value. However, to do so is no easy task, because these conditions of production are themselves comprised of diverse institutional apparatuses that structure the means and relations that a society organizes its sustenance and reproduction, but are also further composed of secondary effects, or ideological institutional apparatuses (e.g., art movements, church denominations, education degrees and schools) that can facilitate 'material' varieties of production (e.g., habitus) but equally can operate in relatively autonomous environments that even conflict with the dominant forms of production or other ideological institutions.[35] A change in the structure of production (e.g., from feudalism to capitalism), for instance, does not necessarily mean a corresponding change in the doctrines or rituals of the Church (though it will undoubtedly have some effect). In this sense, there cannot be a 'subject' that 'makes' history, but rather history is a process that conditions the subject.[36] The difficulty here is that to account for this process of particularity and totality, a theoretical framework must be developed to 'decipher the effects' of these differentiated and relatively autonomous structures on each other

[34] "Imperialism … constitute[s] in part the primordial and essential identity of international law … a constant … most simply associated with power [which] seeks to further itself in every way …. far from peculiar to Western societies." Anghie, *supra* note 20, at 315-319. This same logic leads scholars, such as Gathii, to argue that "imperialism's constant drive to expand … was one of the very conditions of the existence of capitalism". *See* Gathii, *supra* note 18, at 1020.

[35] *See* Louis Althusser, *Contradiction and Overdetermination*, in FOR MARX 87-128 (English ed., 2006); *see also* Althusser, *Ideology and Ideological State Apparatuses*, LENIN AND PHILOSOPHY AND OTHER ESSAYS 127-188 (English ed., 1971).

[36] *See* Louis Althusser, *Remark on the Category: Process without a Subject or Goals*, in RESPONSE TO JOHN LEWIS 95-99 (1973).

'through the various processes of social practice and place them in a hierarchy of causes' that allow for that 'specific totality' that reproduces the necessary conditions of production.[37]

This analytic of seeking to explicate the specific historical composition (in all its institutional diversity and contradiction) that structures the conditions of production in relation to the development of the conceptual vocabulary and professional techniques within international law as the privileged form of regulation reframes the conceptual vocabulary and questions related to the development of international law. To address 'imperialism' in the context of international law, therefore, would be to not only uproot it from natural drives to the specific drives of 'capitalism' as the hierarchical 'cause' that ties together the highly differentiated institutional apparatuses that made up the colonial and postcolonial eras, but to unpack its key elements and explain their overlapping functions, such as the narrowing of economic value to commodity exchange, the political imperative of market entrance, and the central drive of imperialism rooted in the accumulation of capital.[38] And such a historic analysis of these conditions would equally contribute to explain why the specific character of regulation took on its given legal form – without elaborating here, the recourse to formally equal rights that are essential to a liberal rule of law can only occur within the social relationships based on the circulation of commodity exchange.[39] Likewise, the Marxist perspective would necessitate a different set of questions and conceptual tools to address the dynamic of 'culture': for example, how and why did the formal legal description of culture develop as the privileged technique to create solidarity among various people? An answer would thereby need to engage a sociological analysis concerning the prioritization of 'culture' in the globalization of the centralized administrative state and expanding market imperatives. In this sense, the scholar invoking 'culture' would need to distinguish between 'race' as a 'genetic' description rooted in the axial divisions of labor between 'core' and 'periphery' geographies, the 'nation' as a socio-political category related to the legitimization of state bureaucracies that arose with the invention and expansion of European governance, and 'ethnic groups' as a 'cultural' category that refers specifically to the ideological institutional apparatuses that sustain the maintenance of the

[37] *See* Maurice Godelier, PERSPECTIVES IN MARXIST ANTHROPOLOGY 2-4 (1977).
[38] *See* Ellen Meiksins Wood, THE ORIGINS OF CAPITALISM: A LONGER VIEW 110-115 (2002)
[39] *See* Miéville, *supra* note 8, at 23.

conditions of production, as well as the maintenance of non-waged labor.[40] The neglect of Marxist theory in TWAIL scholarship, in short, results in a type of closeted transcendentalism that remains incapable to explain the historic reasons for the how or why of the dynamics and subjects of international law.

IV. CONCLUSION: BEYOND LEFT-WING LIBERALISM

The TWAIL literature arose as a subgenre with international legal scholarship as part of the more general trend towards postcolonial theory within the academy in the 80s and 90s, and the specifically legal intellectual arguments advanced by the Critical Legal Studies and New Approaches to International Law movements. The critique by TWAIL that the colonial legacy permeates the history and contemporary development of the architecture and doctrines of international law across economic, political and social regimes continues to exert an important rupture within the everyday scholarship and conferences for a range of heterodox authors to advance their careers, build new intellectual communities and friendships, and recalibrate the academic literature to account for the dark sides of cosmopolitan virtue.[41] I think this is not only valuable, but an essential space that should not be lost. And yet, at the same time, for all its merits, the TWAIL movement suffers from the paradox that its argumentative logic ultimately relies on the same underlying assumptions of the system it sought to transcend. In mapping out the arguments and blind spots of international law, my hope is that we as scholars deploy the opportunities that TWAIL (and other left-of-liberal perspectives) provides to revisit the analytical richness of theoretical Marxism. For myself, I do not think this means embracing its traditional political implications, nor do I think they are actually available for us today – but perhaps it might lead us somewhere that if not emancipatory, is at least different.

[40] *See* Immanuel Wallerstein, *The Construction of Peoplehood: Racism, Nationalism, Ethnicity*, in Etienne Balibar and Immanuel Wallerstein, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 71-80 (1991).

[41] For a discussion of TWAIL as an academic community built around a shared sensibility towards personal engagement and scholarly concerns, *see* Michael Fakhri, *Questioning TWAIL's Agenda*, 14(1) Oregon Review of International Law 1 (2012).