4 Changing of the guard: A geopolitical shift in the grammar of international law

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But Eden is burning, either getting ready for elimination
Or else your hearts must have the courage for the changing of the guards
Bob Dylan, *Changing of the guards*, 1978

Abstract

In the aftermath of decolonisation developing states in the Global South have participated in the contested construction of international law. These voices have largely united by a Third World Approach to International Law (TWAIL). The author adopts a typology based on the approaches of states in the Global South to international law. Vanguard' states engage with international-law institutions to reinvigorate the grammar of international law. This approach is exemplified by the case *The Gambia v Myanmar,* which The Gambia brought before the International Court of Justice to invoke the *erga omnes partes* obligation of Myanmar in furtherance of peremptory norms. The interactions of laggard states with international law reify existing structural biases in the grammar of international law and therefore limit international law norm-making. This approach is exemplified by the many instances in which the rule of *uti possidetis* has been upheld at the cost of a nation's right to self-determination. The chapter then considers the emergence of a distinct voice under the broader TWAIL umbrella that captures the new critical epistemology, as part of an African approach to international law (AAIL). The author identifies three 'pillars' that set the AAIL approach apart from the approaches taken by other schools of critical legal thought and writing.

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The first is an African understanding of history, informed by the distinct language of the civilising mission and accompanying atrocities of the African colonial encounter. The author notes, however, that African scholars have constructed the role of universalism in leading Africa out of crisis by attributing meaning and legitimacy to sovereignty. The second is the rule of law, which in Africa is seen as a vehicle for transformation and the realisation of rights, stabilising judicial democracies, and ethical leadership. The third is the language of self-determination and collective rights. The chapter concludes that the creation of a vanguard informed by AAIL is a fecund space for academic inquiry into the modern processes of law-making

1 Introduction

Critical legal scholarship has created and sustained important alternative narratives of international law to challenge its mainstream accounts. In the aftermath of decolonisation, developing states in the Global South, often united by a Third World Approach to International Law (TWAIL), have participated in contested international law topics such as territory, sovereignty, human rights, and collective negotiation. They have pushed for the recognition of new norms in these arenas through interaction with each other and with the developed world. This chapter maps patterns in these interactions and their effects. It proposes that there may be a typology between interactions that advance international law by creating new norms for a more inclusive grammar of international law, and interactions that reify an existing structural bias in the grammar of international law, limiting norm-making in international law. The chapter assigns names to these typologies of interaction – the former as the *avant garde* (or the 'vanguard') of new international law, and the latter as the 'laggard'.

The first part of this discussion – using the typology of the laggard and the vanguard – presents the approaches of states in the Global South to international law. The discussion first identifies the traits of the laggard through examples drawn from interaction of the post-colony with *uti possidetis*. The discussion then turns to the vanguard of international law and argues that this advances the structure of legal argument in the alternative by reimagining the role of states from the Global South in challenging the status quo of international law in areas including permanent sovereignty over natural resources, self-determination, territorial sovereignty, and use of force. This is how the vanguard exemplifies the transformative potential of a critical legal approach to mainstream international law.

In the second part, the chapter refines this transformative potential of the vanguard. It argues that as the structure of legal argument in the alternative becomes increasingly nuanced, it opens the door to further

inquiries into discrete strands of critical scholarship.[1] Specifically, African approaches to international law (AAIL) is one such discrete strand with a regional flavour currently generating a critical mass of scholarship. This chapter identifies history, the rule of law, and human rights as the three pillars on which an AAIL narrative rests as the voice of the vanguard within the broader framework of TWAIL.

2 The 'vanguard' and the 'laggard' in international law

In international law the term 'Third World' has a host of meanings, falling under the rubrics of geography (Latin America, Africa, and Asia), history (violence and subjugation), development (developing and least-developed states) and human rights.[2] These meanings are premised on a history of marginalisation and economic exploitation, and often translate into a present-day political coalition.[3] However characterised, the Third World is not a homologous space; it embodies important differences in economic development, human security, and political leadership. Despite these differences, Third World states unite in a narrative which offers a heterogeneous opposition to mainstream international law, each replete with its individual history of marginalisation, route to independence, path to development, and distinct circumstances.

Important differences in economic, social, and political development have created a number of 'third worlds'.[4] As Mickelson states, the Third World is 'not a bloc, but a chorus of distinct voices'.[5] These pluralities and their dynamic with respect to international law are at the cusp of a split – with one group of the Third World able to escape the historical colonial influence to a great extent and shape the global agenda of international law, and impose its version of institutions on the second; much as the classic dynamism of the First World and the Third World evolved into the ideas we today recognise as international law.

1 For structure of legal argument, please refer to J Derrida *Of grammatology* trans G Spivak (1967); M Koskenniemi *From apology to Utopia: The structure of international legal argument* (1989).

2 A Escobar *Encountering development: The making and unmaking of the Third World* (vol 1) (2011); M Mutua & A Anghie 'Proceedings of the Annual Meeting' (2000) 94 *American Society of International Law* at 31; K Mickelson 'Rhetoric and rage: Third World voices in international legal discourse' (1997) 16 *Wisconsin International Law Journal* 353-419.

3 Mickelson (n 2) 353.

4 For an account that treats Third World as a plurality, see de B Sousa Santos 'Transnational third worlds' in J Friedman and S Randeria (eds) *Worlds on the move: Globalization, migration, and cultural security* (2004) 293-318.

5 Mickelson (n 2) 360.

Those in the first set comprise the 'vanguard' by virtue of their ability to engage with international law institutions. They are able to influence the making of international law in newer multilateral consensus-based forums disproportionately.[6] In so doing, this vanguard is able effectively to impose its agenda in other spaces of multilateral decision making in international law where the interactions between powerful and powerless states results in reinstating the status quo as regards norm creation.[7] The second group are the 'laggards' for the purposes of this discussion.

The terms 'vanguard' and 'laggard' that I advance here are indicative of the relative positioning of states to realising a more pluralistic narrative of international law. In describing these positions, it is important to understand that these are not titles that individual states bear, but descriptions based on the interaction between and among these sovereign actors as they play out in the making of international law.

These interactions are classified under two sets in this chapter. The first – the 'laggard' for purposes of this framework – involves encounters between the states of the First World on the one hand, and those of the Third World on the other. The second set represents alliances between Third World states or the 'vanguard' as hypothesised above. These are sets of interaction between Africa and Africa, and between Africa and Asia and Latin America (both referred to as South-South interactions).

The point of departure for those in the vanguard pushing the boundaries of modern international law and those we have classified as the laggard, is the *product of this interaction*. Does it produce new content and generate a new grammar to redefine international law? Or does it resonate with the familiar and well-trodden prosody of 'Westphalian'[8] international law?

6 See on multilateralism and the Global South, VR Vieira 'Beyond the market: The Global South and the WTO's normative dimension' (2016) 21(2) *International Negotiation* 267-294; R Higgott *Multilateralism and the limits of global governance* (2004); B Rajagopal 'International law and its discontents: Rethinking the Global South' (2012) 106 (January) *ASIL Annual Meeting Proceedings* 176-181.

7 On norm stagnation in international law, see J Pauwelyn, RA Wessel & J Wouters 'When structures become shackles: Stagnation and dynamics in international lawmaking' (2014) 25(3) *European Journal of International Law* 733-763; N Deitelhoff & L Zimmermann 'Norms under challenge: Unpacking the dynamics of norm robustness' (2019) 4(1) *Journal of Global Security Studies* 2-17; J Pauwelyn, RA Wessel & J Wouters 'The stagnation of international law' (2012).

8 JH Jackson 'Sovereignty-modern: A new approach to an outdated concept' (2003) 94(7) *American Journal of International Law* 782-802; DP Fidler 'Introduction: Eastphalia emerging? Asia, international law, and global governance' (2010) 17(1) *Indiana Journal of Global Legal Studies* 1-12.

Those in the first category are at the vanguard and those in the second are, for this chapter, the laggard. In deconstruction, we see that the states of the Third World who reimagine their position in today's world make up the vanguard. The laggard are states which replicate past structures of power and represent a stagnation of imagination in international law.[9] The laggard reproduce existing iterations of the grammar of the language, hierarchy, and logic of mainstream international law and resist challenges to change that threaten to displace their traditional 'power-dominance' in international law.

2.1 The tragedy of the laggard

The essential ingredients of tragedy, according to Aristotle, impel and catalyse the ordinary to produce the extraordinary.[10] The continued sense that institutions of universal relevance represent the plurality of voices in the world and have been able to create and sustain shared narratives that inform international law, is the elevation of the ordinary (imposition of power structures to generate inherently unequal terms) to the extraordinary (unwillingness to acknowledge the deeply flawed sources of these terms). The essence of heroism is an anti-heroic stance; a series of negations catapulting the human mind and body into a conscientious climactic effort towards creative loftiness and peripeteia.[11] The resulting imbrications are today's post-colony.

When the narrative of universalism is expected to be delivered by institutions that see and do international law today, we are bound to confront the absurdity of this expectation. These are institutions born of a democratic deficit; creatures of convenience created to legitimise the manufactured sovereignty of an unequal past. To expect them to deliver a narrative that threatens their own relevance in the rapidly changing landscape of international politics is a rather tall ask. There have indeed been occasions when these institutions celebrate resistance and diversity – when they rewrite the Melian dialogue and turn the tide against the reign of might – and these occasions should be noted as steps towards the promise of universalism.[12] But at the same time they act as the crypt-keepers of biases that are so deeply ingrained in the rhetoric of international law

9 See T Ginsburg 'Eastphalia as the perfection of Westphalia' (2010) 17(1) *Indiana Journal of Global Legal Studies* at 27 for why it is in the interest of the Western world to preserve the *status quo* in international law.

10 M Zerba *Tragedy and theory: The problem of conflict since Aristotle* (2014).

11 J Campbell *The hero with a thousand faces* (2008).

12 On standing up to power, see the Melian dialogue in Tucídides, R Warner & MI Finley (eds) *Thucydides: History of the Peloponnesian War* (2006).

that to undo them would be to destabilise the plinth upon which modern international law rests.

The law-making function of such encounters therefore produces a classic redux and ensures a continuity in the narrative that lies at the foundation of international law. However, the probative value of the redux is to pin those vanquished by history under the 'contestations and participations' in claims over territory and power.[13] This is an untenable situation for any prospect of growth in or reimagining of the extant narrative. Consequently, it gets pushed to the tail-end of the resurgent new international law that is being challenged and advanced outside of the formalised structures of universalism.[14]

It is unsurprising, therefore, that international criminal justice, for example, has been an abject failure in how it has approached the post-colonial narrative in institutionalising justice.[15] The dominant language here is that of blame; strongly reminiscent of the 'civilising mission' of international law and the narrative of blame in which it was cast.[16] Is the role of courts and tribunals such as the International Criminal Court, the United Nations International Criminal Tribunal for Rwanda, or the Extraordinary Chambers in the Courts of Cambodia, merely doctrinal when it comes to understanding the effect of their creation and functioning on the post-conflict state and its peoples?[17] Or do they play a symbolic role and have a larger role in transitional justice? How does this symbolic role tie in with the people's history of suffering?

This, too, is the tragedy of the laggard in that the encounter between the post-colony and the universalist rhetoric of deliverance was ultimately reduced to no more than a formulaic application by formalised institutions tasked with interpreting and institutionalising the human suffering of our times.[18] In this task they were seen to apply liberal Western notions

13 S Huntington *The Third Wave: Democratization in the late twentieth century* (1991).

14 Koskenniemi (n 1) 34.

15 Koskenniemi (n 1) 33; G Simpson 'Unprecedents' in I Tallgren & T Skouteris (eds) *The new histories of international criminal law* (2019); R Sen & R Raman 'Retelling Radha Binod Pal: The outsider and the native' in F Mégret & I Tallgren (eds) *The dawn of a discipline: International criminal justice and its early exponents* (2020).

16 M Koskenniemi 'Between impunity and show trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1-35.

17 On critical approaches to institutionalised international criminal law, see RJ Goldstone 'Justice as a tool for peace-making: Truth commissions and international criminal tribunals' (1995) 28 *New York University Journal of International Law and Politics* 485; C Stahn *A critical introduction to international criminal law* (2019).

18 Koskenniemi (n 16) 12-16.

of international human rights law and to create the illusion that this framework spoke to the untold horrors visited upon countries in Africa and Asia through regime change and loss of stability.

For 'Africa',[19] this imbrication is visible in the fault lines of sovereign borders that must respect colonial boundaries while at the same time creating and nurturing modern states that are denied the right themselves to determine their boundaries. The institutional stupor of international law emerges clearly from encounters between states from the Global South and those from the North, reifying the existing parochial biases that stultify the grammar of international law.[20] In every instance in which the rule of *uti possidetis* has been upheld at the cost of a nation's right to self-determination, the *laggard* get heavier as illustrated by the following two examples.

The *Preah Vihear* decision of the International Court of Justice (ICJ) is an especially apposite case to explain the laggard in the context of a post-colonial encounter between East and West (even as one concedes a sense of a proxy contestation in the case between Cambodia (France/West) and Thailand (East),[21] In *Preah Vihear*, Thailand argued in its written submissions as follows: [22]

> Under the customary international law of state succession, if Cambodia is successor to France in regard to the tracing of frontiers, she is equally bound by treaties of a local nature which determine the methods of marking these frontiers on the spot … Thailand recognizes that Cambodia is the successor to France in respect of treaties for the definition and delimitation of frontiers.

Institutionalised international law appears to favour the doctrine of *uti possidetis juris,* or the supremacy of colonial boundaries, above other more

19 Reductive repetition is to distil the history, sociocultural contexts and politics of Africa into core deficiencies constantly requiring externally devised solutions. See eg, A Laroui *The crisis of an Arab intellectual: Traditionalism or historicism?* (1976) 63-73; S Andersson 'Orientalism and African development studies: The "reductive repetition" motif in theories of African underdevelopment' (2005) 6 *Third World Quarterly* 971-986.

20 V Nesiah 'Placing international law: White spaces on a map' (2003) 16(1) *Leiden Journal of International Law* 1-35.

21 P Singh 'International law as an intimate enemy' (2010) 18(1) *African Yearbook of International Law Online* 223-255; CC Jalloh & O Elias (eds) 'Shielding humanity: Essays in international law in honour of Judge Abdul G Koroma' (2015) 15(8) Florida University Legal Studies Research Paper.

22 *Temple of Preah Vihear (Cambodia v Thailand)* ICJ (26 May 1961) (1962) ICJ Reports 35, 145-46, 165.

truly positivist iterations of the rule of territorial delimitation.[23] As the practice of courts in international law has shown, the importance and application of general principles such as equity have been undermined and blurred by the ICJ and other international courts/tribunals in several cases, for example, *Burkina Faso v Mali, Guinea-Bissau v Senegal*, and *Tunisia/Libya*.[24]

Perhaps the most telling illustration of a laggard is a recent case that carries the weight of this thesis. The 2019 Advisory Opinion by the ICJ in *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965* (*Chagos Advisory Opinion*) is a decision that both stagnates as well as propels modern international law's understanding of self-determination and territorial sovereignty.[25] The contestation involved an encounter between the United Kingdom (UK) representing the history of colonialism, and Mauritius representing the post-colony. The issues before the Court were whether the process of decolonising Mauritius was lawfully completed when Mauritius was granted independence in 1968 following its separation from the Chagos Archipelago and what the consequences of the continued administration of the Chagos Archipelago by the UK are – including Mauritius's inability to implement a resettlement programme for its nationals on the Chagos Archipelago, in particular those of Chagossian origin. The Court came out strongly against the 'incomplete' exercise of decolonisation carried out by the UK and concluded that the Chagos Archipelago was not lawfully the UK's territory under the British Indian Ocean Territory programme it had created during the process of granting Mauritius independence from the UK.[26]

While the *Chagos Advisory Opinion* leaves us with a clear and finite condemnation of the residual traces of colonialism in the modern stories of patchwork sovereignty, it also raises important questions on the interpretation of article 73 of the Charter of the United Nations

23 G Simpson 'The diffusion of sovereignty: Self-determinations in the post-colonial age' (1996) 32 *Stanford Journal of International Law* 255; WT Worster 'Maps serving as facts or law in international law' (2017) 33 *Connecticut Journal of International Law* 279; SR Ratner 'Drawing a better line: *Uti possidetis* and the borders of new states' (1996) 90(4) *American Journal of International Law* 590-624.

24 *Preah Vihar* (n 22) 26; *Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ (22 Dec 1986) (1983) ICJ Reports 554; GJ Naldi 'The case concerning the Frontier dispute (Burkina Faso/Republic of Mali): *Uti possidetis* in an African perspective' (1987) 36(4) *International & Comparative Law Quarterly* 893-903; *Maritime delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal)* ICJ (8 Nov 1995) (1991) ICJ Reports 423.

25 *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965* (25 February 2019) (2019) ICJ Reports 95.

26 Paras 174, 178.

(Charter) and on the customary international law of self-determination.[27] It was a potentially perfect setting for the ICJ to clarify in precise terms the difference between external and internal self-determination, and to what extent international law recognises the right of peoples and groups to secede outside of the context of decolonisation. The Court maintained a strong position on recognising decolonisation as the *only* event that can legitimately give rise to a right to self-determination. However, it stopped short of going on to explain what *other* methods might exist, and specifically, why customary international law does *not* recognise a right to *internal self-determination* in the absence of historic oppression or colonial rule.[28] The norm emerging from this reading effectively reiterates a standard we all knew was the position of modern international law – that the right to self-determination only acquires meaning and agency against the backdrop of an historical struggle, colonial rule, oppression, and erosion of sovereign rights.[29] But that the *exception* to this is also conditionally accepted as tenable appears to have some traction since the *Kosovo Advisory Opinion* over ten years ago.

The *Chagos Advisory Opinion* would have been a useful place for the Court to seize this opportunity, especially as its packaging as an advisory opinion allowed the judges appreciably more leeway to voice their observations than a contentious case would have offered.[30] The Court could have explained the reasoning – international stability and comity not being at threat – behind the two varying degrees of recognition accorded internal and external self-determination. Had it done so, the case would have significantly *advanced* the understanding of *uti possidetis* and self-determination in international law. Since it chose to focus only on reiterating a standard that has evolved over the last seventy years in the law on decolonisation and self-determination, the iteration has the

27 See eg paras 145-148.

28 V Kattan 'Part I: The partition of the Chagos Archipelago and the haunting spectre of the South West Africa Cases' 20 September 2018 https://www.ejiltalk.org/part-i-the-partition-of-the-chagos-archipelago-and-the-haunting-spectre-of-the-south-west-africa-cases/ (accessed 27 September 2022).

29 M Koskenniemi 'National self-determination today: Problems of legal theory and practice' (1994) 43(2) *International and Comparative Law Quarterly* 241-269; C Borgen 'The Kosovo Advisory Opinion, self-determination, and secession' 23 July 2010 http://opiniojuris.org/2010/07/23/the-kosovo-advisory-opinion-self-determination-and-secession/ (accessed 27 September 2022); T Christakis 'The ICJ Advisory Opinion on Kosovo: Has international law something to say about secession?' (2011) 24(1) *Leiden Journal of International Law* 73-86.

30 On the promise of the ICJ's advisory jurisdiction generally, see M Reisman 'Accelerating advisory opinions: Critique and proposal' (1974) 68(4) *American Journal of International Law* 648-671.

effect of *stagnating* our understanding of the rule and falls within what this discussion terms the *laggard*.

2.2 The vanguard: Arenas of contestation

If the laggard constitute those that are restricted by the dominant language of international law, the vanguards contest and redefine its grammar. The interaction born of South-South contestation is best illustrated by examples. Here I look to the examples offered by: (1) South-South positionality in norm creation through an example of territorial sovereignty; and (2) African states as participants in the institutions of international law, to understand how mainstream accounts of international law in these areas are being pushed until meanings bend to reveal interesting new frontiers.

2.2.1 Norm creation in South-South encounters in Asia

The South China Sea is the theatre for the dispute of the century involving a clash of important powers over territorial claims to advance political agendas. The 2016 Permanent Court of Arbitration (PCA) award in the case of the Philippines against China under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) regarding certain issues in the South China Sea, though undoubtedly complex, may be read as an inquiry into the relevance of *uti possidetis* in customary international law and its implications for the legal personality of decolonised states.[31] The award accorded primacy to the reading of treaty law over practice of the *uti possidetis* principle. In rejecting China's claim of historic right over the territory encompassing the nine-dash line, the Arbitral Tribunal observed that when China became party to UNCLOS, it accepted the rule of UNCLOS as a treaty, creating higher obligations than any other rule of practice.[32]

When China claimed 'historic rights' over areas of the South China Sea, it was an invocation of the territorial sovereignty it held before the establishment of independent sovereignty by other contesting states in the South China Sea zone. Using a constructed difference between 'historic rights' and 'historic titles', the award subjected China's claim to the codified law of UNCLOS, opening up certain legal repercussions for all

31 IJ Storey 'Creeping assertiveness: China, the Philippines and the South China Sea dispute' (1995) *Contemporary Southeast Asia* 95-118; IJ Storey (ed) *South China Sea dispute* (2017).

32 Para 150 of the Award, quoting the *Fisheries Jurisdiction Case*, ICJ Reports 1998, 432 at para 30; reaffirmed by the International Court of Justice in *Bolivia v Chile* ICJ Reports 2015 at 1 para 26.

states who use this rule to protect their sovereign claims.[33] This is valuable for two reasons. First, the Tribunal observed that sovereignty changed from the point at which UNCLOS entered into force. This means that any historical rights lose their value and contested areas are governed by regimes created by the treaty. As such, historical rights do not stand as proof of sovereignty. However, historical rights over territory and waters have always been recognised as valuable customary law practices.[34] Such rights become enforceable through long usage and acquiescence of the usage. It is a strong message in favour of pushing the extant boundaries of international law for UNCLOS to be read as stronger than *uti possidetis* in this case. Second, the difference between historical rights and historical titles though valid, cannot be used to render historical rights less enforceable. The ruling that historical rights fall short of sovereignty cannot be regarded as balanced as it creates a strange friction between treaty law and customary international law.[35] Nonetheless, for the purposes of our discussion not only is this an encounter that is *South-South* in its characterisation, but it also rewrites the predictability we earlier attributed to formalised institutions by turning *uti possidetis* on its head.

The current climate of increasing tensions on the topic of contested sovereignty offers a timely opportunity to relook at the track record of the participation of states in the Global South in territorial claims.[36] In 2008, the ICJ delivered its judgment in a case brought by Malaysia and Singapore concerning claims of sovereignty over disputed lands.[37] In 2017 Malaysia submitted that judgment for interpretation under article 60 of the Statute

33 The South China Sea Arbitration Award of 12 July 2016, China's historic rights claims, para 180; Historic rights (Philippines submission 1 & 2) relying on juridical regime of historic waters, including historic bays – study prepared by the Secretariat (1962) II *Yearbook of the International Law Commission* 1 at para 189.

34 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* ICJ (24 Feb 1982) (1982) ICJ Reports 18 para 100: 'It is clearly the case that, basically, the notion of historic rights or waters (and that of continental shelf) are governed by distinct legal regimes in customary international law.'

35 On historic title versus historic rights in the *South China Sea* case see F Dupuy & PM Dupuy 'A legal analysis of China's historic rights claim in the South China Sea' (2013) 107 *American Journal of International Law* 124.

36 *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)* ICJ (23 June 2017); M Fitzmaurice 'Three recent works on the ICJ' (2017) 87 *British Yearbook of International Law* 253; G Triggs 'Confucius and consensus: International law in the Asian Pacific' (1997) 21 *Melbourne University Law Review* 650; IJ Storey 'Maritime security in Southeast Asia: Two cheers for regional cooperation' (2009) *Southeast Asian Affairs* 36-58.

37 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* ICJ (23 May 2008) (2008) ICJ Reports 12 paras 92-95. See on this case, S Jayakumar & T Koh *Pedra Branca: The road to the World Court* (2009); but see, on postcolonial readings of the ICJ's jurisprudence on territory and title, K Bhatt

of the ICJ. However, before hearings could commence in the application for revision, the parties decided to discontinue the proceedings. The matter that would have been up for clarification before the Court involved claims of sovereignty. However, it also touched on issues around the meaning of original title as the basis of the cCourt's reasoning in the 2008 case. When one considers that the Court has visited the separation of original title from *terra nullius* in both this and the *Ligitan / Sipadan* case of 2002, it becomes an important reading of post-colonial law regarding territorial sovereignty (as opposed to its colonial iteration as was done in 1928 by the PCA in the *Palmas* arbitration). The abandoned application is only the second instance of any Asian state seeking the jurisdiction of the ICJ for a clarification and is important because the idea of title to territory in the post-colonial era is not only re-examined by Malaysia's application, but also represents the vanguard of states in the post-colonial world questioning the application by the court of principles of title and territory that are far from definitive.[38] Without engaging substantively with the question of original title and how the court has moved away from the position in *Palmas* through the *Ligitan/ Sipadan* and *Pedra Branca* cases, it is still possible to argue for the vanguard which the 2017 application represents. First, it reflects the maturity of the laws regarding effective control and recognition of historical claims. Second, it highlights the missing link between the doctrinal exercise of sovereign control and the historical and legal fact of original title in post-colonial claims to contested territory. Finally, having been articulated by the post-colony itself, this represents a vanguard-interaction of Asian states with themselves before the ICJ to produce and question new norms of territorial sovereignty.[39]

'A post-colonial legal approach to the Chagos case and the (dis)application of land rights norms' (2018) *International Journal of Law in Context* 1-19.

38 For a fascinating study of the ICJ's jurisprudence on post-colonial territorial sovereignty, see S Huh 'Title to territory in the post-colonial era: Original title and *terra nullius* in the ICJ judgments on cases concerning *Ligitan/Sipadan* (2002) and *Pedra Branca* (2008)' (2015) 26(3) *European Journal of International Law* 709-725; see also Y Chao 'Power, jurisdiction and admissibility: Reconceptualizing procedural legal issues in the interpretative proceedings under Article 60 of the ICJ Statute' (2017) 10 *Journal of East Asia and International Law* 511.

39 Para 3, Application for Revision of the Judgment of 23 May 2008 in the *Case Concerning Sovereignty over Pedra Branca (Malaysia v Singapore):* 'The recently discovered 1958 documentation goes directly to the reliability of this vantage point ["this" referring to the basis of the reasoning on original title], calling into question not only the controlling character that was attributed to the 1953 correspondence but also the evaluation of the practice subsequent thereto.' See JZ Wong 'Pedra Branca: Story of the unheard cases by S Jayakumar, Tommy Koh and Lionel Yee' (2020) 32 *Bond Law Review* 129-138; S Chesterman 'The International Court of Justice in Asia: Interpreting the *Temple of Preah Vihear* case' (2015) 5 *Asian Journal of International Law* 1.

2.2.2 Africa and climate change

The development of the doctrine of permanent sovereignty over natural resources[40] has greatly helped emerging economies, particularly in post-colonial Africa and Asia, to establish control over their resources and their means of economic growth. Moreover, the ideological shift towards a New International Economic Order has also encouraged stronger assertion of the rights of peoples and states to control their natural resources by prohibiting all types of interference, not only in the internal affairs of state, but also in economic affairs, prohibiting the use of force and coercion of any kind in international relations, and in realising the human and peoples' right to self-determination.[41] These changes are seen as an instrument for constructing an integrated society and are the bedrock upon which today's post-colonial Africa has built its most powerful articulation of group rights.[42]

Even though the debate over ownership of resources has been resolved in part, climate change creates a continuing crisis for emerging economies, especially those in the most vulnerable regions. First, the worst development outcomes-measures in poverty, inequality, and deprivation are often found in those countries richest in natural resources.[43] These are also frequently in areas that are most vulnerable to the effects of climate change. Instead of contributing to freedom, broadly-shared growth, and social peace, rich deposits of oil and minerals have often brought tyranny and insecurity to the emerging economies.[44]

Second, climate-change induced projects on adaptation and mitigation in developing countries give rise to complex intrastate disputes involving the interests of multiple marginalised communities, including indigenous peoples, racial and ethnic minorities, and the rural poor.[45] In the absence

40 UNGA res 1803 (XVII) Permanent sovereignty over natural resources 14 December 1962.

41 M Bedjaoui *Towards a new international economic order* (1979); N Schrijver *Sovereignty over natural resources: Balancing rights and duties* (2008).

42 HM Arnold 'Africa and the new international economic order' (1980) 2(2) *Third World Quarterly* 295-304; RI Onwuka & O Aluko *The future of Africa and the new international economic order* (1986).

43 See JD Sachs & AM Warner 'Natural Resource Abundance and Economic Growth', Center for International Development and Harvard Institute for International Development (1997).

44 K Vincent 'Creating an index of social vulnerability to climate change for Africa.' (2004) 56(41) *Tyndall Centre for Climate Change Research Paper* 56, (2004).

45 LA Miranda 'The role of international law in intrastate natural resource allocation' (2011) 45 *Vanderbilt Journal of Transnational Law* 785.

of a shared understanding of how to litigate climate change in developing countries, it becomes difficult to prevent the further impoverishment of the impoverished.[46]

Third, the use of energy to combat the stresses of climate change, including water access, food security, health, rising sea levels, and extreme weather events continues to pose a disproportionate drain upon developing economies.[47] These factors are indicative of the general lethargy among developing states in Asia, Latin America, and developing island states in recognising their obligations under climate change to develop domestic solutions providing for adaptation and mitigation consistent with the legal obligations created by international law in the climate change scenario. However, the trendsetter, and a true vanguard in the arena, is Africa's leadership in climate-change norm standardisation and strengthening.

In the increasingly complex framework agreements on climate change, African states are harnessing their sense of community[48] to engage meaningfully, *across* political borders, to forge alliances and negotiating groups led by the communities of peoples that AAIL typifies.[49] In providing a creative and largely local impetus to realise a pan-African response to the challenges of climate change, there is no comparator in the peer group of regional alliances in other parts of the world.[50] Not only have states such as Ghana, Morocco, Ethiopia, Kenya, and South Africa emerged as notable leaders in this 'African way' of building international law through state practice, several of them have also internalised a priority for climate change driven best practices and policy initiatives within their domestic legal and development agendas.[51] This leadership points to the

46 W Reisman 'Protecting indigenous rights in international adjudication' (1995) 89(2) *American Journal of International Law* 350-362.

47 RS Odingo 'New perspectives on natural resource development in developing countries' (1981) 5(6) *GeoJournal* 521-530; EG Eckstein 'Water scarcity, conflict, and security in a climate change world: Challenges and opportunities for international law and policy' (2009) 27 *Wisconsin International Law Journal* 409.

48 Underscored in the second part of this chapter, section 2.3.

49 D Bodansky 'The United Nations Framework Convention on Climate Change: A commentary' (1993) 18 *Yale Journal of International Law* 451; F Yamin & D Joanna *The international climate change regime: A guide to rules, institutions and procedures* (2004); M Hulme and others, *Global warming and African climate change: A re-assessment. Climate Change in Africa* (2005) 29-40; W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10(1) *African Human Rights Law Journal* 1-25; D Bodansky 'The Paris Climate Change Agreement: A new hope?' (2016) 110(2) *American Journal of International Law* 288-319.

50 R Falkner 'The Paris Agreement and the new logic of international climate politics' (2016) 92(5) *International Affairs* 1107-1125.

51 Republic of the Sudan, Ministry of Environment and Physical Development, Higher

importance of Africa in the global conversation on climate change due in part to the disproportionate impact that climate change portends for the African continent, but more importantly for the example it offers here, to establish a pattern of creating and codifying new obligations arising from the framework agreements and the common African position in order to set emerging trends in identifying customary international law.[52]

2.3 Africa at the International Court of Justice

Of the cases heard at the ICJ until 1960, none was brought by an African state. On 4 November 1960, however, two applicants made their way to court, each proceeding against the government of South Africa for the 'continued existence of the Mandate for South West Africa and the duties and performance of the Union, as Mandatory'.[53] These applications were submitted by Ethiopia and Liberia who claimed that through the practice of apartheid and other economic, political, social, and education policies, South Africa had failed to meet its international obligations under article 22 of the Covenant of the League of Nations, and article 2 of the Mandate of 1920. This, the applicants argued, limited opportunities for self-determination for the inhabitants of the territory. In a heavily contested judgment, with six judges writing five dissenting opinions, the Court held South Africa's obligations were to the League as an entity and not to a member state individually. Accordingly, despite its earlier ruling confirming jurisdiction, the Court held that the applicants lacked the legal right to claim performance of these obligations. The Court went on to state that political, moral, and humanitarian considerations did not confer or generate legal rights and obligations.[54]

Council for Environment and Natural Resources, 'National Adaptation Programme of Action under the United Nations Framework Convention on Climate Change' (2007); see also Republic of Uganda, Ministry of Environment 'National adaptation programme of action under the United Nations Framework Convention on Climate Change'; G Fumeaux 'Nationally appropriate mitigation actions for developing countries in view of the post-2012 climate regime: Case studies' PhD dissertation, Department of Economics and Oeschger Centre for Climate Change Research, University of Bern 2012.

52 On the common African position see African Ministerial Conference on the Environment 'Common African Position (CAP) on the post-2015 development agenda' (2015); L Rajamani 'Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics' (2016) 65(2) *International & Comparative Law Quarterly* 493-514; R Washington and others 'African Climate Change: Taking the shorter route' (2006) 87(10) *Bulletin of the American Meteorological Society* 1355-1366.

53 *International Status of South West Africa*, Advisory Opinion, 1950 ICJ 128 (July 11).

54 *South West Africa, Second Phase, Judgment,* ICJ Reports 1966 at 6.

Despite the Court ruling against the applicants, this case represents the immense contribution of the African nations in these areas of contestation – proving to be the first case of African nations approaching the Court despite the absence of an *individual* right or remedy sought to be enforced. Arguments have been made that this decision, amongst others by the Court in the 1960s, resulted in a significant backlash and a reduction in cases brought to the court who made such arguments. Certain scholars argue that the establishment of the International Tribunal for the Law of the Sea (ITLOS) was a consequence of this, with the agreement for ITLOS drafted to give non-state entities access to the dispute mechanism.[55]

The role of the vanguard at the Court continued, emerging again in 1963 when Cameroon brought a case against the United Kingdom for a violation of the Trusteeship Agreement for the Territory of the Cameroons. While the Court eventually held that it could not adjudicate on the merits of the case, the number of African applicants approaching Court increased significantly from this point on, picking up momentum in 2002 when the Republic of Congo instituted a case against France,[56] followed by Djibouti in 2006.[57] A watershed moment came in 1992 when the Libyan Arab Jamahiriya filed two separate applications instituting proceedings against the UK and the USA.[58] The case concerned extradition following the aerial incident over Lockerbie in Scotland. Although the parties agreed to abandon the case in 2003,[59] it remains of immense value for the question of the ICJ's judicial review of Security Council resolutions, as well as the relationship and hierarchy between these resolutions and other sources of international law – complex questions that go to the very foundation of

55 D Shelton 'Form, function and the power of international courts' (2009) 9(2) *Chicago Journal of International Law* 537.

56 *Certain Criminal Proceedings in France (Republic of the Congo v France)* 16 November 2010, ICJ Reports 2010. The Democratic Republic of Congo also filed an application against Belgium. The application concerned the customary international law on the inviolability and immunity from criminal process of incumbent foreign ministers. The court, in its 2000 judgment, held that the international circulation of the arrest warrant constituted a violation of Belgium's obligation towards the DRC. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ Reports 2002.

57 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France*) ICJ Reports 2008.

58 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie *(Libyan Arab Jamahiriya v United Kingdom)*; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie *(Libyan Arab Jamahiriya v United States of America).*

59 On 10 September 2003, the ICJ President issued an Order in each case placing on record the discontinuance of the proceedings, by agreement of the parties.

institutions of international law. These cases illustrate the role of African states as the vanguard in the creation of international law.

Most recent, and perhaps best illustrating the vanguard, is the case of *The Gambia v Myanmar*.[60] The Gambia brought a case against Myanmar before the ICJ alleging Myanmar's breach of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and requesting provisional measures against Myanmar's failure to protect the Rohingya community native to its Rakhine province. This application by The Gambia, an African state, is of particular relevance to our discussion in that it illustrates a situation in which a state from the Global South brought a case before the ICJ *despite the absence of any specific harm to itself*. The Gambia's decision to pursue an obligation *erga omnes partes* shows faith in the system of international-law advocacy in the pursuit of justice before an international court. Myanmar argued that in the absence of specific harm to The Gambia, it could not bring a case before the ICJ. The ICJ, however, held that all states party to the Genocide Convention have a 'common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity.'[61] Thus, The Gambia could invoke the responsibility of Myanmar – an obligation *erga omnes partes* – to ensure compliance with the Convention and in furtherance of peremptory norms. Accordingly, the ICJ held that The Gambia had prima facie standing before the Court in the dispute with Myanmar. In this context The Gambia represents the *avant guard,* or the vanguard, reinvigorating the grammar of international law through its pursuit of justice.[62]

60 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* 23 January 2020 ICJ Reports 2020.

61 *The Gambia v Myamnar* (n 60) 39-42.

62 It was later joined by Canada, the Netherlands, and Maldives, each nation representative of a different geography and history, and so a different approach to international law. See 'Joint statement of Canada and the Kingdom of Netherlands' 9 September 2019 https://www.government.nl/documents/diplomatic-statements/2019/12/09/joint-statement-of-canada-and-the-kingdom-of-the-netherlands (accessed 27 September 2022); Ministry of Foreign Affairs, Republic of Maldives, 'Mission News' https://www.foreign.gov.mv/index.php/en/ (accessed 27 September 2022).

These cases represent the role that the Global South at large, and African states in particular, are increasingly playing in the development and evolution of international law.

2.4 Voice of the vanguard

The Third World comes together as a political alliance based on the hegemonic and oppressive structure of international law, a shared history, and anger at injustices perpetrated against their people.[63] There is a recognition that the law cannot be separated from its historical context[64] and that promises of universality and stability fail to make the regime just and equitable.[65] The promises of universality stem from a geographical condition and not a normative promise.[66] The response that TWAIL offers is, first, to understand and deconstruct international law and to recognise its contribution to the creation and perpetuation of hierarchies that subordinate the Global South to the North. Second, it aims to present an alternative to international governance. Lastly, it aims to ameliorate poverty in the Third World.[67]

This approach requires a certain interconnectedness – a need to intertwine economics, human rights, and ecological concerns to give context to international law.[68] Mickelson points to the work of both Bedjaoui and Mbaye to highlight how development itself was perceived in terms that saw the continued effects of colonisation, the effect of conflict on a society, ecological concerns, and so on.[69] This, in turn, results in the prioritisation of justice and history. The characterisation of this in economic terms appears to be simple given the reality of poverty in the Global South and the wide chasm between the North and the South. However, these are historically grounded – stemming from a common pattern of marginalisation and exploitation across diverse histories.[70] Rather, there is a recognition that the effects of imperialism and colonisation continue to be felt and are reinforced through new mechanisms of exploitation, including the wealthier South's role in the hegemonic imposition of an international monetary regime, and conditions for peace and ideology on

63 Mutua & Anghie (n 2) 32.

64 Mickelson (n 2) 371.

65 Mutua & Anghie (n 2) 31.

66 A Anghie 'Finding the peripheries: Sovereignty and colonialism in nineteenth century international law' (1999) 40 *Harvard International Law Journal* 1.

67 Mutua & Anghie (n 2) 31.

68 Mickelson (n 2) 398.

69 Mickelson (n 2) 370-395.

70 Mickelson (n 2) 410.

the poorer South.[71] Therefore, the call is for the development of a truly inclusive framework for resolving global concerns.

To this end, a Third World approach aims to embrace all voices, including the non-state, non-governmental, and the poor who are key stakeholders.[72] As agendas such as climate change and globalisation, which were not part of the traditional mix of the post-colonial narrative, establish themselves in the mainstream of international law, emerging economic powers from African and Asian states are using these to leverage their vocabulary and infuse the grammar of international law with their presence.[73] The so-called 'Third World' has, therefore, an increasing ability to bargain collectively and stand-up to the 'First World'.[74] But it continues to be important to tackle the presumption that a shared story of development is what connects the coalition.

Other than during the twentieth century, the so-called nations of the Third World can no longer be defensibly classified as a homogenous economic space. The question of distinctiveness of narrative that does not permit the broad lumping-together of nations under a common political cause is a feature of this anomalous homogenisation.[75] The distinct nature of the 'Third World' is today stronger than it has been for the last half century. A presumption of homogeneity fails to account for the complex national and sub-national realities that present diverse pictures of the economies of these developing countries. To rely on the notion of linear industrial progression may be to fail to take account of the complexity

71 Mickelson (n 2) 403; Mutua & Anghie (n 2) 34.

72 Mutua & Anghie (n 2) 37.

73 B Rajagopal *International law from below: Development, social movements and Third World resistance* (2003); V Kanwar 'Not a place, but a project: Bandung, TWAIL, and the aesthetics of thirdness' in V Nesiah, M Fakhri & L Eslava (eds) *Bandung, global history and international law: Critical pasts and pending futures,* (2015).

74 The creation of the International Solar Alliance (ISA) is an example that illustrates this argument. The ISA was created on the sidelines of Paris 2015 to create a geographical alliance between states that lie between the two Tropics, the so called 'sunshine countries' whose objective is to mobilise solar and renewable sources of energy to reduce carbon emissions. It is remarkable that the main participants in this alliance are African and Asian states that by missing out on the industrialisation phase in the Global North, contribute very little to the current global energy and climate crisis but are pulling a great deal of weight in mitigating its impact. See http://isolaralliance.org/ (accessed 27 September 2022).

75 Examining the continuing relevance of the category of Third World, see BS Chimni 'Third World Approaches to International Law: A manifesto' (2006) 8 *International Community Law Review* 3-27; U Baxi 'What may the "Third World" expect from international law?' (2006) 27 *Third World Quarterly* 713-725; Mickelson (n 2) above.

of empirical realities.[76] For example, Colombia's population density is 44.7, income share held by lowest 20% is 4%, and the secondary school enrollment rate is 98%.[77] In contrast, Rwanda's population density is 498.7, income share held by lowest 20% is 6%, and secondary school enrollment rate is 41%.[78] Therefore, in creating policies for development there is no common path for Colombia and Rwanda given the different challenges they face.

The voice of states that are pushing the boundaries of meaning by reimagining international law today are voices of resistance that fall under the first imperative of TWAIL – to understand and deconstruct international law. However, the Third World is not a homogenous space and neither is TWAIL. The common construction of TWAIL allows room for regional specificities of which the development of LatCrit theory[79] mirrors a close parallel to the African approaches to international law (AAIL) suggested in this chapter.

Even within specific regions there is *need* to recognise important differences that complicate generalisations of geography, economic diversity, ethnicity, local values, traditions, and legal systems. Within

76 S Srinivas 'No Global South in economic development' in G Bhan, S Srinivas & V Watson (eds) *Routledge companion to planning in the Global South* (2018).

77 International Monetary Fund *World Development Indicators Data Extract Colombia* (2020).

78 International Monetary Fund *World Development Indicators Data Extract Rwanda* (2020).

79 TWAIL and LatCrit were founded separately in the late 1990s and developed along parallel axes. See A Anghie 'LatCrit and TWAIL' (2011) 42 *California Western International Law Journal* 311. The LatCrit school was founded on the relationship between critical race theory and TWAIL. See E Roman & NT Saito 'Mapping intersections of critical race theory, postcolonial studies and international law' in *American Society of International Law. Proceedings of the Annual Meeting* (1999) 225. The methodologies, politics. and histories of LatCrit revolve around the peripheral role played by non-European states in the development of mainstream international law. See EM Iglesias 'International law, human rights, and LatCrit theory' (1996) 28 *University of Miami Inter-American Law Review* 177; KR Johnson 'Celebrating LatCrit theory: What do we do when the music stops' (1999) 33 *UC Davis Law Review* 753. They advance a powerful claim of anti-subordination to challenge the experiences and perspectives of being structurally disadvantaged in the making of international law. See F Valdes 'Foreword: Under construction-LatCrit consciousness, community, and theory' (1998) 10 *La Raza Law Journal* 1. LatCrit theory recognised the foundational similarities to TWAIL in their approach but differed from TWAIL on their articulation of the importance of localising the race question. See DG Solorzano & TJ Yosso 'Critical race and LatCrit theory and method: Counter-storytelling' (2001) 14(4) *International Journal of Qualitative Studies in Education* 471-495. The success of LatCrit as a distinct critical approach to international law in the last two decades is its ability to create a new space in critical scholarship committed to an anti-subordination and anti-essentialism agenda.

Africa, for instance, different states find themselves at odds with a common African economic agenda.[80] North African exports with latent comparative advantage are more diversified in Egypt, Morocco, and Tunisia than in Algeria, Libya, and Mauritania.[81] Accordingly, the strategies for development in the region are diverse – including supporting research and development and eliminating non-tariff barriers. In contrast, West Africa depends on exports of unprocessed goods in the extractive and agricultural sectors. The goals for this region include facilitating access to markets, increasing access to energy and land, and improving entrepreneurial innovation.[82] Transplanting models of development has fared poorly even on a single continent,[83] and to hold that the coalition today exists on the basis of a shared economic history would be to ignore the complex realities and diverse solutions that these states demand. The broad geographical rubric that encompasses Latin America, Africa, and Asia must take the diverse stages of development of the countries in these regions into account.

This, history has shown, obtains through violence, upheaval and human displacement.[84] A study of the dynamics of extant critical approaches and the impact of the complementary construct of the mainstream, where 'the rest meets the rest',[85] offers unique insights. Further, the point at which 'the rest meets the rest' can be subdivided into two typologies better to consider African approaches to international law. First is the role of intra-African forums and developments; and second, the intersection of 'Africa and the rest of the Third World'. The study of this dynamic where Africa collaborates with itself but also collaborates and collides with the rest of the Third World, presents interesting patterns where the vanguard shapes and incubates the next generation of international law as its native voice – an African approach.

80 African Union & OECD 'Africa's development dynamics: Achieving productive transformation' (2019) 17.

81 African Union & OECD (n 73) 17.

82 African Union & OECD (n 73) 18.

83 M Mutua 'Africa and the rule of law' (2016) 13 *SUR International Journal of Human Rights* 159 at 166, available at https://sur.conectas.org/wp-content/uploads/2016/09/13-sur-23-ingles-makau-mutua.pdf (accessed 27 September 2022).

84 R Higgins *Problems and process: International law and how we use it* (1995).

85 This is an adaptation of the more commonly used 'where the West meets the rest' from EW Said *Culture and imperialism* (1993) and has since been used in other works. See N Ferguson *Civilisation: The West and the rest* (2012). In my adaptation I omit reference to the West altogether and underline the South-South interactions in this chapter.

3 African approaches to international law: The differential

Critical legal scholars have made a compelling case to suggest that the narrative of international law is informed entirely by its *context* from which we derive the 'situatedness' of international law.[86] Parsing the decades of critical legal studies and emerging voices that characterise themselves as actors in the schools, each distinct and with its own agenda, such as 'postcolonial' studies, 'Latin and critical race studies', 'Third World Approaches to International Law', and David Kennedy's 'new approaches to international law', serves as a lens through which to distil the idea that for each of them, what unites the fragmented understandings of international law is its situatedness.[87]

86 See generally JT Gathii 'International law and eurocentricity' (1998) 9 *European Journal of International Law* 184; Mickelson (n 2) 353; M wa Mutua 'What is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31; R Balakrishnan 'Locating the Third World in cultural geography' (2000) 15(2) *Third World Legal Studies* 1-20; D Kennedy 'My talk at the ASIL: What is new thinking in international law?' (2000) 94 *Proceedings of the Annual Meeting American Society of International Law* 104; D Kennedy 'When renewal repeats: Thinking against the box' (2000) 32 *New York Journal of International Law and Politics* 335; D Kennedy 'Two globalizations of law & legal thought: 1850-1968' (2003) 36 *Suffolk University Law Review* 631 (2003); A Anghie & BS Chimni 'Third World Approaches to International Law and individual responsibility in internal conflicts' (2003) 2 *Chinese Journal of International Law* 77; A Anghie and others (eds) *The Third World and international legal order: Law, politics and globalization* (2003); Koskenniemi (n 1); M Koskenniemi 'On the idea and practice for universal history with a cosmopolitan purpose' (2006) 984 *Shiso* 4-29; BS Chimni 'Third World Approaches to International Law: A manifesto' (2006) 8 *International Community Law Review* 3; B Puri & H Sievers (eds) *Terror, peace and universalism: Essays on the philosophy of Immanuel Kant* (2007) 122-148; A Imseis (ed) 'Third World Approaches to International Law and the persistence of the question of Palestine' (2008) 15 *Palestine Yearbook of International Law*; K Mickelson and others (eds) 'Situating Third World Approaches to International Law (TWAIL): Inspirations, challenges and possibilities' (2008) 10(4) *International Community Law Review* 15; K Mickelson 'Taking stock of TWAIL histories' (2008) 10 *International Community Law Review* 355; O Okafor 'Critical Third World Approaches to International Law (TWAIL): Theory, methodology, or both?' (2008) 10 *International Community Law Review* 371; R Falk and others (eds) *International law and the Third World: Reshaping justice* (2008); A Orford (ed) *International law and its others* (2009); BS Chimni 'The world of TWAIL: Introduction to the Special Issue' (2011) 3(1) *Trade, Law, and Development*; L Eslava & S Pahuja 'Between resistance and reform: TWAIL and the universality of international law' (2011) 3(1) *Trade, Law and Development* 103-130.

87 M Khosla 'The TWAIL discourse: The emergence of a new phase' (2007) 9(3) *International Community Law Review* 291-304; OC Okafor 'Newness, imperialism, and international legal reform in our time: A TWAIL perspective' (2005) 43 *Osgoode Hall Law Journal* 171; JT Gathii (2018) 'The agenda of Third World Approaches to International Law (TWAIL)' in Jeffrey Dunoff & Mark Pollack (eds) *International legal theory: Foundations and frontiers* (2019); BS Chimni 'Third World Approaches to International Law: A manifesto' (2006) 8(1) *International Community Law Review* 3.

In this second part of the chapter *situatedness* is interpreted in the context of AAIL. It is suggested that the term may simply be read as a specific narrative within the broader framework of TWAIL – albeit there is nothing simple about the different forms of colonial subjugation and the creation of the subaltern that the disjunctive histories of a conjunctive exercise in *empire* have spawned.[88] Many approaches have emerged to articulate a distinct plurality – AAIL – which posits a critical view of international law as a distinct voice under the broader TWAIL umbrella. Three central pillars of this discreteness illustrate the content and meaning of AAIL which sets the AAIL approach apart from the approaches taken by other schools of critical legal thought and writing. These are, in no particular order, an African understanding of history, the rule of law in Africa, and the African idea of community and human and peoples' rights. These three pillars are crucial to the *differential* when studied alongside the *common minimum* of the TWAIL agenda that runs parallel to and is, in many ways, an umbrella that includes AAIL. In this part of the chapter, I shall attempt to *locate* the distinctiveness of AAIL by situating my reading of AAIL within the larger arguments offered by TWAIL. The aim of this exercise is to reveal a pattern of specifics – the specifics of denial, negation, deprivation, isolation, and non-inclusion that will show AAIL as a distinctively alternate grammar of international law.

It is important to sound a caveat (at the risk of restating the idea of repetitive reduction conceded in Part I) that the 'idea of Africa' or 'Africanness' is one that has proved treacherous in writing and thinking. One simultaneously risks over-generalising and concentrating significant ethnic, historical, cultural and human differences in an endeavour to reduce a grand continent to a single idea.[89] The caveat here, therefore, is that 'African', in the idea of AAIL attempted here, is a deliberate usage, one that does not seek to conflict with the valid inquiries of 'manyness' or 'sameness' inherent in the hermeneutics of Africanness.[90] To transgress this would be a grave disservice to the large and important body of work

88 BS Chimni 'The world of TWAIL: Introduction to the special issue' (2011) 3(1) *Trade Law and Development,* 14-25.

89 Laroui (n 19) 63-75.

90 See generally on the epistemology of constructing the hermeneutics of Africanness, C Ngwena *What is Africanness* (2018).

that interrogates the use of words like 'African' or 'Asian' without regard to these words as *values* with infinite derivative meanings.

3.1 AAIL: Three pillars

3.1.1 History

'The leaves of a tree delight us more than the roots'[91]

That history alone is the true context in which fully to understand political and social events is an interpretation of Tolstoy's view of history. For Tolstoy, history does not reveal causes; it presents only a 'blank succession of unexplained events'.[92] The idea that we are part of a scheme of things larger than we can comprehend is the driving force behind ascribing to the identities of women and men the burden of greatness that is the cost of hindsight – a hasty attempt to fill in the blanks with figures and dates that may explain the inexplicable. In rejecting the opposing view that history is made by real flesh-and-blood people who through their lived experience go on to influence the course of events that we then call history, is to attribute to these accidental heroes a symbolism of being more than they perhaps knew they were to be.[93] The tragedy of their times embodies a deep sense of loss and bewilderment that characterised the colonial encounter and the bitterness and anger of post-colonial states – of fatigue and disenchantment with the experience of *empire*.[94]

That today's international community traces its origins to the imperial past of Western hegemonic states which through European expansionism ensured the economic stability and success of the European 'home state' through its dislocated 'spheres of influence' in the colonised world, is a construction the irony of which can never be lost upon those who lived through the tumultuous generations in the colonies, circumscribed as they were by abject poverty, loss, and a crippling crisis of morality.[95] Equally tenable, is the argument that the shadow of imperialism has not

91 LN Tolstoy *The complete works* vol 1 (1904) 222.

92 I Berlin *The hedgehog and the fox: An essay on Tolstoy's view of history* (2013).

93 J Bronowski *The ascent of man* (2011).

94 For a comprehensive exposition on the retelling of histories in the project of international law, see N Tzouvala 'New approaches to international law: The history of a project' (2016) 27(1) *European Journal of International Law*, 215-233.

95 P Singh *Reading RP Anand in the post-colony: Between resistance and appropriation* (2016); CH Alexandrowicz 'New and original states: The issue of reversion to sovereignty' (1969) 45(3) *International Affairs (Royal Institute of International Affairs 1944)* 465-480.

been eradicated but has simply morphed into institutions promoting the 'common goal' and 'common method' theories of international law.[96]

The point of coalescence of AAIL as a new voice of the vanguard with the existing grammar of international law can essentially be traced through a similar trajectory – the parabola of *history*, or more accurately, a story of the past that has never really ended.[97] History must inform international law for either to be a meaningful account of the human condition. Any narrative of international law that does not engage with its specific history does an injustice to the purpose and process of law while simultaneously challenging the integrity of the legal system that produces it.[98] The African sense of history is evidenced in the writings of Taslim Oluwale Elias and subsequent commentators.[99] Commenting on Elias's view of history, James Thuo Gathii cautions against romanticising a deeply unequal mooring of that history.[100] The AAIL pays special heed to the superimposition of the colonial imprint on a relatively virgin history of international law, rather than to a collision of systems as observed

96 L Varadarajan 'The trials of imperialism: Radhabinod Pal's dissent at the Tokyo Tribunal' (2015) 21(4) *European Journal of International Relations* 800-802; AH Khan 'Inheriting a tragic ethos: Learning from Radhabinod Pal' (2016) 110 *American Journal of International Law Unbound* 26-27. The series of ruptures that have characterised the democratic deficit in the façade of institutions of international criminal law injected into the global community since the 1990s – the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), those opening acts of institutionalised justice in the aftermath of tragedy, have not been free from 'neo-imperial' asseveration. See A Bharadwaj 'International Criminal Court and the question of sovereignty' (2003) 27(1) *Strategic Analysis* 5-20; G Jonathan & L Varadarajan 'Taking Milosevic seriously: Imperialism, law, and the politics of global justice' (2013) 27(4) *International Relations* 439-460. Permanent, ad hoc, or hybrid, these institutions have been marked with formal success coupled with the notional failure to reimagine justice and free it from the charge of foundational imperialism. See BG Jones (ed) *Decolonizing international relations* (2006).

97 D Kennedy 'International law and the nineteenth century: History of an illusion' (1996) 65(3) *Nordic Journal of International Law* 385-420.

98 GRB Galindo 'Martti Koskenniemi and the historiographical turn in international law' (2005) 16(3) *European Journal of International Law* 539-559; M Koskenniemi 'Histories of international law: Significance and problems for a critical view' (2013) 27 *Temple International & Comparative Law Journal* 215; S Marks 'The end of history: Reflections on some international legal theses' (1997) 8 *European Journal of International Law* 449.

99 TO Elias & R Akinjide (eds) *Africa and the development of international law* (1988); K Aoki 'Space invaders: Critical geography, the Third World in international law and critical race theory' (2000) 45 *Villanova Law Review* 913; T Maluwa 'The OAU/African Union and international law: Mapping new boundaries or revising old terrain?' (2004) 98 *Proceedings of the Annual Meeting American Society of International Law* 232-238; A Anghie *Imperialism, sovereignty and the making of international law* (2005).

100 J Gathii 'A critical appraisal of the international legal tradition of Taslim Olawale Elias' (2008) 21(2) *Leiden Journal of International Law* 317-349.

in Asia, or the exclusion of the question of race as emerges in LatCrit scholarship.[101]

TWAIL scholars began their exposition with the assertion that international law is predominantly the law of Christian Europe and embodies the value system of Occidental culture and often Catholic values – an opinion expressed and confirmed by every history of law of the nations.[102] From this perspective, the end of imperialism, while symbolising the culmination of one chapter of dominance, does not create room to forget the past; the past is where polarities were assigned and these are the same polarities we face today. The past is, therefore, inextricably ingrained in the present and future of international law. An AAIL narrative of international law integrates past struggles in present structures to create a context for today's structures and processes rather than artificially starting from the post-colonial era as if wiping the slate clean.[103]

TWAIL's call to pluralism and obfuscation of Austinian sovereignty is internalised by Anghie and reveals a sense of dislocation from the Westphalian 'convenience' of what we term a 'manufactured sovereignty' which, as Anghie explains, is the true origin of today's fundamental inequality among nations.[104] This idea of TWAIL continues to dominate the central political argument in scholarship that foretells the coming[105] of a revolution within international law.[106] TWAIL ideology is a realisation of Kunz's notion of the anti-colonial movement as a 'challenge to Europe and the occidental world of the white man'.[107]

101 JL Kunz 'Pluralism of legal and value systems and international law' (1955) 49(3) *American Journal of International Law* 370-376.

102 JN Shklar *Legalism: An essay on law, morals, and politics* (1964) 181-190; R Cryer 'The doctrinal foundations of international criminalization' in C Bassiouni (ed) *International criminal law: Sources, subjects and contents* (2008) 107-28; Elias & Akinjide (n 99) 112; RP Anand *New states and international law* (2008) 7; Kunz (n 101) 370-376.

103 GM Abi-Saab 'The newly independent states and the rules of international law: An outline' (1962) 8 *Howard Law Journal* 95.

104 BS Chimni 'The past, present and future international law: A critical Third World approach' (2007) 8 *Melbourne Journal of International Law* 499; JT Gathii and others 'Africa and TWAIL' (2010) 18 *African Yearbook of International Law Online/Annuaire africain de droit international Online* 9; JT Gathii 'TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography' (2011) 3(1) *Trade, Law, and Development* 26.

105 R Raman & R Sen 'Retelling Radha Binod Pal: The outsider and the native' in F Megret & I Tallgren (eds) *The dawn of a discipline: International criminal law and its early thinkers* (2020).

106 Singh (n 21) 223-255.

107 Anand (n 102) 8.

The AAIL view is actuated by the distinct language of the African colonial encounter. In characterising Africa as a 'whole', the colonial administrators simultaneously robbed individual African nations of their separate sovereign identities, and then went on to condemn this 'whole' as backward, barbaric, and uncivilised.[108] The civilising mission and its accompanying atrocities wreaked havoc on the African continent plunging it into subjugation and silencing pre-colonial sovereign identities. From these ashes, Elias constructs the role of universalism in leading Africa out of crisis. It is in this sense that Elias attributes meaning and legitimacy to sovereignty – a sharp contrast to TWAIL's exposition on the futility of the 'manufactured sovereignty' discussed here.[109]

When one adds the specific histories of racial subjugation through slavery and the slave trade, through hegemonising kingdoms and tribal nations, through European systems of sovereignty, through the lens of dividing Africa along racial and tribal lines in order to consolidate and legitimise the instrumentality of colonial rule, one begins to count the skeins that make up the differences and arrive at its antipode. The emerging view is that Africa denotes an inescapable plurality in that there are many Africas and the AAIL episteme is best understood in terms of this plurality is this antipode.[110] Africa then becomes not a geopolitical theatre of doing and acting international law, but a 'space where experience is socially produced'.[111]

3.1.2 Rule of law

Despite the Eurocentric foundations of the discipline, there has been an increasing involvement of the Global South in the continued creation and enforcement of international law. The 'traditional TWAIL' scholarship (in itself an oxymoron) has focused on the intersection where 'west meets the rest'. From a TWAIL perspective, international law is the self-aggrandising grammar of unjust and oppressive colonialism, subjugation, violence, and terror. TWAIL scholarship explicates the alternate narrative of compliance and relative autonomy in a system where international law serves the interests of the dominant social forces and states in international

108 Gathii (n 100).

109 Gathii (n 100) 317; JT Gathii 'Alternative and critical: The contribution of research and scholarship on developing countries to international legal theory' (2000) 41 *Harvard International Law Journal* 263.

110 M Koskenniemi 'The politics of international law' (1990) 1 *European Journal of International Law* 4.

111 'Report of the 2017 roundtable of the Kéba Mbaye Conference' http://www.chr.up.ac.za/images/centrenews/2018/files/2018_call_for_papers_keba_mbaye_conference.pdf (accessed 27 September 2022).

relations. Ideologically, this speaks to the role that states and international organisations play in achieving a reckoning with the past in cases and situations where conflict has taken place and has caused human suffering, endangering the dominance of powers and resulting in a negotiation for a replacement of power. The forced homologising of the African continent conflates sovereign landscapes and silences the differences that create identities.[112] Upon this fulcrum lie the terrible narratives of human suffering, told through a bloodied history of slavery, genocide, apartheid, poverty, hunger, abrogation of human rights, and denial of the right to self-determination.

The post-colonial task of rebuilding the rubric of defeated, atrophied, and silenced sovereignty was a mammoth exercise made possible by the ebullience of young nation states and the indefatigable resilience of a wronged people. Here, too, is an interesting opportunity to examine whether the encounter between tragedy and institutions – a simulacrum of the encounter between the powerless and the powerful – might have produced sites of *context* in international law that remain meaningful to the powerless entity emerging from the encounter.[113]

The African Union's work on the development of the rule of law highlights the need for the constant prioritisation of the specific context. The African Union holds that in an African setting the rule of law can only be debated within the context of poverty, power, inequality, and injustice.[114] Strengthening the rule of law in conflict and post-conflict societies produces a set of challenges: manifestations of violence and injustice, broader institutional gaps, and socio-economic needs.[115] The key for the African Union lies in the primacy of the constitutional mechanisms of the regional as well as national constitutions, the use of the rule of law as a vehicle for transformation and realisation of political, civil and socio-economic rights, stabilising judicial democracies, and ethical leadership.[116]

112 For accounts that tend to conflate rather than separate Third World claims as 'Asian-African', see G Abi-Saab 'The newly independent states and the rules of international law: An outline' (1962) 8 *Howard Law Journal* 106; J Castañeda 'The underdeveloped nations and the development of international law' (1961) 15 *International Organization* 41; RP Anand 'Role of the "new" Asian-African countries in the present international legal order' (1962) 56 *American Journal of International Law* 383-385.

113 Anghie & Chimni (n 80) reading Anghie's telling of the creation of mainstream international law in the colonial encounter.

114 African Union *Challenges to the rule of law in Africa: Workshop report* (2016).

115 UNDP Global Programme on Strengthening the Rule of Law in Conflict and Post Conflict Situations 2008-2011.

116 African Union (n 114) 46.

International law scholarship has noted the 'opportunism and eccentricity'[117] in the interplay of legal consequences and political organs. A context that this part identifies as crucial to the African understanding of the rule of law must therefore be traced to the gap between an African and an international understanding of the rule of law. Does such a gap exist? If so, what are respectively the universal and the regional definitions of the rule of law that create or foster such a gap?

First, the rule of law is not a purely legal construct – it involves political science, constitutional theory, and historical experiences that must be read not as formulaic applications to a political situation, but as principles or aspirational standards to evaluate the legal consequences of political decisions.[118]

The UN system has nearly universal recognition by and membership of all the states in the sovereign interstate system of international law-making.[119] This system operates with the Security Council (UNSC) as its center – the UNSC is simultaneously a legal creation of the Charter[120] and is also tasked with implementing the Charter in political situations that call into question the object and purpose of the Charter.[121] The intersection of its legal framework, political legitimacy, and the interests of its constituent states has come to define the UNSC.

Second, the UNSC is generally regarded as the most powerful international authority in the history of interstate international law.[122] Its legitimacy[123] is derived from the general acceptance that the instruments it puts its weight behind command obedience and respect – which, while not part of its legal powers, speaks to the near universal complexion of its legitimacy. From this legitimacy comes its persuasive role in regulating the space between international politics and international law. This space is the rule of law and it exists on at least two levels (with a third possible

117 I Brownlie *The rule of law in international affairs: International law at the fiftieth anniversary of the United Nations* (1998) 212.

118 For the definition on the rule of law used in this paper see I Hurd 'The UN Security Council and the international rule of law' (2014) 7(3) *Chinese Journal of International Politics* 1-19.

119 Brownlie (n 117) 213.

120 Arts 25, 27, 39, 41 & 42 of the UN Charter.

121 Hurd (n 118) discusses this aspect of the role of the UNSC in detail at 3-11.

122 See for an argument on why the UNSC is the most powerful international organisation see S Chesterman 'Legality versus legitimacy: Humanitarian intervention, the Security Council, and the rule of law' (2002) 33(3) *Security Dialogue* 293-307.

123 Hurd (n 118) 7.

level of regionalism) – the domestic and the international.[124] On both the domestic and international levels there is consensus that having an organised system of governance that embodies both accountability and transparency is required for an enhanced experience of the political and social order that ultimately feeds the ideas that keep the systems operating. But this consensus is where the similarities between an international rule of law and a domestic rule of law end. From here on the domestic rule of law (or even a regional rule of law in some organisational models) is a response to the excesses of sovereign interference in the lives and businesses of citizens and therefore acts as a conceptual valve to control authoritarian tendencies in government. Whereas, in clear distinction, the international rule of law is a response to the proliferation and duplication of sovereign equality that creates an international ecosystem of peer review – with the conceptual valve of the international rule of law acting as a control to the externalities that sovereign interactions as equal members of the ecosystem produce.[125]

A gap between the international and the domestic rule of law may be approximated to represent the gap between the international rule of law and an African understanding (comprising the domestic pluralities inherent in the use of the word African) of the rule of law.

African institutions have recognised the rule of law as an integral part of the overall commitment to governance and democracy.[126] As Mujuzi notes, the African Commission's responses to elections, political situations, and even HIV/AIDS, include a recognition of the rule of law's role in securing solutions.[127] Institutions in many African states are unable to function without undue interference. The most notable example is judicial independence where one encounters biased judicial appointments, verbal and physical threats, violent attacks, the payment of bribes, or the sacking of sitting judges.[128] Even though the level of judicial independence has

124 S Chesterman 'An international rule of law?' (2008) 56(2) *American Journal of Comparative Law* 331-362 on the difference between the thick and thin conception of a rule of law.

125 Chesterman (n 124) 335-342 and Hurd (n 118) 16.

126 R Murray *The African Commission on Human and Peoples' Rights and international law* (2000); D Kennedy & C Tennant 'New approaches to international law: A bibliography' (1994) 35 *Harvard International Law Journal* 417.

127 JD Mujuzi 'The rule of law: Approaches of the African Commission on Human and Peoples' Rights and selected African states' (2012) 12 *African Human Rights Law Journal* 89.

128 C Heyl 'The judiciary and the rule of law in Africa' in WR Thomson (ed) *Oxford Research Encyclopedia of Politics* (2019).

improved since the 1990s, courts in many African states still fall below the global average of independence.

Articulating this regional meaning of the 'rule of law' in terms of AAIL while incorporating tolerance of international oversight in national institutions evolves a distinct critique of an international rule of law. In other words, the African idea of rule of law offers a critique to an international rule of law. The AAIL critique of the rule of law lies between the domestic and the international rule of law. It incorporates economic and social rights and the right to self-determination and economic development,[129] and is guided by significant political transformation.[130]

In its application to politics, and in recognition of the legitimacy it enjoys, the tenuous relationship between the thinner (international rule of law) and the thicker (domestic, escalating to regional, rule of law) conceptions of the rule of law may be illustrated by the UNSC-led efforts to internationalise (rather than regionalise) the rule of law in Africa.[131]

During the last two decades the UNSC has given increased importance to strengthening the rule of law through its peacekeeping operations and rule of law missions – providing electoral assistance through capacity-building measures in conflict and post-conflict societies.[132]

In April 2008, the UN Secretary-General, in a Guidance Note, set out the United Nations' approach: [133]

> For the United Nations system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the

129 PT Zeleza & PJ McConnaughay *Human rights, the rule of law, and development in Africa* (2004) 312.

130 Zeleza & McConnaughay (n 129) 314.

131 Hurd (n 118) 17; A Gilder 'The effect of 'stabilization' in the mandates and practice of UN peace operations' (2019) 66 *Netherlands International Law Review* 55-62.

132 For a discussion on why the UNSC rule of law missions in the last two decades appear to disproportionately focus on Africa, see Gilder (n 131) 47-73 discussing the link between political stabilisation, use of force and the rule of law.

133 United Nations 'Guidance note of Secretary General: UN approach to rule of law' April 2008.

> law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

In 2003, UNSC resolution 1509, established the United Nations Mission in Liberia (UNMIL).[134] One of the three pillars of UNMIL was the 'Rule of Law Pillar', which consisted of four components: a Legal and Judicial Systems Support Division; a Corrections Advisory Unit; a Human Rights and Protection Section; and the UN Police. In 2004, the UNSC established the United Nations Operation in Côte d'Ivoire (UNOCI)[135] to assist the Government of National Reconciliation in conjunction with the Economic Community of West African States (ECOWAS) and other international organisations, to restore the authority of the judiciary and the rule of law across Cote d'Ivoire.

In 2007, the UNSC established a UN/AU hybrid operation termed UNAMID to address the conflict in Darfur.[136] The UNAMID was mandated to assist in the promotion of the rule of law in Darfur, which included the task of strengthening an independent judiciary and the prison system. In 2011, the UNSC established the United Nations Mission in the Republic of South Sudan (UNMISS), which was assigned with the task of promoting the rule of law in accordance with the principles of national ownership and in cooperation with the UN Country Team.[137] In 2014, the UNSC established the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA), which was assigned with the primary task of supporting national and international justice and the rule of law.[138]

Through various of its missions and operations the UN has promoted its understanding of the international dimensions of the rule of law in Africa that target the gap between the previously articulated AAIL rule of law and the international rule of law. This raises the questions previously identified as the gap between international rule of law and an African rule of law – whether there is a thicker or thinner conception of the rule of law at work in the precariously independent institutions in African states that is resistant to the universalist or international rule of law[139] and creates room to think about a regional or AAIL model of the rule that

134 UNSC res 1509 'The situation in Liberia' 19 September 2003.

135 UNSC res 1528 'The situation in Côte d'Ivoire' 27 February 2004.

136 UNSC res 1769 'Reports of the Secretary General on the Sudan' 31 July 2007.

137 UNSC res 1996 'Reports of the Secretary General on Sudan' 8 July 2011.

138 UNSC res 2149 'Situation in Central African Republic' 10 April 2014.

139 Chesterman (n 124).

can normatively challenge the international rule of law and represent a common African position on the rule of law.

3.1.3 Community and human rights

The African idea of *community and human rights* is the third pillar of AAIL in describing this new critical epistemology.[140] Can a narrative of the 'law of nations' be told without engaging the plurality that this term connotes? Can it be told responsibly while alienating this plurality?[141] Critical scholarship collectively supports the view that this is precisely the telling of international law that has engendered a democratic deficit among sovereign states, equal in legendary but paradoxical participants in the hegemonic vortex of power that breeds unequals. These unequals within the group of states and elites within each state, constitute roughly that collectivity which is still defensible as the 'Third World' among scholars.

The 'holistic' approach to transitional justice and human rights in post-conflict states illustrates this paradox. It provides for the inclusion of criminal prosecution, civil reparation, social suturing through truth-telling and forgiveness, restitution, recognition, and memorialisation of the struggle to overcome the conflict. Instances from the truth telling mechanism of the South African transition from apartheid, the meetings convened by community elders through the *gacaca* process in Rwanda to hear first-hand accounts of atrocities committed, the carefully preserved, hauntingly stark, genocide memorial at Murambi, and many, many more, serve as tools for living with history.[142] While moral philosophy and legal theory have long recognised *jus post bellum* as a natural limb of the just war theory, it is only now, in the face of heightened concern over human security and the viability of humanitarian intervention, that a legal framework encompassing the normative conception of a *jus post bellum* informs contemporary debate and straddles the principle of distinction within just war theory. Axiomatic support for such a structure will emerge from a study of the historical origin of *jus post bellum*, its location in just war theory, and its use as evidenced by the practice of states in conflict situations. A modern *jus post bellum* would focus on securing a lasting peace by community elders rather than cosmetically consummating hostilities.[143]

140 U Baxi *Human rights in a posthuman world: Critical essays* (2009).

141 RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2006) 30 *Fordham International Law Journal* 296.

142 J Rose *Interpreting difficult history at museums and historic sites* (vol 7) (2016).

143 U Baxi 'The War on terror and the war of terror: Nomadic multitudes, aggressive incumbents, and the new international law - prefactory remarks on two wars' (2005) 43 *Osgoode Hall Law Journal* 7.

For TWAIL scholars, international law makes sense only in the context of human suffering and the palliative or catalytic role that states, the subjects of international law, play in this suffering.[144] They memorialise and serve as record keepers of the atrocities of the past while being a part of the throbbing, living, fabric of the present.[145] What language does this vanquished subaltern narrative use that individualises the lived history of the peoples of these states?

Perhaps the most uniquely indigenous element is that of the African idea of human and peoples' rights. What makes human rights inherent or inalienable? Or more particularly, are human rights truly universal, unlike other legal rights? It is indeed misleading to conceive of a 'right' which can be transgressed so easily by a state or those acting on behalf of a state as by community elders universal or inherent, even in the absence of legally recognised enforcement mechanisms.

There can be no meaningful engagement with the African idea of community in the liberal space unless that space can be remoulded in the cast of community rights. In creating the Banjul Charter and in emerging as a champion in the interpretation of human rights as collective rights, an African approach to problematising the universal human rights project has successfully created a narrative that recognises the inherent, inalienable rights of the human person, but also effectively uses the language of self-determination and group rights to translocate the discourse to collective rights.[146] By doing so, international human rights law has undergone a dimorphism that tends to recognise the African position on collective rights as an extension of and not an exception to the liberal universalist project – proof positive of the inroads made by AAIL.

The redemptive impulses and aims of the human rights project as Mutua sees it are a prison of liberalist ideals – made impregnable by subsequent pluricultural amorphisms of the promise of universalism.[147] Mutua rejects not only the liberalist mainstay of the universalism project that is fixated upon the ultimate truth at the heart of the 'consolidated

144 RP Anand 'Attitude of the Asian-African states toward certain problems of international law' (1966) 15(1) *International & Comparative Law Quarterly* 55-75.

145 P Williams 'Witnessing genocide: Vigilance and remembrance at Tuol Sleng and Choeung Ek' (2004) 18(2) *Holocaust and Genocide Studies* 234-254; M Caswell 'Khmer Rouge archives: Accountability, truth, and memory in Cambodia' (2010) 10(1) *Archival Science* 25-44.

146 See also SP Sinha 'Perspective of the newly independent states on the binding quality of international law' (1965) 14(1) *International & Comparative Law Quarterly* 121-131.

147 M wa Mutua 'Human rights in Africa: The limited promise of liberalism' (2008) 51 *African Studies Review* 17.

colonial guide to human rights', but also the postmodern, postcolonial thinking that the human rights project has failed to serve its purpose and ought to be abandoned in its entirety. He visualises a transformative potential in the radically universal,[148] alarmingly liberalist agenda of the human rights project by giving it the voice of the local. In instrumentalising African voices to retell the African narrative of human rights is, for scholars like Mutua, a way to 'keep rooted, but to flow'.[149]

4 Way forward

The central idea in this chapter reveals that the two theses examined in the two parts (sections 2 and 3 above), respectively stand on a shared platform. This platform is the existence of a distinct *Africanness* in the emerging ideas of a narrative of post-colonial states that embodies the three pillars of an African Approach (set out in in section 3). What does this new critique of mainstream international law portend for future scholarship in this field? One argument might be simply that this speaks to a vindication of the faultlines that section 2 of this chapter examines as the vanguard and the laggard. Do interactions between African and other Third World states truly push the normative potential of international law? What value do the legal systems that are the progeny of the post-colony add to international rule-making before adjudicatory bodies? In conclusion, the creation of a vanguard informed by AAIL is a fecund space for academic inquiry into the sanctity of the modern processes of law-making – a space that leaves several difficult questions unanswered.

148 PC Jessup 'Non-universal international law' (1973) 12 *Columbia Journal of Transnational Law* 415.

149 V Woolf *The collected novels of Virginia Woolf - volume I - The Years, The Waves* (1992) 335-508.