TWAIL and International Organisations: Setting the Agenda

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In Ari Folman’s *Waltz with Bashir*\(^1\) the protagonist’s friend explains him the workings of a human brain: if a human being is shown a series of pictures that supposedly belong to his memory (but in fact are not), the person would begin to believe that they truly pictures from an event that they belonged to. International Organizations, in a manner, represent the distance between a memory (a historical fact, in this case) and a ‘created’ memory. As specialized bodies that are increasingly politically centralized, they generate not only policies, bureaucratic notifications or specialized codes, but they also generate the remembrance or non-remembrance of their effects. As politically and physically distant from most of the people that their politic effects, international organizations embark on the project of regulating, suspending and officiating a series of “non-simultaneously apprehended events”\(^2\). In a manner of speaking, the memories that International Organisations (IOs) “learn from” (if memories are factual narratives from the past) are culturally and historically selective - they might even be in an oppositional position to most in the world – and in these worlds IOs cajole and confirm practices that belong to the “created memory”; not necessarily owned by the State enforcing it, not in possession or control of its “beneficiaries” not even, perhaps in their interest.

In this memory creation function of IOs, they generate knowledge – technical bureaucratic and specialized “guidelines”, advisories, treaties, general comments – this knowledge is generated in the course of a narrative of power, engendered by it, and protected by it. Those persons marginalized, or belonging to States that are not “mainstream” are not part of the process that generates this knowledge and in a manner, the dominant narrative “Third World” peoples and their series of engagements with them are almost invariably only participants in passivity or as interrupters to this great conversation of development, human rights and imperialism. In a manner of speaking, like many before have mentioned, colonialism is a continuing project, whose modes have been relocated but not its behaviour.\(^3\) And one of the

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\(^2\) Buckminster Fuller, “The Universe consists of non-simultaneously apprehended events”

\(^3\) Julius Nyere argued that neo-colonialism is the “inability of States to delink themselves from dependency on their former colonizers. An example of this is the very evident case of the UN Peacebuilding Commission,
most significant vocabularies of colonialism has been that the oppression and the “civilizing burden” narratives are always constructed in a manner that sees the story only from the White Male’s eyes: it differs only to the extent that the eyes belong to the British Soldier or the sympathetic Portuguese Missionary.⁴

Using a framework Constructivist International Relations (IR) theory and the Third World Approaches to International Law (TWAIL), I argue that the effects of International Organizations (IOs) in the kind of norms, policies, practices, law – a comprehensive ‘knowledge’ – are violently a product of phallogocentric⁵, Eurocentric domination. While TWAIL scholars have, over the years, produced immensely relevant material on the international legal system and its ‘material effects on the third world’⁶, with the exception of IOs appearing as mere reference points, most authors intend to look at the law as a vehicle for neo-colonial politic.⁷ Only Bhupinder Chimni⁸ has boldly explored the world that International Institutions (a term broader than simply IOs, to include structures that are not strictly ‘organisations’) occupy and how they have reached a situation wherein they continue to increase influence, entering areas that were previously the exclusive domain of the sovereign state.

A close, far more comprehensive commentary comes from Empire⁹ - where Hardt and Negri explore the theoretical renegotiations of the definition of sovereignty – its relocation from the nation-State to the broader ‘Empire’ – in it, it would include structures, organizations, persons, ideologies - Chimni would call it the “Transnational Capital Class (TCC)”. Empire is a study in how imperialism has merely found different and more complex forms of continuing the project of exploitation, of hegemony and of domination.

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⁵ Male centered, binary obsessed analysis of reality
⁷ Ibid.
⁹ Michael Hardt and Antonio Negri, Empire, Harvard University Press, 2000
I would begin with a brief review of TWAIL scholarship and their interaction with IOs – while some have seen them as sites of possible resistance\textsuperscript{10}, others have been cynical\textsuperscript{11} - I will follow this with a far more critical analysis of what IOs produce, and how TWAIL scholars have responded to it – whether it is the substantial basis of a ‘sovereign nation state’ theory, or the question of the effects of a wide array of IOs’ practices and its material effects. To this, a constructivist analysis – of norm diffusion, of the interactional theory of international law and what kind of role IOs play in the third world is necessary. This broad framework is primarily informed by what is seen the ‘structure of international argument’\textsuperscript{12}, which relies immensely on the idea of artificially created ‘sovereign nation states’ that are, in most instances, colonial legacies of people-hood. I argue that any resistance ‘within’ international legal systems is limited in its scope unless it suspends the use of a colonial vocabulary to articulate the institutional sustenance of ‘plunder and subordination’\textsuperscript{13}, it becomes necessary to relocate the definitional quality of the ‘third world’ from the post-colonial state to the post-colonial peoples. It is also becomes necessary to identify the fluidity of the new imperialism, from erstwhile colonial or dominant international states to broader, wider institutions and structures: the ‘North’ doesn’t operate as a collective of States, it is necessary to locate and witness the performance of Chimni’s TCC or Hardt and Negri’s Empire. Empire is ominous in its often cited quote: “the spatial divisions of the three Worlds (First, Second, and Third) have been scrambled so that we continually find the First world in the Third, the Third in the First, and the Second almost nowhere at all. Capital seems to be faced with a smooth world - or really, a world defined by new and complex regimes of differentiation and homogenization, deterritorialization and reterritorialization”

As such, an oppositional definition or a definition that identifies the third world in terms of a normative vocabulary that still relies on statehood, sovereignty or state/national interest is witnessing itself to an invalidation of suffering and benefiting the first world in the third, so to speak. It is, therefore, necessary to analyse IOs as straddling a world of law and politics, of diminishing state-sovereignty and rising on the one hand of ‘relocated sovereignty’ and on the other, a fragmented, autonomous and ‘expert’ bureaucracy, increasingly independent of

\textsuperscript{11} Both Chimni and Mutua take are far more critical view of the continuing project of neo-colonialism
\textsuperscript{13} Supra, Mutua.
State interests and with its own practice and policy. Unless IOs are subject to a more layered and consciously political analysis, we deny ourselves the space to in fact explore their effects on the lives of the third world peoples.

I

The challenge of TWAIL today is to carry that struggle forward, and to realize that the script of resistance and liberation is a historical continuum, taken sometimes in small, localized, and painful steps. – Makau Mutua

TWAIL as an intellectual movement of academics that has been relatively young. But TWAIL scholars across the board – from Nyamu to Baxi - have read various Third World political resistances as part of this ‘historical continuum’. The Non-Aligned Movement, Nehru’s Panchsheel or ‘five principles of coexistence’, the vocal resistance of Julius Nyere and Sukarno are all reference points of this continuum for these scholars.

While my critique of IOs and broadly the international legal order stems from Anglie’s critique of the colonialist conception of ‘sovereignty’ and Koskenniemi’s argument on the politics of international legal rhetoric: that it could be used as a double edged sword, to “apologize” for power and to simultaneously hold an aspirational quality for itself, as a “utopia” so to speak.

[...]

While the way international law is spoken, and thus applied, reflects the profoundly inequitable constellation of power today, it also offers avenues of resistance and experimentation. [...] Though it often empowers the “wrong” people and justifies the “bad” decision, this is by no means necessarily the case [...] every law is a “politics”, it is likewise true that every politics can become known, and effective, only as “law”, including above all a law that liberates some actors to

14 Supra note 6
16 Supra note 10
http://ssrn.com/abstract=1437362
19 Supra note 12, generally.
20 Martti Koskenniemi, “From Apology to Utopia, the Structure of International Legal Argument, Reissue with a New Epilogue” (2005), Cambridge University Press
decide in accordance with their preferences. The question is [...] by which law or whose law[?] Which is why the assumption that there might be a sphere of ‘pure’ non-law (of politics, economics, strategy, etc.) is ideological.\textsuperscript{21}

In other words, as Baxi quotes the World Socialist Forum: “other worlds are possible”. My suggestion is that their aspirational possibility exists; it must arrive from a non-colonialist standpoint, not from Europe, but from the realities of the third world peoples. The “politics” that is to be “legalized” must be reached from a radical departure from Christian/Eurocentric international law\textsuperscript{22} masquerading as a universal principle.\textsuperscript{23}

However, this historical study of Third World resistance to Western or Northern hegemony has been analysed with little criticality, except in instances of rhetoric. Very little is spoken or written about the Third World subject and how she responds to the hegemonic domination of the international legal order, in other words my argument is that such States have in fact been reduced to being mere objects in the structure of international legal argument.

I identify two trends on why this historical resistance has been unable to channelize itself into a transformative, broader and diverse international legal order. The first, I argue is the continuous obsession with the colonial construct of an artificial nation-state with bestowed sovereignty. The second is the continuous march of the Empire (or the TCC). Together, they have come to not only represent the erosion of our traditional understanding of sovereignty, but also the relocation of a language of rights and equity that was local, empowering and emancipatory.

The historical narrative of third world encounters with International Organisations has been situated in the broader, wider reconstructionist history of the United Nations and the cold-war trajectory\textsuperscript{24}. However, this reconstruction is lacking in its problematic: where does one situate the UN Partition plan for the State of Israel?\textsuperscript{25}, who was the ‘third world’? The Palestinians?

\textsuperscript{21} Martti Koskenniemi, “From Apology to Utopia, the Structure of International Legal Argument, Reissue with a New Epilogue” (2005), Cambridge University Press
\textsuperscript{22} International law “is in its origin essentially a product of Christian civilisation.” I L. Oppenheim, International Law: A Treatise 4 (Arnold D. McNair ed., 1928)
\textsuperscript{24} Luis Eslava & Sundhya Pahuja, “Between Resistance and Reform: TWAIL and the Universality of International Law” 3(1) TRADE L. & DEV. 103 (2011)
Or the Jewish refugees who had survived yet another wave of European anti-semitism? The merits of the partition plan or the narratives of Israeli “Independence” or the Arab “Nakba” occupy and require another analysis, what is necessary for this analysis is that we understand the meaning of this “decision”. To gather the fact that the creation or non-creation of a sovereign state was an imperialist function as a generality; the conception of the nation-state will remain “illegitimate in the eyes of certain sub-state groupings”. The broader question of this argument is that statehood – and the host of baggage that it constitutes – is a conception that is Eurocentric and conceptualizes the need to constitute persons as “citizens” in order for rights to be recognized; this statehood is not the statehood of a self-determining persons, but boundaries, structures, legal obligations and political natures are determined by colonial powers, powers that do not “belong” to the territory or culture, but control it, the destinies are never entwined with the agency of people whom it will affect most directly. And in this case, it was in Europe’s interest to outsource its “Jewish question” to a land that belonged to it as chattel, but did not belong in its worldview.

In a manner of speaking, then, the United Nations acted, as the erstwhile colonial powers wished it did – not as a corporate body with the democracy of its participants – the creation of the nation-state was a function of the erstwhile colonial power that now belonged to a body of States that simply took over as the new mode: from the East India companies, to King Leopold’s excesses in Congo, to the more complex, more difficult to locate body of international lawmaking. Hence, the legitimacy was now bestowed not by victories in warfare, but by discourses of obfuscating ‘international’ law producing bodies. It is evident

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26 James Thui Gathii, “Alternative & Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory”. Gathii mentions Obiora Okafor’s argument that “frailty of the nation state in Africa is partly connected to the imposition – through international law – of Eurocentric notions of the nation-state on culturally heterogeneous African nations”

27 Ibid.


29 Frantz Fanon, Concerning Violence, Accessed at: http://zeroanthropology.net/2009/03/12/frantz-fanon-concerning-violence/

30 A phrase evidently in prominence in Europe through much of the nineteenth century, to such an extent was the phrase widespread that Karl Marx saw it fit to comment on it. See, Karl Marx, “On the Jewish Question”; First Published in February, 1844 in Deutsch-Französische Jahrbücher, Accessed at: http://www.marxists.org/archive/marx/works/1844/jewish-question/
that the ‘intractability’ of the conflict in Palestine (and much of Africa and the Levant) owes much to the denial of voices and of the erasing of agencies.  

To debate the merits of the international legal argument on the partition plan requires much more than the scope of this article. However, my purpose of this argument is in the nature of the international legal order (and international organizations, specifically) is that the project of colonialism only dawned new robes, it remained a project of ‘plunder’, and one of constituting the ‘native’ as a mere object, with little agency and no voice. 

This obsession with statehood and sovereignty is also at the witness stand in the history of two important UN Conventions: the convention on Statelessness and the Convention on Refugees. The necessity to legally obligate States to show concern for ‘stateless’ persons and ‘refugees’ stems from European conceptions of the necessity of citizenship in order for rights to exist, and States to ensure that fleeing persons are protected. The reality of this obsession with statehood falls when we witness how Third World communities and peoples have continued to host massive refugee influxes even without being part of States that are signatories to the convention on refugees. The most number Stateless are today found in artificially created post-colonial states as colonialism left the confused legacy of having to deal with nationality and citizenship as separate questions – the heterogeneity would leave some grouping or the other always as the ‘other’. Whereas earlier citizenship was a varied, diverse and organic question, it turned into one of State recognition and conditional on notions left by erstwhile colonialists. 

While some have lauded the self-determination and equality of states doctrine in the UN Charter as successes of the Third World; There is little acknowledgment of the inherent Eurocentrism of the charter: whether it is the phallogocentric notion of a ‘civilized state’ or

32 To borrow Mutua extensively, yet again. 
34 See, supra, Koskenniemi, “Do these rights exist simply by virtue of statehood? Do they emerge from some higher normative code? Or are they merely legislative constructions? Conventional scholarship associates such assumptions alternatively with naturalism, positivism, idealism, realism and so on.” 
36 Supra note 25 
the creation of the UN Security Council as a superior, enforcing body – the only merit of permanent membership being victory in war.

It is of little surprise, then, that the little victory that was the UN Charter’s ‘equality of states’ doctrine and the recognition of state autonomy of economic affairs would soon be eroded by the Bretton Woods system. Where policies would be decided by a vote that was allotted according to the capital that State parties hold and not on a ‘one state, one vote’ basis. The consequence, specifically of the World Bank, the International Monetary Fund and more recently World Trade Organization has been the erosion of State autonomy, an ‘internationalization of property rights’, structural adjustment programs, expert, neo-liberal bureaucratic regimes and an overwhelming, overarching operation of a free market system.

What most TWAIL scholars in their analysis identify with more concern is the fact that these organizations are undemocratic, that they have had the consequences of eroding state sovereignty and autonomy and that they have pushed for neo-liberal reforms. However, very little has been written to comprehend its very material effects on third world peoples.

This has also begun to change, Nyamu has documented as to the paradigms of Human Rights and development and how they have approached the question of gender equality and culture, her argument is that international human rights and development efforts have concentrated on indigenous cultures as a barrier to achieving gender equality without actually affording it an opportunity to play a role in the progressive realization of the purpose. In fact, international organizations have contributed to patriarchy, where none might have existed. While Nyamu does not explore the roots of such a privileging of ‘neutral’ and ‘global’ values of gender justice independent of local cultural contexts – it is definitely worthwhile to read its meaning: the historic dialectic that existed in Europe and much of the West concentrated on a binary of ‘religion’ (‘culture’ in the third world contexts) and ‘progress’. Western thought hence, has had an experience that it seeks to generalize to all other territories that it takes its civilizing mission to: culture represents barriers to progress and it must be ignored, removed.

38 U.N. Charter, supra note 18, at art. 1, para. 3; art. 55; art. 56.
39 Supra 18
40 Supra, n.8
41 Supra n. 15
42 Nyamu gives the example of the right to property as an important agenda of a Structural Adjustment Program, whereas earlier, societies did not necessarily conceive the idea of a private property, they were now supposed to register their possessions in the name of the male member of the household.
or replaced. The South’s experience has been that of a culture that recognizes progress as an alternate.

The broader point that Nyamu makes is that the discursive practices of international human rights are “a state-oriented discipline that focuses on rights violations within the public sphere, particularly state violations of civil and political rights.” Chimni similarly discusses the privileging of private, civil and political rights over economic, social and cultural rights that are emphasized by international institutions.

Before concluding this section, encounters of the Third World with International Organizations are routine and provide us with meaning as to the stability of international legal argument. Sometimes, these encounters have widespread effects of domination, pillage and denial of agency. But the ‘daily life’ encounters are far more complex. For instance, the UNODC’s appreciation of Iran countering its ‘drug problem’, while another arm of the same organization sought to limit the state practice of awarding death penalties. As Koskenniemi argues, the meaning of international law is unstable because “In the practice of States and international organizations these are every day overridden by informal, political practices, agreements and understandings. If they are not overridden, this seems to be more a matter of compliance being politically useful than a result of the ‘legal’ character of the outcomes.”

The drug control ‘carrot and stick’ policy also bears witness to Nyamu’s argument: practices of IOs are generically Eurocentric in their production of norms, and rarely ever factor in local cultures and practices in this good/bad classification that they follow. The use of marijuana for example has ecological cultural, religious and historical importance for many communities across the Third World – especially in indigenous communities. The history

46 Supra, Koskenniemi, p.3
of the international consensus on criminalization of cannabis, on the other hand, is explicitly representative of Christian notions of purity and order.\textsuperscript{48}

The third world experience with international law is hence, graded. While resistance to all other international law is possible; IOs create permanent law-generating and norm-creating mechanisms that make it difficult for the third world to effectively create modes of resistance and through appropriation and the illusion of giving a choice, they delay and ignore the concerns of the suffering.\textsuperscript{49}

A lot of energy is also spent on defining, dismissing and discussing the meaning of the ‘The Third World’ – all definitional options that have been exercised vary only in the details: broadly, Mutua’s definition of the third world as a “set of geographic, oppositional and political realities that distinguish it from the west” further, emphasizing the “historical experiences across virtually all non-European societies that has given rise to a particular voice”; however, it is not a convincing explanation of the international hegemonic regime. An oppositional or even geographic situating of the third world is restrictive, undemocratic and exclusionary. Where, for instance, would one locate the post-socialist states of Central Asia and Eastern Europe? Such definitional challenges are best overcome by a specific emphasis on what Okafor calls “common historic experiences”\textsuperscript{50}. The emergence of third worldism is simply explained by Baxi through three different and connected registers: colonialism of the past and capitalism of present, the third world as a “vehicle, vessel and visage” of global domination and third, most importantly, through “practices of resistance and struggle by colonially constituted peoples”.\textsuperscript{51}

The continued project of colonialism is difficult to explain through a mere North-South, or anti-West definitional paradigm. Instead, it becomes necessary to identify the Third World as Hardt and Negri have: as having been scrambled across the world – so that we end up routinely discovering the third world in the first and the first in the third. This is a reality that cannot be wished away merely by identifying it in the post-colonial narrative, it must be

\textsuperscript{48} See supra, Mutua, “The pattern is the long queue of the colonial administrator, the Bible-carrying missionary come to save the heathens, the commercial profiteer, the exporter of political democracy, and now the human rights crusader.”

\textsuperscript{49} See for instance Jose Alvarez’s arguments in the chapter “Have IOs Improve Treaty-making” in International Organizations as Law-makers, Oxford University Press, 2006

\textsuperscript{50} Obiora Chinedu Okafor, Newness, Imperialism, And International Legal Reform In Our Time: a TWAIL Perspective, Osgoode Law Journal, VOL. 43, NO. 1 & 2

\textsuperscript{51} See Supra, Baxi
identified in the age of the Empire/TCC: globalized economies, relocated sovereignty and newer, more comprehensive and more complex political projects. The oppositional quality of the Third World, then, is the historical continuum: it stands against the colonial pasts and the continuation of an imperialist domination. However, its oppositional quality is not merely against its erstwhile colonial rulers, but against the colonial project. And while the concern of many TWAIL scholars has been that the neo-liberal state might witness an erosion of sovereignty in favour of international institutions and the TCC\textsuperscript{52}, it shouldn’t make us nostalgic “about sovereignty of the past”\textsuperscript{53}.

II

To a large extent, in fact, the models that had presided over the birth of a nation state were simply dusted off and reproposed as interpretive schema for reading the construction of a supranational power. The domestic analogy thus became the fundamental methodological tool in the analysis of international and supranational forms of order

- Hardt and Negri\textsuperscript{54}

What is important is the existence of a group of states and populations that have tended to self-identify as such—coalescing around a historical and continuing experience of subordination at the global level that they feel they share—not the existence and validity of an unproblematic monolithic third-world category. That much is undeniable. Now, if these states tend to complain about similar things, and tend to speak to similar concerns, it is of course undeniable that, as contingent and problematic as any style they wish to assign to their grouping is, or can be, that grouping—that sense of shared experience—does exist and has been repeatedly expressed. What is more, there is nothing even remotely strange about coalitions being built or carrying on their work under a certain style, even one that has been mostly assigned to them (for example, global women’s movements), even while they themselves recognize the contingency of that style or category

- Okafor\textsuperscript{55}

Constructivism is the youngest entrant in IR theory.\textsuperscript{56} Constructivism’s greatest contribution as such, to IR theory has been in its terms of identifying norms that have diffused across

\textsuperscript{52} Supra Chimni.
\textsuperscript{53} Supra, Hardt & Negri.
\textsuperscript{54} See, Supra, Hardt and Negri, p.25
\textsuperscript{55} Obiora Chinedu Okafor, Newness, Imperialism, And International Legal Reform In Our Time: a TWAIL Perspective. Osgoode Law Journal, VOL. 43, NO. 1 & 2
states in manners and modes that are distinct from the traditional understandings of power and state interests.\textsuperscript{57}

I would touch upon the “interactional theory” of law – that seeks to collaborate Lon Fuller’s perception of a “moral law” and the constructivist world-view of international relations. Both argue that law is not so much a generation of a \textit{grund norm} or an outcome of a Sovereign authority. Law, in Fuller’s case and “norms” in the constructivist opinion is generated out of an interaction between subjects – States, but not them alone.

Law, this interactional theory, argues is “horizontal” more than a top-down approach. In this sense, law is generated when subjects interact and agree to certain rules, and hence, Fuller would argue that law enables not so much of governance than it ensure “communication”.

In other words, this would operate at a level wherein law’s legitimacy would be bound, not so much where it comes from as much from whom it is being subject to. In such an instance, legitimacy would only matter when such a Law is, for instance, subject similarly to everyone – and more importantly, when the subjects of the Law accept it as binding (something that Jutta and Stephen call “bindingness”).\textsuperscript{58}

The promise of constructivism exists, not so much in its emphasis on international institutions or in its emphasis on norms, but the \textit{kind of norms} that it emphasizes on – unlike the traditional IR theories, it opens up prospects for a gendered, racial, cultural religious identification of interaction between states.\textsuperscript{59} Tickner argues, for instance, that the First World operationalizes the male/female binary when it interacts with the third world. The third representing the emotional, unstable and random “female”, while the first represents order, security, rationality.\textsuperscript{60} Such an analysis provides insights into the kind of interactions that might operate in international organizations between states, the kind of decisions that, say, the UNSC might make. In a manner of speaking, then, the third world represents “nature” that has to be controlled, made to behave and obey. The first world’s international law represents the ‘culture’ in this instance\textsuperscript{61} the means to control, punishment, sanctions and extraction of obedience. The fact is that this divide helps maintain the “image of the other” and creates the

\textsuperscript{57} Ibid.
\textsuperscript{60} Ann Tickner, “You Just Don’t Understand: Troubled Engagements Between Feminists and IR Theorists”, International Studies Quaterly, (1997) 41
\textsuperscript{61} Patricia Hill Collins, “Mammies, Matriarchs and Other Controlling Images”, Black Feminist Thought - New York - Routledge - 2000
context of the language of development of MDGs, indices, IMF SAPs, private property, etc at one end and at another – the perpetuation of an ‘emotional third world’ prevents the third world from narrating its own experiences and bringing to the table its own solutions.

However, constructivist experience within the context of Third World has been a far more complex affair. While constructivist approaches provide us with stronger tools to analyse the interaction between North and the South – by opening up the possibility of reading international affairs through, what Rajagopal calls “the local”62: peasant, feminist, workers and anti-racism movements across the board. However, Landolt63 argues that constructivism’s emphasis on [a] “unique adaptation of liberal theory, censorship of material factors, elite focus and tendency to assume a unitary state” harms a more accurate identification of norm diffusion. The fact that constructivists have concentrated immensely on the diffusion of women suffrage, human rights and gender justice questions in explaining “norm diffusion” from the North to the South is an instance of this lack of criticality. Another problematic that western constructivism has provided us with is the factor of reading norms where they do not exist - motivations of the North towards, aid and poverty alleviation – were not driven by any motivation to rectify past injustices, but in order to ensure an indemnity of security against the “disparity in welfare”64. Landolt also critically explains the constructivist analysis of IOs:

*In practice this approach assumes that Western norms such as liberal democracy, free markets and human rights diffuse among states by means of a profoundly independent international social structure, rather than being projected from the domestic level. Constructivism thus assigns greater autonomy to international organisations (IOs) and transnational actors than do other liberal approaches, and both of these actors are essentially severed from state interests.*65

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62 “Rajagopal challenges the received history of the expansion, consolidation, and renewal of international institutions. He departs from the traditional telling which emphasizes that international institutions emerged due to functional needs or leading individuals. Instead, Rajagopal shows how “international law has been constituted by its continuous evocation of and interaction with the category third world. He argues that international law has not taken seriously the local as an agent of the change. By the local he refers to a collection of peasant, environmental, and feminist movements……”


64 Martha Finnemore “National Interests in International Society”, Cornell University Press, 1996

65 Supra, Landolt.
Efforts have now been made to rectify the tri-interaction that exists between TWAIL, Constructivist theory and International Institutions. One of the first attempts has been an understanding of the post-colonial “development paradigm” through the “conceptually contingent” lenses of constructivism and TWAIL to identify the “influence of particular international organizations, states and actors which perpetuates the dominance by the minority”\textsuperscript{66}

Okafor also identifies “newness” in the light of the UN anti-terror reforms in the post-9/11 era.\textsuperscript{67} This “newness” is nothing but a manner of foregrounding the suffering (and the privilege) of one state and pushing it down other states as policies. what this offers is another perspective of how international organizations have participated in foregrounding the suffering of one country, its concerns, its behaviour and used that to the effect of the “subtle displacement of third-world suffering from internationalist consciousness”.

My broader point is that it does not matter what vocabulary is used to access the language of international domination and subjugation – sovereignty, statehood, the empire, global governance, globalization or mere inevitability – some countries, peoples, specifically will be displaced at the cost of the others.

A bolder “TWAIL Constructivism” has been proposed by Odubosu\textsuperscript{68} emphasizing “actors’ identity, power relations in the international system, ideational resources that are available to actors, and methods of engagement.”. Odubosu locates these factors in the international investment dispute settlement system.

\textbf{III}

The possibility of a creation of more democratic, clearer normative international order that is organic and intersubjective exists only as long as TWAIL politics locates these factors as \textit{independent} of the existing international legal framework – using a vocabulary and language that does not carry on a colonial legacy. While intersubjectivity and constructivism might contribute in the interim and in a manner that might open the scope of resistances in the instant international legal order, it does little to deconstruct and remake the international

\textsuperscript{67} Obiora Chinedu Okafor, Newness, Imperialism, And International Legal Reform In Our Time: a TWAIL Perspective, Osgoode Law Journal, VOL. 43, NO. 1 & 2
\textsuperscript{68} Ibironke Odumosu, ICSID, Third World Peoples And the Reconstruction of the Investment Dispute Settlement System” Doctoral Theisis, Faculty of Graduate Studies, University of British Columbia.
order in a manner that is more just and concentrates more on peoples movements, on third world peoples and not artificially constructed ‘sovereign states’

However, intersubjectivity is indicative of the kind of norms it has produced in the international legal order. Malcolm X’s influence went far beyond the United States of America’s anti-racism movement; at one time he was an icon for the citizens of newly born States, free from colonialism, across the African continent. There exists a third world in the first world, and a third world in the first. Malcolm X symbolized the first when he attended the Organization for African Unity (the forerunner for the African Union) representing the Organization of Afro-American Unity.\textsuperscript{69} It is evident in the lawsuit seeking reparations that the CARICOM has instituted against its erstwhile colonial ruler, Great Britain;\textsuperscript{70} this is evidently a result of Kenya’s successful attempt at claiming reparations from Great Britain over its colonial past in the country.\textsuperscript{71} Norm generation, then, is a question of how the communicative actions of States is responded to, or understand or acted upon by others.\textsuperscript{72} One instance of TWAIL pragmatism within International Organizations is the use of the World Trade Organization’s dispute settlement mechanism, which witnessed an interesting ruling in \textit{US-Gambling}\textsuperscript{73} wherein Antigua and Barbuda, a small and vulnerable economy, was permitted to suspend the Intellectual Property Rights of the United States and in effect “legalize piracy”\textsuperscript{74}.

And for these possibilities to exist – we must go beyond the First/Third as solid, non-fluid identities and move to spaces whose existence is not contingent on geographical or colonial histories, but of “common suffering” as a category that is self-identifying, and on based on the strategies of resisting the project of the Empire. And for this, it must include the Indigenous First Nations of the American continent as it must include the Jarawas – the exclusion is to be of Chimni’s TCC: that class of persons that is above sovereign statehood,

\textsuperscript{69} Malcolm X, “Autobiography of Malcolm X”, Ch. 18, \textit{"An extremely important fact is that Malcolm X is the first Afro-American leader of national standing to make an independent trip to Africa since Dr. Du Bois came to Ghana. This may be the beginning of a new phase in our struggle. Let’s make sure we don’t give it less thought than the State Department is doubtless giving it right now."}, Penguin, 1965. (E-Book available with the author)

\textsuperscript{70} Philip Sherwell, “Caribbean states demand reparations from European powers for slave trade”, Telegraph, 11th March, 2014


\textsuperscript{72} Supra note 57

\textsuperscript{73} WTO Dispute No DS285 “United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services”, 28 January 2013

where they reside is of little relevance, they rule and control the flow of information, decisionmaking, the education and the policies of States. Resistance, then, must be universally targeted against this wide class of persons.

Constructivism also offers another analytical tool – that of analysing movements and socio-political revolutions independent of State and power. An analysis, then, of the diverse Arab Spring, movements and NGOs that are resisting this transnational class by more ‘internationalism’ and less ‘globalization’ – NGOs that have fought on the basis of solidarity and not on the basis of taking over the agency of local struggles: Survival International, Minority Rights International, Avaaz.org, Anonymous, Independent Diplomat. These individuals and organizations have moved on the “reconstructionist space” that Attar and Miller saw as an empty space that had one emancipatory contribution: of the ALBA initiative. ALBA is the closest response to fighting the ‘vocabulary of oppression’, the organization has peoples movements’ representatives in the form of the Council of Social Movements

Mutua identifies three threads of Third World scholars in International Law: the first are the ‘betraying class’, scholars who identify themselves with the current order and live by it. The second are the ‘creative reconstructionists’ and the third are the radical believers in the idea of “another world”.

While Mutua believes that the second class – that seeks to resist hegemony from within the system – isn’t as harmful as the first. There can be no ‘total change’ in the formation of international normative practices unless an emancipatory vocabulary language replaces the language of colonialism, order and power. It is necessary that the new international legal order responds to such with a necessary deliberative, humanist, decentralized international organization. Our energies, then, must be spent to identify peoples’ movements that want to witness the erosion and replacement undemocratic IOs that exist today with people based, equitable bodies that concede more and hold back less.  

75 Supra 18
77 Paraphrased from Roy’s famous phrase “more democracy, not less”. See, Arundhati Roy, An Ordinary Person’s Guide to the Empire, South End Press.