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# Critical Third World Approaches to International Law (TWAAIL): Theory, Methodology, or Both?

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## Abstract

This paper engages with the question of whether TWAAIL is a theory, a methodology, or both. It takes the mainstream positivist understandings of the concepts of “theory” and “methodology” seriously in order to assess TWAAIL scholarship against those (admittedly contingent) measures. It argues that TWAAIL offers both theories of, and methodologies for, analysing international law and institutions, before concluding that TWAAIL can be usefully thought of in the way suggested by its very appellation: as a broad approach.

## Keywords

Third World Approaches to International LAW (TWAAIL); theory; methodology

## 1. Introduction

This paper is based on a presentation made at the workshop entitled “Situating Third World Approaches to International Law (TWAAIL): Inspirations, Challenges and Possibilities”, held 15–17 May 2008, at the University of British Columbia, Vancouver, Canada. This workshop was the fourth in a series of TWAAIL gatherings since this form of TWAAIL was launched and presented to the world at Harvard Law School in 1997.<sup>1</sup> Having studied at the University of British Columbia and sharpened my TWAAIL sensibilities here, it was a kind of homecoming, not

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\*) Ph.D, LL.M (University of British Columbia, Vancouver, Canada); LL.M, LL.B (Hons) (University of Nigeria, Enugu Campus). I am grateful to Karin Mickelson, Ibironke Odumosu, and Pooja Parmar for provoking, in discussion, the thoughts expressed here. I am also indebted to all the participants at that Workshop, especially Anthony Anghie and Renisa Mawani, for helping to sharpen those thoughts.

<sup>1</sup>) For more on the character of the TWAAIL movement, see M. Mutua, “What is TWAAIL?”, *American Society of International Law Proceedings* 94 (2000) p. 31; J. Gathii, “Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory”, 41 *Harvard International Law Journal* (2000) p. 263; K. Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse”, *Wisconsin International Law Journal* 16 (1998) p. 353; O.C. Okafor, “Newness, Imperialism, and International Legal Reform in Our Time: A TWAAIL Perspective”, *Osgoode Hall Law Journal* 43 (2005) p. 171 [Okafor, “Newness”].

just in the physical sense but in an intellectual sense as well. I was also excited to be gathered with so many established and upcoming TWAIL scholars. The large number of younger TWAIL scholars gathered together was very clear evidence of the continuing energy and vitality of the TWAIL movement.<sup>2</sup>

This paper attempts to systematically engage the question of whether contemporary TWAIL (as we now know it) is a theory, a methodology, or both. In focusing on and tackling these questions, I am not unaware of the contingencies and silences of the politics of knowledge and naming, and the ways in which even attempting to engage with these kinds of questions might re-inscribe the dominant ideas about what constitutes knowledge, and whose knowledge is real knowledge. Nevertheless, I have chosen to engage self-reflexively with these questions, not to strengthen one particular view about what or whose knowledge is real knowledge, but to suggest that alternative forms of knowledge, ways of knowing, or schools of thought do not necessarily fare poorly even when tested against the central metrics of positivist social science. Thus, the point of the present enquiry is to take the mainstream positivist understandings of the concepts of “theory” and “methodology” as seriously as possible, and assess how well or poorly TWAIL scholarship rates against those (admittedly contingent) measures.

## 2. Is TWAIL a Theory?

There is a sense in which the term “theory” can denote the opposite of practice or action, so that something is theoretical if it is not based on practical experience (i.e., it is all well and good in theory, but can it work in practice?). This, however, is not the conception of the term “theory” that is evoked by the question “is TWAIL a theory?” As used in this question, the term “theory” obviously denotes something different; something other than the opposite of practice or action. It is with this other sense of the term that this paper is concerned.

While there is no single authoritative definition of the variant of the term that is of concern here, much commonality exists nevertheless among the various definitions that have been offered. A few examples will suffice to illustrate this point. To the editor of *The Oxford Dictionary of Current English* the term “theory” refers to a “system of ideas explaining something.”<sup>3</sup> According to a commonly available North American textbook on jurisprudence, “theories in the natural and social sciences usually attempt to describe the world in such a way

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<sup>2</sup> University of Saskatchewan Professor Ibrorke Odumoso’s work exemplifies the skill and energy with which these emerging TWAIL scholars are approaching their scholarly vocation. For an example of her work, see I. Odumoso, “The Law and Politics of Engaging Resistance in Investment Dispute Settlement”, *26 Penn State International Law Review* (2007) p. 25.

<sup>3</sup> See R.E. Allen (ed.), *The Oxford Dictionary of Current English* (1984) p. 780.

that we can better understand why past events occurred or predict how future events will unfold.”<sup>4</sup> For its part, *Wikipedia* (an online encyclopedia which I would not ordinarily cite but for its corroboration in the present regard by other sources) concludes that:

A theory is a logically self-consistent model or framework for describing the behavior of a related set of natural or *social* phenomena . . . In this sense, a theory is a systematic and formalized expression of all previous observations, and is predictive, logical, and testable.<sup>5</sup>

It is this last definition that I have adopted here as my working definition.

In view of the goals of this paper and the nature of the above-referenced definitions, one systematic way to proceed with the current enquiry is to assess TWAIL’s “theory-ness” against the main elements of this working definition (most of which are explicitly or impliedly endorsed by the other definitions).

### 2.1. *Description of Natural or Social Phenomena*

Since there can be no reasonable doubt that TWAIL scholarship describes the behavior of a related set of social phenomena (e.g., international law, justice, order, institutions, etc.), a detailed consideration of this element of the definition need not detain us here.

### 2.2. *Predictive, Logical, and Testable?*

There is also very little room, if any at all, for doubt regarding TWAIL’s qualifications as a predictive, logical, and testable set of systematic and formalised expressions. Regarding its predictive-ness, much TWAIL scholarship tends to offer windows into international law’s tomorrow. Drawing from the empirical history of international law’s engagement with third world peoples, such scholarship tends to imagine and predict the ways in which international law will behave toward the “third world” (or some part thereof) in the near and long term. The contents of a recent edited volume entitled *International Law and the Third World: Reshaping Justice* provides ample proof of this assertion.<sup>6</sup> One need not even go beyond the titles of some of the chapters in that book to appreciate this point. Instructively for our present purposes, Upendra Baxi’s chapter in that book is entitled “What may the ‘Third World’ Expect from International Law?”<sup>7</sup> What is more, my own intervention in that same volume is entitled “Poverty, Agency and

<sup>4</sup> See B. Bix, *Jurisprudence: Theory and Context*, 3rd edition, 2004, p. 13.

<sup>5</sup> See online: <http://en.wikipedia.org/wiki/Theory> (Visited 9 May 2008). Emphasis supplied.

<sup>6</sup> See R. Falk, B. Rajagopal, and J. Stevens (eds.), *International Law and the Third World: Reshaping Justice*, 2008.

<sup>7</sup> See U. Baxi, “What may the ‘Third World’ Expect from International Law?” in: R. Falk, B. Rajagopal, and J. Stevens (eds.), *ibid.* at 9.

Resistance in the *Future* of International Law: An African Perspective.”<sup>8</sup> And if mere titles are insufficient to convince the skeptic, suffice it to quote from this last chapter, where I made bold to predict that based on the historical behavior of international law and institutions over the past few centuries:

Future international law is unlikely to be altered so as to foster the kind of much more equitable world economic order that is envisaged by the campaigns of African (and other third World) peoples for the elimination of the agricultural subsidies that key countries in the North provide to many of their farmers. Similarly, future international law is unlikely to function in a way that greatly enhances the self-constitution of African societies.<sup>9</sup>

Regarding the question as to whether TWAIL scholarship offers logical and testable arguments, propositions and theses, one does not have to accept a particular TWAIL argument or thesis to agree that TWAIL work cannot really be impeached on any of these two scores. If anything, TWAIL scholarship depends for its very sustenance on its logical reasoning, and on the testability of the propositions that it makes. For example, whether you agree with it or not, Makau Mutua’s incisive critique of international human rights law’s fixation on the “savages-victim-savior” metaphor is based on a thorough, systematic and testable analysis of the relevant evidence and literature.<sup>10</sup> Celestine Nyamu’s germinal TWAIL work on culture and human rights is grounded in a systematic empirical study that generated the many eminently logical and testable propositions that she offered.<sup>11</sup> And James Gathii’s painstaking and thorough empirical/conceptual assessment of claims of the emergence of a new doctrine of pre-emptive war under the doctrine of sources is as grounded in systematic logic as can possibly be.<sup>12</sup>

### 2.3. *Model/Framework*

It is clear that, as required by the working definition adopted in this paper, TWAIL scholarship offers various models/frameworks for describing the behavior of a related set of social phenomena. For example, Anghie’s work on the colonial origins of international law,<sup>13</sup> Mickelson’s scholarship on international environmental law and the third world,<sup>14</sup> Nyamu’s (afore-referenced) work on culture and

<sup>8</sup> See O.C. Okafor, “Poverty, Agency and Resistance in the Future of International Law: An African Perspective” in: R. Falk, B. Rajagopal, and J. Stevens, *ibid.* at 95. Emphasis supplied.

<sup>9</sup> *Ibid.*, at 107.

<sup>10</sup> See M. Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights”, 42 *Harvard International Law Journal* (2001) p. 201.

<sup>11</sup> C. Nyamu, “How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?”, 41 *Harvard International Law Journal* (2000) p. 381.

<sup>12</sup> J.T. Gathii, “Assessing Claims of the Emergence of a New Doctrine of Pre-emptive War under the Doctrine of Sources”, 43 *Osgoode Hall Law Journal* (2005) p. 67.

<sup>13</sup> See A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, 2004.

<sup>14</sup> See K. Mickelson, “South, North, International Environmental Law, and International Environmental Lawyers”, *Yearbook of International Environmental Law*, 11 (2000) 52.

women's human rights, and Chimni's recent work on an emerging global state<sup>15</sup> all offer TWAIL models/frameworks both for thinking about international law and institutions as a whole, and for analysing particular aspects or segments of our global order.

What is less clear to some (especially many non-TWAIL scholars) is whether TWAIL articulates a unified or general framework for analysing, critiquing, and re-constructing international law and institutions. This leads us to another element of the afore-mentioned definition.

#### 2.4. *Does a Theoretical School Have to Be Entirely Self-Consistent?*

Given the element of our working definition of a theory that requires it to be “a logically self-consistent model or framework,” does a theoretical school of thought such as TWAIL have to be *entirely* self-consistent (in the sense that all its members agree on almost every single thing)? Clearly not, in my view; otherwise there would be no such things as Marxist theory or feminist legal theory, and no “real-world” theoretical school would even exist at all. As is widely recognised, Marxists do not always accept as correct, everything that Karl Marx said; and they do not, of course, agree with each other all of the time.<sup>16</sup> The same can be said about feminist legal theory. Angela Harris' famous paper entitled “Race and Essentialism in Feminist Legal Theory” and a host of other feminist work underscores what I like to think of as the “fragmented unities” that exist within such broad-based theoretical schools as feminist legal theory and Marxist theory.<sup>17</sup> In truth, what we have here are *theories* – Marxist *theories*, feminist legal *theories*, and the like. In each case, the theories that constitute the relevant school of thought (be it Marxism or feminist legal theory) are connected to each other by an overarching central idea or set of ideas, a broadly (or loosely?) shared approach. It is therefore only fair and accurate to conclude that theoretical schools are hardly, if ever, monolithic epistemic communities. Internal differences almost always variegated and characterise them. And this, it is fair to say, is not always a bad thing.

TWAIL is not, of course, an exception. As I have shown elsewhere, while some TWAILers are more reconstructive than most of their peers, some others subscribe much more firmly and self-consciously than most of their colleagues to a broadly Marxian approach.<sup>18</sup> And while some may confidently wear a poststructuralist tag, others are far less likely to embrace that label. This has made for a really rich and exciting diversity within TWAIL, one that has allowed its adherents to

<sup>15</sup> See B.S. Chimni, “International Institutions Today: An Imperial Global State in the Making”, 15 *European Journal of International Law* (2004) p. 1.

<sup>16</sup> See F. Tarrit, “A Brief History, Scope, and Peculiarities of ‘Analytical Marxism’”, 38 *Review of Radical Political Economy* (2006) p. 595 at 598–599.

<sup>17</sup> See A. Harris, “Race and Essentialism in Feminist Legal Theory”, 42 *Stanford Law Review* (1990) p. 581 at 586–589.

<sup>18</sup> See Okafor, “Newness”, *supra* note 1 at pp. 176–177.

learn from each other, grow intellectually, and avoid ossification in their own narrower scholarly zone of comfort. Given the foregoing discussion about the virtual impracticality and undesirability of monolithic theoretical schools, TWAIL should not suffer reproach merely on the basis of its internal diversity; as long as TWAIL continues to cohere around a broadly unifying intellectual idea or set of ideas, its relatively minor but still creative internal contestations should not be mistaken for incoherence. As diverse as TWAIL scholarship is, it is not without a unifying core, a centripetal force that pulls it together. As I have argued elsewhere, as internally diverse as their approaches and conclusions can be:

TWAIL scholars (or “TWAILers”) are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order... a commitment to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.<sup>19</sup>

### 2.5. *TWAIL Fits into Our Working Definition of the Term “Theory”*

In view of the foregoing discussion, there can be no reasonable doubt that TWAIL scholarship as a corpus does fit into our working definition of the term “theory.” It is definitely a “system of ideas explaining something”<sup>20</sup> and is in broad terms “a logically self-consistent model or framework for describing the behavior of a related set of natural or *social* phenomena.”<sup>21</sup> In the same vein, it is also “predictive, logical, and testable.”<sup>22</sup>

In conclusion here, a few examples of TWAIL theories will suffice to illustrate this overarching point. TWAIL theories on contemporary empire (Anghie; Chimni), the origins of international law (Anghie), international environmental justice (Mickelson), culture and gender (Nyamu), human rights (Baxi; Mutua), interpretation (Chimni), bio-piracy (Mgbeoji) and third world resistance (Rajagopal) are just a few of the many such theories that have flowed from the fecund thought of TWAILers.

### 3. Is TWAIL a Methodology?

*The Oxford Dictionary of Current English*<sup>23</sup> defines the term “methodology” as either the “science of method” or a “body of methods used in an activity.” Thus, there are two separate senses in which that term can be used. The following anal-

<sup>19)</sup> *Ibid.*

<sup>20)</sup> See Allen, *supra* note 3 at 780.

<sup>21)</sup> See Wikipedia, *supra* note 5.

<sup>22)</sup> *Ibid.*

<sup>23)</sup> See Allen, *supra* note 3 at 462.

ysis considers TWAIL's qualifications as a methodology of international legal analysis in the light of each sense of the term.

First, does TWAIL, or some segments of it, constitute in itself a science of method, or has TWAIL contributed to the science of method in international law? In my own view, TWAIL is not so much a science of method, as it is a school of thought that has made important contributions to the science of method in international legal studies. While the *eventual* inclusion of a chapter on TWAIL in the leading book on the methods of international law underscores this fact,<sup>24</sup> the significance of the methodological contributions that TWAIL has made to international legal analysis, the identities of which are revealed below, is a more important measure of TWAIL's claim to some kind of methodological "fame."

Implied in the above discussion is the fact that, as required by the working definition of the term "methodology" outlined above, TWAIL does offer "a body of methods used in an activity", i.e. in the activity of international legal analysis. In another paper, I have suggested – following Mickelson's germinal work on the subject – that TWAIL's methodological insistence on global (as opposed to merely West-centric) historicisation; on identifying continuities amidst the discontinuities that we behold; on centering the Third World (i.e. "the Rest and not merely the West"); on being wary of glib universality narratives; and on focusing on the under-studied resistance of third world peoples; *together* allow TWAILers (and their intellectual allies) to more effectively write the Third World into international legal history and analysis, and alter many of the doctored pictures of international law and institutions that all-too-often dominate the international legal imagination.<sup>25</sup>

#### 4. TWAIL as a Scholarly Approach – Thoughts in Lieu of a Conclusion

From the above discussion, it is clear that TWAIL offers both theories of, and methodologies for, analysing international law and institutions. If this is so, and I am convinced that it is indeed so, then TWAIL can be thought of in the way suggested by its very appellation – as a broad approach. For, although it does lean more in favor of the methodological than the theoretical, the term "approach" does in this case largely accommodate both the theoretical and methodological dimensions and properties of TWAIL scholarship. For TWAIL is an approach that is intimately connected to the kinds of theoretical propositions that are generated from its application. According to *The Oxford Dictionary of Current English*, in the context in which it is used in this paper, the term "approach signifies a

<sup>24</sup> See S. Ratner and A. Slaughter (eds.), *The Methods of International Law*, 2004.

<sup>25</sup> See Okafor, "Newness", *supra* note 1.



“way of dealing with a . . . thing.”<sup>26</sup> Similarly, *The Oxford Thesaurus* defines that term as a “method, procedure, modus operandi, way, technique, style, manner, [or] attitude.”<sup>27</sup>

However, the fact that this term is somewhat biased toward the methodological may dictate in favor of a broader concept, such as “school of thought.” Drawing from similar usage in international relations theory by Hasenclever *et al.*, the expression “school of thought” is used here to largely signify an “intellectual community” grounded in similar ideas.<sup>28</sup> As the discussions at the workshop have shown, TWAIL is a school of thought in that sense.

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<sup>26</sup> See Allen, *supra* note 3 at p. 31.

<sup>27</sup> See L. Urdang (ed.), *The Oxford Thesaurus*, 1991, p. 16.

<sup>28</sup> See A. Hasenclever et al., “Integrating Theories of International Regimes”, 26 *Review of International Studies* (2000) p. 3 at 5.