

Special Issue: Third World Approaches to International Law

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THE WORLD OF TWAIL: INTRODUCTION TO THE SPECIAL ISSUE

B. S. CHIMNI*

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When I was invited by *Trade, Law and Development* to Guest Edit an issue on third world approaches to international law (TWAIL), I readily accepted as I felt it was an opportunity to introduce this distinctive critical approach to law students in India. For despite Indian scholarship playing a crucial role in the articulation of TWAIL, it has not been widely studied in law schools. This paradox compels me to say, at first, a few words on the state of legal studies in India.

I. ABSENCE OF CRITICAL LEGAL SCHOLARSHIP IN INDIA

There is a consensus in the academia that legal scholarship is still to come of age in India. Some would contend that the field of legal scholarship represents a wasteland, even though some outstanding work has been produced by individual scholars. The absence of critical legal scholarship is an inextricable part of this state of affairs. But for the work of scholars like Lotika Sarkar, S.P. Sathe, Upendra Baxi or Flavia Agnes, there is not much to show by way of a body of critical writings. Indeed, despite the constraints imposed by the nature of judicial pronouncements, it is to the landmark judgments of a Justice Krishna Iyer or a Justice P.N. Bhagwati that students still turn for critical insights into the working of the Indian legal

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system. There is a complex set of reasons that account for this scenario. Until recently, this included, the sorry state of legal education, the lack of adequate libraries and research infrastructure, the absence of a tradition of legal scholarship, the meager avenues for publishing, especially the absence of many peer reviewed journals, and often, the colonial mind-set which believes that work done in first world institutions is rigorous and of higher quality, and it suffices to borrow from it when the need arises.

Today, as things have improved on the infrastructure front, albeit only in premier law schools, and good legal scholarship has begun to be produced, the absence of critical scholarship has more to do with the mood of the times. Critical legal scholarship often depends on the disposition of the times. Thus, the Critical Legal Studies (CLS) movement in the United States found its roots in an environment that was imbued with the spirit of the anti-Vietnam war movement. There was the feeling that things were not going right and that the political class had let down the citizens. The mood in India is different. Until very recently, the environment was not one filled with forebodings of things going wrong, but one of hope and optimism. This feeling can be traced to the economic liberalization policies initiated in 1991 which have seen sustained high growth rates. The “national law school” took birth and gained ascendance in this period. These economic liberalization policies have seen the legal services market expand, offering lucrative employment opportunities. Some of the best young minds in the country, who would have earlier not opted for the legal profession, now seek to enter law schools to take advantage of this. The new law graduates have adopted pragmatism as their motif. The task of the law graduate is seen as contributing to nation-building in the era of globalization by using his or her skills to improve the working of laws and legal institutions rather than by offering a structural critique of the Indian legal system. There is therefore little by way of alternative thinking on this system’s functioning, especially in terms of improving its workings for the welfare of the subaltern classes. I wish to be clear here, I think that the turn to pragmatism, from an earlier sterile positivist approach, is a step forward. I also believe that the enormous pool of talent that is coming to the “new law schools”, as also the premier “traditional” law schools, feels for the subaltern classes. But in the present circumstances - where any critique of the neo-liberal agenda with the laws and institutions that have been established to facilitate it, is perceived as part of old world thinking and associated with economic stagnation and state controls that stymied initiative of any kind - make it difficult for critical and alternative thinking to take root. It can only be hoped that the mounting evidence of crony capitalism and unimagined corruption will change this perception.

Meanwhile, the unintended outcome is that the “new law school” is perceived as producing a cadre for servicing global capital; I have heard this criticism from all sections of the legal community. While conceding that these law schools have

brought vitality, life and seriousness to legal education, the concern has been expressed that the new law graduate is inclined to join large law and corporate firms to defend the interests of a few and that the new law graduate tends to act as a transmission belt for legal ideas that promote the interests of global capital. Critical legal scholarship is an obvious fatality in this scenario. In my personal view this narrative is not entirely accurate. There are a number of new law school graduates working for grassroots organizations, doing pro bono work, and producing critical academic work. But if the popular perception is to be dispelled, a more active association, both at the academic and practical levels, with the life world of subaltern groups in India is necessary. To be fair, as the dark side of neo-liberal policies begin to be revealed, there is today a greater willingness to listen to critical and alternative voices. In the circumstances it is to be hoped that TWAIL will also get a hearing.

II. INTRODUCING THIRD WORLD APPROACHES TO INTERNATIONAL LAW (TWAIL)

In so far as the field of international law is concerned, it has been from the very beginning, that is from the first decades after independence, home to critical scholarship. The critical impulse was generated by two factors. The first was to challenge the suggestion of western scholars that international law was the product of European Christian civilization and second, the felt need to reform the process and structure of international law so that it responded to the needs of the Indian people, and, more generally, to the concerns of third world peoples. At first much of the literature was aimed at felling the first assumption. This exercise began even before India gained independence.¹ In the period after independence Judge Nagendra Singh among others wrote extensively on the prevalence of international law rules in ancient and mediaeval India.² Mention may also be made of the pioneering work of C.H. Alexandrowicz, a Polish international law scholar, who spent several years at Madras University in the 1950s and 60s. In his path breaking work *International Law in the East Indies: 16th, 17th and 18th Centuries* Alexandrowicz showed how when the European adventurers arrived in Asia, “they found themselves in the middle of a network of states and inter-State relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilization”.³ His work was carried forward by R.P. Anand,

¹ P. BANDYOPADHYAY, *INTERNATIONAL LAW AND CUSTOM IN ANCIENT INDIA* (1920); S.V. VISWANATHA, *INTERNATIONAL LAW IN ANCIENT INDIA* (1925).

² Nagendra Singh, *India and International Law*, in *ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW*, 25-44 (R.P. Anand ed., 1972); NAGENDRA SINGH, *INDIA AND INTERNATIONAL LAW: ANCIENT AND MEDIAEVAL* (1973); H. CHATTERJEE, *INTERNATIONAL LAW AND INTER-STATE RELATIONS IN ANCIENT INDIA* (1958).

³ C.H. ALEXANDROWICZ, *INTERNATIONAL LAW IN THE EAST INDIES: 16TH, 17TH AND*

to whom this Special Issue is dedicated. In his writings Anand sustained the thesis that Asia was familiar with the language of international law from early times and that founding figures like Hugo Grotius borrowed from the doctrines and practices of Asian states. In the sixties he published two most influential articles on the Asian-African approach to international law.⁴ He followed it up with his widely read work *New States and International Law* (1972)⁵ and later *The Origin and Development of the Law of the Sea* (1983)⁶.

From the early seventies sustained work started to emerge from the Centre for International Legal Studies in Jawaharlal Nehru University, under the inspired guidance of Anand, arguing for change in the body of rules of international law to meet the aspirations of third world peoples. For over four decades now international law scholars at the Centre have been articulating and applying TWAIL to different branches of international law. But the Centre has not been alone in its efforts; much literature has also flowed from other universities. The sustained production of critical international legal scholarship, even in the darkest phase of Indian legal education (the 1970s and 80s), can be traced to the progressive nature of Indian foreign policy in the first decades after independence, articulated at first with great finesse by Jawaharlal Nehru. Of course there have been the usual ups and downs. For those interested I have elsewhere described in some detail the story of international law scholarship in post-colonial India—its different phases and trends.⁷ The Indian effort at producing critical scholarship was considerably helped by the fact that TWAIL was articulated in several countries emerging out of colonial rule. While neglected in the early years by mainstream western scholars, it is coming to have a growing presence in the world of international legal scholarship.

III. THE MEANING OF TWAIL

I need to say a few more words on TWAIL and its defining features. Broadly speaking, TWAIL scholars are united in their opposition to the politics of empire. As Mohsen al Attar and Rebekah Thompson put it in their contribution to this volume:

18TH CENTURIES (1967).

⁴ R.P. Anand, *Role of the "New" Asian-African Countries in the Present Legal Order*, 56 AM. J. INT'L L. 383 (1961); R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55 (1966).

⁵ R.P. ANAND, *NEW STATES AND INTERNATIONAL LAW* (1972).

⁶ R.P. ANAND, *THE ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA* (1983).

⁷ B.S. Chimni, *International Law Scholarship in Post Colonial India: Coping With Dualism*, 23(1) LEIDEN J. OF INT'L L. 23, 51 (2010).

TWAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus. A fundamentally counter-hegemonic movement, TWAIL is united in its rejection of what its champions regard as an unjust relationship between the Third World and international law.⁸

Likewise, Eslava and Pahuja note:

Although there is arguably no single theoretical approach which unites TWAIL scholars, they share both a sensibility, and a political orientation. TWAIL is therefore ... defined by a commonality of concerns. Those concerns centre around attempting to attune the operation of International law to those sites and subjects that have traditionally been positioned as the 'others of international law'.⁹

On the other hand, the diversity of TWAIL is reflected in the different theoretical strands for advancing a third world approach viz., liberal, feminist, post-colonial, and Marxist, or a combination of these. To be part of the TWAIL movement you do not have to subscribe to a party programme. It is a loose network of scholars whose work is animated with the concern to establish a truly universal international law that goes to promote a just global order.

TWAIL can also be looked at through generational lens. The first generation of TWAIL scholars (TWAIL I), which included R. P. Anand, Mohammed Bedjaoui, T. E. Elias, Georges Abi-Saab, S. P. Sinha, Nagendra Singh, J. J. G. Syatauw, Christopher Weeramantry, made a fundamental contribution to the understanding of contemporary international law by defining and articulating the attitude of the newly independent states to international law. The current generation of third world scholars (TWAIL II) owe much to them. Allow me to identify the major strengths of TWAIL I. First, it documented the contribution of third world communities to the evolution and development of international law. This helped destroy the myth that international law was in some peculiar way "invented" in the West. Second, it judiciously recognized that, the complete rejection of the rules of international law was not a feasible option for newly independent states. Third, it underlined the significance of the principles of

⁸ Mohsen al Attar & Rebekah Thompson, *How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination*, 3(1) TRADE L. & DEV. 65, 67 (2011).

⁹ Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3(1) TRADE L. & DEV. 103, 104 (2011) [hereinafter *Eslava & Pahuja*].

sovereignty and non-intervention for peoples who had just thrown off the colonial yoke. Fourth, TWAIL I recognized the potential of the United Nations system to usher in an era of change. It realized that the one state one vote formula allowed third world states in the UN General Assembly to call for the restructuring of contemporary international relations and law.

In the 1990s emerged a second generation of TWAIL scholars who sought to build on the work of TWAIL I. The story of TWAIL II is briefly narrated in this issue by James Gathii, a leading figure of the TWAIL network. Indeed, without his initiative to hold the first TWAIL conference at Harvard Law School and a subsequent one in Albany as well as his prolific writing, TWAIL II would not have had the prominence it has today.¹⁰ I will therefore not go over the ground that Gathii has covered. However, I do wish to explain the broad differences between TWAIL I and TWAIL II. TWAIL II identified a number of gaps in the work of TWAIL I even as its pioneering contribution was duly recognized. First, there was an absence in TWAIL I of a deeper understanding of the phenomenon of imperialism. It posited a simple structuring of history by which colonialism was identified with the phenomenon of imperialism. With the result that in the post-colonial period it did not concern itself with the structures and institutions of global capitalism that dictated continuity between colonialism and neo-colonialism. Second, TWAIL I conceptualized the framework of international law as being neutral. It was perceived as an empty vessel that could be filled with any content. It therefore (with the exception of Bedjaoui) did not pay sufficient attention to the technology of international legal process.¹¹ Thus it failed to appreciate that international law, as it had evolved, did not offer space for a transformational project. A whole host of doctrines and in particular the doctrine of sources of international law limited this possibility. TWAIL I also did not seriously explore the deep roots of indeterminacy in the structure and process of international law. It therefore overestimated the liberating potential of international law. Third, TWAIL I had a particular relationship to the post-colonial state and its policies. The post-colonial conjuncture was seen as one in which support was to be lent to governments undertaking the nation-building task. Consequently TWAIL I failed to glance inwards to pinpoint the class, ethnic and gender divides. Fourth, the discussion on international institutions was largely in the formalist mode, using a positivist legal framework, with matters of power and influence left to political scientists to debate. No attempt was made to situate them within the larger social order, in particular, the

¹⁰ JAMES GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* (2011); JAMES GATHII, *WAR, COMMERCE AND INTERNATIONAL LAW* (2010); For a complete list of publications see JAMES GATHII – PUBLICATIONS, available at: http://www.albanylaw.edu/sub.php?navigation_id=157&user_id=44&view=publications.

¹¹ MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1977).

historical and political contexts in which they originate and function. In the process the fact that only when a coalition of powerful social forces and States are persuaded that an international institution is the appropriate form in which to defend their interests, is it brought into existence, albeit through state action, and it survives only if it continues to serve these interests, was overlooked. Given its positivist methodology TWAIL I also failed to examine the ideological or legitimization role of international institutions. That is to say, the knowledge production and dissemination functions of international institutions are steered by the dominant coalition of social forces and states to legitimize a particular vision of world order. Fifth, TWAIL I eschewed inter-disciplinary inquiry. Disciplinary boundaries, with the odd exception, were strictly respected. There was, for example, a general absence of concern with political economy. Finally, despite its commitment to a more egalitarian and just international law, TWAIL I was distanced from the experiences and concerns of ordinary peoples in the third world.

TWAIL II has attempted to respond to some of these concerns and hopes to take the work of TWAIL I forward by refocusing attention on the structures and practices of imperialism, critiquing the undemocratic character of post colonial states, systematically exposing the hegemonic character of international institutions (in particular the WTO and the IMF/World Bank combine), critically reviewing the debates on the sources doctrine and issues relating to indeterminacy of the legal process, devising a research agenda that reflects the concerns and needs of the marginal and oppressed peoples in the third world, and above all reducing the distance of the world of international law from the lives of ordinary peoples.

What is remarkable about the story of TWAIL II is that it has caught the imagination of the international legal academia in such a short period of time. But it has struck TWAIL II scholars that it is less present in the third world than should be the case. In the instance of countries like India, there is the iterated reason that sustained growth rates suggest that critiques of colonialism or neo-colonialism advanced by TWAIL is misplaced. While the situation is changing with the realization that increased growth rates do not translate into “development as freedom”, it did reduce the attraction of TWAIL in the initial years. However, the tide is turning. There is increasing awareness that key international legal regimes and international institutions like the WTO, IMF and the World Bank promote the interests of global capital rather than welfare of populations in the Global South. At the domestic level, the rapacious exploitation of the land and natural resources by transnational corporations, the growth of crony capitalism, increased levels of corruption, and growing unemployment have led to some rethinking among the new law graduates. In sum, the turn to critical international legal scholarship in India can be traced to the need felt for the democratization of international relations, to address what James Gathii calls “regime bias” in international laws and the democracy deficit in international institutions, especially trade and monetary

institutions. Be it the reform of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights¹² or the permanent membership of the UN Security Council or greater voting rights in the international financial institutions, India has good reason to call for reform in global laws and the global governance system.

IV. CONTENTS OF THE SPECIAL ISSUE

This Special Issue is testimony to the felt need for critical international law scholarship. It carries six works by distinguished international law scholars. Three of these works are devoted to exploring the nature and character of TWAIL; the other three pieces to different dimensions of international economic law. The first piece by James Gathii succinctly tells the story of TWAIL II and its core features. While there are different ways in which the origins of TWAIL II can be narrated, Gathii skillfully captures important dimensions of it. He is also able to portray the aforementioned diversity of the TWAIL project. This diversity has enabled TWAIL II to advance the cause of TWAIL in various directions. To begin with, building on the work of the TWAIL I scholarship it has made an important contribution to the retelling of the history of international law. Antony Anghie's book *Imperialism, Sovereignty and the Making of International Law* (2005)¹³ is a landmark in this regard. TWAIL II has also contributed to articulating distinct approaches to international law which coexist under the umbrella of TWAIL. For instance, I have been at the forefront of articulating a Marxist approach to international law.¹⁴ Likewise, as Gathii notes, TWAIL II has made important contributions to the feminist approach to international law pioneered by Hilary Charlesworth and Christine Chinkin.¹⁵ Balakrishnan Rajagopal's articulation of "international law from below" also represents a distinct understanding of international law.¹⁶ These are remarkable achievements for an incipient "movement". But all told, TWAIL has not been able to dent mainstream international law scholarship. For that to

¹² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 299.

¹³ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005).

¹⁴ B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (1993); B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, *ECON. & POL. WKLY*, February 6, 1999, at 337, 349; B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 *LEIDEN J. OF INT'L L.* 1, 30 (2004); B.S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 *EUR. J. INT'L L.* 57, 82 (2010).

¹⁵ HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000).

¹⁶ BALKRISHNANAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003).

happen, TWAIL scholarship has to be debated more widely, especially in the developing world. As Gatti notes, most of the established TWAIL scholars are located in the first world. There is a certain irony about this. But it could not have been otherwise, for access to the institutional resources of the first world is essential to being heard. But once a presence is established it is important for TWAIL scholarship to have its locus in the third world because as any researcher knows location matters, be it in terms of the issues that are addressed or the ways in which these are approached. This fact enhances the significance of this Special Issue of *Trade, Law and Development*.

TWAIL II has already been the subject of both friendly and not so friendly critiques. The piece by Eslava and Pahuja is a good example of friendly prodding. They mix appreciation with criticism. The fact that the idea of global justice is the basis for critique and reconstruction in TWAIL II scholarship comes in for praise. But in their view “basic questions about the nature of international law sometimes seem an absent subject of analysis within the smorgasbord of TWAIL and TWAIL-friendly approaches”.¹⁷ It is suggested that TWAIL “expand its emphasis on materiality to think of international law as not only an ideological project located in a particular material context, and with material consequences, but also a material *project* by itself”.¹⁸ It is crucial to examine in detail “the way that international law operates, including its daily functioning on the mundane, quotidian, *material* plane”.¹⁹ There is thus an “invitation to delve into the everyday life of international law”.²⁰ To this end, Eslava and Pahuja call for the use of a legal-ethnographic method for “tiny revolutions are everywhere, every day”. We may thus look at domestic phenomena that is not ostensibly international but in actuality is. TWAIL II has been alert to this fact and need. For example, it has made a contribution to the discourse on IPRs and its impact on the right to health. But of course much greater engagement is necessary with the local that is increasingly international.

One way of making the local relevant, or to meet the legitimacy deficit in international law is, as al Attar and Thompson argue in their piece, ‘to promote democratic engagement of citizens in international law-making’. This is especially necessary in the age of accelerated globalization when global governance systems are coming to dwarf national systems. With the result that national elections are losing salience as they have little bearing on crucial policy issues. In this context al Attar and Thompson consider the proposal of Richard Falk and Andrew Strauss to establish a global people’s assembly. In their view this proposal ‘privileges

¹⁷ *Eslava & Pahuja, supra* note 9, at 105.

¹⁸ *Id.* at 108-9.

¹⁹ *Id.* at 103.

²⁰ *Id.* at 123.

procedural over substantial participation'. There is instead a 'need for multi-level democratic governance', that is, at the global, regional and local levels. Al Attar and Thompson conclude that at the end of the day 'what is required is not just a structural change but a transformation of the consciousness of citizens 'for otherwise domination will return in different forms'. TWAIL II certainly needs to pay greater attention to the processes and mechanism of democratization of governance systems and the multilevel mechanisms through which these can be embedded.

Without any doubt one of the foremost scholars in the world on international investment law today is M. Sornarajah. In his essay, Sornarajah discusses the "mutations of neo-liberalism in international investment law" from a TWAIL perspective. While looking at the four historical phases of the development of international investment law, he stresses the importance of the academia in codifying the interests of powerful social forces and states: 'Repetition is a technique of imperial law making which persists to this day' or 'the unfortunate fact is that, the increasing publication of journal articles and books in the developed world by younger scholars, eager to join the neo-liberal bandwagon, has witnessed a profusion in the articulation of neo-liberal views'. This support for the neo-liberal era international investment law is constructed on the assumption that 'foreign investment was so essential to economic development that its flow should be facilitated through its absolute protection'. India has therefore been rapidly signing Bilateral Investment Protection Treaties (BITs); about seventy of them are already in place. But the "absolute protection" model is problematic as symbolized today by the Posco experience where competing values and interests are ignored. It is here that TWAIL scholarship can make a difference. Globally, there is already a degree of rethinking, both in the developed and developing worlds, on international investment law. While 'some Latin American states have withdrawn from the ICSID system, provoking a view that Latin America may return to the days of the Calvo doctrine' 'developed states themselves are content to leave investor-state dispute resolution out of their investment treaties'. As Sornarajah points out, the retreat is most evident in the treaty practice of the United States. Its Model Treaty (2004) contains many 'sovereignty based control devices which undermine its historical stances relating to absolute protection of investments'. Finally "schisms" have opened up within the ranks of arbitrators in an effort to balance competing interests. There is the felt need for factoring in 'the competing concerns of human rights, environmental protection and labor standards'. TWAIL scholars have much to contribute in scrutinizing this line of argument. For it is not entirely certain what these changes mean as in the case of the idea of corporate social responsibility. Is it moved by the quest for legitimacy or is it a response to genuine concerns? The skeptic would argue that it is an attempt to give international investment law a progressive face. But simple critique is not enough. TWAIL needs to offer imaginative solutions, worked out in some detail, to

problems on hand.

The relationship between critique and reconstruction is brought out in Gus Van Harten's paper on the award of ICC Arbitration Tribunal on the Dabhol Project in 2005. He argues that while 'TWAIL offers a useful reference for organizing a critique of the ICC Arbitration' it is 'less relevant ... for the identification of options for reform in international arbitration or of strategies to encourage, manage, or regulate investment for social ends'. Van Harten's review of the award in the Dabhol Project evidences "regime bias" against third world countries and interests. Different strategies facilitated this "regime bias". These included the selection of arbitrators, expanding the sources of law beyond what appeared proper, a selective rendering of the history of the Dabhol Project, a refusal to take cognizance of the objections and opposition to the project on grounds including human rights violations. But what should third world countries do in the future. What should be their strategies? Van Harten looks for "more detailed guidance" from TWAIL on 'discrete priorities for reform', matters presently left to 'other fields of law and policy'. There is an element of truth to the complaint. But it is equally true that the task of critique itself has not yet been fully accomplished. The regime bias is still insufficiently appreciated including certain predispositions that are built into the process of international commercial arbitration. Its history still awaits serious critique from a TWAIL perspective. But Van Harten is right in lamenting that TWAIL does not offer practical guidance to those who take decisions in such matters or draft contractual agreements. This task should certainly be on the TWAIL agenda. It is not enough to offer broad comments on reform. There is a need for an inter-disciplinary use of materials to offer detailed guidance on technical legal issues.

Sara Seck's article on "transnational business and environmental harm" is a good example of an imaginative response to third world concerns. She begins by noting that "when vulnerable communities who are sensitive to ecological limits wish to preserve their local ecology, it is crucial that all possible levels of global, local and transnational governance are sensitive to their call, including potential mechanisms of control within home state jurisdictions. Yet the structural features of international law render this a difficult goal to achieve." On the other hand, any attempt to argue the case for home state involvement has to contend with the charges of neo-colonialism or of insensitivity to third world aspirations. The possibility of such charges being made is the pretext used by home states for inaction even as there is serious violation of local environment spaces by third world governments in the name of development, disempowering local communities. This conundrum is a function of the changing nature of the global economic and ecological order where the reality of economic globalization clashes with the competences distributed between the national and the global to regulate transnational business activities and environmental harm. It has meant the worst of

both worlds for subaltern groups in the third world. On the one hand there is a loss of critical policy space to regulate transnational business in the name of the global and on the other hand a Westphalian logic is used to deprive them from using global opportunities to protect their interests vis-à-vis environmental harm. But it may be conceded that TWAIL scholars are generally reluctant to endorse mechanisms of control in home state jurisdictions because these may be manipulated to justify unilateral measures that harm the interests of third world peoples. But Seck does well to pose this challenge to TWAIL. For example, what kind of legal strategies can be devised to help the affected people of Orissa and to make TNCs like Posco accountable? As Seck suggests, there is a need for bold solutions and from this perspective maps the conceptual frame in which home state obligations can be situated.

V. CONCLUSION

International law is shaping the domestic legal system in critical ways today. Indeed, there is practically no area of domestic law that is untouched by international laws and institutions. Yet India lacks a critical mass of international law teachers and researchers who can look at the structure and process of international law from the perspective of the developing world, in particular its subaltern classes. Al Attar has, in his essay, drawn our attention to the need for devising pedagogic methods that promote “education for emancipation” by drawing on texts like Paulo Freire’s *Pedagogy of the Oppressed*. It is hoped that this Special Issue on TWAIL will in some way contribute to both promoting emancipatory pedagogy and critical international legal scholarship in India so crucial to the realization of its national interests.