TWAIL, TRANSFORMATION, THE NATIONAL JUDGE, ACADEMIC AND MUNICIPAL LAWYER

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First, an apology. The word "keynote" connotes something serious or substantial or at least some important content to convey. To avoid an anti-climax, let me confirm that there is nothing key about my presentation. Further, I have no substantial paper or notes to give you – so keynote is a misnomer. Keynote is what Prof. Antony Anghie gave us at the first TWAIL Conference in 1997[1] when I was a first year LLM Student and Prof. Gathii's junior (who was in his final year of doctoral studies) and whose other name was "Radical Deconstructivist." Prof. Celestine Nyamu (also a doctoral student), was there too. She sat quietly on the front row every so often eye-brows raised in enlightened absorption of erudition. I remember that this 1997 conference, she turned back to shush me as I whispered to my classmate (Dr.) Zachary Lomo that we really must rethink the term "liberal." Before asking if she would be permitted to make an intervention, she truly looked like Thoth – the Egyptian God of knowledge and wisdom. I can only disclose this now: in part because I have an armed guard!

The second apology I should probably make is that when I got the invitation to speak, I did not ask Prof. Gathii whether I am expected to give a "doctrinal" paper – you know the kind that defines TWAIL and re-traces its history with 240 footnotes[2] for the twentieth time to people who already know it! I did not ask the question because, frankly, I did not want to do that arduous work. So, if you expected that, you will be sorely disappointed.

I understood my task (or rather, I persuaded myself) that my task was to simply offer some thoughts about TWAIL in a Third World Municipal setting.

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1 Antony Anghie, Remarks at the First TWAIL Conference Held at Harvard Law School (Mar. 1997).

2 *See, e.g.,* James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography,* 3(1) TRADE L. & DEV. 26 (2011).

Just so that we are on the same page, let's make sure we all understand that I am using Third World as an intellectual concept not a geographical or teleological marker. As Prof. Balakrishnan Rajagopal said: *"Third World as a concept is not inflexibly moored to a fixed and unchanging geography."*[3] Or as Karin Michelson reminded us "Third World is a chorus of voices".[4] Upendra Baxi similarly recalls that *"there are geographies of injustice."*[5] Hence, there can be a "South" within the "North," and a "North" within the "South".

Let's also make sure that we all understand that I am using "municipal" to locate our discourse at the national level but in a dialectical or even pragmatic conversation with international legal discourses. Very shortly, you will see why this is important for my conceptualization. I must say that I hesitated to use to use the word "conceptualization" because it heightens the audience's expectations!

Now, let's start with what I believe is not a controversial statement to this audience, although it could probably cause me a lot of problems in the audience of learned judges I just left in Mombasa. *Historically, the Third World has viewed International Law as a hegemonic regime and discourse of domination and subordination and not of resistance and liberation.*

Now, while I have your attention, I might as well say this. *Historically, women and other marginalized peoples, including people from my home county of Kajiado, have viewed national laws and legal discourses as regimes and discourses of domination and subordination not resistance and liberation.* See what I did there?

One of the things I will be urging you to do today is to see the parallels between TWAIL and local emancipatory discourses; and to know that you can practice TWAIL by engaging in those discourses. So, unlike Jesus who scared that guy that the only way to follow him was to sell all his belongings, give his money to the poor and assume Jesus' spartan and peripatetic life,[6] TWAIL, like human rights, can be

3 Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World Social Movements, and the Expansion of International Institutions,* 41 HARV. INT'L L. J. 529 (2000).

4 Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourses,* 16(2) WIS. INT'L L. REV. 353 (1998).

5 Upendra Baxi, *Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law,* 23 IND. J. GLOB. LEGAL STUD. 15 (2016).

6 *Luke* 18:22 (NIV).

practiced everywhere and in any form: in the small places and in the big cities; by big guns like Prof. Gathii; and by determined starters like Miracle Mudeyi, the 4th Year Law Student at the University of Nairobi, and now a recent graduate.

Just for doctrinal purposes, let us recall the basic objectives of TWAIL so laconically and beautifully given by Makau wa Mutua in 2000[7]:

> *The First objective of TWAIL is to understand, deconstruct, and unpack the use of International Law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans.*
>
> *The Second objective is to construct and present an alternative normative legal edifice for international governance.*
>
> *The Third objective is, through scholarship, policy, politics, and even maandamano, [protests], to eradicate the conditions of underdevelopment in the Third World.*
>
> *The Fourth: to relentlessly question and undermine conceptual meta-narratives of international law for the reasons that TWAIL finds them to be products of hegemonic discourses. I added this one.*

Now, I must say this even though I know Prof. Gathii might not fully agree: TWAIL was, to a very large extent, influenced by and benefitted from NAIL (New Approaches to International Law).[8] The intellectual method is what unites TWAIL and NAIL. What separates us are the first three functional objectives I have stated above. NAIL, as a project, could be undertaken by an astute intellectual who did not have or care for any political project. Just like algebra or calculus, if you are bright, you can do it – but it does not define your politics or ethics. TWAIL rejected this idea – and we would use some impolite words after the sixth glass of wine to describe what this pursuit of deconstruction for intellectual aesthetics seemed to us. Of course, NAIL also, in spite of itself, sought to offer a conceptual metanarrative of being critical. And, as I said before, TWAIL is definitionally suspicious of conceptual meta-narratives.

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7 Makau W. Mutua, *What Is TWAIL?,* 94 PROC. OF THE ASIL ANN. MEETING 31 (2000).

8 *See* Gathii, *supra* note 2, at 28.

Talking of the first objective as I have stated it, I must confess that I have been strident in my statement of it. That stridency reflects my particular approach to TWAIL. It is important to acknowledge that there is much internal diversity and rich variegation within TWAIL – and so, it is not a monolith.[9]

This is a result of where different TWAILers place their emphasis and focus: Some are socialists; some emphasize opposition more than others; some stress reconstruction more than others; some stress feminism more than others; some emphasis praxis more than others. So, it is, as Prof. Obi Okafor says, *a fragmented unity!*[10]

But, as Prof. Gathii (and his newly minted PhD Student, formerly of Strathmore Law School before he got radicalized, Dr. Harrison Mbori) have pugnaciously insisted, all these flavours of TWAIL can be divided into two: Contributionism (or Moderate) Strand and the Critical (or Radical) Strand.[11]

The Contributionist strand emphasizes the Global South's contributions to international law, on the one hand, and Critical Theorists examine the Global South's subordination in its international relations as a legacy that is traceable to international law, on the other.[12]

The Contributionist strand tends to be more moderate, perhaps, benign. On history and origins of international law, for example, Contributionists insist that international law is the product of a number of civilizations – including Africa - rather than the sole product of European civilization. Contributionism emphasizes, for example, that Africa is "an innovator and generator" of norms of international law.[13] Think of the late Judge T. O. Elias here.

9 *See* Karin Mickelson, *Taking Stock of TWAIL Histories,* 10(4) INT'L CMTY. L. REV. 355 (2008) (referring specifically to the TWAIL Vision Statement).

10 Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?,* 10 INT'L CMTY. L. REV. 371, 375 (2008).

11 *See, e.g.,* James Thuo Gathii, *Africa and the History of International Law* (Alb. L. Sch. Legal Stud. Rsch. Paper, No. 48, 2011-2012), https://ssrn.com/abstract=2029019; *see also* Harrison Otieno Mbori & James Thuo Gathii, *Reform and Retrenchment in International Investment Law: Introduction to a Special Issue,* 24 J. WORLD INV. & TRADE 535, 553 (2023); see also Olabisi D. Akinkugbe, *Africanization and the Development of International Investment Law,* 53 CASE W. RES. J. INT'L L. 7 (2021).

12 *See generally* Gathii, *supra* note 11; Akinkugbe, *supra* note 11.

13 Gathii, *supra* note 11, at 1; *see generally* TASLIM OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW (Manchester University Press, 1st ed. 1956).

On the other hand, the Critical Theorists (or radical Strand) focus on the manner in which modern international law continues the legacy of colonial disempowerment while providing spaces for resistance and reform. For critical theorists, a central question for them is how to "defang international law of its imperialist and exploitative biases against the Global South" in general.[14] Think of Prof. Gathii; Prof. Makau wa Mutua; Prof. Anghie; Prof. Obiora Okafor here.

So, we now know something about TWAIL. And we know it is complex. And variegated. Critiques of TWAIL identify this is the first major flaw of TWAIL: that it has no unifying conceptual theory.[15] We say that this is TWAIL's first major strength: that it resists hegemonic metanarrative.

But we also know that one of the insights of the Critical Strand of TWAIL is that international law was produced during the encounter between the Western world with the Colonial "Other"; and that colonialism is a central not peripheral concern of international law.[16] These historical insights yield the further contemporary insight that the colonial pedigree of international law persists in contemporary discourses of international law and its enduring project of governing and transforming non-European Peoples. Given these insights, and given the enduring colonial legacy in the production of contemporary norms and doctrines, then, can a TWAILer be a judge or a lawyer in a State Court in the "Third World" without betraying her TWAIL colours and values? If so, are there any intrinsic insights, values, or approaches to the law and the cases she handling that she brings from TWAIL? If the answer is in the affirmative, should the law teachers in universities in Kenya, then, not take TWAIL a lot more seriously – especially those whose vision is to "be the region's hub of change agents"[17]?

As I pointed out above TWAIL is, above all, an approach to law that is committed to seeing the oft-unseen violence, oppression and social injustice that is occasioned on certain groups of people in the "Third World" through the operation of the law. Much of this law -- which oppresses rather than emancipates; whose doctrines hurt rather than heal; and whose rules dispossess rather than empower – has its origins in the

14 *See* Gathii, *supra* note 11, at 2.

15 *See* Naz Khatoon Modirzadeh, *"Let's All Agree to Die a Little": TWAIL's Unfulfilled Promise,* 65(1) HARV. INT'L L. J. 80 (2023).

16 ANTONY ANGHIE, *Finding the Peripheries: Colonialism in Nineteenth Century International Law, in* IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 32 (2005).

17 Strathmore University Law School, *Vision,* https://law.strathmore.edu/about-us/ (last visited Dec. 10, 2024).

imperial DNA of international law and its mode of diffusion globally. A TWAILer Judge or lawyer armed with this acute awareness and committed to uncovering the colonial origins of the various doctrines of law as well as the theory of the adjudicatory process is better able to see the systemic ways in which the law operates to disadvantage certain groups while masking its violence and oppression through neutral-seeming rules, doctrines and practices. Most of these rules, doctrines and practices are sanitized and given legitimacy through judicial imprimatur. It takes an aware judge and lawyer to see the unseen operation of law; hear the unheard, the unsaid or even the un-utterable perspective; and re-conceptualize the case she is handling in a way which simultaneously does substantive justice to the parties while remaining rooted in a theory of thorough-going change aimed at uprooting the colonial origins of international (and national) law.

Now, I hope to spend the rest of my time demonstrating that this ambitious project is possible. It is possible through commitment to the four things that, I believe, TWAIL teaches us about law and lawyering:

> ***First,*** through a commitment to a historical analysis of law;
>
> ***Second,*** through a commitment to uncovering the material interests of groups in the society;
>
> ***Third,*** through a commitment to pluralism in the law – the complex pathways to justice – and eschewing the colonial efforts to bring everything within the gaze of state-sponsored norms and legal system: in other words, prioritizing, where the first two commitments permit, people-centred justice systems; and
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> ***Four:*** through a commitment to the idea that law exists to lead to societal transformation not to preserve existing patterns of subordination; oppression and equality. Law must, by definition, be transformative because law cannot be, by definition, neutral. We can spend the whole day on this one, so I will just leave it there for a future conference. In my view, this means that a TWAILer must be engaged in an explicit political project: political in the sense of improving the material conditions of the subordinated; the oppressed; the voiceless; the un-seen; the unheard. To restate, a TWAILer cannot be agnostic about the plight of the oppressed and subordinated peoples!

These are the four commitments of a TWAIL lawyer, academic or judge!

These four commitments are my reading of the various political and scholarly projects of TWAILers. In my view, they completely annihilate the second major critique of TWAIL: that it exists to critique for the sake of it.[18] Recall I said that that is, in fact, the major point of departure between NAIL and TWAIL: TWAIL is committed to particular scholarly and political projects both at the international and national levels. I must admit that some TWAILers might find this problematic. But we are a big tent. In my view, though, the lived realities of too many peoples in the Global South do not permit us to engage in critique for mere theoretical stimulation or academic aesthetics: that would be a betrayal of their voices; their needs; their blood; their sweat; their language. I firmly believe that if one claims to speak for a people or with a people, she must care about their lived realities and material conditions: one cannot be agnostic about it.

Now, I already stated that one of the central tenets and insights of TWAIL is that *the Third World is unavoidably constitutive of international law. International Law is made at the frontiers of the encounter between the Third World (the Other) and the Empire.*

Let me add another often-ignored insight – verbalized at least since 1904 by Prof. Robert Lee Hale but never taught to students at Strathmore Law School: *The State is unavoidably constitutive of the market.*[19]

The parallel should be obvious: As International Law is unavoidably constituted and remade in its encounter with the Third World; the market is constituted and remade by the State.

It is important to say that this is neither a conservative nor a progressive statement. It is just a statement of fact. This means that it can be deployed for oppressive and conservative purposes or for emancipatory purposes.

TWAIL is about disarming the oppressive dominance of neoliberal legal and social thought at both the national and international spaces/discourses. Dominant international law naturalizes and preserves power imbalances in the international order and masks the dominance by allowing critiques at the margins as a safety valve to prevent radical transformation in its doctrines and discourses.

18 *See generally* Naz, *supra* note 15.

19 Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38(3) POL. SCI. Q. 470 (1923).

I would like to suggest three ways in which TWAIL can play the emancipatory role in today's world of *ius gentium* – where international law in some form permeates the regulatory and governance affairs of the very mundane and quotidian affairs of a nation and thereby help in "defanging international law of its imperialist and exploitative biases against the Global South."

First, there is the everyday production of what I call "Global Law" – a seemingly "universal" logic on governance, regulations and the appropriate relationship between the public and private law: there is now a serious contest on the way for the social conception of the trinity of property; torts; and contracts. TWAIL can become the regulatory technology or discourse for defanging the malevolent neoliberalism and illiberalism that can be born either of excessive sovereign nativity syndrome or excessive and unsuspicious borrowing of the "Global Law". Think for example of Private Public Partnerships frameworks or the current regimes of sovereign debt.

Second, TWAIL can also become the tool for deracinating the emerging standards of common decency in human rights by infusing critical thought in decolonizing Human Rights. For example, African jurisprudence has been pivotal in redefining the human rights contours of the death penalty as well as sexual and reproductive rights at a time when the US is rolling back gains in both.[20] Basically, TWAIL is improving, updating and even radicalizing the content of human rights – thoroughly decolonizing it and humanizing it in the process.

Third, TWAIL can become the conceptual technology upon which we can build grassroots' coalitions which can then be used to rebuild more legitimate and people-centred states in the Global South – which might ultimately lead to a coalition of Global South States. When that happens, the end of globally-entrenched inequality, oppression and subordination would be at its end. This is, by the way, the response to the third major critique of TWAIL: that it is ambivalent towards the State in the Global South. Yes, TWAIL is, in the main, ambivalent towards the State in the Global South *as presently constituted.*[21] This is because the State as presently constituted is largely illegitimate due to its complicity in continuing its participation in the international order of subordination. However, TWAIL does imagine re-constitution

20 *Compare, e.g.,* PAK v. Attorney General, 262 K.L.R. 1 (H.C.K.) (Kenya) (finding that the Kenyan Constitution has guarantees for abortion in certain circumstances) *and* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (overturning Roe v. Wade finding the right to abortion was not implicitly protected by the United States Constitution). Both decisions were issued in 2022.

of both the State and its citizens in an organic, thorough-going way which would re-create individual states in the image of true equality, freedom and non-subordination. I say more on this at the end.

In all these three instances, TWAIL can be used as a technology to remake international law at the frontier of national law and then re-export a better version of it through the mechanism of Global and Human Rights Law, and, in the last instance, coalition-building.

In these broad projects the two parallel insights: that international law was historically constituted in its unavoidable encounter with the Third World and that the state is unavoidably constitutive of the market – become important starting points for framing legal concepts that aim to challenge the law's tendency to naturalize inequality, suppression and subordination of some people as their accepted lived realities.

Here are specific examples where this is already happening:

- South-South Judicial Dialogues and borrowings which are producing a distinct new School of Constitutional Thought which we can call Transformative Constitutional Thought.[22]
- The discourse and litigation on sovereign odious debt and financial governance litigation.
- Climate change litigation and activism.
- Transnational employment law.
- The expression of sovereignty through public and citizen participation as a juristic thought applied in specific contexts to resist hegemonic state actions.

Ladies and Gentlemen, as I end, you would recall that I talked about the four commitments of a TWAILer? I wish to relate to them here by telling you what it means to be a TWAILer. It means at least three things:

> ***First:*** one must have political commitment to end all forms of oppression in our individual spaces; capacities; scholarship; intellectual thought and professional

21 *See generally* OBIORA CHINEDU OKAFOR, RE-DEFINING LEGITIMATE STATEHOOD: INTERNATIONAL LAW AND STATE FRAGMENTATION IN AFRICA (The Hague: Martinus Nijhoff Publishers, 1st ed. 2000).

22 *See* Willy Mutunga, *Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?,* 8(2) TRANSNAT'L HUM. RTS. REV. 30 (2021).

work. It is not enough to be critical; it is even worse to be just academic or erudite. If you do know the answer to the question: what is your ultimate theory of change, you are NOT a TWAILer. And neither are you Christian. Or Muslim. Or Hindu. Or a real Lawyer. I am sorry: but even Jesus whipped some fellows in the temple.[23]

Second: one must be pathologically optimistic that law has emancipatory potential to transform. Now, people who tend towards TWAIL tend to look at "black-letter law" contemptuously. So, let me be clear that law must be conceived at four levels:

- The Doctrinal (the black letter or the rules);
- The Pragmatic (the practical or the application of the rules to the facts);
- The Theoretical (the philosophy that coheres or questions the doctrinal and the pragmatic: a theory is a set of general statements that aim at justifying or falsifying some discrete legal phenomena);
- The Meta-theoretical (the theory- concerned with an analysis of theory itself: where the context and meanings are produced).

Third: one must be courageous and bold. The work of liberty, freedom and Social Transformation is not for the faint-hearted because none of these things will be willingly given by those benefiting from our unequal society.

How can you be all these three things? Simple. By sustaining the four commitments I talked about earlier:

First, a commitment to a historical analysis of law;

Second, a commitment to uncovering the material interests of groups in the society; and

Third, a commitment to pluralism in the law and people-centered justice.

Fourth: a commitment to using law as a political project to address substantive justice questions of an oppressed or subordinated group.

23 *John* 2:15–17 (NIV).

So: what kind of practical TWAIL Projects can one be involved in in Kenya? I think the TWAIL repertoire can be used to:

- Expose the remnants of Colonial law and its continued application to Kenya:
  - Anti-poverty laws
  - Anti-dissident laws
  - Anti-customary law doctrines
  - Anti-liberty laws e.g. sodomy laws
- Clarify how the state is unavoidably constitutive of the market and how the myth of state neutrality in the market serves foreign powers and their local compradors. It is important to distinguish between limited government and limited state. Our Transformative Constitution, for example, has no conception of limited state. Instead, it permits the state to do all in its power to transform the society. But it limits how the government can do it. Differently put, our Constitution limits the government but not the state.
- Expose how state capture happens and the role of transnational law in the capture.
- Start teaching TWAIL in your Law School AS the MAIN Public International Law Course NOT as the "alternative perspective." While at it, infuse TWAIL thinking in all the courses you teach.
- Build a grassroots coalition to protect Kenya's Transformative Constitution.

Let me end with this: Why is grassroots' coalition-building important? Because that is part of rebuilding a substantively legitimate state in Kenya which will, ultimately, have the capacity to be a TWAIL-state. A TWAIL-state is one which organically subsumes the four TWAIL commitments I spoke about because its institutions are peopled by TWAILers. That means a TWAIL state will be committed to ending all subordination; inequality; state-induced poverty; corruption; and oppression. Imagine if all states in the Global South became TWAIL-states? Then all states in the Global South would use law transformatively: to resist hegemonic international discourses that harm their people; to remove markers of subordination and oppression among their own people; to build truly free, people-centered societies and institutions. Ladies and Gentlemen: Is that not the definition of heaven found in the Bible? TWAIL can ultimately deliver that. That is my meta-theory of change. Come, we TWAIL together!

Thank you for your kind attention. Apologies for taking too much of your time. And for annoying some of you.