Theoretical Perspectives to the teaching and Researching of International Law in Africa

By:

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Delivering Legal Knowledge through Critical Perspectives

In teaching international law in a Kenyan University, my objective has been to proceed beyond having the learners merely recite the rules, principles and concepts of the law of nations, to ingraining in them the capacity to critically deconstruct their limitations, mischiefs, tragedies and opportunities. In that sense, my focus has not been to teach international law as constituting a system of perfect and objective legal norms, but as comprising evolving rules and principles that occupy the same conceptual space as global politics, and are impacted upon by power dynamics between and among states. In particular, it is essential that students perceptively appreciate that international legal rules, and their institutions, are not always just, equitable, fair and objective

It is in that context that I find the ideas postulated by the Third World Approaches to International Law (TWAIL) movement highly informative, and as constituting an indispensable theoretical instrument through which to evaluate, explain and critique the historical origins of international legal norms, and their making and implementation in the contemporary times. It is noteworthy that African scholars, particularly Obiora Okafor, James Gathii and Makau Mutua have been instrumental in the conceptualisation and articulation of TWAIL as an offshoot of critical legal studies (CLS) movement. Through TWAIL, they coherently advocate for the deconstruction of international legal norms and institutions to reveal the manner in which they subjugate, subordinate and dominate the states of the Third World, and more so, African countries' interests and concerns.

Placing Africa's Contribution to the International Legal Regime at the Core

It is imperative for teachers, researchers and students of international law in Africa to be conscious of the biased narratives of the law of nations as originating from Europe and radiating to other regions in the periphery, and as such provide alternative perspectives and insights. It is in that context that the theoretical ideas propounded by the TWAILers provide a vital method of deconstructing various rules and principles in the context of their application and ramifications in Africa, and more particularly, Kenya. Appreciating the significance of the legal method in shifting the theoretical and conceptual context of students, in their perception and understanding of the role and ramifications of international law and its institutions, I dedicate substantive amount of time to a discourse on TWAIL when I teach the 'theoretical approaches to international law' topic.

Inadequate exposure to critical scholarship, as Babatunde Fagbayibo opines, has resulted in African students often failing to appreciate the manner in which both explicit and implicit structural imbalances in international relations, premised on prejudiced and unbalanced international legal instruments and institutions, continue to subjugate and marginalise Africa's interests, concerns and contributions. It is in that context that I strive to demonstrate some of the contributions, by African actors, to the emergence and development of

progressive international legal norms, such as the case relating to the conceptualisation of the right to development. As Obiora Okafor points out, the impetus for the conceptualisation of the right to development is attributable to the ideas and work of African scholars and practitioners in the 1960s and 1970s, particularly the Senegalese Kéba M'Baye and the Algerian Mohammed Bedajoui. In that sense, I even actively proceed to further evaluate whether there is an emerging coherent thread of legal method that may credibly be referred to as an African Approach to International Law.

It may be valuable to highlight to students that even at the Kenyan level, there are exemplary international lawyers have contributed vital African perspectives and insights to the making and implementation of international law, and in the operation of its institutions. In that sense, the Kenyan international lawyers render alternative accounts and narratives of international law, in which Africa is a core actor, possible. Among them is Andronico Adede, a Kenyan who served as a Legal Advisor to the International Atomic Energy Agency (IAEA), and facilitated the drafting of rules relating to notification and assistance in cases of nuclear accidents in the aftermath of the Chernobyl disaster in Ukraine. Adede also notably contributed to the legal regime for the fair governance and utilisation of the oceans and their resources as part of the negotiating and drafting team of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). He would further contribute to the shaping of the transnational legal norms by being a Consultant for the World Health Organisation (WHO) during the drafting of its 2003 Framework Convention on Tobacco Control.

As the Founding Registrar of the International Criminal Tribunal for Rwanda (ICTR), Adede facilitated the establishment and activation of the judicial institution that would contribute vital jurisprudence to the principles of international criminal justice as it sought justice for the victims of the Rwanda genocide. It is noteworthy that Adede was also an active founding member of the African Association of International Law (AAIL), an academic consortium established in 1986 for purposes of fostering 'the development and dissemination of African perspectives and practices of international law.' Part of the cited AAIL objective is achieved through the publication of the African Yearbook of International Law, and Adede served as a member of its Editorial

Advisory Board for years. He dedicatedly contributed to the training of international lawyers by teaching and being a guest lecturer in diverse universities in the world, including at The Hague Academy of International Law.

Frank X Njenga is another Kenyan whose distinguished contribution to the progressive development of international legal norms and the functioning of their institutions merit highlighting to students of the law of nations in Kenya and Africa. With Adede, he contributed to the conceptualisation and shaping of the significant delineations of the UNCLOS. Njenga had previously served as the Legal Advisor to the Ministry of Foregin Affairs in Kenya, a position that resulted in his direct involvement in the negotiation and drafting of bilateral and multilateral international legal instruments. At some point of his illustrious career, he served as the Kenyan representative to the Sixth Committee of the United Nations General Assembly (UNGA), part of which he was elected the Chair of the Committee. In that position, Njenga had the opportunity to evaluate and contribute solutions to legal challenges that confronted the UNGA in the performance of its functions.

The election of Njenga to the membership of the International Law Commission made him part of the select individuals tasked with the significant responsibility of 'encouraging the progressive development of international law and its codification', under the auspices of the UNGA. It is noteworthy that among other positions in which Njenga contributed his rich expertise on international law matters, was by being an advisor to the Organisation of African Unity (OAU) on diverse transnational legal and policy issues, and by serving as the Secretary General of the Asian-African Legal Consultative Committee (AALCC) at some point. It is by highlighting the contributions of illustrious international lawyers such as Adede and Njenga that African students can be ingrained with alternative perspectives concerning the significance of Africa to the making and implementation of the transnational legal regime.

Harnessing the Pedagogical Merits of the Seminar Method

The seminar method of instruction remains my preferred approach to teaching international law, as students are provided with the platform to equally make contributions, critique the presentations, and provide feedback. In particular,

the seminar method of instruction provides avenues of ingraining the deconstructive and demystification methodology in analysing the rules and institutions of the international legal regime by learners in Africa, especially as postulated and advanced by TWAIL. Nonetheless, the success of the seminar method is based on the students accessing relevant reference materials in advance of the lessons, to enable them have a prior grasp of the issue for purposes of more informed participation. This is due to the fact that the seminar method is premised on the pre-supposition that the learners have some background knowledge of the subject matter.

A limitation of this approach in teaching law in Kenya is that quite often, law students are usually not enthusiastic enough to read in advance, and thus may have the incapacity to debate and evaluate the issues critically. Nonetheless, it may be possible to induce the international law leaners to prior reading of the reference materials by designating particular individuals to make presentations on specified areas, or by developing a practice of randomly selecting undesignated students to introduce concepts and respond to queries. Impetus to read in advance, and qualitative engagement in the lesson discourses, may also be encouraged by allocating the consistent participants some marks for class contributions as a form of continuous assessment. However, as I have found out, the allocation of some marks or grades to students on the basis of class contribution favours small classes, and may be problematic and virtually impossible to undertake effectively when teaching large numbers of learners, which can be the case in African universities.

To enhance the evaluation and prescription capacities of students, which is premised on the need to develop solution oriented approaches to the problems and predicaments of Africa in the international society, I have a preference for case studies when allocating research assignments that constitute continuous assessment testing. The case study approach to evaluation questions has the benefit of placing the students of international law at the position of problem solvers, with the objective of stimulating their critical analysis from diverse perspectives, and necessitating deep research.

It is noteworthy that lack of adequate reference materials remains a problem that confronts the teachers of international law in Africa, which has partially

been mitigated by the availability of online libraries and resources. Universities in Kenya have commendably formed consortiums through which they collectively subscribe to online resources, thus increasing access to vital teaching material across disciplines, including in legal pedagogy. Nonetheless, some vital specialised online libraries, particularly those dedicated to legal resources, remain unsubscribed to. This prevailing lacuna in the acquisition of legal resources requires to be addressed, if teaching and researching law through critical approaches is to be optimised effectively in the African region.

Moving Africa to the Core of Transnational Legal Discourses: Research and Publications

My experience in research and publications is that it is an unending learning and self-improvement process, in which mentorship and guidance from more established scholars, publicists and researchers is valuable and indispensable. In my research, I have often, where possible, consciously endeavoured to provide African or Kenyan perspectives to the transnational matter in issue. Indeed, it is indisputable that research and publications provide African scholars with the opportunity to impact on, and shape, the transnational legal norms and international relations discourses and narratives by bringing in vital African perspectives and insights.

This reality is aptly demonstrated by the highlighted TWAIL accounts of the law of nations, which exposed and has consistently brought to the fore the unjust, unfair, unbalanced and inequitable outcomes of colonial and post-colonial transnational legal regime. Deviating from a rigid positivist account of international law, there is no doubt that the role of norm entrepreneurs in academic institutions, civil society organisations, and inter-governmental organisations, cannot be ignored, or regarded as having no impact on the evolution of international legal norms. As Kenneth Abbott observes, liberalism has, as one of its defining features, correctly emphasised the role of individuals and groups ‘across national polities and within international institutions’, in the making, shaping and implementation of international law. It is also instructive to note that Article 38(1)(d) of the Statute of the International Court of Justice recognises the ‘teachings of the most highly qualified publicists of the various nations’ as constituting the ‘subsidiary means for the determination of rules of [international] law.’

A more robust participation by African scholars in research and publications in the matters of international law through critical approaches will be beneficial in progressively shaping and orienting the transnational legal regime to one that reflects and responds to African realities, interests and concerns. To increase the level of African research and publications on matters relating to the international legal regime, more established researchers and scholars have an obligation not to abdicate the task of encouraging, mentoring and nurturing upcoming ones on the basics of quality and credible research and publications. On the other part, upcoming scholars of international law should actively seek information, and particularly participate and assist in activities that promote acquisition of skills and knowledge relating to research and publications, such as workshops and seminars on such issues. Equally vital, upcoming scholars should enthusiastically assume editorial responsibilities in journals and book projects, as a mechanism of exposure and mentorship on what research and publications entail.

It is through increased research and publications in Africa, about Africa's experiences with norms and practices of the international society, that the TWAIL aspirations of alternative narratives and accounts that will compel emerging rules of international law and their institutions to be more just, fair, balanced and equitable to the region, may be realised.

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