TWAIL: Asserting Pride in Global South Epistemes through Critiquing the Silences of the Eurocentric Fantasies of the History of International Law (Part II)

By:

Humphrey Sipalla

June 30, 2022

‘Old pirates yes they rob I
Sold I to the merchant ships […]
Emancipate yourselves from mental slavery
None but ourselves can free our minds
Have no fear for atomic energy
'Cause none of them can stop the time’
Bob Marley and the Wailers, ‘Redemption Song’ Album: ‘Uprising’, October 1980

To Teach or not to Teach the Trojan Deceit

I dare say, however, that recognising the fantastic ironies, which I made clear in Part I of this blog, for what they are only serve to begin our TWAIL critique of international law. To move towards restitution, we must summon up the courage to approach our own epistemes, huddled and terrified hidden inside the darkened caves of colonial legacy. In order to decolonise our minds, as urged by Ngugi wa Thion'go, we must dare to assert pride in our epistemes, and carry them, kicking and screaming if necessary from the darkness of Grotian self-preservation to the light of epistemic self-determination for all peoples.

Another early TWAIL influence – as I now realise – Bob Marley is even more succinct. Urges fearlessness, he notes that we must emancipate ourselves from mental slavery. "None but ourselves can free our minds".

In this search for the bare minimum of truth in histories of international law, inter-disciplinarity will be central. International law and relations scholars will need to be archaeological in their methods, folding up sleeves and with shovel and then later with fine toothbrush, dig up what should be obvious silences in the discourses. We cannot merely limit ourselves to repeating what has been handed down.

Active original research, like all rivers, eventually flow in the ocean of the classroom, into teaching. And the first teaching aid is the textbook. Textbooks are cultural institutions that order societies. Liberating them is central. I am always struck by just how orthodox and traditional *Brownlie's principles of public international law* is. And this coming from the great Ian Brownlie, once a card-carrying member of the UK Communist Party, the radical international lawyer who gave us Nicaragua v US, and chose to represent Serbia in the Genocide cases. He whose life and practice reveals commitment to refreshing peripheral ideas such us sovereign equality and international justice, nonetheless is unable to liberate his Western textbook. And rightly so I say. Let us write our own textbooks, not critical appraisals of eurocentric texts but simply our accounts of how international law started in our pre-colonial states – yes, I am disputing Westphalia here.

Prof Anghie says that in essence, each should find their own date for the commencement of international law. Western Grotius may have found it in the sack of the Santa Catarina. Where do you find your history of international law? Prof Anghie however cautions against adopting indigenous legal theories and principles uncritically. He reminds us that pre-colonial Indian international law did not recognise a fundamental principle such as sovereign equality.

Indeed, since all law is indigenous in origin to some culture or other, we must only critically receive indigenous law. Epistemic self-determination means we not only unearth facts and figures but interpret them. Bob Marley's emancipation of mental slavery is a call to allow ourselves to proceed to new imaginaries, to leave behind fantastic imaginations.

In my own class, I am keen to teach using John Dugard's *International law: A South African Perspective*, and FX Njenga's 2001 *International law and world order problems*, a beautifully radical text that is in urgent need for an update. I have been promising myself to integrate *The African Union Legal and Institutional Framework*, edited by Abdulqawi Yusuf and Fatsah Ouguergouz.

But the age-old platonic problem of whether to teach a lie arises. But this question itself represents a boxing in our intellectual thought. It presents false choices. Why not simply teach the truth? The same problem is presented to the TWAIL scholar when questioning imperial wars, when one is asked whether or not they will condemn such and such hostilities over another. These are false choices. Rather the hegemon and hegemonic tendencies must be the focus of critique. Regardless of the hegemonic actor. This in itself allows TWAIL to critique the hegemonic tendencies of Global South countries. A good example for me is Kenya's nonchalant disdain for Somalia's entitlements in the curiously named Indian Ocean – it is curious why the Ocean is called Indian yet India rather borders the Arabian Sea.

Why, I wonder, must history be so restrained as to expend time and energy in finding a place and time. While initially liberating, does not such attempt, by definition, expose us to the danger of weak historical method, what Kenyan historian Bethwell Ogot calls historicity? Prof Ogot cautions against importing present meaning into the past, thereby distorting the true import of events as impacting its own contemporary time. Should not historiography – proper

historical method à la Ogot – not at once be true to meaning in time while also freeing one from the artificial strictures of space and time?

Allow me to borrow a concept from theology. Theology – and indeed philosophy of God as well – asserts that creation should properly not be understood to have a place and time stricture. Such place and time can be said to be rather, indicative than definitive. The creative power of the Uncaused Cause, the Prime Mover is ever occurring. God therefore cannot only be said to have created the world, but can also more properly be said to be creating the world. Theology and its secular co-discipline philosophy of God have found in ontology a way to free history from historicity and its attendant cultural bias. From this semester, I have attempted to apply this approach to the teaching of the history and origins of international law.

The three ontological moments of international law: A living history

International law, I have suggested to my students, at once originated in and continues to exist in four ontological moments. Why ontological moments? Because international law is not, as Western Grotius purportedly represents, a unique invention of a non-existent singular Eurocentric culture but a procession from the nature of being.

Recognisable encounter. Respectful intolerance. Compelled co-existence. Hesitant supra-normativity.

Recognisable encounter. As suggested above, no lowly citizen visits a foreign land and fails to recognise a sovereign. In fact, no person, driving across their country, for instance, and stops at a roadside eatery, would fail to recognise the leader of a family walking by, of truckers having a quick lunch, or even of farmers walking back from a morning's chore. A sovereign, a leader of leaders, is recognisable from how others behave around them. In fact, a sovereign is recognisable even more by how their subjects behave in their absence. A foreigner is usually quickly cautioned if their conduct went against certain norms, even at the border lands. The sovereign or his agents, one would be quickly told, prohibits this. In fact, if the matter is grave enough, one would usually be urged to flee or to prepare the appropriate recompense.

Respectful intolerance. Even as among sovereigns, it is inconceivable that an encounter with a sovereign would remain unrecognised. Now, does this mean that all recognition will be honoured? No. In fact, rather than invalidating the recognition, disdain or challenge of sovereign authority by a new comer is precisely the hostile act that affirms the recognisable encounter. This is a moment characterised by self-preservation.

I like to give example of an old testament encounter of Solomon and Sheba (1 Kings 10:1-13). Another is the scene of the photo session after the NATO Summit of 25 May 2017. US President Donald Trump comes from behind and pushes back Montenegro PM to stand at the forefront and proudly tidying up his coat ruffled up when reminding the usurper of their place. I argue both events demonstrate ontological recognisable encounters. Instructively, both show variant approaches to fundamental principle of sovereign equality. The US President applies the Ancient Indian principle of hierarchy of sovereigns. Solomon and Sheba foreshadow the Charter of the United Nations.

Whether by disdain and/or challenge, or acceptance of equality, agreements developed from this ontological moment bifurcate and urge a keeping off, a respect for the other's jurisdiction or 'sphere of influence'. Essentially, exercise of one's sovereignty locally is evidence of it being respectfully not tolerated. A curious example of this moment is the 1494 Treaty of Tordesillas.

As this is a class of young people, I am wont to refer to the fictitious but probably truthful scene in the movie *300* where an emissary of Xerxes comes, and quite disrespectfully too, to seek surrender of Sparta. With the cry 'This is Sparta!' the king himself kicks him into the abyss, thus killing him – ah, doesn't one miss the days sovereigns had to do their dirty work themselves. The killing of this ancient fictitious diplomat, as depicted in the movie, develops the principle, even in its violation.

A better example however is the repeated bodily searching of the President of India, APJ Abdul Kalam in JFK Airport in the US in September 2011. More recently, Pakistani police are reported to have entered the North Korean Embassy in Islamabad to check for alcohol contraband on 10 March 2022. Alcohol, plentiful in North Korea and forbidden in Pakistan, serves as the perfect exchange commodity for poorly paid North Korean diplomats. Apologies were

quickly exchanged in both instances. Sovereigns are by definition intolerant to the idea of having equals, but are also respectful about their conduct.

Compelled co-existence. At this ontological moment, the very nature of the local exercise of jurisdiction ensures that the previous moment's intolerance is no longer respectful. For instance, the minute one sovereign determines their northerly border, then have purported to, at once, determined it for their southern neighbour, who until now, we happy to feign respect for their sovereignty. Restrained intolerance cannot any longer be contained. As usually described by the International Court of Justice, a dispute crystallises at this moment.

Normativity in international law can be said to begin to manifest itself at this moment through the development of agreements. This border must be negotiated, by sword or pen. Should sovereign A decide to exclude entry into or to do so on pain of taxation or tribute a certain people, then their sovereign can no longer respectfully 'intolerant' such development. Non-decision is itself acceptance of the principle of hierarchised sovereigns. Rejection is disputation and not necessarily of the principle itself, but of one's order in the hierarchy.

Peace treaties are also an excellent example of this. From the Egyptian-Hittite Treaty after the Battle of Kadesh from c.1259 BC to the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and The Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981 that establishes the Iran-US Claims Tribunal.

Another important example is the OAU AHG/Res. 16(I) on Border Disputes among African States of 21 July 1964, that is misunderstood to represent an uncritical African acceptance of colonial *uti possedetis* but was rather an ingenious and pragmatic settling of simmering unresolvable border disputes in Africa that "constitute[d] a grave and permanent factor of dissention" following mass decolonisation and active "extra-African manoeuvres aimed at dividing African States."

Even in their violation, the international legal normativity that proceeds from this ontological moment is enforced and reinforced by common interests. Sooner or later, disputing sovereigns acclimatise as their reliance on the other's

respect for their interests is compelling, as is evident is say the exercise of diplomatic protection, as is the declaration of piracy as a jurisdictionally universal crime.

Reluctant supra-normativity. Eventually, individualised common interest alone is insufficient to advance normativity from self-determination into human dignity. Certain norms must surely prevail, especially when they limit political – read sovereign – discretion. Elsewhere, I have argued that all law, municipal or international, exists to fetter executive discretion, thus protecting the governed from overreach.

As among sovereigns, the even municipal exercise of sovereignty cannot be unfettered. The cry for human dignity will reach across boundaries of compelled co-existence. Obligations *erga omnes* proceed from this moment. Conduct that pricks the conscience of humanity are prime examples. Genocide, war crimes, crimes against humanity. Islamic law prohibits mutilation of enemy combatants. Further,

> According to the Qur'ān 2:190: "And fight in the way of God those who fight against you and do not transgress, indeed God does not like transgressors." Several reports attributed to the Prophet in which he specifically mentioned five categories of people who are afforded non-combatant immunity under Islamic law: women, children, the elderly, the clergy, and, significantly, the 'usafā' (slaves or people hired to perform certain services for the enemy on the battlefield, but who take no part in actual hostilities).

This appeal to a law higher than both the sovereign and the collective of sovereigns is it itself as natural and undeniable as the very first ontological moment of recognisable encounter.

By way of conclusion: A Grotian TWAIL manifesto?

One must end a fanciful exhortation to abandon deceptive fantasy, as the one above, with some sobering words of caution. Firstly, the typological analyses of African scholarship in international law by James Gathii and Makau Mutua provide an important cautionary tale as to the pitfalls of uncritical

contributionism.

A most important caution must be related to historical method. Bethwell Ogot provides ample caution of the pitfalls of ignoring proper historical method. I hasten to draw a link with Mahmoud Mamdani's caution in *Citizen and subject*, urging a rejection of 'unilinear evolutionism'. The preposterous idea that human affairs necessarily only progress in one deterministic direction, and particularly located in certain cultures has gained so much traction that its deliberate caution is noteworthy. A sure indicator of error are such evolutionisms as those that declare a triumphant finality to human affairs.

Ontological moments allow us rather, to see human affairs for what they are and particularly, to see law for what it is, a set of norms that oscillate between rules and principles, and do so with imperceptible velocity as to simulate a visual continuity. In Swahili, we call this art of performance trickery, *kiinimacho*. And yes, international law can be both definitive and predictable, even in its malleability.

Finally, it is terrifyingly sobering to consider that Hugo Grotius, historiographically considered, acting out a fundamentally TWAILian charge. Yes, he was not simply a young lawyer writing legal opinions. In fact, his point of view can be better appreciated when one considers that the supremely arrogant Treaty of Tordesillas had purported to share the world's oceans between Spain and Portugal – Prof Anghie during the lecture chuckled at the ridiculous assertion of a certain property right to sea routes, once discovered. I dare say, the same will repeat with space routes in the not too distant future.

His *Commentary on the laws of prize and booty* appears in 1868, easily 160 years after he allegedly penned *De Indis*. Even his *Mare liberum* is published contemporaneously but anonymously. He is most likely an unwitting player in the grand chess game of sovereigns and corporations whose power, wealth and greed exceeds credulity. But from his position, he must have seen himself as asserting the rights of the excluded to participate in a fair game.

Maybe, just maybe, Grotius was just being TWAILian, executing an intellectual act of rebellion, of revolution! 'I will think in my own best interests!' he must have thought.

In this very real possibility, I choose to be Grotian!

Should a Wakandan super corporation in the parallel present appropriate such ideas to assert global dominance? Let me get back to you on this.

---

[1] Bethwell Ogot *History as destiny and history as knowledge: Being reflections on the problems of historicity and historiography* (2005). See also, Humphrey Sipalla, 'Towards an African professional history of international law: The life and work of Keba Mbaye' in *African Approaches to International Law: Exploratory Perspectives* (forthcoming from PULP)

View online: TWAIL: Asserting Pride in Global South Epistemes through Critiquing the Silences of the Eurocentric Fantasies of the History of International Law (Part II)

Provided by Afronomicslaw