Reflections on the 9th Afronomicslaw Academic Forum Guest Lecture Delivered by Harrison Mbori and John Nyanje

By:

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On 24th April 2021, the Afronomicslaw Academic Forum held the 9th lecture of its Guest Lecture Series. Using Professor James Gathii's 2020 Grotius Lecture, 'The Promise of International Law: A Third World View', the lecture aimed to help the attendees understand the logic and contours of Third World Approaches to International Law (TWAIL). The lecture was structured in the format of a discussion between Mr. Harrison Mbori and Mr. John Nyanje. Harrison Mbori is a Research Fellow at the Max Planck Institute Luxembourg for International European and Regulatory Procedural Law, while John Nyanje is an international lawyer trained in Kenya and Switzerland. Mbori in his presentation commented on the salient points from Professor Gathii's lecture. Nyanje, responded to Mbori by raising thought-provoking questions about the TWAIL scholarship.

TWAIL, as a critical scholarly network, can be traced to a group of Harvard Law School graduate students who coined the term in 1997. The group argued that international law needed to be democratized in two ways. Firstly, by contesting the domination of international law by European and North American voices through providing opportunities for the participation of the third world. Secondly, by substantively critiquing mainstream views of international law insofar as they perpetuate the subjugation of the third world (Gathii, 2011, p. 32). As Gathii argues, TWAIL is a decentralized network of academics who share common commitments in their concern about the third world.

Mbori started the presentation with an introductory note on the strands of TWAIL scholars developed by Professor Gathii – contributionists and critical traditionalists. He noted that contributionists mainly assert that Africans have contributed to creating the rules and principles of international law. This strand maintains that international law was created through Europe's interactions with the Global South, rather than being a creation of Europeans, which was afterwards applied in the Global South. They, therefore, disagree with the view that Africa is ahistorical and had no civilization. In other words, it was not incapable of taking part in the creation and development of international law. Contributionists include Taslim Olawale Elias, who has sat in the International Court of Justice from 1967 to 1991 and served as the President of the Court from 1982 to 1985.

On the other hand, critical traditionalists such as Antony Anghie argue that there is a culture of domination within international law that seeks to subjugate non-Western peoples and cultures to European westernization. The doctrine of sovereignty serves as the example for this, having been created during Europe's encounters with the Global South through colonization. According to Anghie, the doctrine was developed to manage these nations with different cultures and histories. For example, the doctrine of sovereignty was used to legitimize colonialism by being accorded to the European States and being denied to non-European States. The European States could then do as they wish with the non-European States, which lacked legal personality and could not, therefore, assert any legal opposition (Makau, 2000, p. 33).

Mbori's first salient point from Professor Gathii's lecture was on the promises of international law to the Third World. These have been global social justice,

equality and equity, emancipation, poverty eradication and lastly, development. Unfortunately, however, international law has barely made progress in actualizing these promises. On global social justice, Mbori noted that international law had failed, especially in achieving socio-economic justice between the Global South and the Global North. The promises of emancipation from colonialism and its continuities, such as poverty, have also not been fulfilled. On development, there have been contestations among scholars and practitioners on whether this has been achieved. These contestations extend, for example, to what indices should be used to measure development. In contrast, some practitioners advance quantitative scales such as Gross Domestic Product (GDP), others like Amartya Sen advance more qualitative indices such as the freedoms one has.

I fully agree with Mbori on the fact that international law has failed to actualize its promises. The promise of equality and equity, for example, is tainted by the fact that international law itself in part perpetuates global inequality (this is asserted by TWAIL scholars such as Professor Mohsen al Attar). International law continues to exacerbate the Global North-South divide through institutions such as the International Monetary Fund and the World Bank, which plunder the resources of the South while enriching the Global North (Atapattu and Gonzalez, 2015, p. 6). Furthermore, while it promises emancipation, the colonial nature of international law cannot be denied. All these factors not only demonstrate that international law is yet to achieve its promises, but it is also difficult not to question its capacity to actualize these promises.

The discussion then moved to the third world, not only as a geographic location but as a political and epistemic location. As a geographic location, it mainly includes former colonies in Africa, Latin America and Asia – the nations which did not take part in the Cold War. It is an epistemic location as it is a place where knowledge is created and distributed. Mbori supported Professor Gathii's claim that this knowledge is available but marginalized. Case law produced in courts such as the East African Court of Justice and the ECOWAS Community Court of Justice, located in Arusha (Tanzania) and Abuja (Nigeria) respectively, for example, is not easily found in mainstream textbooks used to teach international law all around the world.

In my view, this marginalization becomes more concerning when we realize such scholarship and case law is also marginalized in the Third World itself. The international law content taught in African law schools displays this – with the textbooks, and other materials used remaining void of scholarship and case law produced in our own epistemic location. Babatunde Fagbayibo, for example, has demonstrated this problem in the teaching of public international law. He shows how the works of contributionists and critical traditionalists, for example, are severely lacking in many course outlines and how such course outlines remain Eurocentric despite the volume of African scholarship on international law in existence.

In his response, Nyanje critiqued this point about the Global South being a location where international law is produced and distributed. He raised the issue that while Africa contributes to the development of international law through the various courts, the kind of law it develops is not the correct type. Here, he used the example of international environmental law as it has been developed in African national courts, specifically the Kenyan Environment and Land Court. He asserted that the Environment and Land Court does not really develop *African* international environmental law – with most case law and textbooks cited emanating from the West. By *African* international law, Nyanje seemed to mean that law makes reference to African international law textbooks and case law from African regional courts, for example.

The Environment and Land Court also referred to the Kyoto Protocol constantly despite the huge contention against the said Protocol for hindering the development of international law. Nyanje's point was that TWAIL scholars have a duty to check the international law that the Global South produces and see if it is in accordance with the cultural and historical underpinnings of our environment. They should not merely advocate that international law should be produced in the Global South, but they must ensure that it is the 'correct' law.

The importance of checking the international environmental law developed becomes especially pertinent after considering the climate change crisis that specifically faces the Global South and Africa. International environmental law and the Global South have a place in addressing this problem, as Professor Carmen asserted in her lecture titled 'Climate Change, Decolonization and International Law'. The Global South, in my view, can only play its role in

tackling climate change sufficiently if it produces the ‘correct’ international law – which, as Nyanje posits, is *African* international law that suffices to the cultural and historical underpinnings of our environment. Only this will be relevant to our environmental situation as Africa. This is not to say that developing international law is the only way to contribute to the fight against the climate crisis, as it is certain that other mechanisms such as social movements have and continue to play key roles in this. Instead, I merely contend that international environmental law is one way to approach the crisis, and Africa has to produce useful principles, which are in accordance with our situation. To this end, I agree fully with Nyanje that TWAIL must extend their efforts to ensure that they are advocating for the ‘correct’ international law.

The need to check the type of international law produced is also prompted by the subsequent effect of such judgments on academic scholarship and teaching. According to Nyanje, the creation of the ‘incorrect’ type of law has a ripple effect because these judgments are often used and referred to in academic work. This academic work then influences the upcoming academics and students’ view of international law. In my opinion, this aggravates the problem that was highlighted before. International law is taught in a Eurocentric manner as the case law and scholarship produced and used to teach in Third World universities remains Eurocentric and is not tailored to the continent’s circumstances.

The third point discussed by Mbori, which is closely related to the marginalization of certain locales, was the epistemic silencing of the Third World and the response by TWAIL to this issue. He commented that TWAIL promotes the epistemologies of the Global South, firstly by acknowledging that understanding of the world exceeds Western understanding. It also seeks emancipation through the grammars and scripts developed in non-Western locales and by using relevant voices on international law produced outside the Global North. In this manner, I think TWAIL scholars attempt to deal with the marginalization of knowledge produced in certain locations discussed above. I agree with this sentiment, and as evidence, we can look to the Afronomicslaw Academic Forum as one academic space where TWAIL scholars challenge this epistemic silencing of the Third World.

In tackling this point, Nyanje introduced the problem of African States not promoting the international law developed in international courts in Africa, thereby making it impossible to market it in the global sphere. He contended that by actively going against the courts' decisions or failing to comply with the decisions, African States undermine these international courts. The SADC Tribunal's fall, for example, has been associated with member States failing to comply with its decisions. One example is Zimbabwe's conduct in the case of *Mike Campbell v The Republic of Zimbabwe*, which concerned the expropriation of land without compensation (Meredith, 2003). In line with this, Nyanje argued that epistemic locations must therefore be protected and promoted through various mechanisms such as obedience to the rule of law (in this case, adherence to the decisions of the courts) and treaties.

Mbori offering a response to this, argued instead that, in fact, the 'disregard' for the decision in the Mike Campbell case was in line with a TWAIL historical argument. He argued that the SADC Tribunal in the case gave a formalistic ruling (that there cannot be expropriation without due compensation), but in doing so, failed to consider historical and especially colonial injustices associated with the matter. This is following that the acquisition of the land in dispute had been through unequal treaties gained through a colonial system that failed to give the native people a chance to engage in the transfer of their land in a meaningful way. I agree fully with Mbori that the disregard for this decision was thereby justified, as it took into consideration the significant historical account of the problem that would otherwise have been ignored.

However, despite the reasonable TWAIL argument for the disregard of the SADC Tribunal's decision, Nyanje's point remains valid in my view. The SADC scenario offers only one case where a reasonable argument for disregarding the decision was presented. However, a lot more decisions by African regional courts continue to be disregarded or undermined by African States for no reasonable argument other than being unfavorable to these States. The African Court evidences this on Human and Peoples' Rights (AfCHPR), whose decisions continue to be undermined by the African States. In its 2020 report, for example, the AfCHPR noted that of its over 100 cases, only Burkina Faso had complied fully with the court's decisions, while Tanzania had only partially complied with the decisions against it. Other nations such as Rwanda, Benin and Libya had not complied at all. Furthermore, the AfCHPR is bedeviled by the

growing withdrawal of direct access jurisdiction to the court by various States such as Benin, Cote d'Ivoire and Tanzania following decisions which they found unfavorable.

Therefore, there is still a need to promote compliance with decisions produced in these African courts. A more active role must thus be taken if locations such as Arusha (which until recently was the seat of three international courts) are to receive attention as sources of important theoretical innovations and development of international law. This is mainly, as Nyanje posits, through ensuring African States' compliance with decisions made by regional courts.

Like Professor Gathii did in his Grotius Lecture, Mbori also looked at TWAIL and its relationship with feminism as well as the history of racial oppression. He looked into this to illustrate TWAIL as a subaltern epistemic location that seeks to counteract dominant accounts of international law and the epistemic silencing of the Third World. Concerning the history of racial oppression, for example, the representatives in attendance saw how Henry Richardson III's TWAIL scholarship has been instrumental in recovering from the epistemic silencing of African American voices, which was perpetuated through slavery and racialized incarceration (Richardson, 2008).

The role of amateurs in critiquing and questioning international law was also highlighted in the discussion. Drawing from Edward Said, Andrea Bianchi posits that amateurs are intellectuals who are less moved by profit in their field but rather seek to question systems and rules as they are (Bianchi, 2017, p.27 -28). Nyanje advanced that amateurs are better placed to critique international law issues as they pertain to the Third World since, unlike well-established international lawyers, they are not subject to the rules of international law. This, I believe, served as a call to the Afronomicslaw Academic Forum representatives to question international law as they engage with it.

The lecture was a great introduction to Africa's engagement with international law and left many of us with much to think about. It outlined the promises of international law to the third world, analyzed what constitutes the third world and looked at the marginalization of the third world as an epistemic location. The lecture was also fascinating because it provided various ways of moving forward. These include the questioning of international law as amateurs, the need to produce *'African'* international law, and the duty we have in promoting

and protecting our epistemic locations.

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