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Postcolonial Approaches to International Human Rights Law: The TWAIL Case*

Uluslararası İnsan Hakları Hukukuna Postkolonyal Yaklaşımlar: TWAIL Örneği

Elif Çağla Yıldız **

Abstract

In the first two decades of the 2000s, TWAIL (Third World Approaches to International Law) attracted considerable attention in academia with its critical approach to international law. Although TWAIL is characterized as a heterogeneous construct due to the various orientations, a postcolonial approach could be considered as a common ground that promotes cooperation across its members. TWAIL scholars questioned the neutrality and universality of international law by emphasizing its association with colonialism. Certain members of TWAIL also investigated the international human rights law based on postcolonial perspectives, stressing that it universalized particular European constructs through certain norms based on European experiences and history. However, it should be noted that some TWAILers did not limit their analysis to deconstruction and, due to their postcolonial perspectives, they also adopted a reconstructionist strategy. In other words, in addition to the norms of human rights law that prioritize and universalize the European experience, the necessity of a human rights corpus free from Eurocentric dimensions is also addressed in TWAIL literature. Furthermore, the postcolonial emancipatory agenda in favour of subalterns seems to have led certain TWAIL members to consider rights as a language of emancipation and a set of limits imposed on state authority. The present article argues that the postcolonial approach of TWAIL members went beyond the deconstructive criticism and proposed a detailed analysis that investigated human rights law based on various perspectives. From this point of view, it aims to reveal the postcolonial character of the mentioned approach, which combines a critical stance with a reconstructive vision.

Keywords

Postcolonialism, International Human Rights Law, Third world, Universalism, Eurocentrism

Öz

2000'li yılların ilk yirmi yılında TWAIL (Uluslararası Hukuka Üçüncü Dünya Yaklaşımları) uluslararası hukuka eleştirel yaklaşımıyla akademik dünyada önemli ölçüde ilgi toplamıştır. TWAIL her ne kadar üyelerinin çeşitli eğilimleri sebebiyle heterojen bir oluşum olarak karakterize edilse de postkolonyal bir yaklaşımı üyelerini birleştiren ortak zemin olarak düşünmek mümkündür. TWAIL üyeleri kolonyalizmle ilişkisini vurgulayarak uluslararası hukukun tarafsızlığını ve evrenselliğini sorgulamışlardır. Kimi TWAIL üyeleri insan hakları hukukunu da postkolonyal perspektifler temelinde incelemiş, uluslararası insan hakları hukukunun Avrupa deneyimi ve tarihine dayalı belli normlar yoluyla Avrupa yapılarını evrenselleştirdiğini vurgulamışlardır. Öte yandan, bazı TWAIL üyelerinin analizlerini yapıbozumla sınırlamadığını ve postkolonyal perspektifleri gereği yeniden inşacı bir strateji de benimsediklerini belirtmek gerekir. Diğer bir deyişle, Avrupa deneyimini üstün kılan ve evrenselleştiren normların varlığının yanı sıra Avrupamerkezci taraflarından arınmış bir insan hakları korpusunun gerekliliğine de TWAIL yazınında işaret edilmektedir. Dahası, madunlar lehine özgürleştirici bir gündem kimi TWAIL üyelerini hakları bir özgürleşme dili ve devlet iktidarını sınırlayan bir mekanizma olarak düşünmeye sevk etmiş görünmektedir. Bu makale TWAIL üyelerinin insan hakları yaklaşımının yapıbozumcu eleştirinin ötesine geçerek hakları çeşitli perspektiflerle değerlendiren detaylı bir analiz ortaya koyduğunu ileri sürmektedir. Buradan hareketle, belirtilen yaklaşımın eleştirel bir tutumu yeniden inşacı bir vizyonla birleştiren postkolonyal karakterinin açığa çıkarılması hedeflenmektedir.

Anahtar Kelimeler

Postkolonyalizm, Uluslararası İnsan Hakları Hukuku, Üçüncü Dünya, Evrenselcilik, Avrupamerkezcilik

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Introduction

Since the development of the postcolonial theory, the relationship between knowledge and colonialism has been critically examined, and the neutrality of various fields of knowledge has been questioned. Employing the poststructuralist methodology, postcolonial theorists scrutinized the correlation between colonial expansion and the production of knowledge in numerous fields. The deployment of poststructuralist methodology was considered by some as a significant attribute of postcolonialism that distinguishes it from other anti-colonial critiques.¹ The colonial discourse analysis and deconstruction were the distinctive features of the postcolonial theory. Thus, several fields of knowledge, including international law, have been subjected to colonial discourse analysis and deconstruction.

On the other hand, the postcolonial approach is not always limited to deconstruction. As Pluckrose and Lindsay argued, the postcolonial theory is not only interested in deconstruction but also reconstruction.² As will be demonstrated in the current article, in addition to exposing the Eurocentric knowledge production that dominates both international and human rights law, TWAIL members also advocated the reconstruction of an inclusive corpus that would achieve universality due to the contributions of the excluded or marginalized Third World perspectives. Furthermore, the political agenda of the postcolonial theory distinguished it from postmodernism,³ and demonstrated its impact on the approaches of several TWAIL members by leading them to analyse rights as a language of emancipation. In the present article, based on the above-mentioned discussions, it is argued that the TWAIL approach to human rights law could not be reduced to a simple rejection. The current paper aimed to demonstrate that a postcolonial approach to human rights law could be more complex than expected based on the review of the works published by TWAIL scholars, who analysed rights based on universality, delimitation of state authority and emancipation rather than rejecting them as categories alien to the Third World or a tool of domination.

I. TWAIL and the Postcolonial Critique of International Law

TWAIL (Third World Approaches to International Law), established in 1996 by the initiative of a group of academics and graduate researchers at Harvard Law School, aimed to introduce Third World approaches to international law.⁴ Although it was established by a limited number of individuals, TWAIL scholars emphasized that the

¹ See Bart Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (Verso 1997) 1, 16.

² Helen Pluckrose and James Lindsay, *Cynical Theories: How Activist Scholarship Made Everything about Race, Gender, and Identity—and Why This Harms Everybody* (Pitchstone Publishing 2020) 72.

³ *ibid* 71.

⁴ James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography' (2011) (3)1 Trade, Law and Development 26, 28.

project was a loose network of academicians open to new participants.⁵ This polycentric network also had a heterogeneous character. As stated by James T. Gathii, a member of the group, TWAIL was a heterogeneous discipline that had internal debates.⁶ Various trends and intellectual sources of inspiration were experienced in TWAIL.⁷ Despite the various trends such as the feminist theory, postmodernism, Marxism, or the critical race theory in TWAIL, TWAILers expressed a common commitment to the intellectual and practical struggle to expose and reduce the features of the international legal system that helped create or maintain an unjust global order, and reform the international law.⁸ As argued by Antony Anghie, the main objective of TWAIL was to realize the promises of international law by transforming it into a system based on justice, not power.⁹

It is possible to argue that the power that Anghie referred to was principally colonial. Based on their postcolonial perspective, TWAILers considered the tie between international law and colonialism as a relationship between knowledge and power. They questioned the legitimacy of modern international law, arguing that it has been associated with colonialism since its birth. Okafor claimed that international law, which was disseminated by colonialism, was considered by the TWAILers as a power instrument rather than a neutral discipline.¹⁰ According to TWAILers, colonialism, imperialism and their forms of knowledge played a role in the development of international law as a discipline.¹¹ By scrutinizing the hierarchy-based knowledge production in international law,¹² TWAIL scholars argued that colonial expansion was justified by the norms and the institutions that legitimized European superiority. Deconstruction of these international legal norms and institutions that legitimized colonial expansion became the primary goal of TWAIL scholars.¹³

The relationship between colonialism and international law has been one of the major themes in TWAIL works, along with its historical and contemporary aspects. Anghie's work is a significant example of the alternative historiography of international law that sought to expose the historical context of this relationship. Anghie addressed the colonial origins of international law by emphasizing the connections between the development of international legal doctrines and the colonial encounters observed in

5 BS Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3(1) *Trade Law and Development* 14 3, 18.

6 Gathii (n 5) 34.

7 Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 266.

8 OC Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective' (2005) 43 (1/2) *Osgoode Hall Law Journal* 171, 176-177.

9 Makau Mutua and Antony Anghie, 'What is TWAIL?' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31, 40.

10 See Okafor (n 9) 177.

11 Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 (1) *Trade, Law and Development* 103, 117.

12 Gathii (n 5) 35.

13 Mutua and Anghie (n 10) 31.

the 15th and 16th centuries. Anghie traced the production of knowledge that justified the colonial domination to the works of the Spanish jurist and theologian Francisco de Vitoria.¹⁴ According to Anghie, by employing “*the dynamic of difference*” as the foundation and designating the European countries as sovereign, Vitoria laid the foundation of the sovereignty doctrine. In addition to tracing the emergence of colonial international law back to Vitoria’s theses,¹⁵ Anghie exposed the colonial dimensions of the 19th century legal positivism which refused the legal personality of “*uncivilized*” societies that did not meet the Eurocentric “*sovereignty*” criterion. In the same vein, the dichotomy of developed/undeveloped countries that underlays the 20th-century Mandate System was also addressed.¹⁶

The persistent impact of colonialism on various disciplines in the aftermath of decolonization has been one of the main concerns in postcolonial studies. In the same vein, TWAIL members emphasized the persistence of the colonial mentality in international law. For instance, as in the NIEO (The New International Economic Order) case, the neglect of the attempts of newly independent states for the restructuration of international law was often indicated in TWAIL works.¹⁷ Post-Cold War international law also provoked TWAIL criticism due to its role in the neoliberal transformation of Third World countries and the violation of their sovereignty with the excuse of “*democratic interventions*”. Emphasizing the relationship between international law and the dissemination of capitalism after the Cold War, Chimni addressed the imposition of a global legal order that facilitated the globalization of capitalism. Thus, Chimni highlighted the role of multilateral, regional and bilateral treaties that narrowed the scope of national laws in the Third World and ensured the free movement of goods, capital and services.¹⁸ Similarly, Anghie emphasized the imposition of neoliberalism by international institutions to underline the persistence of colonial relations in contemporary international law. Thus, one of the main problems Anghie focused on was international financial institutions’ interventions in the political and social structure in Third World countries based on the “*good governance*” rhetoric.¹⁹

The transformation of the Third World through invasions was also addressed in the TWAIL critique of international law. The imperialist character of various justification attempts such as “*war on terror*” or “*new terrorist threat*” was exposed by TWAILers. Anghie addressed the post-9/11 US efforts for the transformation of

14 See Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27 (5) Third World Quarterly 739, 742.

15 Antony Anghie, ‘Francisco de Vitoria and the Colonial Origins of International Law’ in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial*, (University of Michigan Press 1999) 90-91.

16 See Anghie, ‘The Evolution’ (n 15) 745, 747.

17 *ibid* 748-749.

18 See BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017) 507-509.

19 See Anghie, ‘The Evolution’ (n 15) 749.

the Middle Eastern countries with the “*war on terror*” rhetoric. Arguments for an imperialistic reconstruction of international law based on the “*new*” threats to the international community were also analysed as examples of new colonial rhetoric.²⁰ The justification of the invasion of Third World countries with the excuse of a “*new era*” after September 11²¹ was among the issues that TWAIL scholars indicated to demonstrate the persistence of the imperialist rhetoric in international law.

On the other hand, contrary to the first impression of all these briefly mentioned criticisms could evoke, TWAILers did not consider the rejection of international law as a solution. Consistent with their postcolonial tendencies, TWAILers emphasized that they were not only interested in the deconstruction of international law but also its reconstruction.²² The need for the elimination of colonial dimensions of international law and its more susceptible reconstruction for the concerns of Third World peoples²³ was emphasized by TWAILers. Thus, they proposed several reforms.²⁴ TWAIL’s commitment to the reformation of international law despite the focus on its criticism could be considered as an indicator of an equally complex approach to human rights law. The detailed works of TWAIL scholars who investigated human rights law based on multiple perspectives indicate the accuracy of this consideration.

II. TWAIL and International Human Rights Law

On human rights, the TWAIL scholars presented a complex picture. First, it should be noted that, unlike international law, human rights were not directly associated with colonialism by certain TWAILers. Anghie considered human rights as the only area of international law explicitly dedicated to the protection and furtherance of human dignity,²⁵ while Mutua indicated the inaccuracy of equating colonialism with human rights. According to Mutua, although both phenomena seek to transform the non-Western, human rights were inspired by noble ideals, while colonialism was driven by ignoble motives.²⁶ Despite TWAIL’s criticism of the prioritization of specific West-oriented rights and universalization of particular Western forms such as liberal democracy or free market, human rights law was not considered by TWAILers entirely a Western product dedicated to the transformation of the Third World. Although the justification that “*first*” generation rights allowed invasions or imposition of neoliberal policies was criticized by TWAIL scholars, most could not ignore the limits imposed

20 *ibid* 750.

21 See Okafor (n 9) 172, 180.

22 See Gathii (n 5) 39.

23 *ibid* 39.

24 For some suggestions see BS Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8(1) *International Community Law Review* 3, 23-25.

25 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge University Press 2005) 256.

26 Makau Mutua, ‘Savages, Victims, and Saviours: The Metaphor of Human Rights’ (2001) 42(1) *Harvard International Law Journal* 201, 236.

by human rights to the state power, the role they partially played in emancipatory struggles and the existence of the rights with Third World origins in the corpus.

A. Dominant and Marginal Perspectives in International Human Rights Law

One of the frequent criticisms of human rights by TWAIL scholars included the primacy of the Western perspectives in the human rights corpus. TWAIL scholars traced this superiority back to the development of international human rights law. Mutua emphasized the dominance of Western perspectives in the formation of international human rights law. According to Mutua, the motivation behind the development of the international human rights law was primarily the protection of civil and political rights violated during the holocaust, in other words, holding member states to certain standards in the treatment of citizens.²⁷ Reminding the colonial status of most Asian and African countries in 1948 and thereby the exclusion of non-Western perspectives in the establishment of the Universal Declaration of Human Rights, Mutua highlighted the dominance of Western states in the formulation and codification of human rights norms.²⁸

The superiority of civil and political rights, which are indispensable in the Western liberal tradition, was the main target of the criticism of the universality and neutrality of the current human rights corpus. Mutua viewed the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights as attempts to universalize civil and political rights, which are central to the Western liberal democracy. Mutua's assertion was based on the fact that the rights promoted in these documents such as the right to political participation, assembly, association, freedom of expression and the right of due process required a Western liberal democracy built on the separation of powers, regular elections and a multi-party system. According to Mutua, the employment of these civil and political rights by the Western human rights movement as the criteria to differentiate the countries without a liberal democracy led to the stigmatization and marginalization of non-Western political cultures as undemocratic political traditions.²⁹

The European origins of civil and political rights were also addressed by Dianne Otto. Similarly, Otto questioned the universality and neutrality claims of human rights law by emphasizing the association between the development of a particular set of rights and the political and economic development in the post-World War II era.³⁰ Otto considered the Universal Declaration of Human Rights, that was based on civil

²⁷ *ibid* 211-212.

²⁸ Makau Mutua, *Human Rights: A Political & Cultural Critique*, Philadelphia (University of Pennsylvania Press 2002) 46.

²⁹ Mutua, 'Savages, Victims and Saviors' (n 27) 222-223.

³⁰ Dianne Otto, 'Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law' (1997) 18 *Australian Year Book of International Law* 1, 1-2.

and political rights, as an outcome of the post-war world dominated by the West. According to Otto, the economic social and cultural rights included in articles 22 - 27 due to the influence of Latin American and Eastern Bloc nations could not liberate the declaration from Western dominance since civil and political rights were prioritized. The main indicator of this priority was the numerical majority and the position of civil and political rights in the declaration in articles 3 - 21.³¹ However, the number and the position of the articles on civil and political rights in the Universal Declaration of Human Rights was not the only evidence of the dominance of Western perspectives. According to Otto, the development of a separate covenant on civil and political rights based on the contention that they were “*different*” from social, economic and cultural rights due to their negative or absolute character was a predominantly political distinction. Otto considered the codification of two sets of rights in separate covenants as a consequence of the prioritization of capitalist/liberal version of human rights as “*first*” generation rights.³² Otto was not the only TWAIL scholar that read two separate conventions as an indicator of hierarchy. Mutua also emphasized the marginality of the economic, social and cultural rights by underlining their relegation to “*other*” human rights instruments.³³

B.S Chimni also questioned the neutrality and universality of civil and political rights-dominated human rights corpus. Chimni underlined the globalization of the Western human rights narrative that prioritized civil and political liberties, facilitating the universalization of neo-liberalism.³⁴ Indicating the connection between civil and political rights and Western norms, Chimni particularly emphasized property rights. According to Chimni, the right to property, which was at the centre of the human rights discourse, played a key role in the neoliberal transformation of the Third World since its internationalization.³⁵

The role that civil and political rights played in the universalization of Western forms prompted certain TWAIL scholars to address the relationship between these rights and the “*civilizing mission*”. According to Chimni, civil and political rights-dominated human rights discourse justified the interventions in Third World countries as “*civilizing mission*” justified colonialism.³⁶ In the same vein, Mutua underlined the similarities between the justification of the dissemination of Western norms by civil and political rights and colonialism by civilizing mission. According to Mutua, similar to the old version, the current civil and political rights-oriented civilizing missions were

31 *ibid* 13-14.

32 *ibid* 19-20.

33 Mutua, *Human Rights* (n 29) 47.

34 Chimni, ‘A Manifesto’ (n 25) 17.

35 *ibid* 11.

36 *ibid* 16-17.

based on the construction of savages-victim-saviour metaphors.³⁷ The UN, Western states, international non-governmental organizations and Western charities, which play the role of saviour in this construct, promise the Third World peoples' freedom from the tyranny of their states and cultures and a better society based on particular values. The saviours fulfill their promises by transforming or "*civilizing*" non-liberal, non-Western states that correspond to the metaphor of savages by ensuring their adherence to the human rights norms.³⁸ According to Mutua, the savages-victim-saviour construct that provides a foundation for international human rights law focuses on civil and political rights. The construct plays a critical role in the reconstruction of non-liberal countries that violate civil and political rights since the violation of these rights often leads to reports that mostly suggest external intervention.³⁹

Although the human rights corpus has been criticized for its preference of Western norms, it was not considered exclusively a Western product by TWAIL scholars. The contributions of non-Western perspectives to international human rights law were also addressed by several members. According to Mutua, although the international human rights law and the human rights movement have focused on Eurocentric civil and political rights, "*second*" and "*third*" generation rights attempted to make a way into the main discourse of human rights.⁴⁰ In the same vein, Chimni considered certain economic and social rights as a contribution of the non-Western world to human rights. According to Chimni, in the 1920s, the Soviet Union expanded the realm of rights due to the introduction of the right to work, health insurance, free education, paid maternity leave, and disability benefits.⁴¹

However, the origin of economic and social rights was not an uncontroversial issue among the TWAIL scholars. Despite seeing the classification of "*second*" generation rights as an indicator of marginalization, Otto did not attribute economic and social rights to the non-Western World. According to Otto, economic and social rights originated in socialism, which was also a product of Europe. As products of socialist Europe, economic and social rights were downgraded, contrasting the capitalist/liberal human rights norms, which were prioritized with a label of "*first*" generation.⁴² Otto considered the development of solidarity rights as the introduction of the non-Western perspectives into the human rights discourse. According to Otto, solidarity rights made inroads into the human rights corpus, which was under the dominance of two main European visions of the Cold War era as a contribution of the newly independent decolonized states. The efforts of these countries led to the inclusion of the right to

37 See Mutua, 'Savages, Victims, and Saviors' (n 27) 234-235.

38 *ibid* 202-204.

39 *ibid* 228-230.

40 Mutua, *Human Rights* (n 29) 46.

41 See Chimni, *International Law* (n 19) 539.

42 See Otto (n 31) 14, 20.

self-determination and the right to sovereignty over natural wealth and resources in human rights instruments. Despite criticizing the classification of these rights under the category of “*third*” generation, Otto considered their inclusion in human rights instruments important since it represented “*Third World ‘non-aligned’ movement’s exploration of the potential of human rights discourse to address their concerns*”.⁴³

Balakrishnan Rajagopal was another TWAIL scholar who associated solidarity rights with the Third World. Rajagopal associated the articulation of the right to development and the right to solidarity with the human rights approach of the Third World intellectuals to challenge the Western political and economic hegemony after the failure of NIEO proposals. According to Rajagopal, the Third World entered the intellectual arena of human rights and began to present its demands in terms of rights due to the failure of the demands for redistribution.⁴⁴ Although Rajagopal considered the inclusion of collective rights -such as the rights of peoples to self-determination and sovereignty over natural wealth and resources- in the Declaration on the Right to Development as a ground-breaking step in the individual-oriented human rights rhetoric, he also emphasized the marginalization of “*third*” generation rights, of which status and universality were rejected by developed countries and Western academics. However, the significance of solidarity rights was still stressed by Rajagopal since these rights played a critical role in the Third World grassroots movements and paved the way for the communities to use the language of human rights to resist violence. Thus, the right to sovereignty over natural wealth and resources was underlined as an example of the empowerment of local communities in their resistance against the destruction of natural resources.⁴⁵

According to TWAIL scholars, the contributions of the Third World to international human rights law were not limited to solidarity rights. One of the feminist members of the movement, Mosope Fagbongbe, addressed the significant roles played by the Third World not only in the development of solidarity rights but also the international protective measures against violence against women.⁴⁶ Similarly, Otto considered the increase in the number of specialized human rights instruments along with the development of “*fourth*” generation rights the results of the contribution of the Third World to the rights discourse. According to Otto, human rights law exhibited significant dynamism in responding to diversity issues due to the development of new rights thanks to the newly independent members of the UN and various local or transnational social movements for the rights of women, indigenous peoples and cultural and racial rights.⁴⁷

43 *ibid* 21.

44 See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) 207-209.

45 *ibid* 220-221.

46 See Mosope Fagbongbe, ‘The Future of Women’s Rights from a TWAIL Perspective’ (2008) 10 (4) *International Community Law Review* 401, 404.

47 Otto (n 31) 15-16.

Thus, TWAIL scholars who studied human rights law did not consider the corpus exclusively a Western product. On the other hand, although the presence of non-Western perspectives in the human rights corpus was addressed by TWAIL scholars, the subjugation of these perspectives was considered a problem. Furthermore, according to several TWAIL members, the marginalized non-Western perspectives were not limited to “third” and “fourth” generation rights or collective rights. Certain scholars also criticized the subjugation of the concept of duty, which was important in certain non-Western social traditions. Rajagopal emphasized the adoption of a narrow body of individual rights that excluded duties by the West.⁴⁸ Disqualification of the duties was attributed to the predominance of the autonomous individual as the main subject of the human rights law by certain TWAILers. Otto emphasized the failure of the autonomous and self-interested European individual -the principal subject of the human rights law since the development of the Universal Declaration of Human Rights- to represent every context. According to Otto, this autonomous subject with pre-emptive rights excluded the individual model observed in collectivist traditions such as indigenous African societies where the individual builds identity through reciprocal social and legal obligations.⁴⁹ Mutua also addressed several contexts in Africa where the individual is not characterized as an entity isolated from the society but as an integral member of a group motivated by solidarity. According to Mutua, the communitarian traditions where individuals are bearers of both rights and duties unlike their European counterparts and not in constant struggle with the society for the restoration of their rights were marginalized in international human rights law.⁵⁰ Mutua regarded the brief and general articulation of the duties in Article 29 of the Universal Declaration of Human Rights as one of the main indicators of marginalization of certain social traditions that were based on both rights and duties.⁵¹ Otto also considered this brief reference to duties as the subjugation of non-individualist traditions. According to Otto, the dominant paradigm that prioritized individual liberty over collective interests and regarded modern democratic society as a contractual association between individuals and the state excluded traditions that were based on principles of solidarity and interdependence and organized based on communal obligations such as *dharma* or *mitzvot*.⁵²

TWAIL scholars, who studied human rights, not just criticized the marginality of non-Western perspectives but also called for the reconstruction of the human rights corpus. The possibility to achieve a truly universal human rights corpus that equally includes the contributions of each culture was argued by several TWAILers. Mutua

48 Rajagopal (n 45) 209.

49 See Otto (n 31) 11-12.

50 See Mutua, *Human Rights* (n 29) 83.

51 *ibid* 85.

52 See Otto (n 31) 13.

suggested the inclusion of each culture in the construct of human rights law instead of the approach that accepts a single cultural expression or historical experience as human rights.⁵³ His proposals for reconstruction included the harmonization of duties and rights, a balance between individual and group rights, and giving more weight to social and economic rights.⁵⁴ Although Mutua accepted that the current corpus essentially includes many universal norms and ideals, he also emphasized that the dominance of Western liberalism was an obstacle to the universality of the human rights law. According to Mutua, the current picture does not represent the whole, and the gap should be filled by non-Western traditions to achieve a truly universal human rights corpus. During the process of reconstruction, all cultures and traditions should negotiate and reach a consensus on the constitution of human rights and even after the consensus, “*the doors must remain open for further inquiry, reformulation, and revision*”.⁵⁵ Otto also stressed the possibility of achieving cross-cultural values and suggested imagining the human rights law as an evolving dialogue between different traditions and perspectives. According to Otto, to explore cross-cultural values, it is necessary to engage in a critical dialogue that would expose the political character of the rhetoric of “*difference*” and to “*learn to speak in multiplicities rather than dualities*”.⁵⁶ Chimni was another TWAIL scholar that stressed the need to achieve a globally valid notion of human rights. Thus, he suggested the supplementation and modification of the human rights instruments dominated by Western liberalism with transnational and trans civilizational perspectives.⁵⁷

B. Rights as the Limits of State Power

The works of certain TWAIL scholars demonstrated the profound relationship between the Third World and human rights that goes beyond the production of norms. The oppression of Third World subalterns by the ruling elite in post-colonial nation-states was one of the issues that certain TWAIL members addressed in their works on human rights. Certain works emphasized the limit that the human rights law set on state power. Anghie addressed the revolutionary character of the human rights law that delimited sovereigns in their territory and emphasized the fact that post-colonial Third World states never had absolute power in their countries due to the simultaneity of decolonization and the development of the international human rights law.⁵⁸ According to Anghie, human rights fulfilled the critical function of imposing limits on Third World states that oppressed indigenous people, women, the poor and minorities. Anghie emphasized the significance of the international human rights law

53 Mutua, *Human Rights* (n 29) 74.

54 *ibid* 6-7.

55 *ibid* 73-74.

56 Otto, (n 31) 10-11, 35.

57 Chimni, *International Law* (n 19) 542.

58 Anghie, *Imperialism* (n 26) 254.

for Third World peoples since it offers a mechanism for claiming protection from state violence.⁵⁹ Another TWAIL scholar, who highlighted the limits set by the human rights law in favour of Third World subalterns, was Chimni. According to Chimni, rights play a critical role in protecting poor and marginalized groups against destructive state and international institution policies. Thus, Chimni even considered civil and political rights, which were often criticized by the postcolonial scholars for being Eurocentric, as beneficial for the struggle against the detrimental policies of states and international institutions.⁶⁰ Although he reminded us of the limited transformative potential of rights in capitalist societies, Chimni considered rights beneficial for the improvement of the welfare of both working classes and subaltern groups. By citing Karl Marx, Chimni stated that freedom of speech or freedom of the press played a protective role against the attempts of capitalist states to regulate and discipline the lives of ordinary citizens. The protective role of rights against state authority was not only associated with the capitalist societies. Chimni also emphasized the significance of rights in socialism since they secure equal participation or delimit paternalism, state policies that aim at the maximization of social welfare and the employment of coercion in the provision of public goods.⁶¹

C. Emancipatory/Transformative Potential of Rights

Human rights are also analysed by certain TWAIL scholars based on their emancipatory/transformative potential. It was accepted by various TWAIL scholars that rights have transformative potential, albeit a limited one. For instance, Mutua recalled the employment of a rights strategy by the African National Congress to mobilize anti-apartheid resistance and addressed the necessity of resorting to rights in the struggle against oppression.⁶² However, according to Mutua, the designation of human rights as the only instrument for transformation during the construction of post-apartheid South Africa failed to eliminate all legacies of the apartheid. In this regard, Mutua addressed the employment of state institutions for preferential economic, social and political treatment to whites since 1948 as one of the deep-rooted injustices created by the old regime. Another example was the policy of Black land dispossession, resulting in the possession of 87 percent of the lands by the whites.⁶³ According to Mutua, the adoption of a rights-based strategy as the primary transformation instrument after the apartheid led to the recognition of property rights, preserving the status quo where a large part of the land belonged to the white minority. Despite acknowledging the accuracy of the deployment of rights idiom in the struggle against apartheid, Mutua

⁵⁹ Anghie, 'The Evolution' (n 15) 749.

⁶⁰ See Chimni, 'A Manifesto' (n 25) 17, 24.

⁶¹ See Chimni, *International Law* (n 19) 537-539.

⁶² See Mutua, *Human Rights* (n 29) 152.

⁶³ *ibid* 130-132.

considered granting equal rights to everyone without employing other transformative instruments as inadequate for the elimination of social injustices since it leads to the preservation of privileges. Land reform, the reorganization of the bureaucracy and the economy were some of the examples of different transformation mechanisms that could be employed along with rights according to Mutua. For Mutua, while the idiom of rights was an indispensable strategy in mobilizing resistance, it should be considered as only one of several transformation tools.⁶⁴

Another TWAIL scholar who emphasized the necessity of the employment of human rights in the struggle against oppression was Vasuki Nesiah. According to Nesiah, the current deployment of rights by the states or foreign policy initiatives to justify interventions or “*good governance*” was not a valid reason to reject human rights. Addressing the fact that rights also played a critical role in struggles for social justice and civil liberties, Nesiah highlighted the existence of a counter-tradition in human rights. Thus, Nesiah considered human rights as a terrain where both the proponents and opponents of globalization existed and therefore, an area of conflicting visions. Nesiah reminded us of the deployment of human rights in several significant social movements such as abolitionist struggles, civil rights movements, anti-colonial movements, late 18th century revolutions, or labour struggles. According to Nesiah, although human rights were invoked by powerful actors in international politics, allowing these actors to define human rights was not an option. Nesiah emphasized the extraordinary power of human rights and the significance of the recognition of demands for justice as “*human rights*” since it has important consequences for the distribution of resources and meanings.⁶⁵

Rajagopal also addressed the limits of rights as a language of emancipation, yet indicated the difficulty of denying the value of rights “*as a tool of strategy and mobilization for oppressed groups.*” According to Rajagopal, it was hard to designate human rights as the sole language of emancipation for the oppressed groups in the Third World for several reasons. Rajagopal considered human rights as a partially strategic instrument due to its statist orientation, deep connection with development discourse,⁶⁶ or inclusion of certain norms inherited from colonialism such as article 4 in the Covenant on Civil and Political Rights on the state of emergency.⁶⁷ On the other hand, despite underlining the risk of designating human rights as the sole language of resistance, Rajagopal emphasized the necessity of using the language of rights strategically in certain social struggles.⁶⁸

64 *ibid* 151-152.

65 See Vasuki Nesiah, ‘The Rise and the Fall of Human Rights Empire’ (Foreign Policy in Focus, June 28 2012) https://fpif.org/the_rise_and_fall_of_the_human_rights_empire/ Date Accessed 10 October 2021.

66 See Rajagopal (n 45) 232.

67 For details, see *ibid* 176-186.

68 *ibid* 172-173.

The transformative potential of human rights was also analysed by Otto. Otto exhibited a more optimistic approach to the emancipatory potential of human rights despite criticizing the marginalization of non-Western perspectives in international human rights law. From a Foucauldian perspective, Otto reminded us that, although the discourse of rights masked domination, it also provided “*a language and a legal framework of challenging dominating power.*” Otto indicated the possibility of influencing the dominant global rights discourse with local perspectives, mentioning the efforts of indigenous peoples in the negotiation of the Declaration on the Rights of Indigenous Peoples draft. As expected, Otto criticized the classification of these rights as the “*fourth*” generation human rights. Nevertheless, according to Otto, the recognition of these rights also represented a departure from the assimilationist trend and led to dialogue opportunities between indigenous peoples and international human rights discourse.⁶⁹ After emphasizing the necessity to understand the hegemony of global knowledge to realize the potential of local knowledge to resist and reshape it, Otto asserted that the law was not a unitary discourse and it intersected with other discourses in multiple ways at local or global levels, leading to the emergence of multiple areas of power and resistance. According to Otto, several resistance opportunities could be generated by focusing on the interaction between various discourses and practices. And despite its disciplinary aspects, the human rights law also creates and determines several resistance opportunities.⁷⁰

As it was demonstrated in this section, TWAIL scholars, who analyzed the transformative potential of the human rights law, agreed on its capacity to introduce certain changes for oppressed groups in the Third World. The role that human rights played both in the historical and contemporary struggles of the subalterns in the Third World was emphasized by various TWAIL scholars. However, as it was demonstrated, human rights were considered as one of several resistance instruments rather than an instrument idealized as the sole language of emancipation by TWAILers. While rights were generally considered a significant strategy to mobilize resistance, certain TWAIL members stressed the necessity to resort to human rights along with various transformation mechanisms, while others addressed certain features of the human rights law that delimit its emancipatory potential by justifying dominance. Certain members tended to focus on the capacities of the rights, rather than emphasizing the limits of their potential. Nevertheless, whether they focused on limits or capacities of human rights, all members who scrutinized the transformative/emancipatory potential of rights agreed on their consideration as one of the various tools of resistance.

⁶⁹ See Otto (n 31) 23-24.

⁷⁰ *ibid* 34-35.

Conclusion

In addition to the analysis of the international law based on its relationship with colonialism, certain TWAIL scholars also scrutinized the human rights law from the same postcolonial perspective and questioned its neutrality and universality. Thus, the priority of certain human rights norms with Western origins and the Western forms that they aimed to universalize were exposed by the TWAIL members. On the other hand, as the current article aimed to demonstrate, TWAILers did not consider the human rights law exclusively as a body of Western norms or an instrument of domination. In their discussion on the human rights law, TWAIL scholars did not neglect the existence of non-European perspectives in the corpus, while exposing the superiority of the rights with European origins. In addition to emphasizing non-Western perspectives, TWAIL scholars also underlined the role human rights played in emancipation struggles and the limits they imposed on state authority. Consistent with the postcolonial agenda that aimed at the emancipation of Third World subalterns, certain TWAIL scholars stressed the critical role human rights played in delimiting state power and their significance as a language of emancipation, albeit a limited one.

Apart from their criticism, TWAIL scholars also introduced several ideas for the reconstruction of the human rights corpus. These suggestions deepened the complex relationship between the Third World and human rights. Thus, the intellectual and practical relationship between the Third World and the human rights law went beyond the introduction of certain human rights norms or the employment of rights as a language of resistance. The reconstructive suggestions that were introduced aimed to realize the universality that the current corpus lacks by constructing a body of norms that would include the contribution of all cultures without a hierarchy. Several strategies were also articulated by certain TWAIL members to improve the transformative or emancipatory potential of human rights. The recommendations that accompanied criticism deepened the TWAIL scholars' discussion on human rights. In addition to the recommendations that aimed at the universality of the human rights corpus and the improvement of the emancipatory potential of rights, certain TWAIL scholars demonstrated a will to make significant contributions to the introduction of dynamism to the human rights law. Mutua, for example, emphasized the constant development of new conditions of oppression and the resulting constant need for normative standards. Thus, challenges such as the war on terror as a pretext for human rights violations were considered by Mutua as issues that should be resolved with new normative frameworks that would provide civil protection from terrorist attacks without human rights violations. Furthermore, Mutua stressed the necessity of a normative framework for LGBTQ rights in international human rights law.⁷¹ Fagbongbe's criticism about the indifference of international human rights law to the specific problems of the Third

71 See Makau Mutua, 'Standard Setting in Human Rights: Critique and Prognosis' (2007) 29(3) Human Rights Quarterly 547, 620, 627.

World women⁷² also implied various areas without normative standards. The works of TWAIL scholars indicated the dynamism and comprehensiveness that the human rights law could acquire through postcolonial Third World perspectives. TWAIL scholars' discussion on human rights demonstrated the inaccuracy of the association of the postcolonial perspectives with an absolute rejection of universals. As could be observed in the TWAIL example, a postcolonial human rights approach not only exposes the priority of Western norms; and thus, the partiality of the human rights law, but also addresses the presence of, although subjugated, non-Western perspectives and the need for a reconstructed corpus where all cultures are equally represented. Furthermore, the benefits that rights idiom could provide for the subalterns in resistance are also central to postcolonial approaches, as observed in the works of several TWAIL scholars. The works of TWAIL members that addressed what the Third World could acquire or acquired from human rights and what human rights could acquire or acquired from the Third World perspectives indicated the diversity and dynamism that postcolonial approaches could offer to the human rights law in addition to demonstrating the inaccuracy of the association of postcolonial Third World approaches with an absolute opposition to human rights.

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72 See Fagbongbe (n 47) 403.

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