

NEWNESS, IMPERIALISM, AND INTERNATIONAL LEGAL REFORM IN OUR TIME: A TWAIL PERSPECTIVE[©]

BY OBIORA CHINEDU OKAFOR*

We can only speak to these critical events ... as they unfold before our own eyes, from our own unhappy situatedness; the Clio's couch, the disengagement that only distance may bring, is not for us the gift of time. We have to struggle, as best we can, to make sense of current developments, amidst ever menacing forms of infliction of traumatic human suffering. This struggle is necessary, especially in an emergent global milieu rife with what early Habermas was to name as "systematically distorted communication."

–Upendra Baxi, *Operation Enduring Freedom: Toward a New International Law and Order?*¹

The September 11 attacks on the United States have become the pretext for the renewal of a world order centred on ... domination.

–Makau Mutua, *Terrorism and Human Rights: Power, Culture, and Subordination*²

Nolumus [the refusal to learn from foreigners and from the past] is a self-defeating response.

–Ivan Head, *Our Global Circumstance*³

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* Associate Professor, Osgoode Hall Law School, York University, Toronto, Canada. Ph.D., LL.M. (University of British Columbia, Vancouver, Canada); LL.M., LL.B. (Hons) (University of Nigeria, Enugu Campus). This article originated from an invitation to the author to give a lecture to a joint session of the "International Law/Relations" and "Diversity" Workshops at the Faculty of Law, University of Toronto, Toronto, Canada. For their gracious invitation to present many of the ideas contained in this article at that forum, the author is grateful to Karen Knop and Kerry Rittich. The author is also grateful to the participants at that workshop, especially Audrey Macklin and Darlene Johnson, for their helpful comments. A different version of this article was subsequently presented at a conference on "The New International Law" held at the School of Law of Birkbeck College, University of London in May 2004. For facilitating that presentation, the author wishes to thank Sundrya Pahuja and Thomas Skouteris. For helping to further concentrate the author's mind on important nuances in his argument, the author is grateful to all the participants at that conference, especially Nathaniel Berman, Brenna Bhandar, James Gathii, Mecky Kaapanda, Hussein Mohammed, John Swanson, and Bibhas Vaze. This article is dedicated to the evergreen memory of Professor Ivan L. Head, the author's much beloved teacher, mentor, and colleague.

¹ Upendra Baxi, "Operation Enduring Freedom: Toward a New International Law and Order?" in Antony Anghie *et al.*, eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003) 31 at 31 [Baxi, "Operation Enduring Freedom"].

² Makau Mutua, "Terrorism and Human Rights—Power, Culture, and Subordination" (Paper Presented to the International Meeting on Global Trends and Human Rights—Before and After September 11, Geneva, January 2002) (2002) 8 *Buff. H.R.L. Rev.* 1 at 1.

³ Ivan L. Head, "Our Global Circumstance" (Paper presented to the Joint Study Institute Conference, Victoria, Canada, May 2002) [unpublished, on file with the author] at 2 [emphasis in original].

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I.	INTRODUCTION	

This article examines, from a critical Third World Approaches to International Law (TWAIL) perspective,⁴ the highly consequential claim that the terrorist attacks on the United States on 11 September 2001 (“9/11”) inaugurated a new era of international relations in so radically significant a way as to justify the retrenchment or severe weakening of certain fundamental, indeed constitutional, norms of international law, such as: the absolute ban on the practice of torture; the prohibition of the unilateral use of force by states, established by article 2(4) of the *Charter of the United Nations* (the UN Charter); and the ban on pre-emptive strikes that do not conform to the requirements of article 51 of that same treaty.⁵ The article thus focuses on the “newness claim” that is often made in justification of the touted necessity of such reforms, and on the important insights that TWAIL analysis provides regarding the coherence, legitimacy, and sustainability of this newness claim. What would international lawyers see (or better, understand) were they to firmly inscribe the broadly shared experiences of “third-world” peoples into the texts and consciousness of the current “post-9/11” debates on “newness” and international law reform?

One major conclusion of this article is that the newness claim is best understood as a deeply political practice. The very process of asserting newness is, at least in the present context, a key political manoeuvre that allows proponents of radical international reform of the sort already noted

⁴ For descriptions of its nature, and brief histories of its intellectual origins and foundations, see James Thuo Gathii, “Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory” (2000) 41 *Harv. Int’l L.J.* 263; See also Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 *Wis. Int’l L.J.* 353 [Mickelson].

⁵ *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 [CAT]; *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

to justify, more successfully than was previously possible, many of their pre-existing imperial ambitions. The 9/11 attacks have provided much cover for the implementation of longstanding, but previously far less tenable, international law-reform projects.

Another major argument made in this article is that only by discounting (quite heavily in many cases) the broadly shared historical experiences of many “third-world” peoples can the 9/11 attacks be seen as inaugural of a world order that is so significantly new or different as to necessitate the retrenchment or severe weakening of fundamental international law norms. By placing a single country’s experience in the foreground, and the experience of the vast majority of the world in the background, a particular picture of the world is constructed; one that furthers a particular kind of political project. Put differently, this article will show that it is through the subtle displacement of third-world suffering from internationalist consciousness that the construction of this “post-9/11” world as a significantly new *world* order has been made possible.

The third major argument that is made in this article is that, especially in this “post-9/11” era, TWAIL analysis remains an extremely useful, if not invaluable, international law optic that allows us to understand much better, and respond much more adequately to, the sophisticated and subtle processes through which these kinds of newness claims are deployed in order to render otherwise untenable reforms of the international legal order seemingly necessary and even imperative. As a powerful counterpoint and trans-optic to the imaginings, assertions, and even theories of newness that have grounded most “post-9/11” proposals for international law reform, TWAIL analysis is an important resource for challenging the coherence, legitimacy, and sustainability of the touted reform projects themselves, and the imperial global order they frame.

After briefly examining in Parts II and III the sense in which the expression “Third World” is used in this article, and the nature of some TWAIL analytic techniques and sensibilities, the balance of the article will be devoted to a systematic examination of the coherence, legitimacy, and sustainability of the newness claim. Following this analytic exercise, the article will end with a brief pointer to the road ahead for those internationalists who are minded to contest the sophisticated manoeuvres that the current protagonists of international law reform described above have tended to launch.

II. THE “THIRD WORLD” AS A CONTINGENT BUT USEFUL CATEGORY

The immediate post-cold war era intensified pre-existing debates about the location, and even existence, of the Third World. During this period, many commentators, who mostly lived outside the societies that self-identify as Third World, were quick to proclaim the death of that expression as a useful analytical category.⁶ In their view, the category no longer had much purchase or relevance in a post-cold war world.⁷ Moreover, they argued, given the huge disparities in resources and power within the Third World, how could countries like China, Taiwan, and Singapore continue to be lumped in the same general international political category as Bhutan, Mauritania, and Jamaica?⁸ Many of the sceptics have also averred that there is a “Third World” within the “First World,” and vice versa.⁹ These sceptics are not completely wrong. Their arguments regarding the diversity that exists within the third-world category is of course correct. They are also right about the existence of some third world-like communities within the first world.

The whole argument is, however, wrongly framed. What is important is the existence of a group of states and populations that have tended to *self-identify* as such—coalescing around a historical and continuing experience of subordination at the global level that they feel they share—not the existence and validity of an unproblematic monolithic third-world category. That much is undeniable. Now, if these states tend to complain about similar things, and tend to speak to similar concerns, it is of course undeniable that, as contingent and problematic as any style they wish to assign to their grouping is, or can be, that grouping—that *sense* of shared experience—does exist and has been repeatedly expressed. What is more, there is nothing even remotely strange about coalitions being built or carrying on their work under a certain style, even one that has been mostly assigned to them (for example, global women’s movements), even

⁶ See e.g. D. Otto, “Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference” (1996) 5 Soc. & Legal Stud. 337 at 353.

⁷ For overviews of these kinds of objections, see Balakrishnan Rajagopal, “Locating the Third World in Cultural Geography” [1998-99] Third World Legal Stud. 1 [Rajagopal, “Cultural Geography”]; Mickelson, *supra* note 4.

⁸ James H. Mittleman & Mustapha Kamal Pasha, *Out from Underdevelopment Revisited: Changing Global Structures and the Remaking of the Third World* (New York: St. Martins Press, 1997) at 23.

⁹ *Ibid.*

while they *themselves* recognize the contingency of that style or category.¹⁰ And since categories and the words that represent them only serve as contingent signifiers (for example, as a contingent signifier, the word “dance” can shelter even diametrically opposing meanings, or signify different concepts depending on the spatial or temporal context), if these peoples tend to continue to self-identify under the banner Third World, it is difficult to ignore that category without ignoring to a large extent the *shared* experience of subordination that it has come to represent, as well as the strategic deployment of that expression that it obviously entails.

As long as the inevitable contingency of this expression is understood, and the expression is not *inflexibly* moored to a fixed geographic space—but rather to a self-expressed and shared sense of subordination within the global system—it does retain much relevance even today, even in this moment of ferment, even in this “post-modern” world. I am thus in agreement with Balakrishnan Rajagopal that although the expression needs to be thought of with a more flexible geographic sensibility, it need not be abandoned.¹¹ That said, self-identification is heavily influenced by experience, and the sorts of experience of global subjugation that often marks third-world coalitions will often reveal and entail certain kind of maps—certain “geographies of injustice.”¹²

As such, there is a sense in which states or societies or even scholars must *choose* whether or not to self-identify as Third World.¹³ As Karin Mickelson has aptly put it, third-world voices are best imagined as “a chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns.”¹⁴ While there will be some tenors in that chorus, there will also be some sopranos, basses, and altos. These important differences in pitches, resources, and capacities are not usually sufficient to deny coherence or relevance to a chorus or orchestra.

So for me, and almost all other TWAIL scholars, the Third World

¹⁰ For example, as far back as 1983, even before much of the scholarly debate gained currency, Julius Nyerere, former President of Tanzania, and a key leader of the third-world movement of his time, wrote about this very issue. See Julius K. Nyerere, “South-South Option” in Altaf Gauhar, ed., *The Third World Strategy: Economic and Political Cohesion in the South* (New York: Praeger, 1983) 9 [Nyerere]. Feminist scholars are also aware of the contingency of “women” as an analytical category. Many of them have recognized the political practices involved in using or abandoning that category. See J. Oloka-Onyango & Sylvia Tamale, “‘The Personal is Political’ or Why Women’s Rights are Indeed Human Rights: An African Perspective on International Feminism” (1995) 17 Hum. Rts. Q. 691 at 697-705 [Oloka-Onyango & Tamale].

¹¹ See Rajagopal, “Cultural Geography,” *supra* note 7.

¹² Baxi, “Operation Enduring Freedom” in Anghie *et al.*, *supra* note 1 at 46.

¹³ See Nyerere, *supra* note 10.

¹⁴ Mickelson, *supra* note 4 at 360.

remains a crucial analytic category.¹⁵

III. SOME TWAIL ANALYTIC TECHNIQUES AND SENSIBILITIES

On a general level, the TWAIL movement within the discipline of international legal studies is best viewed as a broad dialectic (or large umbrella) of opposition to the generally unequal, unfair, and unjust character of an international legal regime that all-too often (but not always) helps subject the Third World to domination, subordination, and serious disadvantage.¹⁶ Just like the Third World on which it focuses, TWAIL is not a monolithic school of thought. No unanimity can be found within its ranks, and no complete and compulsory liturgy directs its engagement with the international order. Some strains of TWAIL are more oppositional than reconstructive, while others are more reconstructive than oppositional.¹⁷ Some TWAIL scholars are avowed socialists (such as Bhupinder Chimni), but many are not.¹⁸ Some can be seen as leaning toward post-structuralism (such as Rajagopal and Vasuki Nesiiah), but many do not accept the poststructuralist label.¹⁹ Some are feminists (such as Celestine Nyamu, Sylvia Tamale, and Nesiiah), but many may not make bold to claim that prize.²⁰ TWAIL is therefore not even close to a theology. Just like the Third World itself, it may be considered “a chorus of voices” rather than a simple monolithic collegium.²¹

However, despite its healthy internal differences and variegation, TWAIL scholars (or “TWAILERS”) are solidly united by a *shared ethical*

¹⁵ See e.g. the collection of essays in Anghie *et al.*, *supra* note 1.

¹⁶ Makau Mutua, “What is TWAIL?” (Paper presented to the American Society of International Law, Washington, D.C., April 2000) (2000) 94 A.S.I.L. Proc. 31 at 31.

¹⁷ For instance, while Bhupinder Chimni is an avowed reconstructionist, Joel Ngugi is more sceptical of the viability of the reconstructionist effort. See B.S. Chimni, “Third World Approaches to International Law: A Manifesto” in Anghie *et al.*, *supra* note 1 [Chimni, “Manifesto”]; Joel Ngugi, “Making New Wine for Old Wineskins: Can the Reform of International Law Emancipate the Third World in the Age of Globalization?” (2002) 8 U.C. Davis J. Int’l L. & Pol’y 73.

¹⁸ See B.S. Chimni, “Marxism and International Law: A Contemporary Analysis” *Economic and Political Weekly* (6 February 1999), online: Multiworld Network <www.multiworld.org/m_iversity/articles/chimni.htm>.

¹⁹ See Rajagopal, “Cultural Geography,” *supra* note 7; Vasuki Nesiiah, “The Ground Beneath Her Feet: TWAIL Feminisms” in Anghie *et al.*, *supra* note 1 at 133 [Nesiiah].

²⁰ See Nesiiah, *ibid*; Celestine I. Nyamu, “How Should Human Rights and Development Respond to Cultural Legitimisations of Gender Hierarchy in Developing Countries?” (2000) 41 Harv. Int’l L.J. 381; and Oloka-Onyango & Tamale, *supra* note 10.

²¹ Mickelson, *supra* note 4 at 360.

commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order. They accomplish this through a commitment to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.

Thus, TWAIL scholars agree:

[I]nternational law that was shaped in the colonial era was not a neutral discipline but an instrument of naked power, *skillfully dressed up so as to hide its objective* of controlling the colonized world for the benefit of the colonial powers [and that] ... [t]hough the projection of power may be the object of the law [that is, international law], hiding such projection is a necessary one as it would otherwise provoke dissent and contempt for the rules so fashioned.²²

Thus, the international law, which has so often facilitated the achievement of the goals of the much more powerful societies and states, was extended throughout the globe as a result of the colonial encounter. As such, TWAIL scholars are also convinced that understanding and exposing the technologies and colonial devices of international law is crucial to achieving an understanding of the nature of the current international legal regime.²³

In this sense, Makau Mutua is correct to say that “TWAIL is not a recent phenomenon.”²⁴ It is part of a long tradition of critical internationalism.²⁵ Its intellectual and inspirational roots stretch all the way back to the Afro-Asian anti-colonial struggles of the 1940s–1960s, and even before that to the Latin American de-colonization movements.²⁶ It is also deeply connected to the New International Economic Order/G-77 movements that were launched in the 1960s, carried on into the 1970s, and stymied by powerful global forces in the 1980s and 1990s.²⁷ Thus, an earlier generation of TWAIL scholars (like Upendra Baxi, Mohammed Bedjaoui, Keba M’baye, and Weeramantry J.) did foreground most of the very same

²² Muthucumaraswamy Sornarajah, “The Asian Perspective to International Law in the Age of Globalization” (2001) 5 S.J.I.C.L. 284 at 285 [emphasis added].

²³ Antony Anghie, “Time Present and Time Past: Globalization, International Financial Institutions, and the Third World” (2000) 32 N.Y.U.J. Int’l L. & Pol. 243 at 245-46 [Anghie, “Time Present and Time Past”].

²⁴ *Supra* note 16 at 31.

²⁵ See James Thuo Gathii, “Rejoinder: TWAILing International Law” (2000) 98 Mich. L. Rev. 2066.

²⁶ *Ibid.*

²⁷ Mickelson, *supra* note 4 at 362-68.

concerns that contemporary TWAIL scholarship now expresses.²⁸

However, contemporary TWAIL scholarship has benefited much from sustained engagement with other critical schools of international legal scholarship, such as feminist, Critical Legal Studies (CLS), New Approaches to International Law (NAIL), Marxian, poststructuralist, and critical race approaches to international law and global politics.²⁹ Thus, many of the analytic techniques or sensibilities that TWAIL scholars deploy in their scrutiny of the international order will be familiar to other critical internationalists.

The first such technique or sensibility is TWAIL's deep commitment to taking world history, as opposed to merely Western history, much more seriously than most internationalists tend to. TWAIL scholars are in agreement that a historical perspective is *key* to understanding the current features of, and debates about, the international system.³⁰ TWAILers are thus concerned to map the continuities and discontinuities in the historical development of international legal norms, structures, claims, or rules in order to better understand the ways in which they facilitate the serious disadvantages that third-world peoples now suffer. By mapping the techniques and devices used by the global powers in the past, TWAIL scholars can recognize the presence of similar techniques in contemporary international relations. They can then also reveal how those techniques, morphed or not, continue to work today to sustain or create global injustice. Of necessity, therefore, TWAIL takes extremely seriously the history of the colonial subordination of the rest of the world to European power. TWAIL is concerned with understanding and revealing the ways in which international law facilitated this colonial encounter, and the extent to which its role in that encounter is too often replayed and repeated to the disadvantage of most third-world people. A key TWAIL technique or sensibility, therefore, is to seek to write the Third World's shared historical experiences into the processes and outcomes of international thought and action. That the development of this kind of historical sensibility in international legal analysis is critical today is underscored by the way in which the occlusion of the earlier history of U.S. involvement in Iraq works to allow a particular sense and version of U.S.-Iraq relations to take

²⁸ See Baxi, "Operation Enduring Freedom" in Anghie *et al.*, *supra* note 1; M. Bedjaoui, *Towards a New International Economic Order* (Paris: UNESCO, 1979); and K. M'baye, "Le droit au développement comme un droit de l'homme" (1972) 5 R.D. L'Homme 505.

²⁹ See *e.g.* Makau Mutua, "Critical Race Theory and International Law: The View of an Insider-Outsider" (2000) 45 Vill. L. Rev. 841.

³⁰ Mickelson, *supra* note 4 at 406-11 (noting that this deep concern for world history is "the feature most fundamental to anything one could label a Third World approach to international law" at 406).

hold—one that seems to legitimize the latest invasion of Iraq in the minds of far too many observers.³¹

Another key TWAIL technique or sensibility is to take the equality of third-world peoples much more seriously: to insist that all thought and action concerning international law and relations should proceed on the assumption that third-world peoples deserve no less dignity, no less security, and no less rights or benefits from international action than do citizens of Northern states. And so, claims that international law should allow the “consensual” transfer of toxic waste from the Northern states to the Third World are rejected when viewed from this kind of equality optic.³² Claims that states (in practice, the powerful states) ought to enjoy, or already enjoy, a unilateral right to intervene in third-world societies, when the converse is virtually impossible in practice, are viewed by most TWAILers with much deserved suspicion.³³ Thus, the TWAIL vision of equality will, in this connection, extend well beyond formal equality to include a rejection of international norms or decisions that operate like Anatole France’s law that “equally” prohibits the rich and poor from sleeping under bridges.³⁴

Informed by their deep attentiveness to the fact that “universality” and “common humanity” claims have long facilitated and justified Europe’s colonial subjugation and continuing exploitation of much of the Third World, TWAIL scholars are wary of glib assertions of universality that tend to elide or mask underlying politics of domination. As Muthucumaraswamy Sornarajah notes, “a lesson to be learnt [from third-world history] ... is that one must beware of self-proclaimed universalists whose ... reasons for taking universalist stances must be constantly scrutinized.”³⁵

The last key TWAIL technique or sensibility that will be discussed here is the insistence among TWAIL scholars on thinking through the various ways of offering epistemic and ideational resistance to the global

³¹ George E. Bisharat, “Facing Tyranny with Justice: Alternatives to War in the Confrontation with Iraq” (2003) *J. Gender Race & Just.* 1 at 2-15.

³² See e.g. Cyril Uchenna Gwam, “Travaux Préparatoires of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal” (2003-04) 18 *J. Nat. Resources & Envtl. L.* 1.

³³ B.S. Chimni, “Manifesto” in Anghie *et al.*, *supra* note 1 at 64; Antony Anghie, “Francisco de Vittoria and the Colonial Origins of International Law” (1996) 5 *Soc. & Legal Stud.* 321 [Anghie, “Francisco de Vittoria”].

³⁴ Richard B. Bilder, ed., “The Law and Economics of Global Justice”, Book Review of *Global Justice* by Thomas W. Pogge, ed. (2002) 96 *A.J.I.L.* 984 at 984.

³⁵ *Supra* note 22 at 285.

hegemonies that their work often unearths or explains.³⁶ In addition, TWAIL scholars have also explored and analyzed the myriad ways in which international law and global institutions have, over time, responded to the resistance posed to them by third-world actors, especially social movements, and the effects that such resistance has had on law and institutions.³⁷

IV. THE CHARACTER OF OUR TIME—“NEWNESS” AS A TECHNOLOGY OF IMPERIALISM

The widely accepted assertion that the kind of terrorism that the 9/11 attacks represented was so significantly “new” as to have ruptured history and inaugurated a radically new epoch in *global* history, is the major justification for the transformations in the global normative order that have been proposed by certain great powers in reaction to those events.³⁸ It is the key justification that has made the proposed changes seem necessary to so many. For instance, even while distancing himself from those responses to “post-9/11” terrorism that trample on the “irreducible core of the rule of law,” Thomas Franck has declared that any search for “adjustments in applicable domestic and international law [relating to the combating of the al-Qaeda threat] ... must begin with the assumption that terrorism, as currently practiced, does constitute a new phenomenon: one to which traditional constitutional and international legal constraints may not be wholly responsive.”³⁹

In this vein, the plausibility for some commentators of the use of torture, renderings to torture, and murder in the name of targeted killings, is almost entirely based on this newness justification—which is that *the globe* now confronts a threat that is so significantly new that these otherwise abhorrent “tools” should now be made available to the security establishments of states that face terrorist threats.⁴⁰

It is therefore crucial that the widely perceived newness of this “post-9/11” world be subjected to deeper *historical* and *global*, analysis. It

³⁶ B.S. Chimni, “Manifesto” in Anghie *et al.*, *supra* note 1 at 47.

³⁷ Balakrishnan Rajagopal, “International Law and Third World Resistance: A Theoretical Inquiry” in Anghie *et al.*, *supra* note 1 at 145.

³⁸ Thomas M. Franck, “Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror” (2004) 98 A.J.I.L. 686 at 688.

³⁹ *Ibid.*

⁴⁰ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002) at 131-64 [Dershowitz].

is as crucial that, like all previous claims to newness (such as “New Labour politics” in Britain), this contemporary assertion of newness be received and treated as a deeply political practice. Rupture ought not be received so easily when continuities leap to the trained eye.

Given its insistence on the critical relevance of shared third-world experience to the formation of knowledge, policy, and legal norms regarding our world, TWAIL provides one critical way of subjecting the widely perceived newness of this historical moment to the kind of rigorous scrutiny that is proposed here, one that is much more grounded in global historical experience than on contemporary Western experience of the globe. A historical analysis of the globe (a key TWAIL technique) will be essential here. For, as Joanne Meyerowitz has correctly noted, “history never rips in two. ‘Before’ and ‘after’ are never entirely severed, even in the moments of greatest historical rupture. ... In fact, historians devote entire careers to placing the *seemingly new* in historical contexts.”⁴¹

A diverse range of commentators, from George Bush⁴² to Kofi Annan,⁴³ have made important arguments in favour of the newness of this “post-9/11” world. However, in order not to set up a straw argument that can be responded to with little effort, I will attempt to offer a TWAIL-style scrutiny of the newness claim that focuses on a formidable defence of that claim. I will focus on offering a critical analysis of Richard Falk’s intervention in this debate. He is one of the most careful, intelligent, and distinguished of the progressive internationalist thinkers of our time—someone with whom I normally find myself in agreement.⁴⁴

In general, Falk is firmly convinced that 9/11 was a “transformative event” in global history (and not just in U.S. or Western history), and that the threat of terrorism that it represents, what he has styled “megaterrorism,” is so significantly new as to justify certain fundamental reforms in international law and institutions, in particular the invasion of Afghanistan in “self-defence.”⁴⁵ In his own words, “[m]egaterrorism is a unique challenge, differing from earlier expressions of global terrorism, by

⁴¹ Joanne Meyerowitz, “Introduction” in Joanne Meyerowitz, ed., *History and September 11th* (Philadelphia: Temple University Press, 2003) 1 at 1 [emphasis added].

⁴² See e.g. “Transcript of President Bush’s Address” *CNN* (21 September 2001), online: CNN <<http://www.cnn.com/2001/US/09/20/gen.bush.transcript>>.

⁴³ See Kofi Annan, “The Secretary-General Address to the General Assembly” (23 September 2003), online: United Nations <<http://www.un.org/webcast/ga/58/statements/sg2eng030923>>.

⁴⁴ See Richard A. Falk, *The Great Terror War* (New York: Olive Branch Press, 2003) [Falk, “Terror War”]; Richard A. Falk, “Rediscovering International Law after September 11th” (2002) 16 *Temp. Int’l & Comp. L.J.* 359 [Falk, “Rediscovering”].

⁴⁵ Falk, “Terror War,” *ibid.* at xxii, 9; Falk, “Rediscovering,” *ibid.* at 363.

magnitude, scope, and ideology, representing a *serious effort to transform world order as a whole*, and not merely change the power structure of one or more sovereign states.”⁴⁶ Falk is quick to warn though that the newness of the “post-9/11” terrorist threat does not justify most of the other measures that the Bush administration has taken seemingly in response to the 9/11 attacks, in particular, its invasion and occupation of Iraq.⁴⁷

Thus, in Falk’s understanding, despite the existence of other forms of global terrorism before 9/11, because of the uniqueness of the specific kind of megaterrorist threat that the 9/11 attacks represent, those attacks created and inaugurated a significantly new global environment. In Falk’s view, the uniqueness of this megaterrorist threat is predicated on four main distinctive features: its magnitude, scope, ideology, and focus on transforming world order as a whole. “Magnitude” refers to the fact that approximately three thousand people were killed in one of those attacks on one day, and “focus” is self-explanatory. To this Falk adds the important point about “scope”: that the global *network* character of al-Qaeda, the organization that planned and executed those attacks, the “elusive” non-state character of these actors, and the fact that they have “no distinct territorial locus” of their own and operate in secretive cells in many countries, holds them out as a new kind of terrorist threat, and makes this so-called post-9/11 era a new moment in global history.⁴⁸ Furthermore, Falk notes that this attack was directed against the U.S. homeland, the very heart of the mightiest global power that recorded human history has known. It was an attack on the world’s only remaining superpower.⁴⁹

Keeping in mind that the question here is not simply whether al-Qaeda’s threat of megaterrorism “post-9/11” is new, but whether it is so significantly new as to require the kinds of fundamental modifications in the international legal regime that the United States has now claimed in practice, if not in theory (for example, pre-emptive strikes, targeted killings, and the use of torture), let me begin by examining what I see as the weakest link in Falk’s admittedly quite sophisticated argument. This weakest link is his argument for international normative change on the basis that the attack was launched against the world’s vastly most powerful state. While Falk is of course factually correct, it is not clear why such a significantly new moment in global normative history, and the kinds of drastic international legal reforms sought by the United States, should be inaugurated not on the

⁴⁶ Falk, “Terror War,” *ibid.* at 39 [emphasis added].

⁴⁷ Falk, “Rediscovering,” *supra* note 44 at 363.

⁴⁸ *Ibid.* at 360.

⁴⁹ Falk, “Terror War,” *supra* note 44 at xxii.

basis that the attacks killed thousands of people, but simply on the basis that these victims were killed in the United States as opposed to, say, in Sierra Leone or the Solomon islands. Thankfully, I do not read Falk as suggesting this. His implied point, I think, is that even though the 9/11 attacks were *new only in relation to U.S. history*, the U.S. government and public was able to use its vast global power to construct its own reality as *the* global reality. It was able to do so partly via a constant barrage of the horrible images of those attacks on television, in newspapers, in memorial after memorial, and in relentless public flag-waving frenzies. All of these served to whip up a mega-effect: to overstate the uniqueness of the terror that was visited on it in global and historical terms. The United States was also able to harness the dividends of its vastly disproportionate economic, political, and military power to “persuade” regimes around the world to join in its portrayal of these events as profoundly inaugural. This point is of course correct, but nevertheless actually recognizes the fact that the kind of terrorism that was visited on the United States on 9/11 was not intrinsically new, but rather was successfully *sold* as new. This success was achieved mostly because it happened to a country that had the power to sell that kind of event as new. It is not clear then that international law and global institutions should be responding favourably to this myth of newness. Once the hand of U.S. power in constructing this myth of newness is unmasked, the myth all but unravels on that score. And one can easily unmask the hand of power in the construction of this myth by substituting virtually any third-world state for the United States in the story of 9/11 and its aftermath (be it Argentina, Angola, or Algeria).

The next weakest link in Falk’s argument is that the aims and activities of al-Qaeda, which is widely regarded as the perpetrator of the 9/11 attacks, represent a uniquely “serious effort to transform world order as a whole.”⁵⁰ Our “post-9/11” world cannot be said to be new on this score alone. If the popularly accepted idea of terrorism—especially the sense in which Falk uses it and most people have come to understand it—is the deliberate use of violence against non-combatants (that is, *civilians*) for purpose of causing fear in order to achieve political goals, then 9/11 was not the first time that an entity has deployed terrorism as a way of transforming world order. The United States itself has sponsored and used violence against civilian populations in third-world states, albeit almost always through their non-state actor proxies (in Angola, Mozambique, Nicaragua, El Salvador, and so on), in order to transform the “cold-war” era world order in which it battled what it perceived as the communist threat to its

⁵⁰ Falk, “Terror War,” *supra* note 44 at 39.

power and to the world.⁵¹

The third weakest link in Falk's argument is that because of the sheer magnitude of the number of deaths that megaterrorism can cause in just one day, the 9/11-style attacks are so significantly new as to justify certain otherwise untenable international law reforms. This argument is at once difficult and possible to refute. It is hard to refute because it is not easy to dismiss the three thousand deaths that were recorded in one attack on the World Trade Centre as inconsequential in global history. They are of course consequential. However, the point that has been made by Falk and others who argue that this marks al-Qaeda's megaterrorism as significantly new and inaugurates a new world order, is that this sort of mass killing of civilians is unique in its magnitude to both American and *global* history. Yet, in mere seconds U.S. nuclear bombs were deliberately deployed to kill tens of thousands of innocent Japanese civilians during the Second World War.⁵² As Falk himself has recognized, the United States itself is tainted by its own "megaterrorist use of atomic bombs" against the civilian populations of Hiroshima and Nagasaki in 1945.⁵³ Thousands of innocent civilians have been deliberately or at least recklessly killed in U.S.-led, U.S.-sponsored, and U.S.-supported conflicts since then. This has been the case in Angola, El Salvador, Mozambique, and so on. In Angola, over twenty thousand civilians were killed due to a U.S.-sponsored war against the elected but socialist Movement for the Popular Liberation of Angola (MPLA) regime.⁵⁴ In El Salvador, over sixty thousand civilians lost their lives in similar circumstances.⁵⁵ In Mozambique, Human Rights Watch has estimated the civilian death toll at over three hundred thousand.⁵⁶ If the objection to this argument is that these happened during wars, one response could be that, as the Bush Administration has constantly

⁵¹ See e.g. Human Rights Watch, "Mozambique: Human Rights Development 1990", online: Human Rights Watch <[#_90345](http://www.hrw.org/reports/1990/WR90/AFRICA.BOU-07.htm#PS)> [Human Rights Watch]; Scott Horton & Randy Sellier, "The Unity of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador" (1982) Wis. L. Rev. 825.

⁵² Richard Falk, *Reviving Global Justice, Addressing Legitimate Grievances* (2003) [unpublished, paper on file with the author] at 1 [Falk, "Reviving"].

⁵³ *Ibid.*

⁵⁴ See Ernest Harsch & Tony Thomas, *Angola: The Hidden History of Washington's War* (New York: Pathfinder Press, 1976); George Wright, *The Destruction of a Nation: United States' Policy Towards Angola Since 1945* (London: Pluto Press, 1997).

⁵⁵ See e.g. Commission on the Truth for El Salvador, *From Madness to Hope: The 12-year War in El Salvador: Report of the Commission on the Truth for El Salvador* (New York: United Nations, 1993).

⁵⁶ See Human Rights Watch, *supra* note 51.

reminded the public, the current conflict between the United States and al-Qaeda also has all the trappings of a war. In any case, that conflict has clearly taken on the form of a war in Iraq and Afghanistan. If the objection is that the culprits were states rather than non-state actors, the response could be that, in most of these places, the civilians were killed as a result of the same kind of collusion between state and non-state actors that al-Qaeda and Taliban-ruled Afghanistan were accused of.

What is left of the argument in favour of the newness claim is that the 9/11 attacks were carried out by an elusive “non-state actor” that does not inhabit a distinct territory of its own and which operates in a *network* structure, and that this is a significantly new phenomenon. Given the understanding of terrorism offered above, the fact that the attacks on civilians for political ends was or was not launched by a non-state actor should ordinarily be immaterial. As the United States’ public pronouncements on the linkages between certain other states and terrorism confirms, states are as capable of perpetrating terrorism as non-state actors!⁵⁷ The focus should largely be on the civilians killed, the terror inflicted, and the political ends the attacks sought to achieve. Clearly, the focus ought not be concentrated on the formal political status or character of the culprit.

That leaves us with the relatively strong argument concerning the inherent elusiveness of the culprit, a feature that is introduced by the network character of al-Qaeda, and by its de-coupling from a particular territorial space—its lack of geographical moorings. This, it is argued, makes it very difficult for them to be neutralized in conventional ways. However, it is not true that al-Qaeda was mostly de-coupled from territory. The United States itself insisted that al-Qaeda was based in Afghanistan at the time of the 9/11 attacks.⁵⁸ The fact, then, that its operatives are spread around the world is not unique. Other entities that have committed terrorist acts have been similarly constituted (with a headquarters at one location and operatives around the world). In this connection, it is not difficult to think of a notable state actor that can be accused of employing a similar strategy.

Finally, what I will refer to as a “combination argument” can be discerned: even if each of these grounds on which the newness claim is

⁵⁷ The White House, “The National Security Strategy of the United States of America” (17 September 2002) online: <<http://www.whitehouse.gov/nsc/nss.pdf>> at 4.

⁵⁸ See “Attack on Afghanistan: Tony Blair Statement” *CNN* (7 October 2001), online: <<http://archives.cnn.com/2001/WORLD/europe/10/07/gen.blair.speech/>>. Prime Minister Blair reiterates the U.S. justification for the attacks by arguing that “it is clear that they [that is al-Qaeda] are *harboured* and supported by the Taliban regime inside Afghanistan” [emphasis added].

based fails, what is new about the 9/11 attacks and the world that we now inhabit, is that it was the first time that all these features combined in one terrorist culprit. Even this combination argument is historically and globally inaccurate. In Angola, thousands of civilians were deliberately killed by an elusive non-state actor (in this case a guerrilla group) and this actor was sponsored and armed by a state that had, and continues to have, global ambitions. What is more, this non-state actor was highly elusive since it was to *some extent* not moored to a particular territory.

The point of the above analytical exposé is not to suggest that there are no differences *at all* between al-Qaeda and other entities that have engaged in terrorism (be they states or non-state actors) or that our “post-9/11” globe does not face marginally different challenges in comparison to the world order that existed before 9/11. *The point, rather, is that the differences between al-Qaeda and those other kinds and iterations of terrorism, and between the world before and after 9/11, have been significantly overstated by claims that the “post-9/11” world is so significantly new that it justifies pre-emptive strikes, targeted killings, and acts of torture that would be otherwise illegal under international law.* The so-called post-9/11 world is not so significantly new as to justify the retrenchment or severe weakening of fundamental rules of international law so as to afford legal legitimacy to the pre-emptive strikes that the more powerful states launch against weaker, usually third-world, countries. While the current al-Qaeda threat is of course dangerous and worrisome, international lawyers will do well to remember that many third-world states have been subjected to *qualitatively* and *quantitatively* comparable (and even weightier) incidences of megaterrorism. The examples of Angola, Mozambique, and El Salvador that were discussed above are only a few of the all-too-many instances in which third-world states have been brutally attacked by, or at the instigation of, U.S.-led and U.S.-sponsored forces, or other covert or regular forces, leading to the massive loss of civilian lives. At no time were fundamental international norms rewritten for them as a result of the threats they then faced. These states were mostly required to work to defeat these threats within the legal framework established by the UN Charter and other such treaties.

What TWAIL analysis (with its dogged insistence on history, continuity, centering the Third World, resisting global hegemony, demanding increased global equality, and unmasking the hand of power in the construction of knowledge) affords one, is the desire and capacity to write the Third World into any characterization of our “post-9/11” world in order to be in a position to challenge, more effectively, the global validity of the newness claims that have been made since then, and in the end to unmask the hands of power in the construction of this myth of newness.

Ultimately, it seems that it was the United States' vastly dominant global status that ensured that the "exceptionalist" version of the 9/11 story was successfully constructed and pressed into the service of the global imperial ambitions of some in that country.

An important reason for understanding and highlighting this relationship between the newness claim on the one hand, and the ambitions and operations of global power on the other hand, is that particular policy responses may seem much more necessary in the context of the argument that the globe now faces a significantly new kind of threat, and that all of us now confront sufficiently significant "innovations in the practices of the politics of cruelty."⁵⁹ Indeed, it is already crystal clear that as they planned and executed their invasion of Iraq and sought to justify the indefinite detention of suspected terrorists, and so on, policy makers in the United States benefitted much from the construction of this old global threat as significantly new and unique. Without the success they enjoyed in constructing and purveying this myth of newness, many of their more controversial responses to the current terrorist threat would have had even less U.S. and global support, and would have seemed much more misguided and illegitimate than they already appear to many. While Falk does not agree with most of their policies, actions, and recommendations, it is not accidental that most of those who have argued in favour of the legality of U.S. pre-emptive strikes and use of torture in the course of the so-called war on terror (and who have therefore wittingly and unwittingly lent support to the imperial ambition of some in that country), have done so on the basis that these measures are, on the whole, justified by the significant newness of the particular kind of terrorist threats posed by al-Qaeda "post-9/11".⁶⁰ Thus, this 9/11-related newness claim has been much utilised as a "weapon of mass persuasion."⁶¹

The structure of the newness argument that has been made in support of the imperial-style international law reforms that have been urged by the United States and some of its allies bears an unnerving resemblance to the structure of the kinds of newness claims that European powers deployed in the sixteenth and nineteenth centuries, and even much later, as they sought to legitimize their imperial conquests and occupations of the Third World. As Antony Anghie has shown in several interventions in the relevant scholarly debate, the newness to the European colonialists' eyes of

⁵⁹ Upendra Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2002) at 2.

⁶⁰ Dershowitz, *supra* note 40.

⁶¹ I borrow this expression from Paul Rutherford. See Paul Rutherford, *Weapons of Mass Persuasion* (Toronto: University of Toronto Press, 2004).

the so-called new worlds of the Americas, Africa, and Asia was a key point that relevant scholars and government officials of that era deployed in formulating the kind of international law that would serve their imperial ambitions.⁶² As most of these scholars saw it, a novel problem of international law was presented to international lawyers by Europe's "discovery" of the "new" native peoples of the Americas, Africa, and Asia—a problem that required a new solution; new kinds of international law rules that would allow European colonialists to occupy and govern the relevant societies. Needless to say, these types of rules were promptly designed and legitimized by the supposed significant newness and difference of the native peoples of most of the Americas, Africa, and Asia. Thus, just as the newness claim has been indispensable to the imperial-type international law reform objectives of the current U.S. regime and some of its allies, newness and difference were pivotal elements in the absurd series of sixteenth and nineteenth century legal maneuvers that ultimately led to foreign Europeans conferring on themselves the international legal right to coercively occupy and govern these lands.

The point of this extended inquiry into the validity of the 9/11-related newness claim has been to challenge and strike at the very foundations of the worrisome policy responses that have been offered by the United States and some of its allies to the al-Qaeda threat, as well as the international law reform projects that have been entailed. To attack successfully the fulcrum on which these policy responses have been rested is to hasten and ensure their collapse as ideational edifices in a way that even a partial adherence to the newness claim does not fully allow.

To be clear, however, the overarching argument of the article is not necessarily that, despite the 9/11 attacks, a stable political response to the ravages of global terror is needed (although this may in fact be the correct posture to adopt). What is being urged is that when third-world experiences are not discounted, it becomes clear that the "post-9/11" world is not so significantly new as to justify the sorts of international law reform projects being urged by the United States and its key "post-9/11" allies.

Consequently, the broader point that is made in this article is that in the midst of the "post-9/11" coexistence of continuities and discontinuities in global history, international lawyers ought not to be too quick to read rupture. Reading rupture rather too quickly might lead us to accept or tolerate invalid newness claims that facilitate the successful

⁶² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 13-28; Anghie, "Francisco de Vittoria," *supra* note 33; and Anghie, "Time Present and Time Past", *supra* note 23. See also Antony Anghie, "The War on Terror and Iraq in Historical Perspective" (2005) 43 Osgoode Hall L.J. 45.

execution of the imperial projects of a small minority. The subtle power of the newness manoeuvre becomes even more palpable when it is realised that, as Franck has recently noted, in the United States, both the opponents and proponents of the Bush Administration's argument for international law reform in favour of the right to execute pre-emptive strikes tend to agree that the "[al-Qaeda kind of] terrorism is different."⁶³ The fact that those in the United States who opposed the invasion of Iraq have, broadly speaking, now lost much political ground to those who supported and executed that invasion is indicative, to some extent, of the power of the continuing newness claim as a weapon of mass persuasion (in other words, as a political practice). The successful construction of a pre-existing threat as a new one can often authorize the deployment of previously untenable (and usually much harsher) measures to deal with that problem.

Another point that ought to be made clear is that the argument that is made in this article is not that *every* newness claim is incapable of justifying international law reform. Newness claims have been made for as long as international society has existed. Not every one of them has been invalid. For instance, the claims for a "New International Economic Order" that were made in the 1960s and 1970s by the newly decolonised states were based on at least one convincing newness claim.⁶⁴ The nature of this claim was that these states had just been decolonised and their entrance into the global economic arena required changes to be made to international economic law in order to accommodate their entry into the system. The proponents of the deployment of international law reform to reverse climate change have also based their claims on at least one valid newness claim. This claim postulates that the depletion of the ozone layer is a new and harmful phenomenon, and as such requires immediate ameliorative action.⁶⁵ The key in each case is to examine the internal coherence of the newness argument itself, as well as its validity as a justification for the particular kind of political project that is being urged.

⁶³ *Supra* note 38 at 687.

⁶⁴ See e.g. Immanuel Wallerstein, "An Historical Perspective on the Emergence of the New International Order: Economic, Political, Cultural Aspects" in Herb Addo, ed., *Transforming the World Economy?: Nine Critical Essays on the New International Economic Order* (Tokyo: United Nations University, 1984) 21.

⁶⁵ See e.g. Ed Phillips, *Crisis in the Atmosphere: The Greenhouse Factor* (Phoenix: D.B. Clark, 1990).

V. CONCLUDING REFLECTIONS: WHAT TO DO?

The preceding discussion reflects some of the troubling dimensions of the time in which we now live—the world that many internationalists seek to change and make better. Yet, critical internationalists have historically been much better at pointing out the problems with the global order than at proposing viable alternatives to the *status quo*. Critical internationalists tend to share in what Falk, Lester Ruiz, and Robert B.J. Walker have referred to as “a sense of profound disorientation about, literally, where ‘the international’ is going.”⁶⁶

That said, it is obvious that critical internationalists do have much to contribute to progressive global change. One area in which their critical craft is particularly useful is in the so-called struggle of ideas. As Falk and many others have shown, many global powers have managed to maintain “a public posture of innocence” throughout long national and international histories of slavery, racism, dispossession, destruction, and exploitation in the Third World. There is much work to do in carefully unpacking and resisting the sophisticated and complex processes of denial and myth-making that have enabled this deceptive posture of innocence to be maintained.⁶⁷ This, of course, includes unpacking the myth of newness that grounds the current agitations for international law reform by certain great powers. This is one way in which room for international social (and thus legal) change can be created and enlarged.

All in all, as critical internationalists seek to foster this process of deep ideational change and epistemic transformation, it is important that they keep in mind a key point that underlies the discussion in this article: without taking third-world peoples (especially their broadly shared histories, experiences, situations, and yearnings) much more seriously than has hitherto been the case, international lawyers are not likely to succeed in imagining—and what is more necessary, in helping to create—a much more equal, fair, and just world. As Craig Calhoun, the President of the New York-based Social Science Research Council, has correctly noted, the dominance and privilege that attends living and working in the West all-too-often “creates blind spots in the vision” of those scholars who live and work outside the Third World.⁶⁸ As such, if international law reform is to

⁶⁶ Richard A. Falk, Lester Edwin J. Ruiz & Robert B.J. Walker, *Reframing the International: Law, Culture, Politics* (New York: Routledge, 2002) at ix.

⁶⁷ Falk, “Reviving,” *supra* note 52 at 1.

⁶⁸ See Craig Calhoun, “Social Science and the Crisis of Internationalism: A Reflection on How We Work After the War in Iraq,” online: Social Science Research Council <http://www.ssrc.org/president_office/crisis_of_internationalism.page>.

proceed on a coherent, widely legitimized, and ultimately sustainable basis, TWAIL (a critical internationalist movement that trains its lenses squarely on the experiences of third-world peoples) must be taken much more seriously by the authors of international law reform and action. To put in Professor Ivan Head's terms, no *nolumus!*