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# Placing Twail Scholarship and Praxis: Introduction to the Special Issue of the Windsor Yearbook of Access to Justice

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# PLACING TWAIL SCHOLARSHIP AND PRAXIS: INTRODUCTION TO THE SPECIAL ISSUE OF THE WINDSOR YEARBOOK OF ACCESS TO JUSTICE

Sujith Xavier, Amar Bhatia, Usha Natarajan and John Reynolds\*

## I. INTRODUCTION

This Special Issue of the *Windsor Yearbook of Access to Justice* collects some of the written reflections of participants from the Third World Approaches to International Law [TWAIL] Conference held in Cairo, Egypt, from 21 to 24 February 2015.<sup>1</sup> TWAIL is a loosely affiliated network of scholars and practitioners of international law and policy. TWAIL scholars and practitioners are animated by the relationship between the Global North and the Global South, and the ensuing disparities in wealth and health spurred on by processes of diverging and converging colonial and postcolonial histories.

There are various scholarly agendas that are associated with the moniker of TWAIL. Notwithstanding the diversity of perspectives, the central tenets of TWAIL are twofold. First, TWAIL scholars seek to unpack and deconstruct colonial legacies of international law. Second, they also seek to decolonize the material realities of the peoples of the global South by, in part, constructing new and alternative legal futures.<sup>2</sup>

From a general perspective, the arguments encapsulated by TWAIL can be traced back to scholars concerned with the effects of colonialism and imperialism.<sup>3</sup> Within the realm of international law, the origins of this type of thinking are rooted in independence movements of the former colonies. One of the early proponents of this perspective was Justice Radhabinod Pal. In his lengthy dissent from the majority decision of the International Military Tribunal for the Far East (1946-1948), Pal sought to unpack and

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<sup>1</sup> This is the third volume uniting contributions from the TWAIL Cairo Conference, with Special Issues also published with *Third World Quarterly* and the *Journal of International Criminal Justice*: Usha Natarajan et al, "Introduction: TWAIL - on praxis and the intellectual" (2016) 37:11 *Third World Q* 1946; Asad Kiyani et al, "Foreword" (2016) 14:4 *J Intl Crim Just* 1. For more information about the conference, please see online: University of Windsor <<http://www.uwindsor.ca/twail2015/>>.

<sup>2</sup> For background on the origins of the TWAIL network, including previous meetings and conferences, see Natarajan et al, *ibid* at 1946-1947.

<sup>3</sup> Frantz Fanon, *Black Skin, White Masks*, translated by Richard Philcox (New York: Grove Press, 2008); Frantz Fanon, *The Wretched of the Earth*, translated by Richard Philcox (New York: Grove Press, 2004); Edward W Said, *Orientalism* (New York: Random House, 1979).

deconstruct the racial and colonial hierarchies within the structure of emergent international criminal law. He illustrated the manner in which racial hierarchies operated to indict the Japanese on charges of waging aggressive war and crimes against peace. The victors of World War II were not prosecuted for, among other things, killing 140,000 Japanese civilians with the atomic bomb in Hiroshima.<sup>4</sup>

Critical of international law's imperial tendencies, early Third World jurists who took up the baton of decolonizing the discipline included R.P. Anand, Georges Abi-Saab, and M. Sornarajah. Along with others, their work influenced the subsequent crystallization of a conscious TWAIL network. The origins of this can be traced to a group of graduate students and visiting scholars at Harvard Law School in the mid-1990s, who convened the first TWAIL conference there in 1997. Since then, there have been TWAIL conferences at Osgoode Hall Law School, York University in 2001, Albany Law School in 2007, University of British Columbia in 2008, Université Paris 1 Panthéon-Sorbonne in 2010, University of Oregon Law School in 2011, and most recently in Cairo in 2015. The conferences aided and evidenced the growth of TWAIL as a movement and a network. These events brought together scholars from diverse backgrounds working on issues related to international law and decolonization, broadly understood, and committed to improving the everyday realities of the peoples of the Global South.

The Cairo conference was the first time that a TWAIL conference was convened within the Global South.<sup>5</sup> The conference was also the largest gathering of TWAIL scholars to date, with 85 speakers from five continents gathering to reflect on the conference theme, "On Praxis and the Intellectual".<sup>6</sup>

This theme reflected the political realities unfolding in the region. As various peoples in North Africa and the Middle East struggled to democratize their polities, the conference organisers wanted to reflect on the role of the intellectual as a political actor. We thus sought to frame discussions around the conception of praxis as reflection, agitation and transformative action. The questions that animated our call for papers included: What is the role of the intellectual in political life? What is the relationship between our scholarly endeavours and societal structures; whether preserving the status quo, shaping reform, or advocating for radical change? In asking these questions we aimed for individual and collective self-reflection in a particular historical moment and place.

Our call for papers was received with enthusiasm. The conference programme included twenty panels over four days, touching on themes associated with the politics of writing history, subalternity, Indigenous movements, the legacies of the Bandung Conference, the environment, Palestine, international institutions, Islamic law, national and international criminal law, local and global

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<sup>4</sup> *United States et al v Araki-Sadao et al, International Military Tribunal for the Far East*, Dissident Judgment of Justice Pal (Tokyo: Kokusho-Kankokai, 1999); John Reynolds & Sujith Xavier, "The Dark Corners of the World: International Criminal Justice and the Global South" (2016) 14:4 J Intl Crim Just 959 at 962. See also Adil Hasan Khan, "Inheriting a Tragic Ethos: Learning from Radhabinod Pal" (2016) 110 AJIL Unbound 25; Adil Hasan Khan, "International lawyers in the aftermath of disasters: inheriting from Radhabinod Pal and Upendra Baxi" (2016) 37:11 Third World Q 2061; Prabhakar Singh, "Reading RP Anand in the Postcolony: Between Resistance and Appropriation" in Jochen von Bernstorff & Philipp Dann, eds, *The Battle for International Law in the Decolonization Era* (Oxford: Oxford University Press, forthcoming in 2017).

<sup>5</sup> See further Natarajan et al, *supra* note 1.

<sup>6</sup> In addition to these speakers, the conference also included 65 non-presenter attendees.

constitutional law, transitional justice, migration and asylum law, pedagogy and legal education, economic governance, and private ordering.<sup>7</sup>

Based on this remarkable range of conference presentations, we invited interested speakers to participate in two follow-up publication workshops aimed towards the production of three different journal publications. This Special Issue of the *Windsor Yearbook of Access to Justice* is the third component of that publication agenda. Fifteen other conference papers were published between *Third World Quarterly* and the *Journal of International Criminal Justice*. The *Third World Quarterly* Special Issue commences with Georges Abi-Saab's closing keynote address and M. Sornarajah's plenary address, followed by nine articles that built on conference presentations.<sup>8</sup> The *Journal of International Criminal Justice* Symposium includes four papers examining the contours of international criminal law through TWAIL readings.<sup>9</sup>

In our *Third World Quarterly* Special Issue introduction, we laid out our understanding of the meaning and scope of praxis, building on the scholarship of Freire, Gramsci, Fanon, and others. Ultimately, our understanding of praxis is one that is rooted in "the links between what we [international lawyers and international law scholars] say and what we do, as the inextricability of theory from lived experience".<sup>10</sup> Such an understanding has material consequences for those engaged in decolonial knowledge production. TWAIL conferences are also an opportunity to reflect and to move certain conversations forward, both in TWAIL circles and beyond. With this in mind, we also discussed the place of praxis and the praxis of place in this loose, but still collective, TWAIL project. Taking the time to have such discussions and take stock is vital in this moment of uncertainty, in which utopian horizons appear ever more distant.

In this Introduction, we expand on some of these previous discussions and draw connections to the different contributions collected here, which were developed at a post-conference publication workshop that brought together authors and commentators in Windsor, Ontario, Canada.

As for the perennial debate on what constitutes, and is constituted by, the 'Third World' and 'Global South', the occasion that brought the conference organizers and participants together also helped reveal how we stand apart in some ways. These terms are historically rooted, geographically grounded, and have been taken to capture power relations at all levels between communities inside and outside established borders. While not without controversy, one crucial aspect of the term Global South is recognition that there are multitudes of claims in various spaces that are both emancipatory and oppressive. In particular, the possibilities of having a north in the South, a south in the South, and a south in the North are worth considering, even as these occidental orientations collapse under the complexity of peoples' lived realities.<sup>11</sup>

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<sup>7</sup> Organising such an event in Egypt's uncertain political climate was no small feat, and logistics were handled by Usha Natarajan, Emily Zell, Law Department staff, and a wonderful team of graduate student volunteers at the American University in Cairo.

<sup>8</sup> See the special issue in (2016) 37:11 *Third World Quarterly*.

<sup>9</sup> See the symposium in (2016) 14:4 *Journal of International Criminal Justice*.

<sup>10</sup> Natarajan et al, *supra* note 1 at 1948.

<sup>11</sup> See for example, Amar Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' (2012) 14 *Oregon Review of International Law* 131-75; Shin Imai, Leah Gardner & Sarah Weinberger, "The 'Canada Brand': Violence and Canadian Mining Companies in Latin America" (2016), *Justice*

As discussed in relation to Cairo in the *Third World Quarterly* Special Issue, the place of praxis and the praxis of place has heuristic importance, too. This phrasing resonates not just with sites of scholarly production but also with respect to sites of praxis within the practice and periodization of international law and Third World approaches to it.

Along these lines, Obiora Okafor's opening keynote address set the tone and pace for reflections on praxis at the conference, and serves a similar function here. It also complements the other articles on geographical place and dual agency (Cynthia Farid); space and time (George Galindo); and connection, exclusion and belonging, in relation to the place of caste in TWAIL (Srinivas Burra). The colonization of peoples within and by international law and its institutions is also encountered in the challenge of global governance, whether in terms of the harms in Africa from private international governing bodies such as FIFA (Basil Ugochukwu) or the false universalism of global analogies of constitutionalism and administration (Sujith Xavier).

Part of taking stock entailed identifying topics that received comparatively less TWAIL attention in the past, and that are likely to provide fruitful avenues for future inquiry, collaboration, and solidarity. In addition to Burra's important intervention on caste, we were pleased and fortunate to receive papers dealing with Indigenous Peoples and environmental issues, including the complex relationship between them. An examination of the place of Indigenous rights within Latin American politics reveals the means whereby rights are simultaneously enshrined and subordinated (Amaya Alvez Marin). The pressing issue of climate change is examined from the Third World point of view, identifying the international legal frameworks for carbon colonialism (Julia Dehm), while the related issue of pipeline development illustrates the interplay between legal structures and relationships between state, corporate, and Indigenous actors and authorities (Tyler McCreary).

## II. TAKING STOCK AND LOOKING FORWARD: THE MULTIPLE LOCATIONS OF TWAIL INTELLECTUALS AND THEIR PRAXIS

Throughout our conference and workshops, we used Third World and Global South interchangeably as a term of art.<sup>12</sup> Based on the manner in which these terms were deployed, there was a common epistemic assumption. Yet the term 'Global South' came about as a challenge to the various other monikers in use. Tracing the etymology of the Global South and the Third World points to similarities and differences between these terms. These foundations are rooted in broader social science literature that locates and imagines the Global South in multiple registers.

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*and Corporate Accountability Project*, online: <<https://justiceprojectdotorg1.files.wordpress.com/2016/10/the-canada-brand-report5.pdf>>; Boaventura De Sousa Santos, *Toward A New Common Sense: Law, Science And Politics In The Paradigmatic Transition* (New York: Routledge, 1995); Elizabeth Ann Kronk Warner, "South of South: Examining the International Climate Regime from an Indigenous Perspective" in Shawkat Alam et al, eds, *International Environmental Law and the Global South* (Cambridge: Cambridge University Press, 2015); George Manuel & Michael Posluns, *The Fourth World: An Indian Reality* (Toronto: Collier-Macmillan Canada, 1974); Vinay Lal, *The Other Indians: A Political and Cultural History of South Asians in America* (Los Angeles: UCLA Asian American Studies Center, 2008).

<sup>12</sup> See for example, Cynthia Farid, "Legal Scholactivists in the Third World: Between Ambition, Altruism and Access", p 57 in this issue.

Meanwhile, Third World is generally understood as a category used to describe former colonies and underdeveloped nation states currently experiencing crisis or 'slow violence' as result of the colonial, imperial and neo-colonial policies imposed on them during recent or not so distant pasts. These experiences encompass economic, social, cultural or political upheaval in some individualised or conjoined form. While we may not be able to provide a fuller exposition of these etymologies and their various controversies here, it is important to locate them within our broader conversations about the ongoing effects of colonialism and imperialism on the peoples of the Global South.<sup>13</sup>

Understanding the variety of methodological persuasions for TWAIL scholars, we accept the utility of both terms. We propose to use both categories as useful heuristic devices. Both categories have a place in scholarship and teaching, and they open up windows to push for a broader research agenda on our collective past, our here-and-now, and our common future. Such conceptual categories and the analytical tools they offer are urgently needed. By opening up the terms of art we use, we hope to build bridges between TWAIL and decolonial scholars from the South. Creating pathways for interconnection that traverse linguistic and disciplinary boundaries remains in keeping with TWAIL's fluid interdisciplinary methods. At the same time, linguistic and disciplinary boundaries continue to assert themselves even in the final, monolingual output of this special issue (and notwithstanding our efforts at forging further connections within and beyond TWAIL scholarship).

Different understandings of the role of interdisciplinary and inter-temporal connections, disciplinary boundaries and exclusions, and individual and collective agency within institutions and communities pervade several articles in this special issue.

In the context of TWAIL's own intellectual traditions, George Galindo's "Splitting TWAIL" unpacks the politics of periodization that he identifies as implicit in categorizations of distinct 'generations' of TWAIL scholarship. Galindo cautions on the pitfalls of separating out 'TWAIL II' from (invented) 'TWAIL I' traditions, for fear of diluting TWAIL's overarching coherence and denting its capacity to impact upon mainstream international law scholarship. He argues that TWAIL is best viewed as an intellectual movement of Third World international legal scholarship defined by its clarity of common purpose, not as a fluctuating field of thought that varies in its attitudes and priorities from one generation to the next. Galindo traces some of the inter-generational conversations and disconnects between the early Third World jurists and what subsequently crystallized as TWAIL. Drawing important insights from the 2010 TWAIL Paris colloquium in particular, Galindo suggests that these internal disconnects serve to undermine TWAIL's broader legitimacy. The thrust towards a particular mode of scholarly praxis is marked by the article's focus on TWAIL eclipsing the skepticism or indifference it meets, and penetrating a mainstream international legal discourse where the priorities of Third World peoples

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<sup>13</sup> For an extended analysis of 'Third World' & 'Global South' see: Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16:2 *Wis Intl L J* 353; Balakrishnan Rajagopal, "Locating the Third World in Cultural Geography" (2000) 15:2 *Third World Legal Stud* 1; BS Chimni, "Third World Approaches to International Law: A Manifesto", (2006) 8 *Intl Community L Rev* 3; Alfred J Lopez, "Introduction: The (Post) Global South" (2007) 1:1 *The Global South* 1; Caroline Levander & Walter Mignolo, "Introduction: The Global South and World Dis/Order" (2011) 5:1 *The Global South* 1; see also Sujith Xavier, *False Universalisms of Global Governance Theories: Global Constitutionalism, Global Administrative Law, International Criminal Institutions & The Global South* (PhD Thesis, Osgoode Hall Law School, 2015) [unpublished] at 8 on the similarities and differences between the terms 'Third World', 'Global South', and why these terms matter in scholarly praxis.

remain peripheral. Towards this end, Galindo emphasizes the primacy of TWAIL's history as one based not on the carving out of two (or more) different generations, but on the continuities, commonalities and collective traditions of thought that transcend time and bind it as an intellectual movement.

A key founder and sustainer of this intellectual movement, Obiora Okafor's opening keynote address in Cairo examined praxis beyond, but not necessarily without, the academy. Recounting his experiences as the then Vice-Chair and Chairperson, of the UN Human Rights Council Advisory Committee, Okafor reflected on the limits and possibilities of 'TWAILING' the UN. His intervention connected closely to the questions raised by our other keynote speakers in Cairo (Abi-Saab and Sornarajah) on the opportunities of infiltration and operation 'behind enemy lines', and the pitfalls of such compromise.<sup>14</sup>

In his article, Okafor expands on his understanding of praxis as a form of harmony between conception and execution, and offers a rich analysis of the transformative elements of praxis. From his own 'life in TWAIL' and his institutional engagement inside (and beyond) the UN human rights machinery, Okafor presents the idea of a 'TWAILian dramaturgy' as a critical tool to think about the ways in which human drama within social movements, NGOs, international relations and the UN can be used to pursue TWAIL's broad goals of socio-political emancipation and economic justice for Third World peoples. His account is an honest and insightful meditation on the ability of technicians with committed politics to have a transformative impact, and of navigating the contours between one's own strongly felt TWAIL convictions and the constraining environment of mainstream international institutions. This gives us a strong sense of the contradictions and obstacles between theory and practice, or perhaps the inevitable imperfections of praxis. Here, Okafor's piece also speaks to the relationship between 'sporadic' and structural engagement. He emphasises the importance of 'close engagement' to the point of microscopic analysis, so as to understand the 'micro-dramas' that facilitate and foster the making and unmaking of international law. Such engagement from a resolutely TWAIL perspective, for Okafor, allows us to unearth otherwise hidden spaces of contestation, and to better explain our world. This model of engagement remains crucial as we continue to work towards constructing alternative futures.

In line with extending TWAIL analysis to the machinery of international law institutions, Basil Ugochukwu explores the manner in which the Federation of International Football Association's (FIFA's) decision-making apparatus impacts on the Global South, arguing that it exemplifies the exclusionary practices of other public and private mechanisms of global governance. Centering his critique on a global institution like FIFA and its particular governing mechanisms, he calls for greater scrutiny of these often-forgotten global institutions that have significant economic, social, and cultural impacts on the peoples of the Global South. While a cursory doctrinal glance may dismiss FIFA's importance or relevance, Ugochukwu illustrates its undeniable significance for the South and the various power dynamics between Southern states, players and the Association. By shifting focus to FIFA and applying TWAIL to private governing mechanisms, he demonstrates the degree and means by which hierarchies are embedded within technologies of public and private global governance and opens new vistas for TWAIL analysis in the realm of international institutions.

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<sup>14</sup> Georges Abi Saab, "The Third World Intellectual in Praxis: Confrontation, Participation or Operation Behind Enemy Lines?" (2016) 37:11 *Third World Q* 1957; M Sornarajah, "On Fighting for Global Justice: the Role of a Third World international Lawyer" (2016) 37:11 *Third World Q* 1972.

In addition to building connections within the Third World project over time and across different international institutions, efforts are also being made to more explicitly merge TWAIL analyses with ongoing work on the Global South in other disciplines. Sujith Xavier's contribution on "Learning from Below: Theorising Global Governance Through Ethnographies and Critical Reflections from the Global South" provides such an example. This article interrogates the false universalism of Northern and Western theories of global governance (namely, global constitutionalism and global administrative law) through the rhetorical question of whether we should learn from the Global South. Answering in the affirmative, Xavier further explores how to learn from the Global South by articulating an interdisciplinary approach that emphasizes the lived realities of its peoples. This approach begins with TWAIL and builds on these international law arguments through insights from history, sociology, and anthropology about the Global South as a site of knowledge production. Xavier also problematizes monist gaps in TWAIL analysis and democratic and ethical failings in mainstream international law analysis. More specifically, he prescribes both inter- and intra-disciplinary paths forward through the expansion of both legal ethnographies and ethical duties to attend to Southern material realities within international law as a field of practice. In summary, Xavier sketches the outlines of a socio-legal theory of the Global South that better orients scholars and practitioners to the history of the present even as they co-conspire toward emancipatory futures.

Building on Okafor's reflections on 'TWAIL-ing' international institutions, as well as Xavier's argument for interdisciplinary bridging, Cynthia Farid's paper explores the work of Third World international lawyers, scholars and activists living and working in the Third World. It theorizes a location-specific approach that emphasizes the geographical Third World, arguing that Third World "scholactivists" must navigate complicated terrains in which they inhabit both positions of power and act as catalysts for change. Combining insights from TWAIL, Law and Society, and South Asian/Bangladeshi legal history, the article creates a window into the life and work of one of Bangladesh's most prominent international lawyers, Kamal Hossain. Using Hossain's lived experience, Farid walks the reader through the duality of praxis of international law in the Global South. In addition to setting the stage for later work on Hossain's contribution to Bangladesh, this paper offers a better understanding of how local individual actors can shape global processes. The effect of their participation is often facilitated by global and local networks that seek transformative solutions. Simultaneously, the agency of these local actors is shaped and constrained in important ways by existing structures at the local, national and global levels.

As TWAIL scholars seek solidarity within and beyond the practice and study of international law, and argue for the specificity of place, Srinivas Burra points out that the critical purchase of TWAILian praxis depends on the degree to which TWAIL is itself inclusive. His piece on "TWAIL's Others: A Caste Critique of TWAILers and their Field of Analysis" evaluates TWAIL with regard to the question of caste. While centred in India, the hierarchical caste system has left its vestiges throughout South and South-East Asia and beyond in diasporic communities. Scholars of South Asian origin have played a significant role in shaping TWAIL, from formative figures to contemporary flag bearers. Thus, Burra scrutinizes to what extent the movement has combatted pervasive forms of caste-based subjugation and discrimination and, unsurprisingly, finds TWAIL wanting. TWAIL's negligence in combatting caste-based discrimination is particularly distressing given that it compounds mainstream international law's own comparative neglect of caste – one of the most brutal and oppressive social systems – while taking



much clearer stances against comparable evils such as apartheid, racism, and sexism. Burra points out that TWAIL prioritized adopting strong anticolonial and postcolonial stances, subordinating the caste question that contests hierarchies within these anticolonial and postcolonial stances. He points to the privileged social background of international law academics “whose lived experiences immunize them from capturing and analyzing the social phenomenon of caste as part of their world of ideas”,<sup>15</sup> persuasively arguing that while such material constraints could be overcome, this has not happened yet.

### III. EXPANDING ON TWAIL ANALYSIS: INDIGENOUS PEOPLES AND ENVIRONMENTAL ISSUES

As previously noted, one of our aims at the Cairo conference was to deepen and reimagine engagement with underexplored alliances and conversations within TWAIL scholarship. At times, expanding these discussions also overlapped with one of our other aims, which was to focus on praxis. This Special Issue builds on these goals particularly through engagement with Indigenous movements and environmental issues.<sup>16</sup>

The papers in this issue were work-shopped at a gathering in Windsor, Ontario, Canada. Windsor is well-known for its location on the border with Detroit and the United States, as well as for its industrial base in concert with (and then in the shadow of deindustrialization in) Detroit. Characterizing the place of this scholarly praxis in multiple ways, Windsor and its surrounding area is also the site of much of the agricultural work in Ontario, including migrant agricultural workers from Mexico, the Caribbean, and beyond.<sup>17</sup> Especially germane to the following set of contributions, the city and region are also subject to much older, but no less lively, relationships, including the storied jurisdiction of different Indigenous peoples and nations who have called, and still do call, these lands and waters home. While legal scholars in Canada generally, and the two Canadian-based co-editors here, are only at the very beginning of long journeys of learning and teaching about these Indigenous relations and jurisdictions<sup>18</sup>, some of these lessons are worth mentioning briefly here nonetheless.<sup>19</sup>

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<sup>15</sup> Srinivas Burra, “Twail’s Others: A Caste Critique of Twailers and their Field of Analysis”, p 111 in this issue.

<sup>16</sup> See also, James Thuo Gathii, Henry J Richardson III & Karen Knop, “Introduction to Symposium Online on Theorizing TWAIL Activism” (2016) *AJIL Unbound* 18, online: <<https://www.asil.org/blogs/introduction-symposium-theorizing-twail-activism>>. See also Pooja Parmar, *Indigeneity and Legal Pluralism in India: Claims, Histories, Meanings* (New York: Cambridge University Press, 2015).

<sup>17</sup> Adrian A Smith, “Bunk House Rules: Housing Migrant Labour in Ontario” (2015) 52:3 *Osgoode Hall LJ* 863.

<sup>18</sup> See for example, the WYAJ special issue on outdoor Indigenous legal education, John Borrows, “Foreword: Indigenous Law, Lands, and Literature” (2016) 33:1 *Windsor YB Access Just v*; Valarie Waboose & Gemma Smyth, “Reflections on Anishinabe Law Camp in Bkejwanong Territory” (25 October 2016), *Reconciliation Syllabus* (blog), online: <<https://reconciliationsyllabus.wordpress.com/2016/10/25/reflections-on-the-anishinabe-law-camp-bkejwanong-territory/>>.

<sup>19</sup> In addition to teachings that co-editor Sujith Xavier received during the Anishinabe Law Camp organized at Walpole Island First Nation, we are also grateful for enlightening conversations he has had with colleagues Russell Nahdee and Valarie Waboose about some of the histories and relationships of these territories. As mentioned in the body of the text here, such teachings, histories, and relationships are routinely erased from official narratives and documentary histories. We remain solely responsible for any errors here.

Like all land in Canada, the land on which the Windsor writing workshop took place has a contested and complicated history. In a reflection on a recent Anishinabe law camp introducing some members of the Windsor law faculty to Indigenous laws and legal traditions, Professors Valarie Waboose (Anishnabe-Kwe, Walpole Island First Nation) and Gemma Smyth identify that they are writing "...from the Faculty of Law at the University of Windsor, located on [...] Anishinabe Territory, the territory of the Three Fires Confederacy, Windsor, Ontario."<sup>20</sup> Noticeably different, a version of land acknowledgment circulated by the Canadian Association of University Teachers notes the following for the University of Windsor: "We [I] would like to begin by acknowledging that the land on which we gather is the traditional territory of the Attawandaron (Neutral), Anishnaabeg, and Haudenosauonee peoples."<sup>21</sup> In even starker contrast, the official university website only notes that: "The story of our university began with its founding in September of 1857, when the first students arrived to study at its predecessor, Assumption College."<sup>22</sup> While not mentioned on the university webpage, the College's beginnings as Jesuit missionary schools are themselves shrouded in controversy. The relevant lands for these schools were supposedly 'gifted' to the Jesuit missionaries by the Huron/Wendat<sup>23</sup>, who themselves had an agreement to stay on these lands with members of the Three Fires Confederacy (Ojibwe, Odawa, and Potawatomi).

In looking at some of the treaty background that encompasses the wider area where our writing workshop was held, it is clear that British and then Canadian sovereign practices promoted settler self-interest (reinforced by long-standing unilateral treaty interpretations) at multiple levels.<sup>24</sup> For example, Caldwell First Nation has been in the midst of a land claims process since the 18<sup>th</sup> century and their land rights remain in limbo despite a recent specific claims settlement.<sup>25</sup> In both its constitution as a settler-colonial state, and in its ongoing diplomacy, Canada has been characterized by such self-dealing and

<sup>20</sup> Waboose & Smyth, *supra* note 18.

<sup>21</sup> Canadian Association of University Teachers, "CAUT guide to Acknowledging Traditional Territory", online: <<https://www.caut.ca/docs/default-source/professional-advice/list---territorial-acknowledgement-by-province.pdf?sfvrsn=12>>.

<sup>22</sup> University of Windsor, "About the University: Our History", online: <<http://www.uwindsor.ca/47/our-history>>.

<sup>23</sup> See for example, Laurie Leclair, *The Huron-Wyandottes of Anderdon township a case study in native adaption, 1701-1914* (MA Thesis, University of Windsor, 1988) [unpublished] at 12-18.

<sup>24</sup> See, for example, the bare text of the Upper Canada McKee Treaty No. 2 (found online at: <<https://www.aadnc-aandc.gc.ca/eng/1370372152585/1370372222012#ucls4>>) and some of the relevant histories listed in the Bibliography for Treaties of Upper Canada (found online at: <https://www.aadnc-aandc.gc.ca/eng/1100100029097/1100100029098>), including the works by Lytwyn, Smith, and Surtees. In contrast to unilateral treaty interpretations in the shadow of the Royal Proclamation of 1763, see also John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self Government," in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver, University of British Columbia Press, 1997).

<sup>25</sup> Sharon Hill, "Caldwells buying land but years away from a Leamington reserve" Windsor Star (March 26, 2013) <<http://windsorstar.com/leamington-and-pelee/caldwells-buying-land-but-years-away-from-a-leamington-reserve>>; Eva Mackey, "Unsettling Expectations: (Un)certainly, Settler States of Feeling, Law, and Decolonization" (2014) 29(2) *Canadian Journal of Law and Society* 235-252; Dylan Kristy, "Caldwell First Nation signs vandalized in Leamington", *Windsor Star* (11 November 2016), online: <<http://windsorstar.com/news/local-news/caldwell-first-nation-signs-vandalized-in-leamington>>.

unilateralism.<sup>26</sup> This brief mention of the settler-colonial, constitutional, and Indigenous relations that characterize the meeting place of our workshop prompts further questions about the relationship between scholars writing about the emancipation of the people of the Global South, Indigenous peoples of the Global South, and the Indigenous Peoples of Turtle Island (also known as North America).

In explicitly traversing connections between these areas, Amaya Alvez Marin's article explores this confluence of colonialism, constitutionalism, and relations between domestic and international law through the example of Indigenous recognition and water rights in Chile. First, Alvez Marin examines the centuries long political and constitutional exclusion of Indigenous peoples in Chile in light of contemporary struggles for recognition generally and in relation to ancestral water rights. The article then tracks the effectiveness (or lack thereof) of proposals over water from decolonization and national sovereignty over resources to more contemporary conceptions of water as a human right. Given the 'neoliberal judo' of corporations co-opting humans' rights to water, Alvez Marin shows how the struggle against its radical commodification requires more than pluralist constitutional recognition. Instead, she argues that Indigenous ancestral water rights require redistribution of power and resources that challenge both traditional state sovereignty and limited, neoliberal constitutional reform. The article concludes by connecting these problems with insights from Third World Approaches to International Law and Latin American International Law that critique the historical and contemporary intellectual traditions of Western, Euro-American inter-state international law that have shaped sovereignty and constitutionalism to the exclusion of Indigenous peoples and their laws.

Julia Dehm provides a timely and much-needed TWAIL critique of the international climate change regime at a stage where a significant shift has taken place in the law in this area as represented by the 2015 Paris Agreement. Dehm is at the vanguard of a growing number of TWAIL scholars interested in the operations of international environmental law in the Third World. She uses a jurisdictional approach, scrutinizing how modes of authority operate and are legitimized, focusing particularly on the construction of notions of common concern and commonality. She illustrates the different ways in which commonalities have been deployed by international legal regimes and by social justice movements, identifying the 'carbon colonialism' or 'CO<sub>2</sub>lonialism' of the former, and the struggles to provide alternatives for climate justice by the latter. In light of the 2016 US elections, and concerns about how US commitment to international climate law will shift from the Obama to Trump administrations, Dehm's trenchant critique of persistent legal structures takes on particular resonance. It is a reminder that, for the peoples of the Global South on the frontlines of environmental degradation and change, contestation and resistance requires creatively manipulating and reshaping traditional modes of authority and legitimacy. Importantly, the paper identifies how this is indeed occurring through transnational social movements and in local communities worldwide.

Our next article spans successive and interlocking histories and theories of colonial sovereignty and corporate authority on Gitxsan territory in the northwest interior of British Columbia, Canada. Tyler McCreary's article, "Historicizing the Encounter between State, Corporate, and Indigenous Authorities on Gitxsan Lands", details continuities in the centuries-long grasp of colonial sovereignty in these

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<sup>26</sup> See for example, Peyton V Lyon & Tareq Y Ismael, eds, *Canada and the Third World* (Toronto: Macmillan of Canada, 1976) and, most recently, Karen Dubinsky, Sean Mills, & Scott Rutherford, eds, *Canada and the Third World: Overlapping Histories* (Toronto: University of Toronto Press, 2016).

territories while asserting the importance of Indigenous jurisdiction. Informed by Third and Fourth World struggles for *and with* sovereignty, McCreary's article contrasts the workings of storied authority within Gitksan legal orders with the re-territorializing imposition of colonial sovereignty that also authorized corporate presence. This imperial imposition was followed by the settler-colonial divorce of the political domain from the economy, to the continuing benefit of regimes of corporate authority. However, McCreary's article shows how the counterpoise of Indigenous resurgence has impacted state authority *and* corporate strategies of extracting both resources and consent. The article concludes with the ambivalent example of the latter through an Australian coal mining company's negotiated agreements with a Gitksan *wilp* (house group) and how they inevitably reproduce settler-colonial relations.

These articles make helpful inroads into the interconnections between TWAIL, Indigenous peoples from the Global North and Global South, and the complicated links with international environmental laws and movements. Yet much work remains to be done on the relationship between the Global South, Indigenous and Tribal Peoples, and the escalating global exploitation of their lands and waters in an era of climate change and environmental degradation.

Returning to the focus on 'place' at the start of this section, TWAIL scholars writing or publishing in the Global North about the Global South or the Fourth World are confronted with a host of important questions. As mentioned throughout the papers in this issue, complications arise with the neoliberal constitutional inclusion of Indigenous rights, with Third World scholars' engagement with mainstream international institutions, and with the exclusion of caste from both mainstream international law and critical approaches to it. The issue of dual (and triple) agency also complicates any easy divisions of intellectual labour between North, South, East and West. Similar and further questions of solidarity arise for TWAIL scholars based in spaces that were 'gifted', 'surrendered' or stolen from Indigenous Peoples in settler colonial states. As Shaista Patel observes, "[i]t is futile to ask for justice for Muslims in a nation-state where the genocide, the continual extermination of its Indigenous peoples, is a matter of dull and daily state affairs. Our politics must unsettle these daily practices of violence".<sup>27</sup> TWAIL must make implicit connections explicit, such as those between the meaning and scope of decolonization in various spaces of resistance.<sup>28</sup> More importantly, there are useful and strategic bridges of mutual solidarity, support, and learning that can be built between the scholarship on Indigenous resistance and resurgence and scholarship on the Global South. Arguably, there are both surface level synergies and disjunctures, but these connections and differences should be fleshed out further.<sup>29</sup> By doing so,

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<sup>27</sup> Shaista Patel, "Defining Muslim Feminist Politics through Indigenous Solidarity Activism", (1 August 2012), *Feminist Wire*, online: <<http://www.thefeministwire.com/2012/08/defining-muslim-feminist-politics-through-indigenous-solidarity-activism/>>.

<sup>28</sup> Eve Tuck & Wayne Yang, "Decolonization is not a metaphor" (2012) 1:2 *Decolonization: Indigeneity, Educ & Soc* 1.

<sup>29</sup> See, for example, Glen Sean Coulthard, *Red Skins White Masks: Rejecting the Colonial Projects of Recognition* (Minneapolis: University of Minnesota Press, 2014); Audra Simpson, *Mohawk Interruptus (Political Life Across Borders of Settler States)* (Durham: Duke University Press, 2014); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); and Balakrishnan Rajagopal, "Counterhegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy" (2006) 27:5 *Third World Q* 767.

important insights and critiques can be developed and harnessed to better inform daily praxis in the Global South, in settler colonial spaces, and the spaces in between.

#### IV. UNTIL NEXT TIME

In this special issue of the *Windsor Yearbook of Access to Justice*, we have sought to build bridges. These bridges connect the TWAIL research agenda to various positions and projects, both internal and external to the discipline of international law. Some of the papers gathered under this special issue have sought to engage in reflection about praxis, the need to learn from the Global South, the dual realities of individual scholar-activists in the geographical Third World, and some of the exclusions faced within both TWAIL and its multiple locations. Other contributions have outlined further avenues for expanding TWAIL analysis in new intra- and inter-disciplinary directions, as well as seeking to forge links between Indigenous peoples in the Global North and Global South and their connection to TWAIL's animating concerns.

It is our hope that by building these bridges we can foster a much more holistic and thoughtful engagement with the dynamics of international law. As our world braces for the continuing whiplash of neo-liberal economic globalization (itself flowing from the imperial and settler-colonial encounters that establish and maintain international law), activist scholars must push for greater emphasis on the lived realities and self-determination of the peoples of the Global South and the Fourth World. The need for the type of scholarship we have been fortunate enough to collect in this special issue cannot be over-emphasized. The lead advisory in Flint Michigan, drinking water advisories in Indigenous communities throughout Canada, Aymara water rights in Chile, and the drinking water crisis in Haiti have significant interconnections. On the surface, connections can be made to resource ownership, allocation, violence and profiteering. But digging deeper would also reveal the ongoing effects of colonialism, slavery and imperialism that exceed the settler certainty and coerced circulation sought by colonizers, states, and modern capitalists alike.<sup>30</sup> These connections must be explored further and used as the basis of our collective praxis in the years to come.

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<sup>30</sup> Robert Knox, "Valuing race? Stretched Marxism and the logic of imperialism" (2016) 4:1 *London Rev Intl L* 81.