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Viewing the International Labour Organization's Social Justice Praxis Through a Third World Approaches to International Law Lens: Some Preliminary Insights

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LAW for
SOCIAL
JUSTICE

Edited by

George P. Politakis

Tomi Kohiyama

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International Labour Office
Geneva 2019

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Obiora Chinedu Okafor, Titilayo Adebola and Basema Al-Alami

I. Introduction

The overarching objective of this paper is to shine a Third World Approaches to International Law (TWAIL) torchlight on the ILO's social justice discourse and praxis to find out what can be seen, or seen in a new light, or seen in a different way, when the TWAIL approach is adopted, and to comment on the significance of our findings, if any. To this end, the paper pursues two specific and intertwined goals, namely: (i) to analytically tease out the similarities and differences between TWAIL's avowedly (global) social justice discourse and praxis and its ILO counterpart; and (ii) to, in the light of the findings of the preceding exercise, reflect on what (if anything) the ILO's and TWAIL's social justice discourses and praxis can learn from each other.

In the light of these goals, the paper will necessarily begin with a brief explanation of what TWAIL stands for as an intellectual social justice movement and as a 'networked' school of thought in international legal studies. This exercise will be followed by an examination of what we see as the 'commanding heights' of the ILO's social justice discourse and praxis (workers' rights, other economic and social rights, and the rights of indigenous peoples). Thereafter, a number of preliminary insights from an engagement between the TWAIL and ILO social justice discourses and praxis will be offered. The paper ends with some brief concluding comments.

II. Explaining TWAIL

While TWAIL is an intellectual movement, and is not partisan, it also does not float high above politics in the way too many schools of thought present themselves – not always with credibility.¹ What binds TWAIL scholars (TWAILers) is a rock-solid commitment to the difficult task of producing international law scholarship that (i) uncovers how international law disadvantages the Third World and/or (ii) envisions ways to change or transform international law to accommodate much more equitably than is currently the case, the interests of Third World peoples.² TWAIL work is global social justice work, and is vitally important to international law scholarship and practice, because hitherto, international law – both its texts and the living law as it is actually applied and experienced – has generally (albeit not totally) functioned in a way that systematically disempowers, dispossesses and disadvantages the Third World.³ It is therefore important to adopt or at least listen keenly to TWAIL in order to be in a better position to push or coax both the texts and the living versions of international law in the right directions, and progressively right the wrongs of the past and present.

So, where exactly is this ‘Third World’ located, this geo-political expression that TWAIL argues has, in general, tended to be subordinated by the living international law praxis? In a ground-breaking paper, Karin Mickelson imagined the Third World as a ‘chorus of voices’.⁴ In a chorus, you have all types of pitches and voices. But in the best choirs, their songs come out harmoniously. China is not Botswana, Botswana is not Nigeria. Nonetheless, on most issues, these different countries have very many shared concerns, which is because they have a history of being subordinated or being treated with in similar ways. This is why despite China’s great and rapid economic growth and its new position as a major global power itself,

¹ Makau Mutua, ‘What is TWAIL?’ (2000) 94 *Proceedings of the Annual Meeting of the American Society of International Law* 31.

² *ibid.* See also Obiora Chinedu Okafor, ‘Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective’ (2005) 43 *Osgoode Hall Law Journal* 171.

³ Mutua (n 1); Okafor (n 2).

⁴ Karin Mickelson, ‘Rhetoric and Rage, Third World Voices in International Legal Discourse’ (1998) 16 *Wisconsin International Law Journal* 353.

it still aligns on almost every issue with the G77 at the UN; an alliance that now self-describes as the ‘G77+China’.⁵

Thus, the Third World is an appellation that is affixed to the peoples and the States in which those peoples live that have, broadly speaking, experienced a particular kind of historical subordination with specific properties at the hands of global power formations (be they the Royal Niger Company, the Dutch East India company, the European colonial powers, and the contemporary global hegemon); the places where this has been most intense or pronounced.

The Third World is not, however, a ‘fixed geographic space’.⁶ Nevertheless, there is a remarkable consistency of those who self-identify as ‘Third World’. There are, of course, material circumstances that have led to their broadly shared sense of self and understandings of the world and international law’s orientation and valency as both text and practice. Thus, as Upendra Baxi has noted, there are also certain ‘geographies of injustice’⁷ that shape the location of the Third World. In the last 100 years or so, these geographies of injustice have tended to point in certain well-known directions: the former European colonies in Asia, Africa and Latin America. But there is also the notion that at least the understandable conception of the ‘Third World’ needs to be eased open to accommodate the South within the North – the so-called ‘Fourth World’.⁸ What is more, as discussed in Chimni’s work, one should not forget the North within the South. This is not a completely new concept because the concept of ‘compradors’ (from Marxism) has been around with us for a long time. There is for sure a South within the North and an emerging North within the South. However, in line with B.S. Chimni’s position, it is argued that while there may be a

⁵ For example, see the position of this group at the recent UN Conference on South-South Cooperation (BAPA+40) (March 2019) <<https://www.unsouthsouth.org/bapa40/statements/>>.

⁶ Balakrishnan Rajagopal, ‘Locating the Third World in Cultural Geography’ (1999) 15 *Third World Legal Studies* 1.

⁷ Upendra Baxi, ‘Geographies of Injustice: Human Rights at the Altar of Convenience’ in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001) 197.

⁸ Amar Bhatia, ‘The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World’ (2012) *Oregon Review of International Law* 131.

North within the South, it is not the same North. There are differences in the features of the North in the North and the North in the South. Space limitations does not allow the adumbration of this point here.

TWAIL analysis is not, however, de-mobilized by the fact that the Third World with which it is mostly concerned may not have perfectly exact boundaries. It remains a cogent theoretical framework and methodology that is as cogent as other broad frameworks and methodologies. For instance, it has been argued that TWAIL offers both theories of, and methodologies for, analyzing international law and institutions; TWAIL may also be thought of as a broad approach.⁹ That paper began by examining the conventional features of theories and methodologies. Without necessarily accepting those features as immanent or canonical benchmarks for ‘measurement’ or assessment, it tried to discover the extent to which TWAIL matches the features of these traditionally established theories and methodologies. It found that TWAIL does indeed match the features of these more conventional theories and methodologies.

However, it should be kept in mind that TWAIL does enjoy a rich and productive kind of internal variegation. Some TWAILers are more oppositional than reconstructive. Some focus more on pointing out the problems with international law’s engagement with the Global South. For example, scholars like Joel Ngugi have asserted that TWAIL should be entirely oppositional (arguing that you cannot put old wine in new wineskins and expect it to taste any better).¹⁰ He had assumed a harder post-structuralist stance at the time. Conversely, B.S. Chimni takes the opposing view. He has always insisted that TWAIL should not merely ferret out the disadvantaging and dispossessing aspects of international law.¹¹ Instead, TWAILers should imagine a new international law – a more just international order.¹² Nevertheless, like feminists for example, TWAILers are all united solidly

⁹ Obiora Chinedu Okafor, ‘Critical Third World Approaches to International Law: Theory, Methodology, or Both?’ (2010) 10 *International Community Law Review* 371.

¹⁰ 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 *UC Davis Journal of International Law and Policy* 73.

¹¹ Bhupinder Chimni, ‘Third World Approaches to International Law: A Manifesto’ in Antony Anghie et al (eds), *The Third World and International Legal Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers 2003) 52.

¹² *ibid.*

by an ethical commitment to focus their analytical lens on the subjects and objects that contribute to the subordination and disadvantaging of the Third World, and to imagine or re-imagine an international law/order that will not dispossess or disadvantage the Third World. That is what binds TWAILers, to analytically centre the Rest rather than the West. And so, despite the rich variegation within it, TWAIL offers a vastly coherent approach to the study of international law and international relations. It should be kept in mind (and this bears repetition) that the kind of differentiation that characterizes TWAIL is also exhibited by all other recognized schools of thought. At the level of detail, all schools of thought and approaches also have variegations and internal differences. On-the-whole, however, considering that TWAIL is a big tent, it is better to think of it as a set of approaches that cohere at a level, as an approach. This would save us time lost to endless debates about narrow positivist notions of what theories are and are not, and what methodologies are or are not.

In terms of the methods that TWAIL scholars deploy,¹³ the very first thing that TWAIL approaches require us to do is to take history seriously. This is crucial to TWAIL work, albeit not unique to it. TWAIL scholars map the techniques, devices and technologies used by global power in the past and present. One cannot adequately map and think through how global power circulates and operates today in international law and relations without understanding how it functioned in the past in that context. If you have studied the past, you are better equipped to recognize it in today's manoeuvres and operations of the law. In looking at history, TWAIL scholars look not only at continuity, but also discontinuity. Continuity and discontinuity exist simultaneously, but in what relative measure?

Second, in taking history seriously, TWAIL scholars take global history seriously; that is to say not just the history of the West, but also the history of the Rest.¹⁴ TWAIL scholars seek to write the Third World's shared historical experiences into the processes and outcomes of international legal thought and action. For example, with intellectual property, questions to ponder include: historically, what was the relationship of intellectual property to the Third World? Was intellectual property used to extract

¹³ For these methods, see Okafor (n 2).

¹⁴ *ibid.*

resources? If one were to look at issues from the perspectives of Third World peoples, what may they think about intellectual property laws and the international regimes that underpin them?

Third, TWAIL takes the normative equality of Third World peoples seriously.¹⁵ TWAIL insists that all thoughts and actions concerning international law and international relations should proceed on the assumption that Third World peoples deserve no less rights and dignity than citizens of the West. For example, a TWAIL examination of the arguments that international law should allow the ‘consensual’ transfer of toxic waste from the Global North to the Global South reveals how the law demeans and endangers the lives of the Third World peoples.¹⁶

Fourth, TWAILers are informed by a deep attentiveness to the historically persistent misuse and abuse of notions of universality and claims of common humanity which have licensed the subjugation, suppression and dispossession of the Third World throughout history. The early chapters of Antony Anghie’s book explain how that was precisely the technique the Spanish used in conquering Latin America.¹⁷ TWAILers are – quite rightly – very suspicious of glib or facial notions or assertions of universality.¹⁸ For example, Muthucumaraswamy Sornarajah correctly notes that ‘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’.¹⁹ Again, this is not peculiar to TWAIL.

Fifth, TWAILers study the resistance of Third World peoples to global hegemonies and their effects. For example, Blakrishnan Rajagopal’s work on development in international law comes readily to mind.²⁰ And some of Titilayo Adebola’s work on the ways of resisting the expropriation of the intellectual property of Third World peoples using formal legal techniques

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge UP 2005).

¹⁸ *ibid.*

¹⁹ Muthucumaraswamy Sornarajah, ‘The Asian Perspective to International Law in the Age of Globalization’ (2001) 5 *Singapore Journal of International and Comparative Law* 284.

²⁰ Balakrishnan Rajagopal, *International Law from Below* (Cambridge UP 2003).

falls within this genre.²¹ How do you resist the deployment of the principles of law? Some TWAILers study resistance and techniques of resisting hegemonic laws.

The above is not an exhaustive list, but it covers examples of techniques used by TWAILers. Although many of these techniques are not in themselves unfamiliar to other critical international law scholars, it is their use in combination one with the other and their being squarely focused on the treatment of Third World peoples in and by international law and relations that provides them with their distinctiveness as TWAIL methods/techniques.

III. The ILO's social justice discourse and praxis

Since its creation, the ILO has adopted 190 conventions, 6 protocols and 206 recommendations that address a wide range of issues, ranging from minimum wages and working conditions to discrimination and social security. Setting international labour standards goes to the heart of the work of the Organization. Depending on the context, histories, and so on, such standards can have a salutary effect on the enjoyment of the social and economic rights of workers, as well as on the realization of the rights of indigenous peoples.

The promotion and enhancement of social justice sits at the core of the ILO's mandate, as the Organization is committed to improving labour conditions around the world, almost always in situations and contexts involve social-economic injustices and hardships for some (though not all).²² In fact, the ILO is often celebrated in the academic realm as one of the few international organizations that has a mandate that is squarely focused on social justice.²³ While the Offices of the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees, among others, may

²¹ Titilayo Adebola, 'Access and Benefit Sharing, Farmers' Rights and Plant Breeders' Rights: Reflections on the African Model Law' (2019) 9 *Queen Mary Journal of Intellectual Property* 105.

²² Monique Zarka-Martres and Monique Guichard-Kelly, 'Decent Work, Standards and Indicators' in David Kucera (ed), *Qualitative Indicators of Labour Standards: Comparative Methods and Applications* (Springer 2007) 83.

²³ Guy Ryder, 'The International Labour Organization: The next 100 years' (2015) 57 *Journal of Industrial Relations* 748.

dispute this conclusion, the main point being made here is that the attainment of social justice is so central to the ILO's work that it tends to stand out in that regard. This section of the paper explores the ILO's social justice mandate and its relevance for, and consequences on, workers' rights, social and economic rights more generally, as well as on indigenous peoples' rights.

1. *What is social justice?*

Given that social justice is at the heart of the ILO's mandate, one must understand what is meant by social justice before analyzing it in the context of the ILO's work. Thomas Pogge has adopted an institutional approach to justice, arguing that the principles of justice apply to the basic structure of society and its rules. This basic structure consists of the most prominent institutions of society, particularly those that fundamentally shape society and hence have profound and pervasive effects on people's lives.²⁴ These institutions include:

society's basic mode of economic organization; the procedures for making social choices through the conduct of [...] individuals and groups [...]; the more important practices regulating civil (noneconomic and nonpolitical) interactions, such as the family or the education system; and the procedures for interpreting and enforcing the rules of the scheme.²⁵

Furthermore, according to Pogge, what is key to the notion of global justice are the negative duties that impose constraints on conduct that worsens the situation of others.²⁶ Pogge's analysis of global justice relies to a large extent on human rights, which he regards as the core values of society's moral and political discourses.²⁷ Hence, according to Pogge, institutional order is unjust if it foreseeably generates a human rights deficit.²⁸ Other renowned scholars have also delved into the notion of social justice, especially as it pertains to workers. According to ILO's Director-General

²⁴ Thomas Pogge, *Realizing Rawls* (1st edn Cornell UP 1989) 22.

²⁵ *ibid* 22–23.

²⁶ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2nd edn Polity Press 2008) 15.

²⁷ Thomas Pogge, 'Human Rights and Global Health: A Research Program' (2005) 36 *Metaphilosophy* 182, 195. Pogge (n 24) 25.

²⁸ *ibid*.

Guy Ryder, for example, ‘social justice is not synonymous with inequality, but it coincides very strongly with inequality’.²⁹ Clearly, the inequalities that societies have been undergoing for decades produced, and continue to produce, social injustice.³⁰

2. *The ILO and social justice*

One key significance of the notion of social justice in the context of international law, and more particularly international labour law, is set out in the preamble of the ILO Constitution. The preamble states that ‘universal and lasting peace can be established only if it is based upon social justice’. The preamble also highlights a number of concrete measures urgently required in order for social justice to be achieved around the world, such as the establishment of a maximum number of work hours in a day or week, the provision of adequate wages, and the prevention of unemployment. It therefore seems that such measures are fundamental to the Organization’s social justice mandate, and that social justice is in turn key to its overall remit.

As we have seen already, the preamble also draws a direct link between the notion of social justice and that of world peace and security.³¹ The ILO’s website states that the ‘aspiration’ for social justice involves working men and women freely claiming ‘on the basis of equality of opportunity their fair share of the wealth which they have helped to generate’.³² As Marius Staden puts it, it seems that ‘the real reason for the establishment of the organisation was [...] the need to achieve social justice so as to avoid war and revolution’.³³ This makes it even clearer that the pursuit of (specific types of) social justice goals are a key part of the ILO’s *raison d’être*. According to Staden, the founding principles of ILO have been reformulated on three different occasions: the Declaration of Philadelphia 1944,

²⁹ Ryder (n 23) 751.

³⁰ *ibid.*

³¹ In the Constitution, member States agreed that they were ‘moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world’.

³² ILO, ‘The need for social justice’ <<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang-cn/index.htm>>.

³³ Marius Staden, ‘Towards a South African Understanding of Social Justice: The International Labour Organisation Perspective’ (2012) *Journal of South African Law* 91, 95.

the Declaration on Fundamental Principles and Rights at Work 1998, and the Declaration on Social Justice for a Fair Globalisation 2008, all three of which are elaborated upon, to an extent, below.³⁴

3. *The ILO and the socio-economic rights of workers*

As is evident from the discussion above, it seems that ILO's social justice mandate is mainly focused on improving workers' rights and their work conditions. What is more, the Organization is currently celebrating its 100 years of fighting for social justice, on and off its website. The ILO has noted that, alongside promoting a fair globalization, it has championed the concept of 'Decent Work' as a global development goal.³⁵ The Organization points out that its Decent Work concept was adopted by the international community through Goal 8 of the 17 Sustainable Development Goals, which aims to 'promote inclusive and sustainable economic growth, employment and decent work for all'.³⁶ Furthermore, the ILO notes that, through its Decent Work efforts, it has carried out a quest that addresses forced labour, slavery, and freedom at work since the early 1990s, and that the Organization has adopted multiple standards on such issues.³⁷ For instance, the ILO's Governing Body created the Special Action Programme to Combat Forced Labour (SAP-FL) following the publication of 'Stopping Forced Labour' in 2001.³⁸ Eliminating forced labour has now become one of the most widely accepted norms in the international realm. The ILO's website also notes that the Forced Labour Convention (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105) enjoy the highest rates of ratification among all ILO conventions. Despite this treaty ratification success, however, forced labour, human trafficking and slavery practices continue to exist around the world.³⁹

³⁴ *ibid* 96.

³⁵ ILO, '100 years of fighting for Social Justice' (2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_657787/lang-en/index.htm>.

³⁶ *ibid*; Sustainable Development Goals Fund, 'Goal 8: Decent Work and Economic Growth' <<http://www.sdgfund.org/goal-8-decent-work-and-economic-growth>>.

³⁷ ILO, 'A Global Alliance Against Forced Labour and Trafficking in Persons' (2012) <https://www.ilo.org/wcmsp5/groups/public/---cd_norm/---declaration/documents/publication/wcms_203446.pdf>.

³⁸ *ibid*.

³⁹ *ibid*.

It could appear from the preceding discussion that the focus of the ILO is solely on the improvement of working conditions. However, about a decade into the ILO's life as an organization, and following the incidence of mass poverty that characterized the Great Depression in the United States, the expansion of the mandate of the Organization appeared necessary. As such, the ILO's first Director affirmed that 'the social factor must take precedence over the economic factor'.⁴⁰ For him, social justice was a policy through which individuals are able to attain their 'political, economic and moral rights'.⁴¹ Hence, it became clear as time went on that in order for the Organization to be successful at achieving social justice, it had to expand its mandate to cover more social and economic rights. Economic and social affairs were no longer considered an end or a goal in and of themselves, but rather a means of achieving the social justice end.

The preamble of the ILO Constitution sheds light on the principles that should guide the policies of member States. Although many of these objectives may be categorized as traditional labour standards – e.g. policies relating to the minimum wage, hours of work, and work conditions, among others – the Declaration of Philadelphia nonetheless contains, as Lee describes, 'broad objectives which amount to the concept of a Welfare State'.⁴² For example, the Declaration contains objectives such as efforts towards the enjoyment of adequate housing, equality of education, full employment, child welfare, and higher standards of living. While the ILO's 1919 Constitution states that 'labour should not be merely regarded as a commodity', the 1944 Declaration conveys the same notion more affirmatively and decidedly by explicitly asserting that 'labour is not a commodity'. Hence, this Declaration reaffirms that the fundamental aim of ILO is the achievement of a broadened notion of social justice.

Furthermore, one of the key objectives of the Declaration on Fundamental Principles and Rights at Work is to cooperate with ILO member States in their efforts to promote, among other issues, the

⁴⁰ Nicolas Valticos and Geraldo Potobsky, *International Labour Law* (2nd edn Kluwer 1995) 26.

⁴¹ *ibid.*

⁴² Eddy Lee, 'The Declaration of Philadelphia: Retrospect and Prospect' (1994) 133 *International Labour Review* 467, 471.

elimination of discrimination and forced labour, freedom of association, and the right to collective bargaining.

Ten years later, ILO adopted the Declaration on Social Justice for a Fair Globalisation. According to its preface, this Declaration emerges at a crucial time 'reflecting the wide consensus on the need for a strong social dimension to globalization in achieving improved and fair outcomes for all'. The Declaration promotes and reaffirms many other related objectives, such as fuller employment, and enhanced social security and labour protection measures. The Declaration also states that member States have 'a key responsibility to contribute, through their social and economic policy, to the realization of a global and integrated strategy for the implementation of the strategic objectives, which encompass the Decent Work Agenda'. Hence, it is yet again evident that this Declaration also has at its core goal the achievement of social justice, largely through the promotion of social and economic rights around the world.

4. *The ILO and the rights of indigenous peoples*

The ILO was the very first international organization to turn its attention to the rights of indigenous peoples.⁴³ The Organization has been engaging with indigenous peoples' issues almost since the year of its creation. For instance, in 1921 the ILO carried out a number of studies on indigenous workers,⁴⁴ and five years later, the Organization created the Committee of Experts on Native Labour, which gradually led to the adoption of a series of conventions related to native labour issues.⁴⁵ Although all ILO's conventions and declarations apply to indigenous and tribal peoples, the Organization adopted two international instruments open to ratification, which specifically and exclusively address indigenous and 'tribal' peoples: the Indigenous and Tribal Populations Convention, 1957 (No. 107) and its successor the Indigenous and Tribal Peoples Convention, 1989 (No. 169). These are the

⁴³ Athanasios Yupsanis, 'The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples' (2016) 49 *Canadian Yearbook of International Law* 117, 118.

⁴⁴ Hurst Hannum, 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649, 652.

⁴⁵ Patrick Thornberry, *Indigenous Peoples and Human Rights* (1st edn Manchester UP 2002) 320.

only international treaties that deal exclusively with the rights of indigenous peoples' issues as they pertain to labour.⁴⁶

Convention No. 107, which came into force in June 1959, was the first, and in fact remained for thirty years the only international legally binding instrument focusing on the individual rights of indigenous peoples.⁴⁷ Convention No. 107 was particularly celebrated for having focused on the rights of indigenous peoples to their lands – despite overlooking the issue of access to natural resources in these lands. For instance, article 11 recognizes the right of individual or collective ownership of the lands that indigenous peoples have traditionally occupied. Furthermore, article 12(1) mandates that indigenous peoples shall not be removed without their free consent from their habitual lands. The convention generally covers land rights,⁴⁸ working conditions,⁴⁹ social security and health,⁵⁰ education and means of communication,⁵¹ and administration.⁵²

While at face value such provisions seem to be in line with the fundamental objective of achieving social justice, articulated in both the ILO Constitution and by Thomas Pogge, such provisions are undermined by a number of vague clauses that confer on member States the discretion to remove indigenous peoples from their traditional and habitual lands without their consent when this is 'in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations'.⁵³ The object of the convention is to protect and integrate indigenous peoples in the national societies within which they live, which, as Athanasios Yupsanis eloquently puts it, is a clear 'paternalistic approach that was a product of the ethnocentric view of those populations as being 'less advanced'.⁵⁴ The dual aim to protect and integrate indigenous peoples into national societies is a role

⁴⁶ ILO 'Indigenous and tribal peoples' <<https://www.ilo.org/global/topics/indigenous-tribal/lang-en/index.htm>>.

⁴⁷ Yupsanis (n 43) 120.

⁴⁸ Convention No. 107, articles 1-10.

⁴⁹ *ibid* article 15.

⁵⁰ *ibid* articles 19-20.

⁵¹ *ibid* articles 21-26.

⁵² *ibid* article 27.

⁵³ *ibid* article 12(1).

⁵⁴ *ibid* article 1(1)(a); Yupsanis (n 43) 121.

allocated primarily to member States, by virtue of article 2(1). One of the most fundamental elements of Convention No. 107 is the type of temporary State (affirmative) action required under the convention to realize the indigenous peoples' rights it guaranteed. In other words, the convention encourages States to take special measures wherever social, economic and cultural conditions hinder indigenous peoples' lives. This positive duty is in fact subject to the provision that it need only continue as long as it would be deemed necessary to have a special protection mechanism, and should cease otherwise in order to avoid 'creating or prolonging a state of segregation'.⁵⁵

The paternalistic approach that this convention tended to be based on meant that indigenous peoples were left entirely out of the Organization and enforcement of such programs. Although the imposition of an obligation on the State to adopt such special measures was undoubtedly a positive development, especially at the time the convention was adopted, the temporary nature of the provisions is nonetheless largely problematic, as it tends to conflict with the aims and aspirations of indigenous peoples, most of whom reject the notion of assimilation and instead demand permanent protection.⁵⁶

It was in recognition of many of the problems with this convention that in September 1986, ILO's Governing Body organized a fourteen-day meeting of fifteen experts to investigate the possibility of amending the convention, given (a) indigenous peoples' disapproval of Convention No. 107 and (b) the shift in the attitude of both international bodies such as the UN, and many national governments.⁵⁷ All fifteen experts unanimously condemned the assimilation approach of the convention,⁵⁸ recommending that the convention be amended immediately in a way that would ensure that indigenous peoples had the greatest possible control over their economic and social development.⁵⁹ The revision of the Convention No. 107 resulted in the adoption of Convention No. 169 on 27 June 1989. Both

⁵⁵ *ibid* article 3(2)(a).

⁵⁶ Garth Nettheim, 'Peoples and Populations – Indigenous Peoples and the Rights of Peoples' in James Crawford (ed), *The Rights of Peoples* (Clarendon Press 1988) 107, 125-26.

⁵⁷ Yupsanis (n 43) 129.

⁵⁸ *ibid*.

⁵⁹ Russel Barsh, 'Revision of ILO Convention No. 107' (1987) 81 *American Journal of International Law* 756, 761.

conventions deal with the same subject-matter in almost the same fashion, with one stark difference: the new convention abandons the assimilationist orientation of its predecessor. Thus, Convention No. 169 recognizes, *inter alia*, indigenous peoples' right to their distinct and unique cultural identity.⁶⁰ The preamble of this newer treaty recognizes the aspirations of indigenous peoples 'to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions within the framework of the States in which they live'.

Another major shift authored by the drafters and parties to the new convention is the replacement of the term 'populations', adopted in Convention No. 107 by that of 'peoples' in the new convention, given that indigenous peoples are, like other peoples, entitled to the right of self-determination.⁶¹ Although the inclusion of the term 'peoples' in this convention is positive, there exists a caveat in article 1(3) of the convention, stressing that 'the use of the term peoples in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'. In other words, the convention could be read by some as implicitly excluding the right of indigenous peoples to exercise self-determination. Hence, despite its successes, some argue that the new convention is still somewhat assimilationist in its spirit and in fact far more detrimental to the rights of indigenous peoples than its predecessor, given that 'colonists have become a little more sophisticated', abandoning the language of assimilation but yet retaining the underlying core policies unchanged.⁶² For instance, the newer convention still contains a requirement that indigenous customs and practices be compatible with the national legal system and internationally recognized human rights.⁶³

⁶⁰ Elizabeth Pearce, 'Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law' (1991) 22 *Columbia Human Rights Law Review* 361, 382.

⁶¹ Scott Forrest, 'Indigenous Self-Determination in Finland: A Case Study in Normative Change' (2006) 42 *Polar Record* 229.

⁶² Sharon Venne, 'The New Language of Assimilation: A Brief Analysis of ILO Convention 169' (1990) 2 *Without Prejudice* 53, 56, 66.

⁶³ Convention No. 169, article 9(1).

IV. Preliminary insights from a TWAIL engagement with the ILO's social justice work

Having laid a foundation for the analysis that we follow, by explaining TWAIL (albeit only briefly), and thereafter outlining what we see as the 'commanding heights' and 'highlights' of the ILO's social justice discourse and praxis, this section focuses on dealing squarely with both its overarching objective (i.e. to shine a TWAIL torchlight on the ILO's social justice work), and on its more specific – if closely integrated – goals (i.e. to tease out the similarities and differences between TWAIL's social justice discourse and praxis and its ILO counterpart; and to reflect on what, if anything, these two bodies of work can learn from each other's approach).

It should be noted at the outset that the point of this comparative exercise is not to identify which social justice discourse and praxis is better, as between the ILO's and TWAIL's. Rather it is simply to report our analytical findings.

1. *Similarities*

The first similarity between TWAIL and the ILO social justice discourse/praxis is, of course, that they are both focused (to an extent) on international law: its creation, character, implementation, impact, relevance, and dual capacity to both facilitate and hinder the struggle for social justice.⁶⁴ This much is evident from the discussions in sections II and III, and is hardly a controversial point. This is not, of course, to claim that the ILO and TWAIL are only focused on the international plane. For, both TWAIL and the ILO social justice work have certainly been transnational in at least one sense; in the sense of also working at and on the juncture between the 'international' and the 'domestic'. Both are as concerned with international law qua international law as they are with how it operates within States and societies.⁶⁵ For instance, as we have already seen, the ILO's core mandate and operational activities also focus on the real-life conditions of workers on the domestic plane and on the conformity or otherwise of these conditions

⁶⁴ Chimni (n 11).

⁶⁵ For an example of this kind of TWAIL scholarship, see Luis Eslava and Sundrya Pahuja, 'Beyond the (Post)colonial: TWAIL and the Everyday Life of International Law' (2012) *Law and Politics in Africa, Asia and Latin America* 195.

with international law.⁶⁶ The ILO also focuses on what these conditions, and the views/actions of the actors within States that are responsible for their creation or amelioration, can tell us about the need for international regulatory reform in the worker's rights/welfare area.⁶⁷ This is one consideration that is at the centre of its tripartite approach.⁶⁸ On TWAIL's part, it is as concerned with the character of particular international treaties and practices, as it is with the 'everyday life of international law' at the 'mundane level' within Third World and other States (how it is applied by administrative officials in tax departments, or by immigration officers at airports).⁶⁹

The second similarity is that while the protection of workers' rights is, of course, at the very core of the ILO's social justice discourse and praxis, TWAIL is as concerned with the rights and labour conditions of working people, and some TWAIL scholars have also explicitly trained their lens and focused their efforts in the same direction, for instance, Upendra Baxi,⁷⁰ Obiora Okafor,⁷¹ Titilayo Adebola⁷² and Adrian Smith.⁷³

The third similarity is that the concerns of TWAIL and the ILO for social justice are expressed, in part, through their deliberate, socially aware, and historically-predicated engagement with economic and social rights (as opposed to only or mainly civil and political rights), and with their centrality to any credible global human rights scheme and any viable effort to uplift living standards and ensure world peace. As section III shows, this understanding is palpable from even a cursory familiarity with the ILO's constitutive document and work. That TWAIL work is undergirded by this kind of conceptual framework is as decipherable from the discussion in section II.

⁶⁶ Anil Swarup, 'A Tripartite Approach to the Prevention of Bonded Labour in India' (2009) <https://www.ilo.org/global/about-the-ilo/multimedia/video/video-interviews/WCMS_119268/lang-en/index.htm>.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ Eslava and Pahuja (n 65).

⁷⁰ Upendra Baxi, *The Future of Human Rights* (Oxford UP 2006).

⁷¹ Obiora Chinedu Okafor, 'Assessing Baxi's Thesis on the Emergence of a Trade-Related Market-Friendly Human Rights Paradigm: Recent Evidence from Nigerian Labour-Led Struggles' (2007) 1 *Law, Social Justice and Global Development*.

⁷² Adebola (n 21).

⁷³ Adrian Smith, 'The Bunkhouse Rules: A Materialist Approach to Legal Consciousness in the Context of Migrant Workers' Housing in Ontario' (2015) 52 *Osgoode Hall Law Journal* 863.

The last similarity that we have discerned is that while the ILO has dealt, in some way, with the rights of the indigenous peoples of both the Global North and the Global South for nearly 100 years now (however unsatisfactorily), TWAIL's scholarly agenda has more recently grown beyond its concern mainly for the indigenous peoples of the Global South, to accommodate (if rather inadequately as well) the concerns of the indigenous peoples of the Global North – people who have been referred to as the 'South within the North'.⁷⁴ More recent work by Amar Bhatia illustrates this point.⁷⁵

2. *Differences*

The discussion in the last paragraph contains within it the seed of the first difference that we have noticed between TWAIL and ILO social justice discourse and praxis. This is that the ILO's engagement with the rights of indigenous peoples has been historically more global in reach and much more longstanding than TWAIL's, even though this gap has closed more lately. This suggests that there could be a thing or two for TWAIL to learn from the ILO's institutional memory and work in this area.

A related but differently oriented point is that the concern of TWAIL's discourse and praxis with the rights of indigenous peoples has tended to be more deeply structural than the ILO's. It has tended to be more closely oriented toward the ways in which indigenous peoples can exercise their rights to self-determination and claim their autonomy in a robust way from largely domineering and repressive States around the world.⁷⁶ As we have seen, the ILO's discourse and praxis in this area was initially more assimilationist, and later on became much less so, although it is still accused of standing significantly short of a framework that could offer discursive, normative, or even practical facilitation to the expression of the demands of many indigenous peoples for deeper structural reform leading to enhanced autonomy.

Another area in which TWAIL's social justice discourse and praxis is more structural and thus poses a greater challenge to the conventional global legal and political order than that of the ILO, is in relation to the

⁷⁴ Bhatia (n 8).

⁷⁵ *ibid.*

⁷⁶ *ibid.*

distribution of global socio-economic resources and their benefits. While it is capable of contributing to the restructuring of global wealth distribution along a number of axis, the ILO's highly commendable efforts to enthrone a regime of decent work across the globe and ensure that many economic and social rights are enjoyed in a more widespread manner both within and across State borders is nevertheless circumscribed and limited by the fact that it more-or-less does not really extend beyond this point. By contrast, while TWAIL's social justice discourse and praxis largely aligns with the ILO in this area, it goes well beyond to target squarely and consistently the structural barriers that create the massive inequalities in the enjoyment of economic and social rights across the world in the first place.

It is thus no surprise then that while TWAIL's social justice discourse and praxis is in addition also heavily focused on right to development discourse and praxis, and on the need for that right to be framed and experienced more and more in binding legal terms, the ILO does not appear to have been as focused as TWAIL has on this approach. Right to development discourse and praxis is a structural approach to the effort to achieve social justice across the world.

It also appears that TWAIL's social justice discourse and praxis tends to be more suspicious of assertions of our common humanity and impositions of allegedly or even legitimately universal standards, as either existing or desirable, usually backed by claims of our common humanity. While our common humanity is an alluring goal to achieve, it has never really been as widely accepted and internalized in real life around the world as it would otherwise appear. From the time of Vittoria to this day, assertions of our common humanity have not always turned out all that well for subaltern, less powerful, peoples. And so, while universal standards can, of course, be desirable, and can often be a force for good, TWAIL teaches us to embrace them with caution. Universality is not to be embraced at the drop of a hat, without a deep and careful considering its intended and unintended consequences. To be clear, TWAIL does not tend to argue that common humanity claims and universal standards possess a fixed subordinating or oppressive valency, or are always a bad thing. Rather, to emphasize by repetition, the point is to be more suspicious of these claims and standards, and to embrace them on a case by case basis. No rejection of multilateralism is entailed here, and no embrace of unilateralism is suggested either.

The last difference between the ILO and TWAIL social justice discourses and praxis that is commented on in this paper is that while the ILO's work in this regard has been strong from the beginning about the need to view the State, especially the Third World State, as far from a 'supra-class' entity (that possessed little internal variegation and in that regard and that was not riven by socio-economic class divisions), with notable exceptions, earlier TWAIL work tended to exhibit a degree of studied ignorance in this regard. The ILO is, of course, almost intrinsically designed to deal with the State on the basis of its differentiation into different 'class' interests.

Turning to what can the ILO and TWAIL social justice discourses/praxis learn from each other, the first teachable point is that TWAIL needs to continue to focus – as it has now been over the last two decades – on not treating the Third World State as supra-class. It needs to continue to examine the class and other divisions within the Third World itself which support or facilitate international law's contribution to the subordination and immiseration of all too many people in the States that self-identity as such.⁷⁷ The ILO's social justice discourse and praxis has been excellent at this.

By contrast, the ILO may benefit (within the significant political constraints it certainly faces and has to survive within) from a greater attention to the structural; a turn to an approach that is intrinsic to TWAIL. It will benefit by paying greater attention to the structural barriers that, in the first place, produce the social injustices that it has to deal with. Without a greater success at upsetting the structures that produce these injustices, they will simply continue to expand in scale and intensity, and in their negative impact of the lives of the workers of the world, and especially those who are from the Global South. This expansion in scale and intensity has been the world experience for some time now.

Lastly, the ILO may also benefit from a greater attention to the ways in which even well meaning universally applied standards could, in reality, work against the interests of Third World peoples who are the vast majority of humanity after all. As we all know, same treatment does not always lead to equity.

⁷⁷ See, for instance, Bhupinder Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1.

V. Conclusion

In conclusion, the overarching point is that TWAIL and the ILO are engaged in a discourse and praxis of global social justice that is both similar and different, and that both will do well to learn from each other's approach. However, it is realized that as TWAIL is a scholarly movement and the ILO a political institution, the latter may face certain kinds of constraints as to the approach it can take in this regard that the former does not. Still, as we have seen, as international institutions go, the ILO is the closest to TWAIL in terms of its goals and approaches.

However, this paper has two key limitations. The first is that it does not unpack the negotiating histories of the ILO Constitution, conventions and recommendations. In other words, it does not consider the issue of whose voices mattered and whose interests prevailed in the construction and development of the ILO's legal architecture. The second is that the paper does not delve into any kind of detailed analysis of the ILO decisions and 'jurisprudence'.