FROM CLASH TO ACCOMMODATION: REFLECTIONS FROM FOUR DEVELOPMENTS IN INTERNATIONAL LAW

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I. INTRODUCTION

Non-western scholars have often contended that the demise of Eurocentrism in international law is an inevitable part of the entire process of physical and intellectual decolonization. With the third world nations getting more assertive day by day there is a remarkable shift from order oriented understanding of international law to demand for justice oriented modifications. Unlike *Rawls's* model, the law of peoples is increasingly assuming more active role in being responsive to the call for global justice. Pragmatism is giving way to purposiveness. One of the most significant developments in the global legal order in the recent times has been the acknowledgment of prevailing inequity and slow but definite initiation of its neutralization.

The paper shall elaborate this argument by discussing four contemporary developments in the corpus of international law- (i) Passing of the United Nations Declaration on the Rights of Indigenous People, 2007 by the United Nations General Assembly; (ii) Emergence of two separate international codes of conduct on transfer of technology; (iii) Doha Declaration, 2001 and subsequent amendment of The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995 (TRIPS) in 2017; (iv) Increased proliferation of third world scholarship in contemporary international law thinking. These four factors (amongst others) represent the aspirations of the third world countries and indicate that the present bargaining chip in the hands of the third world is not as devalued and hollowed as it used to be. Their voice is getting stronger and by the natural process of evolution, international law is entering a new phase of "accommodation" of interests from a culture of clash of interests.

The idea is to symbolically say that we are in that stage of international law progression where it is no more a tool of amelioration for the privileged few. With contracting global space and increasing interdependencies third world nations or the global south continues to push for a rightful place in international justice scheme.

II. FROM WESTPHALIAN CONCEPTUALIZATION TO UNDRIP, 2007

A. Indigenous Peoples and the Westphalian Model

Indigenous people have a long history of struggle. Along with colonized territories they were the worst victims of the process of colonization. The classical Westphalian world order could consist of only nation-states and not the natives per se. One of the reasons for it was that the structure that Westphalian system brought along with it was strictly formal and centralized which went against the very ethos of indigenous peoples' scheme of things. "Indian"[1] as the term was used to identify aboriginals or indigenous people by the European

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[1] Indian, native or aboriginal can safely be the synonyms of 'indigenous person'. The word 'indigenous' stems from the Latin form *indigena* (INDV +GENVS) which means 'one born in a place, a native' or 'born or produced in, or belonging to a particular place' (and not of external origin). Definition found in Oxford Latin

settlers in the annexed territories. A reflection of how they were looked upon could be found in *Francisco de Vitoria's* (a sixteenth century philosopher-jurist) account wherein he refers Indians as "unfit to found or administer a lawful State".[2]*Vitoria* was a complex figure of his times. In one of his assertions he argues "at the time of the Spaniard's first voyages to America they took with them no rights to occupy the lands of indigenous population".[3] On the other hand, his proposition also confers the ability of universal reason to Indian; nevertheless, tagging him as backward, barbaric, uncivilized and therefore subject to sanctions. In Vitorian thought, Indians who inevitably and invariably violate *jus gentium* are denied the status of the all-powerful sovereign that has the rightful capacity to administer the law.[4] After an excellent analysis of Vitoria's work, *Professor Anghie* has written in one of his works that –

> "Vitoria's work suggests that the conventional view that sovereignty doctrine was developed in the West and then transferred to the non-European world is, in important respects, misleading. Sovereignty doctrine acquired its character through the colonial encounter. This is the darker history of sovereignty…"[5]

B. Pre-United Nations Era

As a follow-up to the preceding narrative it would be appropriate to rope in two incidents of the pre-UN era wherein the status of indigenous people was considered by the self-anointed international community. It should be noted however, that this concern, if not disguised, was not very honest at the basic level. Indigenous people in the world's sight were still a 'backward community'. On the typical lines of *Kipling's* words in "White Man's Burden" the newly emerged nation-states took upon themselves to meet for the first time at the Berlin Africa Conference (1884-1885) which dealt with the issue of African aboriginals more specifically. The idea was to 'integrate' the aboriginal population into the "civilized world" and in order to realize this, the "trusteeship doctrine"[6] was introduced. It was, as if, a legitimate yardstick in the relationship between empowered nations of that time and indigenous populations.[7]

This position was more emphatically enunciated in the League of Nations in its Covenant.[8] Even though the text did not directly mention indigenous people (using only "peoples"), its language nevertheless had a direct impact on the future of indigenous people. As per the Covenant, those parties "which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world'' should be governed by the principle that "the well-being and development of such peoples form a *sacred trust* of

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Dictionary (1968). In modern international law, the indistinct use of those terms involves the idea of priority in time. See E. Daes, *Working Paper by the Chairperson-Rapporteur on the concept of "indigenous people"* UN Doc.E/CN.4/Sub.2/AC.4/1996/2, June 10, 1996, p.no. 5.

[2] Francisco de Vitoria, *De Indis et de Ivre Belli Relectiones* 116 (The Carnegie Institution of Washington, Washington, 1917).

[3] *Ibid*.

[4] "Francisco de Vitoria and the colonial origins of international law" in Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 29 (Cambridge University Press, U.K, 2005).

[5] *Ibid*.

[6] A kind of 'guardianship' exercised by nation-states over aboriginals.

[7] See Maria Victoria Cabrera Ormaza, "Rethinking the Role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Cooperation" 4(1) *Goettingen Journal of International Law* 265-268 (2012).

[8] The Covenant of the League of Nations(April 28, 1919), art. 22, *available at*: http://www.unhcr.org/refworld/docid/3dd8b9854.html (last visited on November 10, 2018).

civilization and that securities for the performance of this trust should be embodied in this Covenant". The text goes on to say that "the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, *and who are willing to accept it*, and that this tutelage should be exercised by them as Mandatories on behalf of the League" (*emphasis supplied*).

C. Post UN Efforts and the UNDRIP, 2007

As an organ of the United Nations, International Labour Organization (ILO) became the first inter-governmental organization to give special attention to the concerns of indigenous people in 1957 with the adoption of the "*Convention (No.107) concerning the Protection and Integration of Indigenous and Tribal and Semi-Tribal Populations in Independent Countries.*"[9] For the first time indigenous people were defined by their identity and were not generalized as "populations". It sought to solve the crisis of forced and underpaid labour undergone by the indigenous people in former Spanish and Portuguese colonies in Latin America. Hence, the preamble declared – "it (is) desirable both for humanitarian reasons and in the interest of the countries concerned to promote continued action to improve the living and working conditions of these populations by simultaneous action in respect of all the factors which have hitherto prevented them from sharing fully in the progress of the national community of which they form part".[10]

This convention was rejected by the indigenous community for a simple reason that it had the same underpinnings of the League's Covenant that prescribed the idea of "integration" with absolute disregard to the cultural identity and distinctiveness of the people concerned.[11] In preamble alone the word "integration" features thrice. Article 2 makes it more emphatic.[12] Apart from the rejection by indigenous people themselves, world at large was also not very supportive of it and the convention could manage the ratification of only 17 states.[13]

This unevenness in the recognition of indigenous people didn't stop the communities' representatives to gain access to international intergovernmental institutions and spark discussions concerning their claims of self-determination; albeit subjected to the confines of nation-state international legal order.[14] In other words, indigenous peoples demanded what scholars define as *internal self-determination*.[15]

This was followed by the establishment of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. José Martinez Cobo was appointed as a Special Rapporteur to study the issues of discrimination against indigenous people. In his study,

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[9] 328 U.N.T.S 247, 26 June 1957 [ILO Convention No.107].
[10] *Ibid*.
[11] *Supra* note 7.
[12] It declares that the "Governments shall have the primary responsibility for developing co-ordinated and systematic gaction for the protection of the populations concerned and their progressive integration into the life of their respective countries".
[13] The Convention should however be given credit for being the first international document which conferred upon indigenous peoples' rights over the territories traditionally occupied by them (art. 11,12).
[14] R. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?" 7 *Harvard Human Rights Journal* 40-42 (1994).
[15] Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal*101(Cambridge University Press, Cambridge,1995).

*Cobo*emphasized on the element of "historical continuance" demonstrating the colonial precepts of the discrimination against the indigenous people.[16]

The ILO again took up the matter and in 1989 adopted a resolution titled *Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries.*[17]This convention was slightly more progressive in the sense that it took away from states and gave the right of self-identification as indigenous people to the people themselves.[18] Also, it explicitly supported the cultural distinctiveness and autonomy of indigenous and tribal groups.[19] This much of recognition didn't go down well with majority states and consequently, like its predecessor this convention also ended up being a legal and political failure with just 22 ratifications.

D. The UNDRIP

After these two treaties, it was realized that a concrete step is required to proceed in the direction of giving indigenous people what is rightfully theirs. It should also be noted that as politics unfolded, it was more profoundly realized that indigenous people were also equal subjects of debate on permanent sovereignty over natural resources and its colonial genesis.[20] Land rights and rights like self-determination and cultural identities took the centre stage in indigenous peoples' negotiations. After the initial draft in 1994, with prolonged discussions and stocktaking United Nations finally passed the historical declaration titled - UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[21] Some of its critical points that articulated key norms relating to indigenous people in international law are as follows:

i. No strict definition of indigenous people.[22]
ii. Right of self-determination.[23]
iii. Right to maintaining their identity.[24]
iv. Right to land and territories which they have traditionally owned.[25]
v. Participation in issues of governance and decision making process.[26]
vi. Restitution and fair compensation for their lands taken.[27]
vii. Fair, independent, impartial and open adjudication.[28]
viii. No militarization of areas belonging to indigenous people.[29]

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[16] J. R. Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, September 30, 1983, para. 379, 380.
[17] 1650 U.N.T.S. 383, 27 June 1989 [ILO Convention No. 169].
[18] Indigenous and Tribal Peoples Convention, 1989, art. 1.
[19]*Id*.,art. 2(b).
[20]Jane A. Hofbauer, *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications* 63-68 (2009) (Unpublished LL.M. thesis, University of Iceland).
[21] GA Res. 61/295, 13 September 2007.
[22] In its preamble para. 21 UNDRIP recognizes the existence of a variety of historical and cultural backgrounds surrounding indigenous peoples and the necessity of taking these differences into consideration. Further in para. 4 the use of the words "inter alia" reflects an attempt to encompass other ethnic groups, which were also victims of dispossession, but not necessarily linked with the history of colonialism.
[23] UNDRIP, 2007, art. 3.
[24]*Id*., arts. 5, 8, 12, 14, 20, 24.
[25]*Id*., arts. 10, 26.
[26]*Id*., art. 18.
[27]*Id*., art. 28.
[28]*Id*., art. 27.
[29]*Id*., art. 30.

This resolution was adopted in the General Assembly with the approval of 143 member states. Although being a declaration, it may be categorized as a soft law instrument; nonetheless its text is pivotal in determining the place of indigenous people in the world vision. From here things can move on to become more concrete step by step as it generally happens in development of any aspect of international law.

III. UNITED NATIONS DRAFT INTERNATIONAL CODE OF CONDUCT ON TRANSFER OF TECHNOLOGY (COC)

A. Backdrop

When it comes to Transfer of Technology (TOT) there are two critical precepts that need to be understood. Firstly, immediately after the colonial era got over most of the TOT and its drivers such as intellectual property and investment were pitched by the MNCs as the panacea for the lagging economies of the developing and least developed nations. And, while the third world got convinced of the urgency to enter into agreements with the MNCs mostly incorporated in the developed world, they hardly realized the nature of the terms and clauses often riddled with restrictive trade practices. Secondly, TOT agreements were strategically linked by the MNCs to the right to build, operate and maintain the manufacturing units. This was coupled by the neo-colonial substratum that formed the basis of clauses stipulating 'grant back' provisions or the 'turnkey' packages.[30]

In effect though, these agreements did not lead to creation of jobs or rise in the substantial standard of living of the local population because of the misapplication of the idea of the TOT itself.[31] Scholars cite four primary reasons for this:[32]

a. **Lack of developed infrastructure and market**- Nations importing the technology had no support systems in place to back up or sustain the technology. This lead to a situation wherein, economies were rendered incapable of absorbing and sustaining advanced technology. Also, the lack of skill with regards to the operation and maintenance of the machinery aided as an impediment for creation of abilities to learn from the technology by getting involved in it.
b. **Inappropriate technology**- Improper discerning of technology needs and choosing on basis of imperfect information also lead to the importation of unnecessary technology which added little value to the nations' growth.
c. **Failure to develop indigenous technological skills**- A frenetic attitude towards quickly adopting technology at any cost lead to the lack in development of indigenous technology skills. This ultimately resulted in the long term dependence over the imported technology.

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[30] See David M Haug, "The International Transfer of Technology: Lessons that East Europe can Learn from the Failed Third World Experience" 5 *Harvard Journal of Law & Technology* 209 (Spring Issue, 1992).

[31] United Nations Draft International Code of Conduct on Transfer of Technology, 1985 defines TOT as - 'the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service and does not extend to the transactions involving the mere sale or mere lease of goods'. Hayden added to this definition of TOT saying- "the important factor [in defining technology transfer] is that the recipient acquires the capability to manufacture itself a product whose quality is comparable to that manufactured by the technology supplier." See Eric Hayden, Technology Transfer to East Europe-U.S. Corporate Experience, UN/ECE, Proceedings of the UN/ECE Seminar on The Management of the Transfer of Technology Within Industrial Co-operation, Geneva, Feb., 1976, 23.

[32] *Supra* note 30.

d. No technological development plan or policy- Lack of vision on the part of these increasingly dependent countries aided to the situation getting catapulted to technological colonialism.

B. COC and its Assessment

It is in this backdrop that the third world soon realized the necessity of guidelines with regards to a meaningful transfer of technology. Then UNCTAD took it up and after a heavy bargaining between the major global blocks United Nations Draft International Code of Conduct on Transfer of Technology, 1985 (COC) was framed.[33] It will not be an exaggeration if we say that this COC formed the 'conscience' of the fair TOT procedure. It was a product of long drawn negotiations between G77 and OECD countries in which G77 succeeded in identifying some crucial restrictive trade practices that MNCs till date continue to follow. Grant back provisions, provisions requiring the acquiring party to refrain from challenging the validity of patents, exclusive dealing, restriction on research, price fixing, restriction on adaptation (of the imported technology to local conditions or introducing innovations in it) etc. were categorically identified within the COC to put a check on 'technological colonization'.[34] Unfortunately though, the spirit of COC was gradually lost because of its non-binding nature and the arguments of the OECD countries during the time of negotiations continued to prevail as norms of the practices governing TOT. The only place where COC spirit is still to an extent reflected is in the text of the outcome documents of international environmental conferences.[35] But, the tragedy of non-inclusion of TRIPS[36] in TOT debate perpetually revives the chauvinistic cannons of negotiations like 'freedom of contract', 'freedom of choice of law and forum' etc.[37] It is no genius to construe that these cannons are detrimental to the interests of developing countries and LDCs because of a much weaker bargaining chip that they possess.[38]

Even after the apparent failure, the achievement of this COC is immense. It has made the technology importing countries more aware of the bargaining spaces that they can utilize during the technology transfer negotiations with the MNCs. Although, the restrictive trade practices identified in the globally available COC, the process of technological colonization has been slowed down considerably. As mentioned before, reflections of fairer technology

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[33] It primarily sought to identify restrictive trade practices adopted by the MNCs in TOT agreements like grant back provisions, denying challenges to validity of patents, exclusive dealing, restriction on research, restriction on the use of personnel, price fixing, restriction on adaptation (of the imported technology to local conditions or introducing innovations in it).

[34]Chapter IV, Draft International Code of Conduct on the Transfer of Technology, 1985 (version), *available at*: http://unctad.org/en/docs/psiteiitd28.en.pdf; See also David Silverstein, "Sharing United States Energy Technology with Less-Developed Countries: A Model for International Technology Transfer" 12 *Journal of International Law and Economics* 363 (1978).

[35] For instance, Chapter IV of Agenda 21 which was one of the documents adopted in the United Nations Conference on Environment and Development, 1992 has following to offer-

"Environmentally sound technologies are not just individual technologies, but *total systems which include know-how, procedures, goods and services, and equipment as well as organizational and managerial procedures*. This implies that when discussing transfer of technologies, *the human resource development and local capacity-building aspects of technology choices, including gender-relevant aspects, should also be addresse*d. Environmentally sound *technologies should be compatible with nationally determined socio-economic, cultural, and environmental priorities*." (*emphasis supplied*)

[36]The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995.

[37] Ton J. M. Zuijdwijk, "The UNCTAD Code of Conduct on the Transfer of Technology" 24 *McGill Law Journal* 571 (1978).

[38]Mohammad Umar, "Role of TRIPS in Transfer of Environmentally Sound Technologies to Developing and Least Developed Countries" 9 *Dr. Ram Manohar Lohiya National Law University Journal* 146 (2017).

transfer mechanisms are already there when it comes to transfer of environmentally sound technologies. Although, as a binding instrument the COC still seems a farfetched idea, but credit for aforesaid developments goes to the efforts of UNCTAD which prepared the draft COC and led to a certain awakening.

IV. DOHA DECLARATION ON TRIPS AGREEMENT AND PUBLIC HEALTH, 2001 &THE TRIPS AMENDMENT OF 2017

After hardening of international patent laws through TRIPS, it was increasingly realized by the developing and least developed countries (LDCs) that the so called flexibilities offered under the TRIPS agreement have significant loopholes. Especially, with regards to pharmaceuticals and public health it was considered extremely important to provide for cheaper health alternatives to their citizens. Given the fact that drugs dealing with diseases as serious as HIV/AIDS had been patented and their availability was beyond the reach of the poor population of the third world countries, a system of compulsory licenses (CL) was evolved.

CL is one of the most contentious yet most frequently invoked flexibilities under the TRIPS agreement. Through CL, member countries within their domestic jurisdiction can allow someone other than the patent holder to produce the patented product or process without the consent of the patent owner.[39] This is deemed justified on the grounds of public need and is backed by the rationale that government intervention to break the shackles of monopoly is legal if the IPR holders do not make technologies available in the public interest.[40] Pharmaceuticals is now one such public interest area in which Article 31 (from which legality of CL is derived) is frequently invoked by the developing countries and LDCs.[41]

However, the luxury of invoking Article 31 is available only to those countries which can afford to exploit non-market mechanisms. For the incapable, it is meaningless. The only option remaining is importing generic drugs from countries where compulsory license is already granted. Before 2003, the countries practicing CL who were sought to export generic drugs by the needy countries could not export because they were bound by Article 31(f) which allows the issuance of compulsory license only if its "use shall be authorized predominantly for the supply of the domestic market" of the member country.[42] This left needy countries helpless because they could not render basic generic to their ailing populations. To deal with this, on 14th November 2001, Doha Declaration on TRIPS Agreement and Public Health[43] instructed TRIPS Council to "find an expeditious solution to

[39] More details *available at*: https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm(last visited on November 10, 2018).

[40] Khorsed Zaman, "The TRIPS Patent Protection Provisions and Their Effects on Transferring Climate Change Technologies to LDCs and Poor Developing Countries: A Critical Appraisal" 3 *Asian Journal of International Law* 153 (2013); TRIPS, 1995, art. 8.1.

[41] *Ibid.*

[42] *Ibid.*

[43] Its philosophical genesis can be found in the initial four paragraphs which are as follows-

"1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.

this problem" and report to the General Council.[44] It came to be known as the "Paragraph 6 issue"[45]. General Council thereupon, in 2003 Cancun Ministerial Conference came up with the decision that Article 31(f) obligations shall be waived for the export of pharmaceutical products produced under a compulsory license to the developing countries and LDCs.[46] Though initially this decision was interim and provisional, it was agreed to be made permanent in General Council meeting of 2005, though unanimously adopting a protocol to that effect.[47] Recently in 2017, a formal amendment was made after reaching the threshold of two third members' ratification of that protocol to amend the TRIPS Agreement.[48]

It is the sheer gumption of the third world collective that made this amendment possible in the WTO agreement (the first and the only one till date). This will lead to the availability of cheaper drugs in many poor countries round the globe and can be seen as a symbol of growing strength of the third world voice internationally.

V. ADVENT OF THIRD WORLD SCHOLARSHIP

A. Backdrop

International Law scholarship has been dominated by the western scholars since its inception. Views about different aspects of international law were predominantly discussed and published in the galore of premier Ox-Bridge institutions that led to a situation in which the progress of international law was driven by a certain perspective of developed nations that did not necessarily include issues concerning the global south or the third world.[49] In an Article published in European Journal of International Law (not long back in 2014) it was highlighted that progress of international law had its roots in Christian civilization of the developed world today. The authors approve the objectivity of this arrangement rather than question it critically. It says:

> Law is traditionally attributed a key role in Western progress narratives. The roots of the strategic position of law in society and conflict resolution date back beyond the Enlightenment period. Two factors deserve mention here. First, there is the influence of the highly developed Roman law on the

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4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all."

[44] Doha Declaration on the TRIPS Agreement and Public Health, para. 5(b), adopted on November 14, 2001, WT/MIN(01)/DEC/2, *available at*: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (last visited on November 10, 2018).

[45] Para. 6 of Doha Declaration says- We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

[46] Decision of the General Council of August 30, 2003, WT/L/540 and Corr.1, *available at*: http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (last visited on November 10, 2018).

[47] More details *available at*: http://www.wto.org/english/thewto_e/gcounc_e/meeting_oct05_e.htm(last visited on November 10, 2018).

[48]WTO IP rules amended to ease poor countries' access to affordable, *available at*: medicineshttps://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm (last visited on November 10, 2018).

[49] A reflection of this proposition can also be found in the discussion on indigenous people in this paper.

> advancement of Western societies and legal systems. *Other, non-Western cultures were and still are less law-centred*. The second factor contributing to the key role of law builds on the relationship between the individual and God in a monotheistic religion. Here, i.e., in Christianity, Judaism, and Islam, strong rules and abiding by them play a central role. Rule-compliance is essential for the relationship between man and God. Law abidance connects man with God who turns into a punishing God if the rules are not observed. *The role of rule compliance in the monotheistic Christian religion was perfectly compatible with the law-centredness of the Roman law-based Western culture.*[50]

In another article from 1988, *Professor David Kennedy* traces the "generations of lawyers" in which he demonstrates how those western international lawyers and scholars were instrumental in shaping international law.[51] According to *Kennedy*, while the generation before the World War II was more doctrinal in its approach, the one after that gave those doctrines an "institutional shape, not only in the United Nations System and in the new international economic institutions, but also in the United States State Department, in the law firms and in the multinational corporations".[52]

B. TWAIL: Utility and Impact

When the new scholarship is taking a form and is pushing the existing alignment of the international legal discourse, it is becoming more and more evident that international law can be inclusive and just only when aggression of Eurocentric forces yield to the global democracy. The Third World Approaches to International Law (TWAIL) school of thought is an existing alternative to compete with the colonial and single eyed tendencies of existing international law. *Mohsen al Attar and Rebekah Thompson* note:

> TWAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus. A fundamentally counter-hegemonic movement, TWAIL is united in its rejection of what its champions regard as an unjust relationship between the Third World and international law.[53]

TWAIL can be bifurcated into two generations. First generation of the third world scholars (now titled as TWAIL-I) comprised greats like Professor R.P.Anand, Professor Upendra Baxi, Mohammed Bedjaoui etc.[54] They collectively challenged the notion that

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[50] Tilmann Altwicker and Oliver Diggelmann, "How is Progress Constructed in International Legal Scholarship?" 25(2) *European Journal of International Law* 425-444 (2014).

[51] David Kennedy, "A New Stream of International Law Scholarship" 7(1) *Wisconsin International Law Journal* 4 (Fall, 1988).

[52] *Ibid*.

[53] Mohsen al Attar & Rebekah Thompson, "How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination" 3(1) *Trade Law and Development* 65, 67 (2011).

[54] For a sample of first generation TWAIL scholarship from India writings see, Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India* (Firma KL Mukhopadhyay, Calcutta, 1958); Nagendra Singh, *India and International Law: Ancient and Medieval* (S. Chand and Co. Pvt. Ltd., New Delhi, 1973) (vols. I and II); S. Prakash Sinha, *New Nations and the Law of Nations* (A.W. Sijthoff, Leyden, 1967); R.P. Anand, *New States and International Law* (Vikas, New Delhi, 1979); R.P. Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff Publishers, The Hague, 1983); Upendra Baxi, "New Approaches to the History of

International Law is the propriety of the western thought process or is a gift from the west to the world. *Professor Chimni* has pointed out some of the achievements of TWAIL-I in following words:

> First, it recorded the contribution of Asian peoples to the evolution and development of international law. Second, it showed realism in recognizing that only reform and not revolution was possible in the sphere of international law. Third, it was correct in believing that a global coalition of Third World states alone could provide the counter-power to seek concessions from powerful states. Fourth, it rightly contended that the fact that the vast majorities of peoples lived in the third world must be reflected in the body of contemporary international law.[55]

However, in spite of these strengths there were few areas which were yet to be tackled by the third world scholars.[56] It was done by the second generation which was referred to as TWAIL-II. Most of them are carrying the battle forward and producing scholarship that, in the words of *Professor Chimni*:

> " …hopes to take the work of TWAIL I forward by refocusing attention on the structures and practices of imperialism, critiquing the undemocratic character of post-colonial states, systematically exposing the hegemonic character of international institutions (in particular the WTO and the IMF/World Bank combine), critically reviewing the debates on the sources doctrine and issues relating to indeterminacy of the legal process, devising a research agenda that reflects the concerns and needs of the marginal and oppressed peoples in the third world, and above all reducing the distance of the world of international law from the lives of ordinary peoples."[57]

TWAIL-II has largely been successful in its attempts to achieve the above objectives.Most of the prominent scholars associated with it such as Professor Antony Anghie, Professor B.S. Chimni, Professor James Thuo Gathii etc. have propelled the cause of TWAIL to the next level. Their third world manifesto[58] and writings on the imperial underpinnings of the international law prove the presence of neo-colonial tendencies in present international law paraphernalia. As *Professor Anghie* argued in one of his works that doctrinal and institutional developments in international law cannot be understood as "logical elaborations of a stable, philosophically conceived sovereignty doctrine…[but rather] as being generated by problems relating to colonial order".[59]

The TWAIL movement is making its marks and their predictions and criticisms are often vindicated by the calls in international forums. Internationally, it is getting more and more recognized, which is very essential to have a just international legal order. They have

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International Law" 19 *Leiden Journal of International Law* 555, 556 (2006); C. H. Alexandrowicz, *An introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th centuries)* (Clarendon Press, Oxford, 1967).

[55] B. S. Chimni, "The World of TWAIL: Introduction to the Special Issue" 3(1) *Trade Law and Development* 14 (2011).

[56] For details see *Ibid*.

[57] *Ibid*.

[58] B.S.Chimni, "Third World Approaches to International Law: A Manifesto" 8 *International Community Law Review* 3-27 (2006).

[59] *Supra* note 4 at 6, 7.

conducted various conferences[60] in different parts of the world where renowned scholars from all around the world have emphasized on the third world needs in today's era. Their scholarship is consistent, organized yet flexible, convincing and extremely impressive. *Professor Gathii* in one of his works published in 2011 attached a bibliography of modern TWAIL scholarship which is a proof that how qualitatively and vigorously this movement has grown to fill the crucial vacuum in international legal scholarship.[61] Although some scholars criticize them for offering no positive agenda for action or reform in international law and relations,[62] but credit goes to them for highlighting aspects and perspectives of international law which were never discussed before. If there are no solutions then identifying problems is the first step towards finding solutions.

VI. CONCLUSION

As stated in the introduction, the four illustrations above are to show the growing assertion for democracy in international legal order. However, the hypothesis of such transformation from order to justice cannot be accepted in absolute sense. There remains a significant amount of work that needs to be done so as to ingrain just aspirations of the third world as a part of hard law. For instance, like code of conduct there was a proposed code of conduct for MNCs as well and both of them were never officially adopted. Similarly, the UNDRIP does not guarantee a change in the treatment of indigenous people all around the world. Some even sense it as a non-obligatory document which is optional to abide as it is just a "declaration". While limitations of the current situation stand true, the fact cannot be sidelined that these are the signs of growing resistance from the victims of the skewed international legal system. As and when this resistance gets more organized; the international law will transcend from being the law of nations to the law of people.

[60] Recent conference was held at American University in Cairo. Previous conferences were hosted by premier institutions like Harvard Law School, Osgoode Hall Law School, Albany Law School, University of British Columbia, and University of Oregon Law School.

[61] James Thuo Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" 3(1) *Trade Law and Development* 26 (2011).

[62] For instance, see Jose Alvarez, "Revisiting TWAIL in Paris", *available at*: http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/ (last visited on November 14, 2018).