Asian Journal of International Law (2023), **13**, 318–341
doi:10.1017/S2044251322000558

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Locating TWAIL Scholarship in China

Yilin WANG

The Graduate Institute of International and Development Studies, Geneva, Switzerland
Email: yilin.wang@graduateinstitute.ch

(Received 28 April 2022; revised 22 August 2022; accepted 30 August 2022; first published online 26 October 2022)

Abstract

This paper opens a scholarly discourse about Chinese scholars' engagement with TWAIL (Third World Approach to International Law). This paper shows that Chinese international law scholars and TWAIL align in their resistance to Eurocentrism in international law, while they differ in their attitude towards whether to refrain from "national allegories" and criticize international law as a state-centric invention. A state-centric approach means that mainstream Chinese international lawyers tend to adopt a pragmatic attitude towards international law, employing it as a strategic weapon. During the course of this inquiry, this paper also observes a critical strand in Chinese academics – mostly outside of the international law discipline, and within the disciplines of history and philosophy – that is dedicated to redeeming China's subjectivity and history, which may be useful to understand Chinese critical spirit.

Keywords: TWAIL; Chinese scholarship; international law; history

China and the Third World have been in close alliance since the decolonization period. This close alliance is manifested in several aspects. First, China was one of the founding countries of the Bandung Conference – "a symbolic birthplace of TWAIL".[1] Second, the core force of the Third World countries – the Non-aligned Movement (NAM)[2] – supported Communist China in retrieving its seat at the United Nations (UN), resulting in a long and consistent espousal by China for the Third World wave in the international arena.[3] Due to these historical affinities, the first generation of Chinese international law scholars, which included Wang Tieya, contributed substantially to non-Western and Third World approaches to international law.

Some of these affinities stretch to the present in forums where diplomatic rhetoric still uses a "Third World-ist" language.[4] Because of the close alliance with the Third World

[1] Makau MUTUA and Antony ANGHIE, "What Is TWAIL?" (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31 at 31.

[2] The NAM is widely recognized to be the legacy of the Bandung Conference in which China was an important co-initiator, together with India.

[3] Hedley Bull said in the 1970s, "China disavows entirely the role of a great power, and views itself as the champion of the Third World nations in their struggle against 'super power hegemonism'." Hedley BULL, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (London: Macmillan, 1996) at 286.

[4] Speech by Wen Jiabao, Premier of the State Council of the People's Republic of China, at a Rally Commemorating the 50th Anniversary of the Five Principles of Peaceful Coexistence. WEN Jiabao, "Carrying

countries, the Group of 77 (G77) and China were called a "Club of One" within the UN, which advocated for the interests of developing countries.[5] However, and despite their political alliance and historical affinities, current mainstream Chinese scholars in international law seem to show a disinterest in TWAIL (Third World Approach to International Law) scholarship. This phenomenon is worth pondering, especially given that some arguments of TWAIL might have instrumental value for China's official position in international law.

Having this question in mind, I intend to open a scholarly discourse in this paper about the relationship between Chinese scholars and TWAIL. The objective is to understand whether there is really a lack of engagement, and to redeem some TWAIL scholarship and the like in China if there is any during different periods of time. This paper is arranged as follows: Section I identifies what TWAIL is, focusing on its history, current development, and some critical features. Section II sets out the close identification between Chinese international legal scholarship with Third World scholarship in the decolonization period, in particular the Chinese contribution to TWAIL. Section III explores whether there are still "TWAILers" and kindred scholarship in China, particularly after the Cold War. Section IV provides some concluding remarks.

As I will explain in this paper, there is a duality of engagement with international law by Chinese scholars – of resistance and pragmatism – arguably characterizing the Chinese approach to international law where there appears to be some, if declining, association with TWAIL. I borrow here the characterization of Luis Eslava and Sundhya Pahuja about TWAIL scholarship – "between resistance and reform: TWAIL and the universality of international law" – to depict this conflictual relationship between Chinese mainstream scholars and international law. I argue that Chinese international law scholars and TWAIL align in their resistance to Eurocentrism in international law, while they differ in their attitudes towards whether to resign from "national allegories"[6] and criticize international law as a state-centric invention. The state-centric approach means that mainstream Chinese jurists tend to adopt a pragmatic attitude towards international law, using international law as a strategic weapon "inherited from the culture at which the struggle is directed" and choosing to live within the "imperialist hegemonic structures" of international law that favours great powers.[7] The instrumental use of international law, a sort of pragmatism in the Chinese philosophy of international law, also limits its critical purchase.

I. What is TWAIL?

Identifying TWAIL is becoming increasingly complicated. In its early period TWAIL may have only been concerned with international law scholars from the Third World whose

Forward the Five Principles of Peaceful Coexistence in the Promotion of Peace and Development" (2004) 3 Chinese Journal of International Law 363.

[5] Ann Kent noted that China was able to seek balance between its own interests and those of developing states. Ann KENT, "China's International Socialization: The Role of International Organizations" (2002) 8 Global Governance 343

[6] Balakrishnan RAJAGOPAL, "Locating the Third World in Cultural Geography" (1998–1999) 15 Third World Legal Studies 1 at 12, 19. The concept of "national allegories" in the words of Frederic Jameson means that "all Third World texts are ... national allegories" of imperialism and colonialism. Rajagopal disagreed with the over-valourization of national narrative and historical experience of colonialism, given that "it has the effect of sweeping other forms of local oppressions and struggles under the carpet."

[7] I borrow this passage from Christopher Gevers where he examined the work of the critical TWAILer Umo Umozurike, Gevers cited the work of the African writer NGUGI in his work *Petals of Blood* to describe the ambivalences of Umozurike not being entirely dismissive of international law. Christopher GEVERS, "Literal 'Decolonization': Re-Reading African International Legal Scholarship through the African Novel" in Jochen von BERNSTORFF and Philipp DANN, eds., *The Battle for International Law* (Oxford: Oxford University Press, 2019), 383 at 395.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

interventions were to deconstruct the colonial legacies of international law and to engage with the decolonizing efforts.[8] Yet, when the concept of the Third World is no longer bound by the geographical South and the stringent criteria of developing countries, some people in the developed North that are excluded socially and economically may also fall into the realm of the Third World.[9] This territorial imprecision may extend to the identification of TWAIL scholars. Scholars from the North who are defending the South and the marginalized groups often find resonance with each other under the TWAIL label.[10] These specificities of TWAIL somehow delinked nationality from scholarly association.

TWAIL, in many authors' descriptions, is also evolutionary. Antony Anghie and B.S. Chimni defined two generations of TWAIL: "TWAIL I" and "TWAIL II". TWAIL I refers to the scholarship produced by the post-colonial international legal actors (including "international lawyers, political actors and intellectuals from the South who had long grappled with the vicissitudes and complexities of the international legal order").[11] TWAIL II inherited certain aspects from TWAIL I but departed from it significantly in the sense of dealing with "the vestiges of 'formal' empire and expanding multi-dimensional forms of 'informal imperialism'."[12] It was also during the first TWAIL meeting in Harvard in 1997 that a group of TWAILers traced, in retrospect, the contributions of TWAIL I: James Thuo Gathii said it was a contributionist generation.[13] But TWAIL II and the generations beyond were expected to depart from the totalizing tendencies of these "national allegories" while at the same time remaining alive to its historical roots of colonialism and imperialism. Balakrishnan Rajagopal proposed that decentering the Third World from its geographical moorings of the "nation" and reimagining it as a counter-hegemonic discursive tool would allow us to interrogate the various ways in which power was used.[14]

Even though TWAIL scholars have also been criticized for lacking a "coherent and distinctive 'Third World approach'",[15] there is a key concept running through TWAIL thinking – a critical engagement with imperialism. According to Michael Fakhri, in an interview, a TWAIL way of thinking is that "you cannot understand international law without understanding imperialism".[16] It was admitted that there would be differences in the understandings of imperialism, but TWAILers tend to pay more attention to "the way that international law's foundations were grounded in the justification of imperialism and its acquisitive aims".[17] Despite the imperialistic tendencies of international law, TWAIL scholars seem to share some faith in international law in that it can provide a new future. As Anghie and others did, adopting a critical methodology within the boundaries of

[8] "Third World Approaches to International Law (TWAIL)" *Nathanson Centre* (February 2015), online: Osgoode Conferences and Workshops <https://digitalcommons.osgoode.yorku.ca/nathanson_conferences/50>.

[9] Andrea BIANCHI, *International Law Theories: An Inquiry into Different Ways of Thinking*, 1st ed. (Oxford: Oxford University Press, 2016) at 205; Rajagopal, *supra* note 6 at 3.

[10] James T. GATHII, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" (2011) 3(1) Trade Law and Development 26.

[11] Luis ESLAVA, "TWAIL Coordinates" (2 April 2019), online: Critical Legal Thinking <https://criticallegalthinking.com/2019/04/02/twail-coordinates/>.

[12] *Ibid*.

[13] Gathii, *supra* note 10.

[14] Rajagopal, *supra* note 6 at 3.

[15] Karin MICKELSON, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1997–1998) 16 (2) Wisconsin International Law Journal 353.

[16] "On Food and TWAIL: An Interview with Dr Michael Fakhri" (20 August 2018), online: Flora IP <https://www.floraip.com/2018/08/20/on-food-and-twail-an-interview-with-dr-michael-fakhri/>.

[17] *Ibid*. Luis ESLAVA and Sundhya PAHUJA, "Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law" (2012) 45(2) Law and Politics in Africa, Asia and Latin America 195 at 210.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

the legal body sometimes allowed TWAIL scholars to speak, interact, and act within the law.[18] This approach provides intellectual space for TWAIL to constantly challenge the imperialistic structure of international law while holding the belief that international law can still provide emancipatory potentials for building an international society with egalitarian values.

Whether to become a TWAILer is a question of self-identification in a contingent and historically situated way.[19] To self-identify is to align with the vision provided by a group of TWAIL scholars in the discursive language of critiquing power and knowledge production, unpacking ideology and speaking for the subaltern. "The common legacy of subordination— regardless of physical boundaries and specific geographic spaces constitutes a unifying and self-identifying factor for TWAIL scholars, regardless of whether the chorus of their voices blends harmoniously."[20] Self-identification, hence, becomes the distinctive characteristic for TWAIL scholars who were not necessarily born or educated in a Third World country, but spoke the language of TWAIL to diverge and to resist. However, one has to admit that many who similarly shared the concerns about the Eurocentrism of international law may choose not to self-identify as a TWAILer for a variety of reasons. For instance, Gathii argued that even though Jose Alvarez was critical of some TWAILers' views for being nihilistic, "Alvarez's own work has contained many TWAIL-like themes, and has often been as critical of certain liberal approaches to international law just as TWAIL scholarship has been."[21]

In these considerations, if we have to generalize the features of TWAIL – a reductionist process which is not an optimal way of providing nuances[22] – there are at least three central features arising from the scholarship. First of all, TWAIL can be divided into different generations: from TWAIL I to TWAIL II and beyond.[23] Second, TWAILers commit to interrogating the Eurocentrism, imperialism, and colonial vestiges in international law (both formal colonial and neocolonialism). By decolonizing the material realities of the peoples of the Global South, the Third Worlders aspire to build new and alternative legal futures. Third, an important pillar of TWAIL is self-identification and community building for sharing friendship, experiences, and comrades.[24] As Gathii said:

> this diversity of influences in TWAIL scholarship occurs because unlike certain critical intellectual movements, it is not characterized by leading figures producing works that set the parameters and boundaries of inquiry. Rather, TWAIL, as alluded to above, has a fluid architecture of many different individuals who mix, reuse and re-combine various TWAIL and non-TWAIL ideas and themes. Within this network, no

[18] Luis ESLAVA and Sundhya PAHUJA, "Between Resistance and Reform: TWAIL and the Universality of International Law" (2011) 3(1) Trade Law and Development 103.

[19] Obiora Chinedu OKAFOR, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall Law Journal 174. Fakhri also mentioned this point of self-identification, Interview with Fakhri, *supra* note 16:

> There is no card, website or application to becoming a TWAILer. You just write a piece saying, I am thinking about the same questions of social justice, equality, oppression, liberation with a particular history. If you want to be in TWAIL, that means you are in TWAIL. TWAIL is open. You self-identify.

[20] Mickelson, *supra* note 15 at 360; Bianchi, *supra* note 9 at 207.

[21] Gathii, *supra* note 10 at 42.

[22] Rajagopal also said that "there is no such thing as the Third World, that can be understood solely in terms of a singular determinant, namely, the political geography of ex-colonial nationalism." Rajagopal, *supra* note 6 at 15.

[23] Eslava, *supra* note 11.

[24] Interview with Fakri, *supra* note 16.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

> one individual, or set of individuals has direct control of TWAIL scholarly production. As a result, there is no full knowledge of all the parts, or even anything remotely suggesting control.[25]

Thus, the fluid and open structure of TWAIL allows more scholars to join and resist the imperialistic structure of international law.[26]

It is also with regard to these characteristics of TWAIL that I open this exploration of TWAILers in China. This paper, therefore, does not take self-identification as the only feature of TWAIL scholarship, but engages with the substance more closely to see whether there are TWAILers and the like in China in different periods of time.

II. Chinese TWAIL-ERS in the postcolonial period (1945–1989)

As mentioned earlier, mainstream Chinese scholars were historically adamant promoters of Third World scholarship during the decolonization period. The historical intimacy as allies and companions between China and the Third World countries rendered the indispensable affinity for the Chinese epistemic group to capacitate themselves with Third World sensibilities to criticize and resist the unfair imposition and Western domination in the current international system of norms and ordering.

In 1948, one of the leading figures of the Chinese Communist Party, Liu Shaoqi, gave a speech on "Internationalism and Nationalism", stating that "[c]ommunists must be the staunchest, most reliable and most able leaders in the movement for national liberation and independence of all oppressed nations ... [they] certainly cannot conduct aggression on any other nation or oppress national minorities within the country".[27] Under this banner of national liberation, the first generation of Chinese international law scholars – precursors such as Wang Tieya, Zhou Gengsheng, Li Haopei, Chen Tiqiang, and many others – were the unyielding fighters that spoke for the vulnerable newly independent countries in international legal scholarship.[28]

Most prominently, in 1983, Wang Tieya wrote an important piece entitled "the Third World and International Law" in a collection of the papers of the most important scholars in international law in its time to provide opinions on international law. In that paper he asked:

> how is it possible that such a complicated and diverse hodgepodge of countries can be lumped under a single heading? It is possible because these countries have a similar history—one of suffering oppression, exploitation and humiliation; because they share a common experience—one of undergoing bitter struggles to rid themselves of colonial rule in order to gain independence and freedom; because they find themselves in identical quagmires today: they are all treated as political lightweights,

[25] Gathii, *supra* note 10 at 37.

[26] The open structure echoes to some extent what Eslava and Pahuja called "an 'open' universality which implicitly resides at the core of the TWAIL project" that focuses on the specific material practices of international law everywhere. Eslava and Pahuja, *supra* note 18 at 122.

[27] LIU Shaoqi, "On Internationalism and Nationalism" (9 November 1948) broadcast by North Shensi Radio, reprinted in China Digest (14 December 1948), quoted in Arthur STEINER, "Mainsprings of Chinese Communist Foreign Policy" (1950) 44 American Journal of International Law 69 at 74–5. Steiner also identified several premises of the anti-imperialist movements of communist China.

[28] See for instance, CHEN Li, "Tracing Chinese Scholar Chen Tiqiang's Pursuit of International Law Education and His Major Contribution to the Doctrine of Recognition" (2020) 10 Asian Journal of International Law 68. See also HE Qisheng, ed., *Luojia International Law: Scholars and Studies* (*珞珈国际法：学人与学问*), 1st ed. (Wuhan: Wuhan University Press, 2011).

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

> have undeveloped economies, and are technologically backward. Their similar histories, similar present problems, and similar aspirations are what make these nations the Third World and a new force to be reckoned with.[29]

At the end of that paper Wang also encouraged Chinese international lawyers to give heed to the Third World studies in international law against the backdrop of the increasing impact of Third World countries in international relations.[30] Similar critiques against imperialism and colonialism were shared by many other Chinese international lawyers. For instance, in a memoir about Zhou Gengsheng, it was said that Zhou had a strong aversion to the imperialism embedded in Western international legal textbooks in light of European history of diplomacy and politics.[31] Zhou also placed emphasis on developing a Chinese academic system of international law, distinct from the European and Western systems.[32]

On the topic of unequal treaties, a great number of Chinese scholars have made contributions to the legal scholarship. The analysis of *Unequal Treaties* by Anne Peters in the Max Planck Encyclopedia showed how Chinese experiences were predominant in this debate.[33] Peters recognized that the issue of unequal treaties became part of Chinese identity and the common heritage of Chinese scholarship for a long period.[34] For instance, Zhou Gengsheng's manuscript on *International Law* and *Ten Lectures on Unequal Treaties* addressed important viewpoints on subaltern states. Zhou strongly criticized unequal treaties as a result of imperialism and defined the origin of unequal treaties as a trade-facilitated tool used by European states against Eastern states (including Turkey, Persia, Korea, China, Siam, *etc.*).[35] In the 1990 *Hague Academy Collected Course*, Wang Tieya also harshly criticized the Western-imposed unequal treaty regime, which had been used to justify and condone the West's rule over China for more than a century.

> They brought to China international law which applied among themselves, but they did not apply it to China, or they applied only those principles and rules which they could make use of in their activities of oppression and exploitation. One thing they insisted on was the sanctity of the unequal treaties. For them, the main role of international law was to guarantee and supplement the execution of unequal treaties.[36]

It was against this imposition of unequal treaties that this generation of Third World international legal scholars vigorously defended the principles of sovereignty and

[29] WANG Tieya, "The Third World and International Law" in Ronald St. J. MACDONALD and D.M. JOHNSTON, eds., *The Structure and Process of International Law* (Heidelberg: Springer Netherlands, 1983), 955 at 959.

[30] *Ibid*., at 957.

[31] LI Mousheng, "Memoir of Professor Zhou Gengsheng (周鲠生教授传略)", in He, *supra* note 28 at 6.

[32] *Ibid*.

[33] Anne PETERS, "Treaties, Unequal" in *Max Planck Encyclopedias of International Law* (Oxford: Oxford Public International Law, 2018) at para 7. With the debates about and the adoption of the Vienna Convention on the Law of Treaties, China was in a better place to argue that treaties signed under coercion were void. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1151 U.N.T.S. 331 (entered into force 27 January 1980), art. 64. See also CHIU Hungdah, "A Comparative Study of the Chinese and Western Position on the Problem of Unequal Treaties（中國與西方關於不平等條約問題的比較研究）" (1969) Cheng-ta Faxue Pinglun （政大法學評論）1, at 1.

[34] Peters, *supra* note 33.

[35] ZHOU Gengsheng, *Ten Lectures on Unequal Treaties* (*不平等条约十讲*) (Shanghai: Taipingyang Bookshop Print, 1929). ZHOU Gengsheng, *International Law* （*国际法*） (Beijing: The Commercial Press, 1976).

[36] WANG Tieya, "International Law in China: Historical and Contemporary Perspectives (Volume 221)" in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 1990) at 258.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

sovereign equality.[37] As Wang explained, "[t]he newly established States are also most attached to the concept [of sovereignty] as they are extremely sensitive to any infringement of their newly acquired independence and sovereignty".[38] According to Wang, China placed emphasis on sovereignty since this prize was earned after extensive battles to regain its lost sovereignty.[39]

By sticking to the formal legal validity of these foundational norms, socialist and Third World critiques constructively imbued the "epistemic determinacy and a meaningfully counter-hegemonic character" into the interpretation of international law.[40] This was demonstrated by the way Chinese academia developed the topic of non-intervention. In a 1950 paper by Chen Tiqiang titled "Who is Undermining International Law?" Chen argued that the imperialist approach in the Korea War should be condemned on the basis of the UN Charter's prohibition of aggression and intervention.[41] In a later paper published in 1956 on the China's Peoples' Daily – one of the main media outlets in China – Chen placed emphasis on the principle of non-intervention during civil strife.[42] Chen said that:

> the principles of international law stipulate that the government of a country has the obligation not to allow the area under its administration to be turned into a base to conduct hostile activities against the government of a foreign country with which it is at peace.[43]

Chen made this point within an intention to warn off the British government for harbouring a Taiwanese fighter jet in a Hong Kong airport during the civil strife between the mainland and Taiwan.

In 1960, Yi Xin also wrote on the issue of non-intervention, stating that:

> Bourgeois international law, therefore, provides for 'intervention in default of right' and other pretexts for imperialism, namely, intervention can be carried out in 'self-

[37] See for instance, Anand strongly attacked the rejection of the principle of sovereign equality by positivists and attributed this rejection to the development of Eurocentrism in legal and political thinking. RP ANAND, "Sovereign Equality of States in International Law (Volume 197)" in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 1986) at 64.

[38] Wang, *supra* note 36.

[39] *Ibid*.

[40] As B.S. Chimni wrote in *International Law and World Order*, it is not the formal legal validity that suffices to load the norms of non-use of force with normative weight, it is "the consensus on political and historical judgment embodied in the rule" that qualifies "the reason that legal texts constrain." B.S. CHIMNI, *International Law and World Order: A Critique of Contemporary Approaches*, 2nd ed. (Cambridge: Cambridge University Press, 2017) at 533. See also Ryan MITCHELL, "The Korean War and the Ontology of Intervention: Chen Tiqiang's 'Who Is Undermining International Law?' (1950) — A Translation by Ryan Mitchell", online: Legal Form <https://legalform.blog/2019/03/05/the-korean-war-and-the-ontology-of-intervention-chen-tiqiangs-who-is-undermining-international-law-1950-ryan-mitchell/>.

[41] CHEN Tiqiang, "Who Is Undermining International Law? (誰是國際法的破壞者)" (1950) 8 Shijie Zhishi (世界知識) 7, quoted in Mitchell, *ibid*.

[42] CHEN Tiqiang, "We cannot allow Hong Kong to be Used as a Base for Hostile Activities against the Mainland", China's People's Daily (March 19, 1956), quoted in Jerome Alan COHEN and Hungdah CHIU, *People's China and International Law, Volume 1: A Documentary Study* (Princeton: Princeton University Press, 2017) at 176. In a different paper, Chen commented also on the Hungarian Incident and the non-intervention principle, published in the *Enlightenment Daily* (April 5, 1957).

[43] *Ibid*.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

> defence' or in the interest of the 'balance of power' and intervention can be based on so-called 'humanitarianism'.[44]

Yi Xin said that no matter how high-sounding these grounds for intervention were, they were only pretexts "used by strong capitalist countries for engaging in foreign expansion".[45] "So-called 'humanitarian intervention' is designed to spread a beautiful carpet over another road of imperialist intervention in the internal affairs of other countries."[46] Therefore, a great many Chinese international law scholars upheld the principle of non-intervention in light of the five principles of peaceful coexistence – a concept raised at the Bandung Conference and also in the Joint Statement of the Premiers of China and India.[47] Zhou Gengsheng elaborated on the principles of peaceful coexistence, in which he cautioned against seeing non-intervention mechanically because "the imperialists use the good slogan of 'non-intervention' to connive at aggression which in fact constitutes indirect intervention".[48] He raised the example of the Spanish Civil War in 1936 where a group of Western countries proposed the "nonintervention agreement" and a "nonintervention committee", which caused the Spanish Republican government to be finally overthrown by the Fascist faction.[49]

In a paper published in the China's Peoples' Daily, Chiang Yang criticized the universalism in American jurisprudence and the "so-called 'world legal order'". He insisted that:

> the poverty and backwardness of the people of the colonies, semicolonies and various countries in Asia, Africa and Latin America are the results of a long period of barbarous plunder and oppression by imperialism, especially American imperialism.... The only way for them to get rid of such a situation is to rise in revolution and uproot the colonial rule of imperialism.[50]

He considered that "the 'universalism' theory of the American reactionary jurists was an ideological weapon preserved for struggles in Asia, Africa, and Latin America".[51] Yang criticized the idea of the "world state" promoted by Philip Jessup because the purpose of this "world state" was to implement Western universalism, which would eventually deny the right of revolution from the governments and peoples of various states.[52] These criticisms of particularized Western universalism echoed what James Gathii had argued: "Third

[44] YI Xin, "What does Bourgeois International Law Explain about the Question of Intervention? (资产阶级国际法在干涉问题上说明了什么)" (1960) 4 International Studies (国际问题研究) 47, quoted in Cohen and Chiu, *supra* note 42 at 167.

[45] *Ibid*., at 165.

[46] *Ibid*., at 166.

[47] See for instance, PAN Baocun, "Five Principles of Peaceful Coexistence and Contemporary International Law" (和平共处五项原则和当代国际法) (1984) 2 Chinese Journal of Law (法学研究) 84.

[48] Zhou Gengsheng, "The Principle of Peaceful Coexistence from the Viewpoint of International Law (从国际法论和平共处的原则)" (1955) 6 Chinese Journal of Law (法学研究) 37 at 38, quoted in Cohen and Chiu, *supra* note 42 at 130.

[49] *Ibid*.

[50] Chiang Yang, "The Reactionary Thought of 'Universalism' in American Jurisprudence" Peoples' Daily (17 December 1963) at 5, quoted in Cohen and Chiu, *supra* note 42 at 43.

[51] *Ibid*.

[52] Yang here quoted Jessup's elaboration of a "world state" and the result of a "world state" that "[t]he law of a world state would deny the 'right of revolution'". See Phillip JESSUP, *A Modern Law of Nations* (New York: Macmillan, 1948) at 185. Jessup was also famous for promoting the rule of law as a medication "to counter the possible development of other ills which follow in the train of the virus". See Philip C. JESSUP, "To Form a More Perfect United Nations (volume 129)", in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 1970), 6.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

World positions exist in opposition to, and as a limit on, the triumphal universalism of the liberal/conservative consensus in international law."[53]

An important premise of Chinese scholars in this period was that "imperialist big powers may impose their will on the international community and thus influence the enactment of international law."[54] Yet some Chinese scholars assumed a less radical approach and did not reject the possibility of international law being interpreted to the advantage of the Third World. They believed that international law had "its own objective rules of development which cannot be diverted by will of imperialist big powers and the development of international law cannot be separated from the [objective] rules of the development of the international community".[55] Chen Tiqiang's doctoral thesis, completed at Oxford, on the issue of recognition, also suggested that:

> the higher purpose of international law was to offer protection against the encroachment of the rights of weaker states: 'non-recognition does not give the foreign State the right to treat the unrecognised Power as if it were beyond the pale of international law'.[56]

Hence:

> [The] constitutive view that the international community is in the nature of a closed club, to which new entities can only be admitted through recognition, is itself erroneous. It is certainly untrue today that any portion of humanity can be treated as beyond the protection of international law.[57]

The rebellion against exclusion and faith in international law to bring recognition and justice were marked in some Chinese scholarship in this period.

On the sources of international law, many Chinese scholars in the postcolonial period argued that only treaties and customs could be considered sources of international law.[58] Only resolutions adopted by the UN General Assembly that were of a normative character relating to the rights and obligations of states, interpretations of the UN Charter, fundamental principles of international law, or declarations of existing international law might be capable of constituting a subsidiary source of international law.[59] Liu Ding, the Dean of International Law Faculty of Renmin University in the 1980s, asserted that:

> according to international law, an international organization does not have legislative power and the resolutions it passes generally do not have binding force upon its members... However, resolutions of international organizations of significant importance, which are consistent with generally recognized guiding principles of

[53] James Thuo GATHII, "Rejoinder: Twailing International Law" (2000) 98 Michigan Law Review 2066 at 2067.

[54] PAN Baocun, "On the Scientific Nature of International Law （国际法的科学性探讨）" (1985) 5 Chinese Journal of Law（法学研究）80 at 85, as quoted in Hungdah CHIU, "Chinese Attitudes Towards International Law in the Post-Mao Era, 1978–1987" (1987) 21 International Lawyer 1127 at 1130.

[55] *Ibid*. Wei Min likewise criticized the policy-oriented approach for making international law to follow the change of policy of certain big powers. Wei argued that international law should serve as a baseline for right and wrong, as well as providing restraints and sovereign equalities for a normal international order. WEI Min, ed., *Introduction to International Law* (*国际法概论*) (Beijing: Guangming Daily Publishing House, 1986).

[56] Chen, *supra* note 28 at 76

[57] See CHEN Tichiang, "Recognition in International Law: With Special Reference to Practice in Great Britain and the United States" DPhil, University of Oxford, 1949, quoted in *ibid*.

[58] LI Haopei, *Introduction to Treaty Law* (*条约法概论*) (Beijing: China Law Press, 1987).

[59] WANG Tieya and WEI Min, eds., *International Law* (*国际法*) (Beijing: China Law Press, 1981).

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

> international law, do possess legal validity and should be considered as a source of international law. The Declaration on the Establishment of A New International Economic Order and its Programme of Action adopted by the Sixth Special Session of the General Assembly of the United Nations on May 1, 1974, and the Charter of Economic Rights and Duties of States adopted by the Twenty-Ninth Session of the General Assembly of the United Nations on December 12, 1974, which confirm the permanent sovereignty over natural resources of states, sovereign equality of all states, the undeniable rights of all states to participate equally in resolving world economic problems and other principles, should have the validity of international law.[60]

Liu's attention to the New International Economic Order and the Charter of Economic Rights and Duties, which also established the epistemological foundation for the discipline of International Economic Law in China, was remarkable – in the sense of recognizing the economic sovereignty of states.[61] The importance attributed to the unanimously, or almost unanimously, adopted General Assembly Declarative resolutions as a possible formal source of international law was well discussed in Li Haopei's paper on *jus cogens*. In that paper he showed great support for including these kinds of resolutions as part of formal international law and for the increasing Third World influence in the General Assembly. His paper, first published in Chinese in the Chinese Yearbook of International Law (1982),[62] was translated into English in the collection of Selected Articles from the Chinese Yearbook of International Law in 1983.[63]

In general, Chinese scholars do not accept general principles of law derived from domestic law and awards of international tribunals as the sources of international law. Zhu Lisun, in his textbook on *Public International Law* (*Guoji Gongfa*) published in 1985, wrote:

> first, in reality there are only two legal systems, i.e., municipal law and international law, and there exists neither an abstract law nor a legal system above the municipal law and international law. Therefore, there will be no general principles of law in abstract. Second, the general principles of law advocated by Western legal scholars are municipal law principles. However, since international law and municipal law are two different legal systems, the principles of municipal law cannot be applied to international law.[64]

Chen Tiqiang also explained in 1984 that:

> when the Western powers appeared on the Chinese scene, they brought with them this system of international law. But though they applied among themselves the

[60] LIU Ding, *International Economic Law* (国际经济法) (Beijing: China Renmin University Press, 1984) at 14–15, as quoted in CHIU Hungdah, "Chinese Views on the Sources of International Law" (1987) 28 Harvard International Law Journal 289 at 304.

[61] Liu Ding was famous for having set up the discipline of International Economic Law in China as the founding father. See "Professor Zhang Shangjin on the Teaching and Research of Private International Law in Renmin University" (6 April 2010), online: Renmin University News <https://news.ruc.edu.cn/archives/15727>.

[62] LI Haopei, "Jus Cogens and International Law (强行法与国际法)" (1982) Chinese Yearbook of International Law 37.

[63] Chinese Society of International Law, *Selected Articles from Chinese Yearbook of International Law* (China Translation and Publishing Corporation, 1983).

[64] ZHU Lisun, *Public International Law* (*国际公法*) (Beijing China Renmin University Press, 1985) at 10, as quoted in Chiu, *supra* note 54 at 1141

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

> whole system of international law, they applied to China only those portions which authorized and legitimatized the plundering, exploitation and oppression of colonial peoples.[65]

Citing the classification of humanities by James Lorimer and the five classes provided by Oppenheim, which hierarchized states according to civilization levels, Chen expressly unveiled how the "humiliation suffered by China was due principally to the imperialist policy of the Great Powers and the incompetence [of China]" and how international law could do nothing to change the semi-colonial degradation of China, which more served as an accomplice to these hegemonic ambitions through the absurd civilization levels labelled by these distinguished international law scholars.[66]

These passages of international legal literature by Chinese scholars cursorily encapsulated how Chinese legal scholars in the post-colonial period enriched the Third World voices in international law, challenging imperialism and colonialism. Yet, after the 1980s, especially after the Soviet Union dissolved and China entered the market economy, this anti-imperialist voice faded away in the international legal literature. A changing pattern emerged, as the next Section will unpack.

III. The Engagement of Chinese scholars with TWAIL in the post-cold war period (1990 'TIL now)

As stated earlier, the TWAIL approach we discuss today was a moniker coined at the Harvard Conference in 1997. It retrospectively traced the work of international legal scholars such as Georges Abi-Saab, Mohammed Bedjaoui, Christopher Weeramantry, and Fouad Ammoun.[67] Yet, as Anghie and Chimni have identified, there was an evolution from TWAIL I to TWAIL II. An important difference between TWAIL I and TWAIL II was a further critique of the postcolonial nation-state – as a result of Western-imposed international law – and an interest in the violence of the nation-state at home as well.[68] It is worth noting that this important piece by Anghie and Chimni – which was cited by various scholars in identifying the TWAIL movement – was published in the Chinese Journal of International Law, whose editors-in-chief at that time were Wang Tieya and Yee Sienho.

In line with this thread, in 2003 Wang and Yee have edited a collection of essays in memory of Li Haopei in *International Law in the Post-Cold War World*. In this collection, many themes were in light of TWAIL, such as "general principles of law regarding the protection of minorities" by Theo Van Boven, "the concept of war crimes" by George Abi-Sabb, "the sovereign equality principle in the 21st century" by Gao Feng, and a rereading of *opinio juris* by Bin Cheng, *etc*. For instance, Bin Cheng, by highlighting the status of *opinio juris* in the making of customs, had made known the theory of "instant custom" in the area of space law – that every state exercises complete and exclusive sovereignty over the airspace above its territory, which was quickly recognized. His doctrinal analysis in that regard was also an important addition to the Third World voices.[69] The creation of "instant custom" was, according to some authors, "a way to properly respond to the

[65] CHEN Tiqiang, "The People's Republic of China and Public International Law" (1984) 8 The Dalhousie Law Journal 3 at 7.

[66] *Ibid*., at 9.

[67] Eslava, *supra* note 11.

[68] Antony ANGHIE and B.S. CHIMNI, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 Chinese Journal of International Law 77 at 82.

[69] Bin CHENG, "Opinio Juris: A Key Concept in International Law That Is Much Misunderstood" in Sienho YEE and Tieya WANG, eds., *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (London: Routledge, 2001) 56 at 76.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

critique by Third World writers that traditional CIL [customary international law] which crystalized the *status quo* that could only be challenged by a slow and difficult process."[70] It is noted from the TWAIL perspective that some of these approaches to revolutionary customs explicitly consider the position of Third World states.[71]

In the same collection of essays, there was some scholarship from a realistic approach – or to put it in more concrete terms, the New Haven school. Wang Guiguo's paper on the Chinese perspective of sovereignty in the period of globalization was a representation of the New Haven school. Wang Guiguo, a student of Michael Reisman and a disciple of the New Haven school,[72] explained in his chapter why China adhered to an absolute approach to sovereign immunity on the bases of sovereign equality and non-interference. On the one hand, he understood why China stuck fast to the concept of sovereignty, as many Third World countries did in the decolonization period, where they demanded equal footing. On the other hand, he considered a shifting role of China in joining the world economic institutions for its own benefits, which required China to make a compromise to the principle of sovereignty. He noted that:

> China needed technology and capital and that the membership of the IMF and World Bank group would not only bring badly needed hard currency to the country but would also help build confidence in foreign investors interested in doing business in China.[73]

Yee Sienho's own chapter in this collection also showed the development in the understanding of international law since the establishment of the UN. He recognized the importance of Third World states in the Cold War period where international law was about coexistence and cooperation. Yet he proposed that international law had entered a new age of "co-progressiveness" after the Cold War, in that there was more inclusive and egalitarian participation in international law making and that the rule of law and human rights law remoralized international law.[74] These observations – made with optimism and hopefulness about international law – were somehow different from the voices expressed in the 1997 Harvard Conference or the later conferences on TWAIL, which were more critical of international law continuously being a product of imperialism and neocolonialism. Yee and some other scholars appeared more optimistic, holding that international law entered a new stage of cooperation and co-progressiveness.

In the post-Cold War period, Chinese scholars appeared to adopt fewer anti-imperialist tones in describing international law, focusing more on the scientific, technical, and universal aspects of international law. Wang Tieya's speech at the UN General Assembly on

[70] George Rodrigo Bandeira GALINDO and César YIP, "Customary International Law and the Third World: Do Not Step on the Grass" (2017) 16 Chinese Journal of International Law 251 at 263.

[71] In a different paper, Bin Cheng also eloquently showed how space law had been a clear example of the colonial impact on international law due to the unequal weight of States in enacting international legal norms. Bin CHENG, "The Contribution of Air and Space Law to the Development of International Law" (1986) 39 Current Legal Problems 181 at 190.

[72] WANG Guiguo, "The New Haven School of Legal Theory from the Perspective of Traditional Chinese Culture" (2012) 20 Asia Pacific Law Review 211.

[73] Wang Guiguo, "Sovereignty in Global Economic Integration: a Chinese Perspective" in Yee and Wang, *supra* note 69, 357 at 371. Wang also said, "when the matter was discussed at the Ministry of Foreign Affairs, the first issue considered and debated was whether the IMF and World Bank membership would impair China's sovereignty and if so to what extent."

[74] What Yee meant by a more inclusive process of law making was that not only states, but also NGOs and individuals, should be able to form an international civil society for international decision-making. Yee, "Towards an International Law of Co-Progressiveness" in Yee and Wang, *supra* note 69, 10 at 38.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

the universal approach to the teaching of international law was one representation. Having admitted that modern international law was a result of Eurocentrism, Wang showed that in non-Western places there were rules analogous to European international law. He believed that the differences between the non-West and the West in terms of different cultural and historical heritage and different social and political systems could "yield even more fruitful results" because international law has developed from "subordination to coordination and then to cooperation".[75] Wang considered that:

> Article 9 of the Statute of the International Court of Justice provides that 'in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured' ... The implementation of the aforementioned provision makes the Court a real world court. In the same sense, when international law itself represents the main forms of civilization and of the principal legal systems of the world, it becomes universal.[76]

In the same speech, Wang also quoted Judge Bedjaoui's edited work, *International Law: Achievements and Prospects*, with a collection of fifty authors "selected on the basis of broad geographical coverage". Wang believed that such work could facilitate a universal approach to the teaching of international law and the national ethnocentric approach should be discarded.[77] Bedjaoui also steadfastly espoused the education of international law to reduce fanaticism of war and to create solidarity among all humans.[78] Yet, the unswerving support for universalism – a spirit also enshrined in the writings of RP Anand – was also criticized for catering to the Western international legal scholars.[79] Anand, along with the likes of other Third World scholars, was dedicated to the recovery of the "lost histories of the new post-colonial states without rejecting international law".[80] Antony Anghie argued that Anand "adopted, on the whole, a conciliatory position: the aim was to reform international law rather than dispense with it".[81] Anand also represented the particularistic universalism of non-European international law.[82] Even though Anand's work was not so much appreciated in China because of his criticism of the Tibet issue,[83] Anand's approach of "particularistic universalism"[84] was shared by many legal minds in the post-colonial world, such as Mohammed Bedjaoui, Wang Tieya, and C. H. Alexandrowicz.[85]

[75] WANG Tieya, "Universal Approach to the Teaching of International Law" in *International Law as a Language for International Relations* (The Hague: UN Publications, Kluwer Law, 1996) 320 at 323.

[76] *Ibid*., at 323. In the same vein, Anand also had an optimism about the ICJ. See Prabhakar SINGH, "Reading RP Anand in the Post-Colony: Between Resistance and Appropriation" in Bernstorff and Dann, *supra* note 7, 297 at 304.

[77] *Ibid*., at 323.

[78] Mohammed BEDJAOUI, "L'humanité En Quête de Paix et de Développement (I) (Volume 324)" in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 2004) at 103.

[79] Singh, *supra* note 76 at 309.

[80] *Ibid*.

[81] Antony ANGHIE, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 202.

[82] Arnulf BECKER LORCA, "Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation" (2010) 51 Harvard International Law Journal 475.

[83] RP ANAND, "The Status of Tibet in International Law" (1968) 10 International Studies 401.

[84] Singh, *supra* note 76 at 309.

[85] For instance, Alexandrowicz argued for non-discriminatory legal universalism by scouring the evidence in Asian and African practices of international law. David ARMITAGE and Jennifer PITTS, "'This Modern Grotius'An Introduction to the Life and Thought of C. H. Alexandrowicz" in C. H. ALEXANDROWICZ, *The Law of Nations in Global History* (Oxford: Oxford University Press, 2017) 1 at 21.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

In a book edited by Anand in 1972, Upendra Baxi contributed a chapter which represented another end of the spectrum of opinion on internationalism. Baxi's internationalism was very different from the one held by Anand and Jawaharlal Nehru. Baxi attacked the nationalism in Indian international legal scholarship for taking intellectual decolonization too far. Unlike Anand, who focused on state and sovereignty, Baxi took a people-centric approach and found international law to be a construct from below.[86] Baxi's approach was appreciated in a wider fashion by today's TWAIL scholars as we see in the work of Gathii, Chimni, and Rajagopal.[87] By contrast, in Chinese international legal scholarship international law remains and continues to remain state-centric. Scholars of international law, even when they are looking at issues of human rights, tend to focus only on collective human rights, such as the right to self-determination.[88] For instance, Bai Guimei, an eminent human rights scholar at Peking University, published a series of papers about collective human rights in the Chinese Yearbook of International Law. In her articulation, external self-determination – an entitlement exclusive to colonized territory and people under subordination – is a well-recognized right based on UN resolutions. In the meantime, the more controversial right to internal self-determination, according to Bai, denoted self-governance without external interference and equal rights to participate in political decisions rather than a special right for minorities within a state. Her interpretation was grounded on the doctrines of Western scholars such as Antonio Cassese, Thomas Franck, and Gregory H. Fox.[89] Other than promoting the right to self-determination, starting from 1990, Bai was also dedicated to articulating a group of "new generation of human rights" – which are mostly collective rights and social/economic rights – such as the right to development, the right to environment, the right to peace, the right to food, the right to natural resources, and the right to humanitarian aid.[90] It was in this category of collective rights that Bai articulated the shared concerns of Third World countries and scholarship.[91] Finding a "non-Western theory of universal human rights" based on the Oriental/Chinese culture was one of the key tasks of human rights education in China.[92]

It was also in this post-Cold War period that China stepped into a new era of market economy, which had arguably eliminated the biggest ideological obstacle to China's

[86] Upendra BAXI, "What May the 'Third World' Expect from International Law?" (2006) 27(5) Third World Quarterly 713.

[87] On this point, Gathii concurred with Chimni and Anghie that "Third World states 'often act in ways which are against the interests of their peoples', rules of international law ought to be evaluated from the 'actualized experience of these peoples' rather than those of the states." Gathii, *supra* note 10 at 43.

[88] For instance, Bai argued that China had provided rights to minority nationalities consistent with the ICCPR, but the right to self-determination was not applicable to the regional national autonomous regions in China's setting. BAI Guimei, "The International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities" (2004) 3 Chinese Journal of International Law 441 at 463.

[89] BAI Guimei, "On Internal and External Self-determination (论内部与外部自决)" (1997) 3 Chinese Journal of Law (法学研究) 105.

[90] BAI Guimei, "On the New Generation of Human Rights (论新一代人权)" (1991) 5 Chinese Journal of Law (法学研究) 1.

[91] *Ibid*.

[92] Sang-Jin HAN, Guimei BAI & Lei TANG, "A Universal but Non-hegemonic Approach to Human Rights in International Politics: A Cosmopolitan Exploration for China" in Michael KUHN, Shujiro YAZAWA, ed., *Theories about and Strategies against Hegemonic Social Sciences* (Stuttgart/Hanover: ibidem Press, 2015) 297, at 308. The authors noted that many Chinese scholars tried to "break away from their typical preoccupation with Chinese characteristics, and explore possible Chinese contributions to enriching human rights as universal values".

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

international law development.[93] The South Tour speech by the Chinese statesman, Deng Xiaoping, in 1992, minimized the ideological differences between capitalism and socialism as China used a more pragmatic approach to seize the chances in world economic development. Meanwhile, China also shifted from being a marginalized outsider that purely criticized and challenged the international legal system dominated by the West, to a recipient and participant of the contemporary international legal system.[94] Since 1992, the major goal of China's development has been to get to the centre of the decision-making process in the international legal system as a stakeholder.[95] In the post-Cold War period, pragmatism became a more prominent approach.[96] The old generation of scholars who were used to assuming a resistant tone in international law, such as Wang Tieya, Li Haopei, and Ni Zhengyu, participated less in research work. The new generation of international law scholars became the central pillar in analyzing international legal issues. These international law scholars mostly graduated from Peking University and Wuhan University, under the education of the old generation of international legal scholars.[97] Since 2001, the discussions in international law became more policy-oriented, particularly influenced by the Sino-US relationship.[98] Chinese scholars started to introduce the New Haven school into Chinese academia.[99] Some scholars identified with the New Haven school (with its complicated, technical, and contextualized process), for this school combined foreign policy purposes and international law values.[100] In general, an instrumental approach to international law can be seen in Chinese scholarship.[101] The instrumental approach predominated Chinese legal academia, while critical approaches like TWAIL or feminism had little influence. For instance, He Zhipeng and Gao Yue contended that TWAIL and feminism were value-loaded perspectives without a comprehensive overview of international law.[102]

Be that as it may, TWAIL and critical scholarship have gained some momentum in the past decade, largely influenced by international developments.[103] In a recent piece

[93] DENG Lie, "Review of Public International Law Studies in China after 40 Years of Reform and Opening-up (改革开放 40 年中国国际公法学研究述评)" (2018) 3 Law Review (法学评论) 1.

[94] *Ibid*.

[95] *Ibid*.

[96] PAN Junwu, "Chinese Philosophy and International Law" (2011) 1 Asian Journal of International Law 233 at 238.

[97] *Ibid*. See also the Chinese Yearbook of International Law, online: <http://www.csil.cn/Year/List.aspx?CId=35>.

[98] *Ibid*.

[99] BAI Guimei, "The Policy-Oriented Theories of International Law (政策定向学说的国际法理论)" (1990) Chinese Yearbook of International Law 201; BAI Guimei, "Myres McDougal and Policy-Oriented School (梅尔斯·麦克杜格尔与政策定向学派)" (1996) Chinese Yearbook of International Law 361.

[100] LI Ming, "Reform and Opening Up, the Sill Road, and International Law – a Political Perspective of Law (改革开放、丝绸之路、国际法 – 从政治角度看待法律)" (2014) 6 Journal of Shihezi University 1; LIU Zhiyun, "The New Haven School: A Theoretical Innovation in International Law in the Cold War Period (纽黑文学派:冷战时期国际法学的一次理论创新)" (2007) 5 Journal of Gansu College of Political Science and Law (甘肃政法学院学报) 134.

[101] Here, an instrumental approach to international law was not due to the introduction of the New Haven school; rather, it was that New Haven's instrumental approach was in line with the Chinese consistent approach to international law since Qing Dynasty and Republican era. I thank the anonymous reviewer for raising this point.

[102] HE Zhipeng, GAO Yue, "Critical Realism as a Methodology of International Law (作为国际法研究方法的批判现实主义)" (2014) 3 Law and Social Development (法制与社会发展) 148, at 149.

[103] Wang Yizhou noted that an international environment of restraining despotism, respecting individual rights, and criticizing hegemony was formed. WANG Yizhou, "Rebuild the Relationship between International Politics and International Law – Facing the People-centric and Society-based Studies of International Problems (重塑国际政治与国际法的关系——面向以人为本、社会为基的国际问题研究)" (2007) 4 World Economics and Politics (世界经济与政治) 6. Some young scholars also tried to explore the Marxist approach to international law, in which they borrowed from Chimni's study in Marxist international law to criticize the

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

published in 2022, the international law theorist, He Zhipeng, appeared to take a different approach, acknowledging the importance of critical studies based on theories and practices.[104] He Zhipeng also grounded a need of understanding the plurality of human rights from a historical and social dimension by referring to the theories of Makau Mutua.[105] In a piece published in 2009, Li Hongfeng, a scholar who graduated from Wuhan University, introduced TWAIL scholarship to the Chinese audience for the first time.[106] Yet his brief introduction did not capture the complexity of TWAIL and did not pay attention to the growing people-centric approach and the critique towards neocolonialism. Among recent Chinese critical work, Wei Leijie's piece on the lack of subjectivity in China's international law studies was notable. He criticized the over-emphasis on the legitimacy of the current international legal system among some Chinese scholars, which included being too trusting in the legality of international adjudication and the lack of interest in international legal theories, such as critical legal studies, post-colonialism, and TWAIL. He noted that both legal histories and TWAIL shared the view that international law is a politicized narrative. He also argued that mainstream authors in international law had intentionally overlooked TWAIL, but he pointed out that a deconstructive approach such as TWAIL could reveal the internal controversies of international law, which should be valuable in correcting the over-emphasis on positivism in Chinese international legal research.[107]

Notably, Peking University provided an important environment for the development of critical legal studies in China. Over the past years, Peking University invited Antony Anghie, David Kennedy, Anne Orford, Martti Koskenniemi, Frédéric Mégret, and a group of critical scholars to deliver lectures. Anghie's lecture in 2018, for instance, discussed "TWAIL in a Changing World Order".[108] Li Ming, an eminent international legal scholar at Peking University, noted the paucity in furnishing alternative ways of thinking about international law among Chinese legal scholars and teachers, which he believed was one of the reasons why TWAIL studies had been impoverished in China over the years.[109] Chen Yifeng, also based at Peking University, and a faculty member of the Harvard University Institute for Global Law and Policy programme, was probably one of the few scholars who contributed to an international TWAIL scholarly project, as embodied in his chapter in *Bandung, Global History and International Law*, reviewing China's engagement in Bandung.[110] His doctoral thesis on the principle of non-intervention criticized Western humanitarian interventionism under the banner of human rights and democracy in the

injustice and class embeddedness of international law and to protect the interest of Third World countries for democratization of international law. See for instance, HUANG Xiaoyan, "The Application of Marxist Legal Methodology in International Law Research (马克思主义法学研究方法在国际法研究中的运用)" (2012) 1 Xinjiang Social Science (新疆社会科学)84; LV Yanfeng, "Marxism and International Law Research (马克思主义与国际法研究)" (1991) 3 Contemporary Law Review (当代法学) 22.

[104] HE Zhipeng, "On the Building of International Professional Community (论国际法职业共同体的构建)" (2022) 2 Science of Law (法律科学) 188.

[105] HE Zhipeng, "The Historical and Social Dimensions of Human Rights (人权的历史维度与社会维度)" (2021) 1 Chinese Journal of Human Rights (人权研究) 13.

[106] LI Hongfeng, "Critique and Deconstruction: Review of TWAIL (批判与重构：国际法第三世界方法述评)" (2009) 22 Journal of Yunnan University (云南大学学报) 134.

[107] WEI Leijie, "The Lack of Subjectivity in Chinese International Law Studies: Reflections and Demystification (我国国际法研究的主体性缺失问题：反思与祛魅)" (2020) 8 Academic Monthly (学术月刊) 142.

[108] "Peking University Wang Tieya International Law Lecture Series – 'TWAIL in a Changing World Order'" (11 October 2018), online: PKU <https://en.law.pku.edu.cn/newsevents/global/87071.htm>.

[109] LI Ming, "A Reflection on the Critical International Law – The Nature and Influence of International Law (国际法的性质及作用：批判国际法学的反思)" (2020) 32 (3) Peking University Law Journal (中外法学) 801.

[110] CHEN Yifeng, "Bandung, China, and the Making of World Order in East Asia" in Luis ESLAVA, Michael FAKHRI, and Vasuki NESIAH, eds., *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2017), 177.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

post-Cold War period.[111] His recent work on global health law showed how the colonialist approach, which prioritized external supervision and state responsibility, is still present in today's global health governance.[112] He urged for a shift in mindset and for greater focus on the importance of international collaboration and capacity building for developing countries.[113] Lai Junnan, also a graduate of legal history at Peking University, and currently based at Fudan University, wrote substantially on the colonialized history of China in the nineteenth century, which echoed the studies of Antony Anghie and C. H. Alexandrowicz.[114] Lai argued that the "unpoliticized" narrative of international law and the positivism prevalent in the nineteenth century were complicit in the imperialist expansion into Oriental countries. In a different paper, Lai revealed how the Chinese intellectual community, at a critical juncture in the Late Qing Dynasty, was deeply troubled by the question of whether to accept international law, and these intellectuals' bifurcated attitudes to international law epitomized continuous dialectics between a Western-imposed international law symbolized as "civilization" and the sovereign inequality in actual international relations.[115]

A group of scholars are strongly interested in the nineteenth century history of international law in China. For some, Henry Wheaton is a critical figure for disseminating the discourse of "civilization", which was used to convert non-Christian states by promising them rights endowed by international law to Christian states.[116] In a similar vein, in a paper published in the *European Journal of International Law* in 2016, by international relations scholar Yin Zhiguang,[117] Yin discussed how European international law had acquired universality in late-nineteenth century China through the translation of Western writings into Chinese, such as those by Henry Wheaton, as well as other legal documents on international law. Yin pointed out that "the clashes between China and the European colonial powers by nature were disputes between the jurisdictions", and the failure of China in this jurisdictional rivalry was due to an imposition of Eurocentric international law and universalism.[118] Here, Yin's view echoed Sundhya Pahuja in her paper of "Laws of Encounter", in which she redescribed international law as rival jurisdictions. She claimed that state making was an actualization of jurisdiction through the universalization of sovereignty.[119] Lydia He Liu, a well-established scholar of comparative literature and East Asian studies at

[111] CHEN Yifeng, "The Non-intervention Principle in the Post-Cold War Period: Critique of the Theories of Western New Interventionism (试论当代国际法上不干涉内政原则)" (2011) 89 Chinese Yearbook of International Law 176. See also CHEN Yifeng, *Principle of Non-Intervention in International Law* (论当代国际法上的不干涉原则) (Beijing: Peking University Press, 2013).

[112] CHEN Yifeng, "Health for All or Health Securitization? Critical Reflection on the Foundations of a Global Health Law (健康主义抑或安全主义?反思全球卫生法的理论基础)" (2021) 4 Social Sciences Abroad (国外社会科学) 79.

[113] *Ibid*., at 80.

[114] LAI Junnan, "The Narrative of China in the Nineteenth-Century International Law Studies (十九世纪国际法学中的中国叙述)" (2012) 5 The Jurist (法学家) 131.

[115] LAI Junnan, "A Misread New Word: The Impression of International Law by the Late Qing Nationals (误读下的新世界: 晚清国人的国际法印象)" (2010) 1 Tsinghua Forum of Rule of Law (清华法治论衡) 228. Lai, adopting a post-colonial approach, traced the two important figures in the Late Qing Dynasty in importing international law into China (Zheng Guanyin and Wang Tao).

[116] Lai, *supra* note 113. See also Xiaoshi ZHANG, "Rethinking International Legal Narrative Concerning Nineteenth Century China: Seeking China's Intellectual Connection to International Law" (2018) 4 The Chinese Journal of Global Governance 1.

[117] Yin also gives a lecture on Third World and International Law, organized by the Transnational Law School of Peking University.

[118] YIN Zhiguang, "Heavenly Principles? The Translation of International Law in 19th-century China and the Constitution of Universality" (2016) 27 European Journal of International Law 1005 at 1005.

[119] Sundhya PAHUJA, "Laws of Encounter: A Jurisdictional Account of International Law" (2013) 1 London Review of International Law 63.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

Columbia University and Tsinghua University, also paid great interest to the translation of Henry Wheaton's work into Chinese.[120] She conceived the translation of international law in the nineteenth century as an important pillar for the construction of universal values, which served as part of the colonial expansion. She argued that the translator of Wheaton's book, W. A. P. Martin, had a Christianizing mission and was strongly nationalistic because Martin chose Wheaton rather than other European Scholars (such as Vattel) to translate.[121] Moreover, she showed that Martin's translation provided an important justification for the Western violations of international law by resorting to force in the Opium War.[122]

The reflections on empires and imperialism preoccupied various disciplines of international studies about China.[123] Lydia Liu's work, *The Clash of Empires*: *The Invention of China in Modern World Making*, has a sustained focus on sovereign thinking, which allowed her to interweave disparate strands of research on international law, semiotics, imperial gift exchange, missionary translations, grammar books, and colonial photography.[124] For instance, she pinpointed that the British had rejected the use of the written Chinese character *yi* (夷) after the Opium War in the Anglo-Chinese Treaty of Tianjin, because the British believed that the use of that character was intended to insult foreigners. Liu importantly pointed out that the rejection of *yi* was actually a self-suspicion of the British in reinforcing sovereign thinking in China or, as Derrida would say, "those who inspire fear frighten themselves, they conjure the very specter they represent. The conjuration is in mourning for itself and turns its own force against itself."[125] Liu thus highlighted the self-suspicion of the British "within the imperial unconscious with regard to the mystified location of the 'barbarian' and its relationship to the sovereign self".[126] Meanwhile, in the book, Liu also cited C. H. Alexandrowicz concerning the conversion of Asian states to "positivism of the European brand", pointing out how internationalists tended to privilege the positivity of sovereign rights, with a lack of attention to the interesting processes of conjurations – a process of battling the ghost of the other within the self.[127]

The colonial history of China continued to be an important focus among Chinese scholars, though not necessarily only international legal scholars. In addition to this focus, two other important features characterize Chinese scholars' quest for global issues: one is more central to international law, which is the adherence to the identification of developing country; the other is more related to philosophy and history, which builds on the concept of Tianxia (all under heaven) as an alternative to the European nation-state domination. On the one hand, the identification of developing states refers mostly to an economic status that many other Third World countries were also fighting for. In this regard, the positioning of the developing states that China spoke for – either the non-aligned

[120] Lydia H LIU, "Legislating the Universal: The Circulation of International Law in the Nineteenth Century" in Lydia H LIU, ed., *Tokens of Exchange: The Problem of Translation in Global Circulation* (Durham, NC: Duke University Press, 1999), 127.

[121] *Ibid*.

[122] Martin's work was highly commended by the British Ambassador Frederick Bruce.

[123] See for instance, Wei Leijie wrote substantially on the topic of imperialism and legal orientalism, showing that globalization was only a rhetoric of new imperialism for building the global monopoly and neoliberalism has dominated the discourse of modernity, in order to create a global power structure to serve the interest of great powers. WEI Leijie, "The Legal Imperialism in the Globalization Era and the Discursive Hegemony of the Rule of Law (全球化时代的法律帝国主义与 "法治" 话语霸权)" (2013) 35 (5) Global Law Review (环球法律评论) 84.

[124] Lydia He LIU, *The Clash of Empires*: *The Invention of China in Modern World Making* (Cambridge: Harvard University Press, 2004).

[125] *Ibid*., at 105.

[126] *Ibid*.

[127] *Ibid*., at 108.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

states or G77 – as one club also provides scholars with more legal groundings to articulate the economic injustice and inequality engendered by imperialism. On the other hand, the rediscovery of Tianxia – as a provincialized concept that stands differently from the nation-state concept – could resonate with TWAIL in a way that challenges the nation-state concept.

The identification – "developing country" – with direct legal consequences in trade laws (special and differentiated treatment) and environment agreements (common but differentiated responsibilities) became a favoured one in Chinese scholarship *vis-à-vis* the term "Third World".[128] For instance, on the topics of international economic law, Chinese scholars rely on the position of developing countries to criticize how the rules of the World Trade Organization (WTO) and investment laws are biased against developing countries.[129] For instance, Wang Guiguo wrote:

> although globalization has led to the possibility of cross-retaliation, which is seen to equip weak and developing countries with measures against the big and strong, at the same time, and also because of globalization, they are unable to employ these measures. On the whole, it is still the weak and small countries which are disadvantaged.[130]

Chinese scholars tend to stress economic sovereignty, arguing that economic sovereignty encompasses permanent and complete sovereignty over natural resources, wealth, and all other economic activities (as well as the right of nationalization and confiscation).[131] This approach was similarly shared by many Third World countries.[132] Despite the tide of economic globalization starting from the 1990s, Chinese scholars still insisted on the concept of sovereignty to promote economic development and actual justice in economic relations. The right to development was already considered an important right in China's corpus in the 1990s.[133] The stance of developing countries was also linked to Bedjaoui's elaboration of the non-aligned movement; i.e. that developing and non-alignment can be assimilated into the same ideological vector of the Third World, in the sense that underdevelopment was a result of imperialism.[134] It is also this "relative disadvantage experienced by Third World countries" that allows these countries to demand a response "in normative terms, as an intolerable situation".[135]

[128] See for instance the introduction of the Third World resistance as developing countries in David P. FIDLER, "Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law" (2003) 2 Chinese Journal of International Law 29.

[129] Ming DU, "Globalization and Its Discontents" (2008) 7 Chinese Journal of International Law 590; WANG Zonglai and HU Bin, "China's Reform and Opening-up and International Law" (2010) 9 Chinese Journal of International Law 193; ZHAO Jun, "Developed Countries' Cap-and-Trade Border Measures: China's Possible Reactions" (2013) 12 Chinese Journal of International Law 809; HE Juan, "Developing Countries' Pursuit of an Intellectual Property Law Balance under the WTO TRIPS Agreement" (2011) 10 Chinese Journal of International Law 827.

[130] WANG Guiguo, "Radiating Impact of WTO on Its Members' Legal System: The Chinese Perspective (Volume 349)", in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 2011) at 342.

[131] ZHANG Hui, "The Development of International Economic Law in China for the Past 40 Years: Review and Reflections (中国国际经济法学四十年发展回顾与反思)" (2018) 2(6) Wuhan University International Law Review (武大国际法评论) 72.

[132] See Fidler, *supra* note 128 at 47.

[133] Zhang, *supra* note 131.

[134] Mohammed BEDJAOUI, "Non-Alignement et Droit International (Volume 151)", in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 1976).

[135] Mickelson, *supra* note 15 at 360.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

Meanwhile, some Chinese scholars (mostly not in the field of international law) started to pay attention to the concept of Tianxia from the mid-1990s in order to understand the relationship between sovereignty and human rights.[136] The worldview of Tianxia – a concept connoted in the Pre-Qin period, literally means "all under heaven". An important connotation of Tianxia was that "the world is for all" and "all are brothers within the Four Seas".[137] This episteme has become an important episteme for scholars to envisage global governance after the age of nationalism or, in Jurgen Habermas's words, "a post-national constellation".[138] This approach was to assume a forward-looking perspective and look for a creative response to new global challenges by (re)excavating Chinese traditions.[139] Some Chinese scholars conceived that this concept of "Tianxia" could be a capacious concept, going beyond national boundaries in the world by opening up new principles of global order out of Confucian traditions.[140] This Tianxia approach was thus reconfigured as something different from European universalism and expansive nationalism.[141] This strand of scholars, therefore, tried to combine the universal values of globalization as "substance" (*ti*) and China's own experience as "practical use" (*yong*).[142] This was considered a new Tianxiaism, which is something of a Chinese cosmopolitanism.[143] Yet the meaning of Tianxia can really cut both ways.[144] Some criticized the concept of Tianxia, arguing that:

> Tianxiaism in essence plays the role as a 'shadow' of domestic absolutism and autocracy on foreign affairs, which totally neglects ordinary citizens' basic human rights and the benefits of civilians in neighbouring countries, only enhancing the privilege and the pride of the ruling class.[145]

Nevertheless, the popularity of searching for an alternative as a new "Tianxiaism" in Chinese scholarship, according to the historian Ge Zhaoguang, was largely due to a reflection on the Western universal values and colonialism across a global range. That is also

[136] Han, *supra* note 92 at 109.

[137] LI Shenzhi, "Globalization and Chinese Cultures (全球化与中国文化)" (1994) 2 Pacific Journal (太平洋学报) 3.

[138] Jürgen HABERMAS, *The Postnational Constellation: Political Essays* (Cambridge, MA: MIT Press, 2001).

[139] Han, *supra* note 92 at 109.

[140] The most prominent scholarship in this regard is Zhao Tingyang. ZHAO Tingyang, *The Tianxia System: A Philosophy for the World Institutions* (Jiangsu Jiaoyu Chubanshe, 2005). Zhao highly praised the Confucian tradition of Tianxia and family/state to ensure effective governance. Zhao also proposed Tianxiaism and the world institution to replace the nation-state institution.

[141] See Han, *supra* note 92 at 116. Tianxiaism was contemplated as a possible source of new ways of thinking that transcends Western hegemony.

[142] Li, *supra* note 137.

[143] XU Xianming, "The Right of Harmony: The Fourth Generation of Human Rights (和谐权:第四代人权)" (2006) 2 Renquan (人权) 30.

[144] Ge Zhaoguang said that

> Tianxiaism with a deep historical origin may either be interpreted as cosmopolitanism that opens to universal gospels and values ... or it may follow the tradition of exclusive nationalist mentality and develop into an ambition of reigning Tianxia through economic and military modernization.

See GE Zhaoguang, "A Fantasme about Tianxia (Empire-World)" (2015) 29 Reflexion (思想)1, also translated in French by Philippe Uguen (with the title "L'empire-monde fantasmé") and collected in the book Anne Cheng (ed.) *Penser en Chine* (Gallimard 2021) 58.

[145] WANG Peng, "The Poverty of Tianxiaism: From Archaeology of Knowledge to Philosophical Critics and Political Assessment", quoted in Han, *supra* note 92 at 111.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

why critical studies (such as *Orientalism* by Edward Said and *Empire* by Michael Hardt and Antonio Negri) acquired an increasing audience in China. Ge argued that "these critical studies on globalization, modernity and world order, reactivated the sentiments of 'our one hundred years of humiliation', the tidal critiques on modernity, and the ambition to rebuild a Tianxia".[146]

In connection, Teemu Ruskola's work, *Legal Orientalism: China, the United States and Modern Law*, shared a similar purpose with Said's *Orientalism*, which provoked many discussions in China.[147] A group of Chinese scholars spoke highly of this book, as seen in its Chinese translation in 2016, with a great many eminent scholars endorsing the book on its cover.[148] Ruskola elaborated on how the European tradition of philosophical prejudices about Chinese law developed into a distinctively American ideology of empire, influential to this day. Ruskola's work, similar to Said's, was an elaboration of American legal orientalism (which characterized China as a lawless society) as a practice of imperialism. But Ruskola's views received criticisms from some Chinese scholars.[149] Some argued that an over-valourization of imperial history among Chinese scholarship failed to recognize that China's transformation into a nation-state deeply modified international law as well.[150] Lu Nan, for instance, believed that China's pragmatic approach – taking international law as a weapon against oppression and domination in decision-making – was an appropriate approach that speaks to both China's concerns and global demands.[151] At the end of the book, Ruskola alluded to the possibility that China could shift from Legal Orientalism to Oriental Legalism, which would allow China to acquire more discursive power in the making of international rules of law. This possibility was considered as a great chance for China to create its distinct position from Occidental discourses – either as an evolving Chinese universalism or as an Oriental legalism.[152] Ruskola postulated that "if law can resignify China, we must be prepared to accept that China can also Sinify law".[153] The same as the concept of Tianxia, this concept of Oriental legalism could cut both ways, with one way pointing towards a certain imperialistic universalism. The question, therefore, lies in how to keep this imperialistic potential at bay, a question that many Chinese intellectuals are dedicated to answering. As Anne Orford rightfully pointed out:

[146] Ge, *supra* note 144.

[147] Teemu RUSKOLA, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, MA: Harvard University Press, 2013).

[148] The book was recommended by Wang Hui, Huang Zongzhi, Cui Zhiyuan, Bei Danning, Ji Weidong, Fang Liufang, He Qinhua, Mi Jian, Gu Peidong, Jiang Shigong, Li Xiuqing, Wang Zhiqiang, Zheng Ge, Zhang Yongle, You Chenjun, Zhang Taisu, and others.

[149] MA Jianyin, "The Scholarly Description of Imagining the Other and Inventing the Self – About Legal Orientalism and its Chinese Implication ("想象" 他者与 "虚构" 自我的学理表达 – 有关《法律东方主义》及其中国反响)" (2017) 3 SJTU Law Review (交大法学)12.

[150] LU Nan, "Towards Oriental Legalism, Review of Ruskola's Legal Orientalism (迈向东方法律主义? – 评络德睦《法律东方主义》)" (2017) 3 SJTU Law Review (交大法学) 24. LU Nan, "A Misuse of Functional Comparative Law and the Mutation of Orientalism – A Discussion of Ruskola's Legal Orientalism (功能比较法的误用与东方主义的变异 – 从络德睦的《法律东方主义》谈起)" (2017) 6 Journal of Comparative Law (比较法研究) 187. As Lu argued, for instance, China's joining into the WTO deeply modified the WTO as well.

[151] *Ibid.*

[152] LIANG Zhiping, "Law and Lawless (有法与无法)" *Oriental Morning Post Shanghai Book Review* (东方早报·上海书评) (9 October 2016) 401, reprinted on *Sohu* (11 October 2016), online: Sohu https://www.sohu.com/a/115889406_467440; see also ZHANG Yongle, "From Saïd to China – a Reading of Legal Orientalism (从萨义德到中国——法律东方主义》的一种读法), 2016 (4) China Law Review (中国法律评论) 173.

[153] Ruskola, *supra* note 147 at 233. See also WEI Leijie, "How is Possible to Understand Legal Orientalism Properly (妥适理解法律东方主义何以可能)" (2018) 1 SJTU Law Review (交大法学) 89.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

> a number of influential Chinese legal and philosophical scholars including Jiang Shigong, Wang Hui, and Liu Xiaofeng have begun to draw on the work of Halford Mackinder and on Carl Schmitt's *Großraum* thinking to shape possible interpretations of China's role in resisting US imperialism through constituting new forms of spatial order [...] In these accounts, we get a sense of what a *Großraum* with Chinese characteristics might look like—one in which China will deliver a new regional order that ends American hegemony in Asia, draws inspiration from Confucian culture, Hegelian philosophy, and international communism, and represents those people who live in Third World states.[154]

IV. Concluding remarks

Overall, this paper aims to understand how close or far Chinese scholars are to the TWAIL tide; on which opinions they are associated; and on which opinions they are dissociated. At a prima facie level this paper first notices that Chinese scholarship in international law in recent years has had very few engagements with TWAIL scholarship, probably *vice versa*. This paper starts an inquiry on this observation. It shows that in the post-colonial period Chinese scholarship has greatly contributed to the development of TWAIL I.[155] Chinese TWAIL scholars, such as Wang Tieya, Chen Tiqiang, and Zhou Gengsheng were looking to prove that China was a civilized nation-state. They were revolutionary and they deeply believed that colonial forms could be repurposed and that colonial history was a thing of the past. In the post-Cold War period, this tight relationship appeared to weaken due to Chinese international legal experts' taking a more pragmatic approach to international law – which makes their study appear to be less critical than that of the TWAIL II generation.[156] Yet, outside of the discipline of international law, a group of Chinese scholars in philosophy, history, and international relations contributed more to the thinking of post-modernity; alternatives to Western universalism; and reflections on colonial histories. This observation to some extent echoes the comments of the Chinese ICJ Judge, Xue Hanqin, on Anghie and Chimni's paper about TWAIL: "China's position to a large extent stands in line with the first generation, while it also shares in many an aspect the views of the second generation on the contemporary issues of international law."[157]

[154] Anne ORFORD, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021) at 65–6.

[155] Both TWAIL and Chinese scholarship have, over the years, constructed a solid alternative legal edifice that narrated socioeconomic and political disparities in the South-North dichotomy, and promoted the eradication of underdevelopment conditions in the Third World.

[156] There are also other reasons why Chinese scholars dissociated from the TWAIL II, which are not addressed in this paper. The rise of China as one of the major geopolitical powers is a likely direct cause of this dissociation. Given that the core argument of TWAIL is the critique on imperialism, China itself might be a target of TWAIL criticism. For instance, Chimni said that emerging powers like China and India made themselves accomplice of neoliberalism and capitalism. B.S. CHIMNI, "Anti-Imperialism: Then and Now" in Eslava, Fakhri, and Nesiah, *supra* note 110, 35 at 38. As China itself emerged as a geopolitical power with imperial potential, the centrality of imperialism (beyond European imperialism) in TWAIL scholarship could hardly be a pragmatic choice for Chinese international lawyers. There may be additional factors besides this one, such as the fact that Chinese intellectuals are intimately associated with China's official positions on international law. As a result, Chinese academics frequently take a state-centric stance. However, academics from other Asian nations, including Japan, also have a tendency to follow government positions, despite the fact that China and Japan have very different political environments. There might be cultural, social, or historical reasons why academics in these Asian countries choose to adopt the official lines. Many more reasons need to be investigated in this regard, and I will need to fully address these questions in another paper.

[157] XUE Hanqin, "Chinese Contemporary Perspectives on International Law History, Culture and International Law (Volume 355)" in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 2012). Judge Xue's

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

The views shared with the second generation of TWAIL were a continuous critique of Eurocentrism and their interest in history, but the divergences probably lay largely in whether to hold a post-colonial critique of states and sovereignty as an invention of international law as well as an interest in the violence of nation-states at home.

However, it is also worth noting that during this process of rediscovery, where I follow the division of TWAIL I and TWAIL II to understand the engagement with TWAIL by Chinese academics, I also find an uneasiness in following strictly this division that TWAIL II is inevitably more critical than TWAIL I. Being critical is a contextualized activity. I share here Christopher Gevers' discussion of the limitations of the classifications of TWAIL I and TWAIL II. Gevers elaborated on how a critical strand in TWAIL II, in the African context, led Oji Umozurike to weaken his critical disposition over time (in terms of Umozurike's conservative shift and closer alliance with T. O. Elias' traditional strand).[158] Gevers eloquently showed how intellectual contexts and global/personal politics have dissimilarly influenced the choices of the so-called traditional/critical TWAILers.[159] In light of this contestation of the critical TWAIL division, I also rediscovered some critical voices in Chinese scholarship in law and other disciplines in recent years. These voices may stand more in line with TWAIL I in the sense of setting out how pre-colonial Chinese empires have contributed to the development of international intercourse or have acted as a reflection on colonial history. Nevertheless, these voices are critical in themselves if read in a contextualized manner. There was a sense of insecurity among Chinese scholars about the absence of "subjectivity and history" to the Chinese character and her community. To rephrase Chinua Achebe's efforts: to restore the elements "to the African character and his or her community".[160] Many Chinese scholars are still in a process of searching for subjectivity for China in international law.[161]

The New Leftist public intellectual, Wang Hui, and his critique of modernity is remarkable in this regard as a reflection of Westernized modernity and universality in the post-modern period. He argued that to reflect and resist does not mean a simple negation, nor does it mean a return to an atavistic legal nationalism. Rather, it was to use a genealogical approach to unpack the complex relations between modernity and society, problematize the historical narratives of multiple centrisms, and reveal the dilemma of modern society.[162] The purpose is to jump out of the monolithic narrative of modernization, globalization, and legalization. On this point, Wang Hui's views resonated to some extent with Boaventura de Sousa Santos' critique of globalization.[163] Santos' characterization of "insurgent cosmopolitanism" imagines a progressive coalition that assumes the role of a resisting force against hegemony, making this coalition distinct from Western cosmopolitanism. De Sousa Santos identifies insurgent cosmopolitanism as "the aspiration by oppressed groups to organize their resistance on the same scale and through the same type of coalitions used by the oppressors to victimize them, that is, the global scale and local/global coalitions."[164] Yet, de Sousa Santos insightfully points out the weakness of "insurgent cosmopolitanism": it demands constant self-reflection because such a coalition "can later come to assume hegemonic characteristics, even running the risk of

comment sheds light on why the Chinese international legal scholars remain more associated with the first generation of TWAILers in their criticism of Eurocentrism. Such association is mainly in the sense that China wished to use the concept of sovereignty to its benefit, in terms of sovereign immunity and non-interference.

[158] Gevers, *supra* note 7 at 403.

[159] *Ibid*.

[160] Cited in *ibid*. at 398. Chinua ACHEBE, *Things Fall Apart* (London: William Heinemann Ltd, 1958).

[161] Wei, *supra* note 107.

[162] WANG Hui, *The End of the Revolution: China and the Limits of Modernity* (London: Verso, 2009) at 69.

[163] Boaventura de SOUSA SANTOS, "Globalizations" (2006) 23 Theory, Culture & Society 393.

[164] *Ibid*., at 398.

https://doi.org/10.1017/S2044251322000558 Published online by Cambridge University Press

becoming converted into globalized localisms".[165] Therefore, understanding the complexity of Chinese scholars' struggles and the significance placed on history by Chinese scholars[166] would also help us further understand the insurgent-cosmopolitan and non-hegemonic aspirations of these elites to position (and reposition) China's approach to international law. But the key to this process, as de Sousa Santos would say, is to keep the reflexivity ongoing. I believe that future TWAILers in China should be motivated by that and should continue with that reflexivity. A more concrete idea to develop TWAIL scholarship in China is to engage more critically with the power relations in international law, including self-reflexivity, and speak for the subaltern peoples and groups.

Acknowledgements. The author would like to thank the anonymous reviewers for their insightful comments.

Funding statement. None.

Competing interests. The author declares none.

YILIN WANG is a Post-doctoral Researcher funded by the Swiss National Science Foundation. She holds a doctoral degree in international law from the Graduate Institute of International and Development Studies in Geneva, Switzerland.

[165] *Ibid*.

[166] Orford, *supra* note 154 at 68. Orford noted,

> it is worth being curious about rather than dismissive of that commitment politics when we study the history of international law from a Chinese perspective. When historians of China apply the allegedly apolitical methods of empiricist history to their studies, they bring with those methods a philosophy and indeed a politics that inevitably shapes the historical accounts they produce.

Cite this article: WANG Y (2023). Locating TWAIL Scholarship in China . *Asian Journal of International Law* **13**, 318–341. https://doi.org/10.1017/S2044251322000558