Indonesian Journal of International Law

Volume 19
Number 2 *Third World Approaches to International Law*

Article 7

1-31-2022

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Recommended Citation

Singh, Prabhakar (2022) "Editorial: Tales of Multiple Decolonisations," *Indonesian Journal of International Law*: Vol. 19: No. 2, Article 7.
DOI: https://doi.org/10.17304/ijil.vol19.2.0
Available at: https://scholarhub.ui.ac.id/ijil/vol19/iss2/7

Indonesian Journal of International Law (2022), Vol. 19 No. 2, pp. iii-xii
https://doi.org/10.17304/ijil.vol19.2.0

Editorial

TALES OF MULTIPLE DECOLONISATIONS

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I. INTRODUCTION

The *Indonesian Journal of International Law* (IJIL) is pleased to host the first of its two issues on the Third World Approaches to International Law (TWAIL). We are editing this TWAIL issue, incidentally, in the backdrop of the novelist Amitav Ghosh's *The Nutmeg's Curse* that plants nutmeg, a product exclusive to the Banda islands in Indonesia, at the core of the Dutch colonization of Indonesia and the contemporary climate crisis affecting islands.[1] TWAIL is an epistemological journey that developing country scholars have been charting since decolonization.[2] Indonesia had played a key role in re-thinking decolonization. As one of the world's chief archipelagic states instrumental in establishing an "archipelagic consciousness" at the 3rd United Nations Law of the Sea Conference between 1971-82, Indonesia has made significant contributions to international law.[3] This is natural since the Indonesian territory comprises of about 17500 islands.

Indian R.P. Anand and Egyptian-origin Georges Abi-Saab are two important names that readily come to our mind when considering the role of the newly decolonized states in international law.[4] At the same time, the

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[1] A. Ghosh, *The Nutmeg's Curse: Parables for a Planet in Crisis* (Penguin, 2021).

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

[3] For the UNCLOS, '(a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands; (b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.' 3rd *United Nations Convention on the Law of the Sea*, 1833 UNTS 397 (1982), Art. 46.

[4] R. P. Anand, "Role of the "New" Asian-African Countries in the Present International Legal Order," *American Journal of International Law* 56 (1962), 383–406. Georges Abi-Saab, "The newly independent states and the rules of international law: an outline," *Howard Law Journal*

Indonesian scholar JJG Syatauw debated if calling the decolonized states "new" prevented such states from contributing to international law.[5] The RP Anand-led New Delhi seminar in November 1967 centered on these tensions apparent in the universalization of international law after decolonization. The conference proceedings were published in an edited volume. Upendra Baxi opened the anthology by defining eurocentrism in the following words

> *"Eurocentrism, a term susceptible to pejorative use, refers to settled habits or thoughts which have led to the mostly uncritical acceptance of European and Western intellectual and socio-cultural traditions as the invariable. In its most acute form, it has led to the unnecessary denigration of Indigenous traditions of the colonized nations. However, it had led to a continuing indiffe ence to these traditions even in the scholarly discourses, in its milder and pervasive form. This has been particularly unfortunate because, publicists are "functional equivalents" of municipal constitutive structures in international law."*[6]

R.P. Anand's anthology facilitated a robust conversation between Percy Corbett, Richard Falk, Leo Gross, J.J.G. Syatauw, Quincy Wright and Indian scholars on international law's universalization. They were the leading international lawyers of that generation and many sat on the *American Journal of International Law*'s editorial board. Quincy Wright, Anand's mentor, did not live to see the publishing of this important anthology.[7] Wright was instrumental in the publication of Anand's paper titled "Role of the "New" Asian-African Countries" which became a template for other developing country scholars.[8]

Within a decade and a half of Anand's anthology, in 1984-85, foreign graduate students at Harvard Law School organised the first seminar on the Third World attitudes to international law. The result was a collection edited by Thai scholar Surakiart Sathirathai titled *Third World Attitudes Toward International Law: An Introduction*.[9]

At this point, Anand's focus had turned to the United Nations Convention

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8 (1962), 97-121.

[5] J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (M. Nijhoff, The Hague, 1960).

[6] U. Baxi, "Some Remarks on Eurocentrism and the Law of Nations," in, RP Anand, ed. *Asian states and Development of Universal International Law* (Vikas Publications, 1972) 3.

[7] "Dr. Quincy Wright, 79, Is Dead; Authority on International Law; Proponent of Understanding" *New York Times*. (October 18, 1970).

[8] Anand, "Role of the "New" Asian-African Countries," 383 – 406.

[9] F. Snyder and S. Sathirathai, *Third World Attitudes Toward International Law: An Introduction* (M. Nijhoff, 1987) xii

on the Law of the Sea (UNCLOS).[10] The UNCLOS had recognized the "archipelagic principle," if you will, as an antidote to the territorial nationalism of large states. Indonesia and the Philippines were the primary Asian states to have benefited from this development. Anand's tradition shone through in Mochtar Kusuma-Atmadja's 1992 study on "the contribution of New States" and the UNCLOS. A scholar and former foreign minister of Indonesia, Kusuma-Atmadja highlighted that Indonesia's was the world's "first national application by the law of the principle of straight baselines, recognized in the *Anglo-Norwegian Fisheries Case*."[11] Thus, Indonesia has been a keen student of the post-postcolonial international law, the UNCLOS being its robust example.

After Sathirthai and Snyder, another group of graduate students and visitors at the Harvard Law School organized a conference in the Spring of 1997. The group comprising Celestine Nyamu, Balakrishnan Rajagopal, Hani Sayed, Vasuki Nesiah, Elchi Nowrojee, BS Chimni, and James Gathii, coined the term TWAIL.[12] They received the mentorship of Antony Anghie and Makau Wa Mutuwa.[13] TWAIL conferences have since been held in Oregon, Cairo, and Singapore.

II. TWAIL AND ITS DISCONTENTS

The decolonization of Africa and Asia doubtless marked a new beginning of history.[14] Asia decolonized nearly a decade before Africa, whereas, by 1960s, most of the Latin American states had been independent for a century. This prompts crucial questions: "What did Latin America make of this head-start?" and "What did it offer to the countries that were in the process of getting independence?". Many Latin American states are white settler-states built on indigenous pasts. In South Asia, contrarily, caste-based discrimination

[10] R.P. Anand, ed. *International Law: Law of the Sea and Beyond* (Radiant Publishers, New Delhi, 1978).

[11] M. Kusuma-Atmadja, "The Contribution of New States to the Development of International Law" *Santa Clara Law Review* 32 (1992), 889, 903.

[12] J.T. Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography" *Trade Law & Development* 3 (2011), 26, 28; Antony Anghie, "TWAIL: Past and Future," *International Community Law Review* 10 (2008), 479; J.T. Gathii, "Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory, Symposium Issue Foreword" *Harvard International Law Journal* 41 (2000), 263.

[13] A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal* 40 (1990), 1-80.

[14] M. N. Shaw, "The international status of national liberation movements," *Liverpool Law Review* 5 (1983), 19–34.

continues even as religious minorities have been at the receiving ends of rising majoritarianism.[15] Nevertheless, the developing country status of Latin American states save them from a settler-state critique. Most recently, Chile's rejection of a new "plurinational constitution" in September 2022, for many, indicates the continuing legacy of "settler colonialism" in Latin America.[16] Moving away from state-centrism, a central TWAIL tenet, necessitates that developing and developed settler-states be equally critiqued from the sociology of law lens.[17] And, TWAIL, of all movements, must stand at this forefront.

On closer scrutiny under the sociology of law lens, the "semi-peripheral consciousness"[18] referred to by Becker Lorca seems to partially stem from Latin American settler-colonialism.[19] It then also becomes obvious why for some scholars, while their narrative gets oxygen from their developing country passports, their jobs come from the European ones. Too, much of the Latin doctrines in international law, Calvo clause for example, can then be seen as a product of the white-settlers resistance in Latin America to European colonialism. And yet, about 20 years of TWAIL-ing has passed without a direct and critical examination of the question of race and law in South-South relations.[20]

We need to recall that it was in Latin America, in Montevideo, that an international convention to settle the definition of the modern 20th century state was convened.[21] Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States of America, and Venezuela participated in

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[15] Srinivas Burra, "TWAIL's Others: A Caste Critique of TWAILers and Their Field of Analysis," *Windsor YB Access Justice* 33 (2016), 111.

[16] New Amauta (@AmautaNew), 'Chile has just rejected its new plurinational constitution,' Twitter, https://twitter.com/AmautaNew/status/1566640585808588800.

[17] Besides the indigenous population, the racism against Afro-descendants is another issue in Latin America. See, Judith Morrison, "Race and Poverty in Latin America: Addressing the Development Needs of African Descendants," *The UN Chronicle*, https://www.un.org/en/chronicle/article/race-and-poverty-latin-america-addressing-development-needs-african-descendants.

[18] A. Becker-Lorca, "Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation," *Harvard International Law Journal* 51 (2010), 475, 502.

[19] R. Merino, "Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America," *Leiden Journal of International Law* 31 (2018), 773–92.

[20] Four Indian-American women on August 26 were racially abused by a Mexican-American woman in Texas who hurled abusive racial comments at them. The Texas woman said that they are "ruining America" and should "go back to India". See, "Four Indian-American women racially abused, assaulted in Texas," *The Hindu* (26 August 2022). Likewise, Hindu Indian American was abused by a Sikh Indian American. See, 'Indian-American racially abused in California,' *The Indian Express* (1 September 2022).

[21] *Montevideo Convention on the Rights and Duties of States*, 165 LNTS (1933) 19, Art. 1.

this 1933 Convention. Latin America and the Caribbean thus, both, supply the modern definition of state as well as send to us the first glimpse of the idea that nationalism is a European export routed through the Americas to Asia and Africa.

It is, therefore, significant that the critique of TWAIL has come from Latin American scholars for TWAIL's setting too much in store by the decolonization of 1960s. For example, Becker Lorca argues that 'resistance is not the exclusive patrimony of third-world international lawyers who were active during the 1960s decolonization [and] [d]efying the Eurocentric assumptions of international legal scholarship is not an exclusivity of contemporary international lawyers acquainted with postcolonial studies.'[22] However, far from claiming any exclusivity on "resistance," Anand had often noted that the "western" lawyers were the first to advocate for resistance since most new states accepted international law's tutelage.[23] After all, Kusuma-Atmadja's claim was that Indonesia was the first to accept, not reject, the International Court of Justice (the ICJ) ruling. Becker Lorca's narrative of a semi-peripheral consciousness essentially attempts to set the effective date of the developing country resistance to international law to the 19th century and not the middle of the 20th, the time of decolonization. Such an effort coming from the reading of the Japanese, Thai, Ethiopian, Ottoman and Argentine practices, the participants of the Hague Peace Conference 1907, tells a story that is different from the decolonisation that happened in the 1950s.

Similarly, the Brazilian lawyer George Galindo finds TWAIL classification into two phases problematic due to an alleged "difficul self-identification of past third world legal scholars".[24] Galindo supports "the inner coherence" of the TWAIL movement. The perceived disparity between Latin American and Asian states, arguably, stems from a century-long gap in their respective decolonization(s). Not all Latin American states might even want to call their independence from Spain and Portugal decolonization like the Asians. After all "semi-periphery" and "periphery" must produce, not just temporally but also normatively, different decolonisation(s).

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[22] Becker-Lorca, "Universal International Law" 502.

[23] P. Singh, "Reading R P Anand in the Post-Colony," in, Jochen von Bernstorff and Philipp Dann (eds) *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP, 2019) 297.

[24] G. Galindo, "Splitting TWAIL?" *Windsor Yearbook of Access to Justice* 33 (2016), 37; See, J. D. Haskell, "TRAIL-Ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law," *Canadian Journal of Law & Jurisprudence* 27 (2014), 383–414. S. G. Sreejith, "An auto-critique of TWAIL's historical fallacy: sketching an alternative manifesto," *Third World Quarterly* 38 (2017), 1511-1530.

It is then apparent that the post-coloniality of international law needs unpacking from not just colonial lens, but also from semi-colonial one. In that case, we might want to consider at least three continuing decolonisations; the semi-peripheral (*Montevideo Convention*, 1933), the peripheral (after the *UN Charter*, 1945), and the archipelagic (the *UNCLOS*, 1982) to fully account for the wholesale developing country experiences.

III. THE UNCLOS AND TWAIL: DRAWING LINES ON WATER

Politics is boiling Asians seas today. Therefore, readers have to look no further than land and sea disputes in Asia to evaluate the fruitful impact, if any, of TWAIL on people's lives. Most Asian states, except China, have accepted third-party territorial dispute settlement. Cambodia,[25] Thailand, India,[26] Pakistan,[27] Indonesia,[28] Malaysia, and Singapore[29] have all gone to the ICJ. The Philippines has used the provisions of the UNCLOS to trigger a Permanent Court of Arbitration case against China's imposition of a nine-dash line on the South China Sea.[30] Moreover, Asian judges have immensely contributed to the development of international law. Judge Nagendra Singh was the ICJ's President when the Court delivered its landmark ruling in the *Nicaragua* case on "non-intervention" as a settled customary international law.[31] Judge Weeramantry's much celebrated dissent in the *Nuclear Weapons Advisory Opinion* presented South Asian epics as mirroring nuclear catastrophe.[32]

How about the islands, Asian states, and international law? Speaking for Indonesia, the issues of islands in Asia was once dismissed by Judge *ad hoc* Thomas Franck as "the fate of history in obscure places". For Judge Franck, the two disputed Islands between Indonesia and Malaysia, namely Ligitan and Sipadan, were "not the stuff of which history is made, at least until recently."[33]

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[25] *Temple of Preah Vihear* (Cambodia v Thailand) Merits, Judgment [1962] ICJ Rep 6.

[26] *Case concerning Right of Passage over Indian Territory* (Merits) [1960] ICJ Rep 6.

[27] *Arial Incident of 10 August* 1999 (Pakistan v. India) Jurisdiction of the Court, Judgment [2000] ICJ Rep 12.

[28] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia) [2002] ICJ Rep 625.

[29] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), Judgment, [2008] ICJ Rep 12, 39.

[30] *The South China Sea Arbitration* (Philippines v. the People's Republic of China), Award of 12 July 2016, https://pcacases.com/web/sendAttach/2086.

[31] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, [1986] ICJ Rep 12, para 246.

[32] Dissenting Opinion of Judge C.G. Weeramantry, in, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226 at 429, 257.

[33] Dissenting opinion of Judge ad hoc Franck, in, *Sovereignty over Pulau Ligitan and Pulau*

While judge Franck gave the two islands to Indonesia, the ICJ awarded it to Malaysia based on proof of effective occupation and control using colonial stationery.

In the case between Malaysia and Singapore, the ICJ found that 'the nature and degree of the Johor's Sultan authority exercised over the Orang Laut,' "the people of the sea," inhabiting the islands in the Straits of Singapore 'confirms the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Pulau Batu Puteh.'[34] In those words, the ICJ sanctified the histories of the people presented before it by states so long as it is supported, like in the *Malaysia/Singapore* case, by colonial stationery. Malaysia's claim was supported by 'a letter from J.T. Thomson, the Government Surveyor of Singapore, reporting in November 1850'.[35] The South China Sea islands, even rocks, are hardly obscure and in fact stand at the center of Asian peace. At the core of Asian peace are significant historical, literary, and methodological issues in international legal scholarship.

International law, as the ICJ disputes have shown, only accepts colonial histories. A non-participating semi-peripheral China provides its alternative to history through "literary works" as evidenced by the arguments in the South China Sea dispute. Zhiguo Gao and Bing Bing Jia, for instance, argue for "literary works" from "time immemorial" for the pre-1935 account of the historical evolution of the nine-dash line in Chinese practices.[36] Zhiguo Gao is a judge of the Law of the Sea Tribunal at Hamburg and Bing Bing Jia is a professor of international law. The Natuna fishing grounds within Indonesia's 200-nautical-mile exclusive economic zone under the UNCLOS also overlap the nine-dash line. China defends this nine-dash line using literary works from "two millennia" ago. Chinese foreign ministry's Position Paper, for example, on the South China Sea dispute asserts: 'China has indisputable sovereignty over the South China Sea Island. Chinese activities in the South Sea date back to over 2,000 years ago'.[37] The Chinese state as well as Chinese publicists speak in common voice.

Sipadan (Indonesia v. Malaysia) [2002] ICJ Rep 625, 692.

[34] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), Judgment [2008] ICJ Rep 12, 39.

[35] *Ibid.* 37.

[36] Zhiguo Gao and Bing Bing Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *American Journal of International Law* 107 (2013), 98, 100.

[37] 'China was the first country to discover, name, explore and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them'. *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 December 2013), para. 4, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201412/t20141207_679387.html. Cf. Andy Hanlun Li, "From alien land to inalienable parts of China: how Qing imperial possessions became the Chinese Frontiers," *European Journal of Interna-*

Ex-colonial Asian states, however, don't always align with its scholars. In 1962, India's legal advisor Krishna Rao, too, argued from the "ancient Hindu literature" about Indian positions on the Himalayas in his scholarly writings.[38] Contrarily, India's foreign ministry based its argument on mostly boundary treaties drawn up by the British, the so-called unequal treaties.[39] Most recently, Chinese scholar Jiangfeng Li argues that we ought to "avoid frivolous challenges" to the validity of treaties using the doctrine of unequal treaties.[40] Nevertheless, Zhiguo Gao and Bing Bing Jia's rhetoric of 2000 years in the South China Sea appears to mimic Krishna Rao's "over 3,000 years" on the Himalayas, two territories in international law governed by two regimes, namely treaties and the UNCLOS.

Very importantly, then, a closer reading of the Chinese history of "imaginary" lines is revealing. It has not been stressed enough that from the year China claims to have a 9-dash line in the Sea, another line, the Hu Huanyong Line, an "imaginary line drawn by Chinese geographer Hu Huanyong in 1935" divided China's territory diagonally from south to north.[41] Needless to say, while the drawing of lines on domestic maps is a sovereign prerogative, unilateral drawing of lines on international maps by states is a violation of international law.

The race for the "ancient" in large states has, intriguingly, spurred a similar trend in smaller states claiming to be the origin of Asian epics. In July 2020, the Nepalese Prime Minister said: 'India had claimed the Indian site as the birthplace of Lord Ram, even though the real Ayodhya lies at Thori in the west of Birgunj.'[42] This situation prompts a crucial question: "Why should Thailand and Myanmar, both states having cities named Ayodhya and Indonesia famous for its *Ramayana* rendition in Prambanan, avoid making such arguments as

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tional Relations 28 (2022), 237–262.

[38] K. Krishna Rao, "The Sino-Indian Boundary Question and International Law," *International & Comparative Law Quarterly* 11 (1962), 375, 379.

[39] K. Krishna Rao died aged 48 while serving as legal adviser in the Indian Ministry of External Affairs. His obituary noted him "as an expert also in drafting the new regulations to cover man's activities in outer space." 'Dr. K. Krishna Rao of India, International Law Expert,' *The New York Times* (29 November 1970).

[40] Jiangfeng Li, "Equal Or Unequal: Seeking A New Paradigm For The Misused Theory Of "Unequal Treaties" in Contemporary International Law," *Houston Journal of International Law* 38 (2016), 465, 498.

[41] See, Premier Promotes Urbanization (28 November 2014), http://english.www.gov.cn/premier/news/2014/11/28/content_281475016489266.htm.

[42] PM Oli says "real" Ayodhya is in Nepal and Lord Ram is Nepali; BJP rejects claim, *The Hindu* (14 July 2020).

"historical"? This is unlikely, however, since these countries have all been party to disputes before the ICJ which ensures that only those main sources of law that are enumerated in the ICJ Statute – treaty, customs, and general principles – are applicable. Yet Nepal's political claim for finding real Ayodhya in Nepal is an iteration of China's invocation of "literary classics" from two millennia ago to claim Chinese possessions.[43] And both China and Nepal, as uncolonized polities, inherit a semi-peripheral consciousness of international law although divided by relative political, economic, and military power. Needless to say, myths have while united people in Asia, it has brought states to war when assumed as history.

Does TWAIL view these "literary" alternatives as good histories to replace "colonial history"? Is that how epistemological decolonization works? TWAIL should not only speak but supply the contents of the proposed alternatives and associated problems. Far more important than TWAIL's coherency is the need to talk freely about inter-state Asian disputes to ensure TWAIL's contribution to dispute resolution. TWAIL must hold and facilitate uncomfortable conversations in Asia. For example, it is necessary to determine whether Asian states are extending their territorial nationalism into choppy sea waters to defeat much-fought decolonization. Should we not see the UNCLOS, 1982, as third decolonisation after 1933 and 1950-60s? To that end, TWAIL should investigate the doctrines of international law that larger Asian states use as fig leaves for their territorial aggrandizement. Beyond plural narratives, TWAIL must now be a tool for the deconstruction of politics passing off as law and epistemology.

IV. CONCLUSION

Developing countries are a large group of states with varied histories, colonialities, and post-colonialities. Only by putting people at the center of the discourse would displace state-centrism. The loot and subversion of Asia by British and Dutch East India companies put capitalism at the centre of colonialism. While establishing a monopoly over distributing the ticket to civilization, international law ensured that only a few non-western states had partial recognition; the so called semi-civilized or semi-peripheral states.

[43] The UNCLOS also created right for landlocked states such as Nepal. The UNCLOS Article 125 reads: 'Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.' The UNCLOS, supra note 3, Art. 125. See, S. Subedi, "Economic Diplomacy for Nepal," *The Kathmandu Post* (29 November 2020).

This fabricated lack of civilization furnished logic for intervention which, in due course, paved the way for investment and laws for its protection. First projecting investment law as the human rights of multilateral corporations, uncritical scholarship now borrows from human rights to argue for the protection of foreign investment.

Various disciplines have tried to capture the truth of colonialism and globalization in their respective registers. International law has lagged in this regard since, as a textbook subject, critical insights require lived experiences and platforms.[44] Racism, capitalism, and other structural injustices continuously de-platform non-western voices nevertheless. At the same time, lives in the geographical south are mined by global north even though lived experience cannot be exported nor borrowed for processing. This mining of the lives of the geographical south must contribute beyond the rituals of armchair productions.

The novelist Amitav Ghosh exposes a circle of misfortune that loops Indonesian islands and their people at the receiving ends of colonization three centuries ago and the climate crisis in the 21st century. The territorial aggrandizement of the landed Asian nations against archipelagic consciousness, while placing Amitav Ghosh in international law's bibliography, is also the crystal ball for the continuing misfortune at the Asian seas.

We present to our readers the IJIL's first TWAIL issue with such sentiments. We know that readers complete authors. Therefore, we leave it to our readers to determine whether this TWAIL issue just describes problems or advances solutions. Indeed, the dialectics between descriptions and solutions must continue to animate TWAIL scholarship.

[44] Antony Anghie, "Welcoming the TWAIL Review," *TWAIL Review* 1 (2020), 1-6.