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Conference on The Third World Today
Closing Remarks
What is to be done?
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Over the past day and a half we have listened to TWAILERs. Although at times they disagreed with one another, six abiding themes emerged:

(1) They reminded us of the centrality of colonialism – and colonial legal concepts -- for understanding both international law's past and its present. They have suggested to us the ways colonial patterns persist and continue to structure the sources of international law as well as our foundational concepts such as "sovereignty" and "sovereign equality." Along the way, they have undermined the progress narrative that tends to smother innovative thinking. (Listening to them reminds me of what I tried to accomplish in my own modest way when I handed out a list of "50 Ways International Law Hurts Our Lives" during my President's Address at the ASIL's 101st annual meeting.)[1]

(2) They have reminded us of the continuing role of the "civilizing" mission to understanding such current phenomena as the turn to international organizations (IOs), the "good governance" advice offered by international financial institutions (including campaigns by IOs and NGOs directed at "corruption"), the popularity among certain do-gooders of the principle of R2P (responsibility to protect) and "humanitarian" intervention, and, of course, how some see the "war" on terror as part of modern "crusade" against unchristian infidels.

[1] Available at http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__faculty__faculty_profiles__jalvarez/documents/documents/ecm_pro_065322.pdf.

(3) They remind us of the continuing (if often subtle) impact of racism and cultural superiority (even among "enlightened" cosmopolitans such as international lawyers) and of the way international law and its elites continue to obliterate the agency of non-Europeans, as through a totalizing discourse on "development" that seeks the total economic, political and social transformation of "the other," or through international lawyers' preoccupation with the relatively small differences between European and U.S. approaches to liberalism which ignores the concerns or insights of "the other."

(4) They remind of the continued centrality of commerce and even hoary Marxist concepts such as "class," when it comes to understanding legal regimes which ostensibly have nothing to do with either (such as human rights).

(5) They remind us of how "globalization" has made geographic or state-specific descriptions of power – once cast as forms of "imperialism" or "hegemony" or "empire" -- overly facile in a world where parts of the global south (e.g., the BRICs) exploit other parts of the south -- to the detriment of non-elites and the disempowered within all states from the north and the south. TWAIL is not merely a critique of the United States and its allies; it problematizes the concept of the "Third World" itself.

(6) In a related point to (5), they tell us how international legal institutions and legal process inspire Gramscian forms of collaboration (and occasional resistance). They add layers of complexity to the concept of "globalization," and go on to render more complex our understanding of regimes such as "human rights" which, in their handling, has a dark as well as genuinely progressive side.

For me, the TWAIL literature casts a very different light on three elements of the traditional international lawyers' overly sanguine progress narrative. As most here know, international lawyers tend to celebrate as "progress" the following:

Treatification. We all tend to celebrate that so many pockets of international law are now subject to ever growing numbers of bilateral and multilateral treaties. To most of us the treatification of our law, and the supposedly decreased reliance on non-treaty sources of international obligation, legitimates contemporary international regimes, whether these deal with trade, investment, or human rights. Treaties are, after all, the exemplar of real law, honestly and democratically made. They are typically subject to vertical consent: since most states need to secure some parliamentary or other forms to treaty ratification, treaties share some of the legitimacy associated with national law-making. Further, unlike custom – which was imposed on decolonized nations without their real consent-- states are horizontal equals when it comes to treaty making as they voluntarily decide whether or not to join them. Unlike the vagaries of custom – whose content and origins remain shrouded in mystery – treaties have the advantage of distinct (and determinate) texts. They have the advantage of precision. Of course, for many of the same reasons, treaties are seen as more credible sources than general principles of law (which few international lawyers define in precisely the same way) or that positivistic nightmare, "soft law."

The rise of non-state actors. Most of us also regard the de-centralization of the state and the concomitant rise in non-state actors as signaling significant progress in international law-making processes. We celebrate the fact that international law is no

longer made by and for great powers, or only by governments to defend state power. We like the fact that NGOs, IOs, and non-state actors (such as individual complainants in regional human rights courts) have now joined the formerly exclusive state club and now adding their voices to the making, the interpretation, and the enforcement of international norms. We have legitimized such post-Westphalian actors as "members of international civil society," "representatives of the international community," "norm entrepreneurs," members of knowledgeable "epistemic communities" armed with progressive social goals (such as the protection of the environment), or valued non-state "enforcers" of international norms. As these labels imply, we see these non-state actors or organizations as heralding the democratization of international law and of the invisible college. We see this as signaling how expertise outside the foreign office is now being brought to bear on international problems. We see the enhanced participation of non-state actors as going a considerable way towards, as Louis Henkin urged, eliminating the "S" word (sovereignty) as a hindrance to the making of or complying with international law.

Judicialization. Most of us also herald the proliferation of international dispute settlers – especially the spread of international courts and tribunals in fields as distinct as trade and international criminal law – as important markers in overcoming Austinian complaints that our rules are not really law. Austinian criticisms of international law seem particularly archaic in the face of persistent compliance with the edicts of our new international adjudicators. We also relish how the "internalization" of international norms (stemming from the decisions of ECJ, the ECHR, or the WTO Appellate Body) is bringing international law ever closer to

national law. Thanks to such courts, international lawyers are able to parse "caselaw" --like real lawyers. We also see the victory of constructivist insights in the rise of an international judiciary. That states increasingly agree to have their actions judged by supranational adjudicators – something which still puzzles many political scientists – is seen as evidence that states have learned from their prior mistaken reliance on power politics. The proliferation of international courts tells us that states are increasingly willing to delegate the interpretation of their obligations to neutral third parties who are more likely to put the litigants – whether from the north or south or whether pitting a non-state complainant against a government – on a "level playing field." The turn to international adjudication is seen as constituting immense progress from the bad old days where states settled disputes through power politics or gunboat diplomacy. For many of us, judicialization is itself the exemplar of "the rule of law." For a subset, such as Anne-Marie Slaughter, Ruti Teitel and my NYU colleague Rob Howse, it is more than that.[2] For them, "transjudicial communications" among international courts or among national and international courts confirm the first two positive trends noted above. Such judicial dialogues are the triumphal product of treaty-generated delegations of authority that undermine the state-centricity of old fashioned forms of international law. For judicial romantics, judicialization – especially the cross-pollination that occurs when, for example, WTO panels reach for (and enforce) rules from other regimes-- is ushering in a new kind of "humanity's law" that is increasingly sensitive to the rights and impacts of the law on individuals. Judicialization is, in short, an essential part of the legal humanism that

[2] See Anne-Marie Slaughter, "Judicial Globalization," 40 Va. J. Int'l L. 1103 (2000); Ruti Teitel and Robert Howse, "Cross-Judging: Tribunalization in a Fragmented But Interconnected Global Order," NYU J. Int'l L. & Pol. 959 (2009).

makes the individual the ultimate beneficiary of international law. For many of us, international courts are the institutional manifestation of the human rights revolution – a revolution whose positive effects are increasingly being felt in all pockets of international law, from *jus in bello* to the international law of commerce.

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We have had a welcome respite from that kind of celebratory talk here. TWAILERs expose all three of these ostensible causes for celebration to the harsh light of day. They show us a world where treaty negotiations – whether bilateral or multilateral -- are subject to forms of subtle and not so subtle forms of coercion (such as threats from the IMF or from the "market"). These are also, they remind us, part of the non-state actors who now are often licensed to intervene in our post-Westphalian law-making venues. They show us treaties – such as bilateral investment agreements (BITs) – whose lack of precision (and yes continued reliance on old-fashioned custom from the colonial era such as the "international minimum standard of treatment" of aliens) can be transformed by arbitrators into a license to second-guess the regulatory bona fides of developing or rich states or a tool to enforce the ideologically driven "Washington Consensus." The TWAILERs' world is one where the most powerful and heavily funded NGOs (from Amnesty International to Transparency International) may be doing the bidding of the most powerful richer governments; where the touted "norm entrepreneurs" are not only human rights advocates but also TNCs taking advantage of WTO processes or of investor-state dispute settlement provisions in BITs without need to exhaust domestic remedies; or where the international judgments that are most likely to secure compliance are not the edicts of

the UN's human rights committee or the Inter-American Court of Human Rights but of those same investor-state arbitrations whose raison d'etre is precisely to protect the rights of the world's most powerful TNCs, with precious little evidence to show that the result is actually beneficial to the economic development of poor states.

In forcing us to see the dark side of what others celebrate, TWAILERs answer the question "what is to be done" differently. TWAILERs are not urging that we forego treaty making. They are not telling us to avoid the "democratization" or the judicialization of international law. To the extent TWAILERs propose cautionary lessons or make recommendations, their lessons are more complicated and not subject to easy synthesis. For some TWAILERs, perhaps the majority, the critical mindset *is* their reform agenda.

By forcing us to see the "dark" side of treatification and the rise of non-state actors, they teach us the continuing virtues of rival sources of international law that may be more bottom up than top down (such as custom which still requires a geographically expansive inquiry or general principles of law which may require attention to local rules that states create for themselves and domestic constituencies support). They force us to re-imagine the institutional forums in which those treaties are negotiated or where the first drafts of treaties are crafted – to imagine more equitable rules to govern UN treaty making conferences or the practices of UNCITRAL or the International Law Commission.

TWAILERs' skeptical look at the non-state actors now empowered by globalization and its institutions remind us of the continuing importance of finding ways to counter the evils of globalization. They tell us that sometimes those

countervailing forces are, by default, states themselves, whether acting alone or as part of new alignments of power (e.g., the group of 20 or regional associations defined around specific topics). Some TWAILERs therefore suggest that governments are necessarily part of the solution and should not always be our target.

And exposing the underbelly of judicialization may be the most subversive weapon in the TWAILERs' toolkit. In showing us that the turn to adjudication – whether through investor-state dispute settlement or war crimes tribunals – may not always lead to "progressive" results, TWAILERs highlight the *hegemonic power of international legal processes and of lawyers themselves*. This TWAIL critique is personal and sometimes devastating. It is directed at virtually all of us who have worked to establish these courts or may have even served on these courts or arbitrations. They tell us that *how* we settle our international disputes – that is, the kinds of tribunals we establish, with what jurisdiction, subject to what claimants and empowered with which remedies – may matter just as much as whether we choose to settle such disputes peacefully. They remind us that the fragmented law emerging from our proliferating tribunals may not be the fortuitous outcome of a rich diversity of dispute settlers. TWAILERs suggest, on the contrary, that such fragmentation may be the conscious and inevitable product of an international legal system and mindset that continues to reward the powerful and the well-connected. They look at the forum-shopping that the proliferation of dispute settlers enables and see the triumph of power, inside knowledge, and resources and not the idealized "rule of law." They see races to the international courthouse and the increasing "Americanization" of arbitral mechanisms as benefitting some claimants, some kinds of lawyers and law

firms, and some states more than others, rather than the touted "leveling of the playing field."

The normative implications of all of this – and the potential reform agendas -- spread out in all directions. They challenge, for example, the absence of rules to limit conflicts among international adjudicators, whether these serve on the ICJ or in ICSID tribunals or the lack of harmonized rules of professional responsibility that permit U.S. attorneys to prepare their experts before trial but penalize such efforts if done by others from a different legal tradition. They challenge views that see investor-state arbitrations capable of making a state liable for its affirmative action programs or that award investors as a group sums in excess of a state's gross national product as interchangeable from the typical commercial dispute between two private companies – which may also be subject to privatized, expeditious dispute settlement shred of accountability or transparency. They are equally skeptical of reform agendas that anticipate exporting European forms of adjudication to, for example, the UN human rights committee. For TWAILERs, context matters and no single reform agenda suits all.

TWAILERs also tell us that there may not be a single "invisible" college of international lawyers but many. That college is not the progressive place Oscar Schachter imagined but a motley collection of privileged elites, members of David Kennedy's various expert classes, who specialize in and benefit from the judicialization of pockets of the law – such as trade and investment – and who collaborate (consciously or not) in its replication because it benefits them financially

or in other ways, such as in professional prestige.[3] What was once a fraternal, spontaneous gathering of the like-minded becomes a den of the commercially self-interested who require national and international regulation to compel them to act in the public interest. TWAILERs also challenge the traditional view of the supply side of the invisible college, namely our law schools, including those specialized "global law" schools, like my own, that unduly benefit from and contribute to the inequities of international dispute settlement and other international law-making processes as presently conceived.

The very personal nature of the TWAILERs' critique poses its gravest challenge. The sting they inflict causes others to flinch. No one – not lawyers, law firms or law schools —likes to be told that even when they seek to do good they are unwitting tools of the hegemon. But the lack of friends is not TWAILERs' biggest problem. Their biggest challenge for TWAILERs and fellow travelers is internal: how to avoid falling into nihilism and despair. TWAILERs struggle with how best to turn what are sometimes disparate, very personal critiques into a viable reform agenda that can lead eventually to the redesign of international legal processes.

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[3] See generally, David Kennedy, "Challenging Expert Rule: The Politics of Global Governance," 27 Sydney J. Int'l L. 5 (2005).