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A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias

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Abstract

This essay critically examines T. O. Elias's international legal scholarship, especially in so far as he sought to reclaim, or claim, a place in international legal history for Africa. Having found that Africa contributed to the formation of international law, Elias argued in favour of reforming its rules so that they could serve the interests of the newly independent African states. In this respect he influenced many contemporary international lawyers in Africa and elsewhere. In particular, his singling out of sovereignty as a barrier to reforming international law is shared by generations of international legal scholars who have criticized states for placing too high a premium on their sovereignty, thereby placing insuperable barriers to their acceptance of egalitarian goals, expressed by, for example, the international bill of human rights. The essay also contrasts Elias to scholars of international law who took the colonial legacy of international law as a barrier to reforming it so that it was consistent with the interests of so-called post-colonial African states.

Key words

colonialism; contributionism; T. O. Elias; Eurocentricity; sovereignty; TWAIL

I am delighted to have been invited to contribute an essay to this series of the *Leiden Journal of International Law*'s examination of the works of leading international legal jurists. I first encountered the scholarship of Taslim Olawale Elias as an undergraduate student at the University of Nairobi. I read with keen interest his book on African customary law at the time.[1] As a graduate student, I encountered his book on Africa and international law; I was hooked on it. My initial reflections on Elias were published in 1998.[2] It has been a decade since, and I do not pretend to have completely understood this great jurist of international law. In writing this essay I went back to my notes and incomplete drafts on Elias's early work from ten years ago, particularly his view on how Africa participated in shaping international law. This essay also reflects conversations with many people familiar with my interest in Elias over the years. It has therefore been influenced in many ways by friends such as Obiora Okafor and David Kennedy, with whom I shared

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1. T. O. Elias, *The Nature of African Customary Law* (1956).
2. J. Gathii, 'International Law and Eurocentricity' (review essay), (1998) 9 EJIL 184.

my initial impressions of Elias and who encouraged me to make this a project. Antony Anghie, Nathaniel Berman, Makau wa Mutua, Karin Mickelson, Celestine Nyamu-Musembi, Joel Ngugi, Kithure Kindiki, Obijiofor Aginam, Balakrishnan Rajagopal, and Bhupinder Chimni in various ways offered valuable insights over the years.

In my 1998 review essay I argued that there was a strong and a weak tradition in international legal scholarship in the post-Second World War period. I placed Elias in the weak tradition, for reasons which I shall elaborate more fully below. Since then, other scholars have argued that Third World international legal scholarship falls into two traditions roughly along the lines I outlined. For Makau wa Mutua, it is affirmative reconstructionists seeking transformation and the minimalist assimilationists who collaborate with the West.[3] Bhupinder Chimni and Antony Anghie divide this scholarship into Third World approaches to international law (TWAIL) I and TWAIL II.[4] Obiora Okafor has argued that TWAIL is a broad umbrella with some reconstructive and oppositional voices within it.[5] It is welcome to note that my characterization of Elias as falling in the weak tradition is the subject of a critical essay in this volume. In fact, Third World approaches to international law, with which all these authors are associated, has come under critical scrutiny in recent years.[6] These critical engagements with TWAIL work are very welcome. Ten years after my initial exploration of Elias's work, for the extensive reasons I allude to in this essay, I still found that his work on Africa's contribution to international law falls in the weak rather than strong tradition – weak in the sense that his scholarship primarily provides a cultural rather a structural (economic) critique of international law and relations.

In referring to Elias's scholarship on Africa's contribution to international law as weak, something which I do not do in this essay, I do not want to minimize the significance of Elias's scholarly work. In fact this essay is an exploration of just how significant his contribution was and continues to be. International lawyers from newly independent African countries, such as Elias, faced a daunting challenge. After all, international law was undoubtedly and unmistakably Eurocentric in its imprints. These scholars could either reject it entirely or accept only those parts of it that were not inimical to the interests of the newly independent African countries. Herein, then, lay their task. Rejecting it entirely without an ability to change it even in the United Nations, where developing countries had majorities, seemed foolhardy. Yet accepting it without challenging its participation in the colonization of their countries seemed unacceptable.

Indeed, most of the first generation of scholars in post-Second World War Africa took neither of these routes. The defining question in their work was how to establish

3. M. Mutua, 'What is TWAIL?', (2000) 94 *American Society of International Law Proceedings* 31, at 32.
4. A. Anghie and B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict', in S. R. Ratner and A. Slaughter (eds.), *Methods of International Law* (2004).
5. O. Okafor, 'Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective', (2005) 43 *Osgoode Hall Law Journal* 176.
6. For example, see U. Natarajan, 'A Third World Approach to Debating the Legality of the Iraq War', (2007) 5 *International Community Law Review* 405; D. Fidler, 'Revolt against or within the West? TWAIL, the Developing World and the Future of International Law', (2003) 2 *Chinese Journal of International Law* 29.

a doctrinal basis or a set of principles to address not only their frustration with international law but also how its rules and institutions could contribute to the challenges of these newly independent countries. My essay explores the manner in which the writings of Taslim Olawale Elias encountered and negotiated the foregoing challenge.

From that vantage point, one of the most significant insights of Elias's scholarship is its argument in favour of 'inter-civilizational participation in the process of crafting genuinely universal norms'.[7] Elias's emphasis on Africa's participation in the formation of international law amounts to contributionism. Contributionists regard international law as the product of a number of civilizations rather than the sole product of European civilization. Contributionism emphasizes the importance of participation by diverse constituencies in the creation of global norms. Other adherents of this view of building truly global norms call the approach inter-civilizational.[8] An inter-civilizational approach differs from Eurocentrism since Eurocentricity presupposes that one civilization from one part of the world dominates the making of international law norms. However, while contributionism emphasizes a more democratic process of international law norm-making, it is not concerned with the priorities reflected in the norms that emerge from an inter-civilizational norm-making process. For example, contributionism's main agenda is not to tell us what interests international law protects and those that it poorly represents. On the other hand, contributionism has its strengths. It has important effects in critiquing the absence of Africa in the making of international law, as I shall show below more extensively. One cannot underestimate the significant dignitary effects that rewriting international law from an African perspective has.

I proceed as follows. In section 1, I trace how Elias engaged in rewriting international law and the distinguishing characteristics of what I call the Elias tradition. In section 2 I examine an alternative to the Elias tradition in African international legal scholarship of the same time period as Elias. I end with a conclusion.

1. Rewriting international legal history from an African perspective

1.1. Elias's assault on Eurocentricity in international law

Elias's work epitomizes one of the earliest critiques of international law's Eurocentricity. There are at least two aspects to it. First, Elias's work is unique in the manner in which it foregrounded an assertion of African identity against international law's claim to universality. Second, in so doing, his critique of international law's Eurocentricity undermined its central claim of universality as a constitutive foundation of the discipline. Elias was one of the first among African scholars of international law in exposing the Eurocentricity of international law and in advancing corrective measures. As I shall show below, Elias masterfully marshalled a variety of arguments

7. See P. S. Surya, *Legal Polycentricity and International Law* (1996).
8. Y. Onuma, 'When Was International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective', (2000) 2 *Journal of the History of International Law* 1.

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that demonstrated that the international or universal was not merely constituted by Europeans in Europe, but also by Africans. Elias's book, *Africa and the Development of International Law*, is an eloquent and extensive exposition of this tradition.

The importance of asserting an African identity in the post-Second World War period was to uphold the dignity, identity, and self-determination of the African race as a race equal to other races, thereby hoping to end the persistent prejudice against Africans that laid a substantial basis for external slavery of Africans and colonial subjugation of Africa by European countries. Asserting the African identity was, however, not only an assault on stereotypes of African inferiority and backwardness,[9] but also on notions of Western and white supremacy as represented by colonial rule and other forms of Western subjugation and power over Africa.

Elias's work is therefore one of the most significant scholarly works of his period, making the best case for rejecting and, therefore, redefining categories such as 'backward', 'uncivilized', and 'barbaric' assigned to African communities in international legal history.[10] Therefore for African scholars such as Elias and Felix Okoye[11] a major purpose of rewriting the history of international law was to correct the historical record; to rescue Africans from their assigned place in history by glorifying a bygone past, where the African, much like the European, was a member of ancient kingdoms or political units equivalent to the 'modern' and 'civilized' Western states.[12] It was in this sense that a scholar in the Elias tradition 'challenged the myths of black inferiority, servitude, backwardness'.[13]

By reinterpreting tropes of the African as uncivilized, barbaric, and backward, these African scholars realigned colonial categories, thereby producing a post-colonial international law that made the racist and imperial connotations of the colonial discourse speak with race-blind meanings. Elias was advancing a project

9. In addition, Elias must have been well aware of the insulting racism that confronted African diplomats in Western capitals like Washington, DC in the 1960s and 1970s.

10. Hegel among other enlightenment European scholars reinforced the exclusion of Africa from the universal future of conscious humanity embodied in Judao-Christian historicity. See B. Jewsiewicki and V. Y. Mudimbe, 'Africans' Memories and Contemporary History of Africa', (1993) 31(1) *History and Theory*, at 1–11. International scholars in the nineteenth century similarly adopted the view that Africa had no history. These scholars also emphasized that Africa was different from Judæo-Christian Europe because of general cultural inferiority and political disorganization, which in turn barred Africa from membership of the family of nations.

11. F. Okoye, *International Law and the New African States* (1972).

12. The image of merry Africa adopted by post-colonial African historians is very similar to that adopted by anti-slavery campaigners and Christian humanitarians in the United Kingdom in the seventeenth and eighteenth centuries. These campaigners sought to challenge the eighteenth-century biological thought which justified the slavery of inferior races such as Negroes. These campaigners were associated with the creation of the idea of a 'noble savage', an abstraction of European literary thought. According to Philip Curtin, the 'exotic hero was an ancient device of social criticism to describe the golden age – a time and place infinitely better than the real world, necessarily beyond the view of the audience, either in the past or in the future, or a far country'. P. Curtin, *The Image of Africa – British Ideas and Action, 1750–1850* (1964), at 48–51. Even before the 'discoveries of new lands', some medieval European traditions, according to Curtin, laid great stress on the value of unadorned nature, apostolic poverty, and a simplicity that was thought of as primitive. Ibid. Yet, as Curtin reminds us, the image of the noble African or savage was not intended to suggest that Africans 'were better than Europeans, or that their culture, on balance, measured up to the achievements of Europe . . . the attitude was mildly patronizing'. Ibid., at 49–50.

13. B. Davidson, Black Star: *A View of the Life and Times of Kwame Nkrumah* (1973), at 12–13.

of colour- and imperial blindness by advancing a claim of African 'dignity and self-respect of a kind that they had not known for generations'.[14]

Elias's restating of the colonial and imperial polarities of white/black, civilized/uncivilized in effect articulated a notion of an essentialized African community that shared ideals, some akin to those of Western societies, at precisely the moment he sought to transgress these polarities. In restating these polarities, Elias presupposed that African identity was shared and stable.[15] It in turn closed possibilities of seeing Africa as anything but a unitary whole. An important implication of the view of a shared and stable African identity is that it disguised the deep fractures along class, economic, gender, ethnic, and political lines.[16] These alternative and multiple frames of identity were disguised by the homogenizing effects of nationalism in the immediate post-colonial period which provided an essential backdrop for the emergence of the scholarly tradition to which Elias belonged.[17]

1.2. Rewriting international legal history from an African perspective

Elias argued that, prior to the colonial conquest, Africa was and had always been a participant in the international community. In so doing, he rejected the period of colonization as the move from a people without history to global incorporation, or as a transitory epoch from fragmented alienation to collective international solidarity. According to Elias, 'If we are to grasp something of the significance of Africa in current international affairs, we must begin with a brief account of the role which different parts of the so-called dark Continent played since recorded history in their internal as well as their external relations.'[18]

In the first part of chapter 1 of his book *Africa and the Development of International Law*, entitled 'Ancient and Pre-medieval Africa', Elias uses historical accounts to demonstrate how the rulers of Carthage (present-day Tunisia) acquired an extensive empire in Africa. According to Elias the Carthaginian empire explicitly excluded Sicily, Sardinia, and southern Spain by treaty.[19] Elias uses this treaty, which he says excluded parts of Europe from the Carthaginian empire, to make two claims.

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14. Ibid.
15. This also presupposed a binary opposition between European and African identity. The European identity is not problematized as varied, fragmented. A. Riles, in 'Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture', (1993) 106 *Harvard Law Review* 723, argues that the writings of nineteenth-century international legal scholars such as the Reverend T. J. Lawrence 'participated in the creation of an essentialized and coherent European community defined in dichotomous opposition to non-European "savages." The portrait of European identity demanded the suppression of contradictions and differences in favor of a picture of unity and essential characteristics.' Riles also observes that '[i]t is not difficult to understand this conception of European identity as an argument for the authority of international law. In a world full of bonded cultural units of collective representations bordered by intelligible boundaries, a language such as international law that managed the chasm between such units held a privileged position'. Ibid., at 736. Edward Said proposed that the Orient was constructed by the Occident 'as its contrasting image, idea, personality, experience', an image of otherness, while orientalism served as 'a western style for dominating, restructuring, and having authority over the Orient'. E. Said, *Orientalism* (1979), at 1–3.
16. The realignment of colonial categories also had the simultaneous consequence of camouflaging class differences and imperial alliances among the African people.
17. This debate maps onto the idea of having unitary African governments as opposed to federal governments. On the Kenyan case see J. Gathii, 'Kenya's Legislative Culture and the Evolution of the Kenya Constitution', in Y. Vyas et al. (eds.), *Law and Development in the Third World* (1994), at 74.
18. T. O. Elias, *Africa and the Development of International Law* (1974), at 3.
19. Ibid.

First, Elias sought to underline the military power of Carthage as an *African* empire. Second, Elias also demonstrated that Africa had contact with Europe prior to colonial conquest through an international convention as was typical in relations between states. As a result, Elias was laying a basis for dispelling the image of Africa as a dark continent. In Elias's view,

> [I]t was mainly this exclusion [such as by the treaty precluding the expansion of the Catharine empire into Europe and the closure of the North African coast west of Cyrenaica to foreigners] that must account for the lack of information in the writings of classical authors about the nature and extent of the Carthaginians' African trade.[20]

In this view, history mistakenly and inadvertently reflects Africa's otherwise true participation within the international community in the pre-colonial period. Elias concludes exuberantly that his 'outline should serve as an interesting background to the account now being given of how the *Sahara may be said to have dominated the history of the north no less than it has done that of the south*'.[21]

Further on, Elias tells us of the '*universality* of trade in cloth and other luxuries (in beads for example) which together with the largely urban pattern of settlement distinguished the Guinea region from all other parts of Africa south of the "sudanic" belt'.[22] It is the interaction and contact of African trade at specific entry ports with Western traders that created universality in Elias's narrative. Hence, commerce between Africa and Europe is equated with universality. The quality of the interaction is not the subject of his focus. For example, it is significant that Elias only talks about the slave trade in relation to its abolition. Elias has little to say about how international law was implicated in the history of slavery in the eighteenth and nineteenth centuries. Elias also does not address or make any observations with regard to the ways in which images of backwardness and barbarism ascribed to Africans under international law justified colonial expropriation of African lands. After all, Elias's primary project was to dispel the falsity of these repugnant colonial categories rather than engage in all the purposes they serve.

The pre-colonial period in Elias's view offers ample evidence of the presence of 'internationality' or contact between Africa and Europe. The high degree of knowledge and practice of diplomatic law as then known in Europe and Asia within Africa is part of the historical evidence Elias uses.[23] It is apparent that his criteria of what constitutes 'international' only applies to interaction between medieval African

20. Ibid.
21. Ibid., at 5 (emphasis added).
22. Ibid., at 6 (emphasis added). Historians have noted that the 'pattern of empirical information about Africa was itself [in the eighteenth century] a product of the peculiar relations built during the centuries of slave trade': see Curtin, *supra* note 12, at 9. Information on trade was of importance because of the commercial links, especially in slaves, between the west coast of Africa and European and other traders. Another important matter of commercial importance was 'an elementary knowledge of political structure . . . for traders, who had to deal with African authorities'. Ibid., at 23. European travellers at the time therefore wrote with particular attention to matters of trade, commerce, and the 'political' structure of African societies. Almost two centuries later, African jurists of international law found that this information in part was produced to serve the commercial interests of European traders. Unlike the traders and European audiences, these jurists used this information as evidence to back their assertions of African contact with the West prior to colonial conquest.
23. Elias, *supra* note 18, at 15.

kingdoms and states and those of Europe and Asia. If this is so, then perhaps Elias is as much to blame as Eurocentric international legal jurists for understating the influence of Euro-African contact in the pre-colonial and colonial periods that took place within an exploitative and extractive relationship.[24] In fact, the colonial period is not Elias's primary focus, as his interest lay in recovering the history of pre-colonial Euro-African commercial and diplomatic relations that can also be described as not having been entirely benign. In addition, since Elias traces internationalism to African contact with Europe or the Middle East, one can assume that this criterion of internationality does not extend to interactions among African 'states' in the pre-colonial period. So, in seeking to refute the undeniable Eurocentrism in international legal history, Elias underplayed intra-African contact as further evidence to undermine international legal history's tale of its origins.

The book then moves on to a familiar historical narrative, from the scramble for Africa to treaty-making to drawing up the boundaries and the assumption of sovereignty over Africa by the colonizing powers. Significantly, rather than examine the imperial nature of the treaties entered into between 'African' chiefs and European trading companies or powers supposedly ceding African land to these colonials, Elias uses the treaties as further evidence of the participation of African pre-colonial kingdoms in the international sphere. To Elias, therefore, it seems that these treaties were a reflection of the freedom of African chiefs to enter into relationships with European countries. This unfortunately is the logic that British colonial courts used to find that African communities had sovereignty to cede their land to colonial authorities at a time when these communities were under the complete control and jurisdiction of colonial powers.[25] In fairness to Elias, one cannot argue that he was entirely unaware of the problematic origins of unequal treaties and the hesitation of some then newly independent states to be freed of obligations under such treaties. In other writings, Elias addressed the concerns of newly independent countries arising from unequal treaties.[26]

Yet it would not be in accurate to argue that Elias underemphasizes the role of international law in the colonial encounter, to the extent that his most important contributions did not examine its role in the economic and political subjugation of Africa.[27] Instead, Elias presents international law as capable of addressing the inadvertencies of world history and the emerging problems of 'modern' times. As I will show more fully below, Elias sought to advance the claims of newly independent countries through international legal protections such as the Universal Declaration of Human Rights and the UN Charter. By contrast, there were African scholars of the period who examined how these colonial treaties between two unequal parties

24. The point here is simply that the cultural Eurocentrism of international law was inseparable 'from the parallel project of colonial domination'. Riles, *supra* note 15, at 737.
25. For an extensive analysis see J. Gathii, 'Imperialism, Colonialism and International Law', (2007) 54 *Buffalo Law Review* 1013.
26. See, for example, T. O. Elias, 'The Berlin Treaty and the River Niger Commission', (1963) 57 AJIL 879, at 879–80.
27. Elias, for example, notes that the mandate system which was 'an indirect result of the European colonization of Africa' was 'of considerable interest to public international law'. Elias, *supra* note 18, at 21.

could have been coercive.[28] Elias's main focus was to celebrate African participation within international law rather than enquire into the manner in which international law was implicated in establishing an institutional basis for European domination of Africa within the international political economy.

As noted above, Elias took a very sympathetic view of the ability of international law and institutions to resolve challenges of the 'modern' era. Like pragmatists and functionalists of the post-Second World War period, he saw international institutions as rising to the occasion to address the problems of the day. In fact, Elias was very much like a modern-day liberal international legal scholar with an idealism that favoured co-operation among states to achieve 'greater peace and prosperity', among other noble goals.[29] On the question of succession to treaties entered into before independence, Elias informs us that a new principle against automatic succession

> is not to deny the relevance to contemporary problems of many of the rules governing state succession in customary international law. It is only to emphasize that there is need to rethink and redefine certain aspects of the traditional law on the subject in light of the phenomena of decolonization and the progressive development and codification of internal law.[30]

It is not entirely clear that Elias considers it a possibility that decolonization had not changed the structural inequalities between Africa and the West but was rather a continuation in many respects of the past. Unsurprisingly, therefore, Elias is happy to report that

> it has been a realization of this new factor in contemporary international life [t]hat has led the General Assembly to request the International Law Commission to undertake, as a matter of urgency, the study of the subject of succession of states and governments with a view to its progressive development and codification.[31]

Clearly, then, the possibility that international law could play a role in achieving what he thought needed reform was the focus of his work. He had hope that international law and institutions would change the problematic predicament of African countries that was a major theme of his work.

Like Elias, some Third World nationalist-leaning scholars have argued that although 'states' in the modern sense may be of European creation, there are political entities in Africa that antedate European states.[32] Thus whereas classical

28. See section 2, *infra*.
29. In this sense Elias was like contemporary liberal scholars such as Anne-Marie Slaughter, who argues in favour of a 'system of global governance that institutionalizes cooperation . . . such that all nations and their peoples may achieve greater peace and prosperity, improve their stewardship of the earth, and reach minimum standards of human dignity'. A.-M. Slaughter, *A New World Order* (2004), at 15. See also *infra*, notes 65–85 and accompanying text.
30. Elias, *supra* note 18, at 23. Similarly, in another context he argues that '[n]ew and improved methods of arriving at international treaties were adopted based on the principle of *pacta sunt servanda* in its true sense, while the grounds of invalidity of treaties were chastened and redefined in order to meet the needs of the newly emerging welfare order. Thus, fraud, coercion and similar practices which have affected the establishment of so-called international agreements and treaties were eschewed as part of the new contemporary international law'. T. O. Elias, *The United Nations Charter and the World Court* (1989), at 9.
31. Elias, *supra* note 18, at 23.
32. M. Jewa, 'The Third World and International Law', Ph.D. thesis, University of Miami, 1976, at 7.

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international lawyers such as Henry Wheaton,[33] T. J. Lawrence,[34] and James Lorimer[35] regarded international law as limited to the 'civilized and Christian people of Europe or to those people of European origin', African scholars of the immediate post-independence era only addressed the Christian or Western origins of international law by proclaiming its co-equivalence with Africa's participation in shaping it. The real essence of international law – its imperial mercantilist character – was therefore safely veiled by the myth of the simultaneous shaping of international law by Europe and Africa.[36]

This view of an Africa that shares the same attributes as Western societies is a simple inversion of colonial categories such as the view that African communities were simple tribes living in a state of nature. The effect of inverting these colonial categories, which at face value is a gallant nationalist rescue of the African from the colonial stereotypes, has the additional effect of producing a post-colonial image of the African that reproduced colonial categories shorn of their racist and imperial connotations.

There are in addition other significant consequences of the inversion of these racist and imperial categories produced in the process of purportedly rescuing African images from their inauspicious portrayal. The production of an essentialized African identity with social, political, and economic arrangements very similar to those of Western societies created myths of homogeneity among African people which were of course not true, as already noted above.[37]

Yet I recognize that it may well have been a nationalist response of engaging the colonial project in international law to borrow myths of sameness to justify the acquisition of autonomy from colonial rule. However, the attempt to reverse these colonial categories had adverse consequences. First, this view of sameness resulted in a simplistic homogenization of Africa and in the process resulted in understating the nature of its plurality. This kind of homogenizing nationalism was also used to legitimize the creation of one-party states in Africa in the post-colonial era. Post-colonial governments, relying on these myths of homogeneity, closed the spaces of politics by legislating for one-party states for the ostensible reason that there was little or no heterogeneity between Africans once their colonial oppressors had left the seats of power.[38]

Second, the myth of homogeneity produced by these writings has the effect of disguising the class and imperial alliances within African communities. In effect, this myth displaces the possibility of contestation by displacing differences among Africans. Such myths in effect served as an ideological tool of African ruling classes to

33. H. Wheaton, *Histoire de progrès du droit des gens* (1865).
34. On T. J. Lawrence see Riles, *supra* note 15, at 723–40.
35. J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1894).
36. Section 2 of this essay addresses the way in which a different school of post- independence African international lawyers traced the imperial and mercantilist character of international law.
37. On this see K. A. Appiah, *In My Father's House: Africa in the Philosophy of Culture* (1992).
38. In Kenya and Nigeria, for example, it was argued that the idea of having a divided executive between a prime minister and a president was alien to the manner in which African chiefs ruled in pre-colonial times. See Gathii, *supra* note 17, at 74.

maintain their hierarchy in their respective societies, communities, and countries, particularly in the immediate post-independence moment. This was certainly not the goal of the Elias project. However, because of the nationalist underpinnings of post-colonial scholarship of which Elias was a part, African leaders seeking to legitimate their cruel governance of the newly independent states latched on to it, since it helped them to emphasize unity and cohesion as a counterweight to the divide-and-rule tactics of colonial rulers.[39]

1.3. Sovereignty in rewriting international legal history

Elias's definition of sovereignty in international law is informed by his basic project of reclaiming, reconstructing, and rehabilitating the African past and making comparisons with its supposed European equivalent. Unsurprisingly, Elias first refers to sovereignty as the command of the sovereign that forms the basis of the unbroken narrative from the past into the present.[40] Chapter 2 of *Africa and the Development of International Law* is a reconstruction of the African past.[41] Elias uses the anthropological research and work of Meyer Fortes and E. E. Evans-Pritchard to show that African states and kingdoms had sovereigns just like European states.[42]

Elias argues that the new political aggregations produced by colonialism 'closed the historic modes of international intercourse of indigenous states and kingdoms. They were supplanted by the new external relations governable by international law.'[43] To Elias, therefore, colonialism interrupted the manner in which African 'states' or kingdoms such as Carthage interacted with European states in the pre-colonial period. Having already discussed these African–European trade and diplomatic links at length in chapter 1, Elias's chapter 2 portrays colonialism as an abrupt interruption to Euro-African contact.

This interruption of African sovereignty, according to Elias, had consequences, since

> [O]nly sovereign states were at any time the subject of customary international law. The drama of international legal relations was being played out, so far as Africa is concerned, by European governments among themselves with regard to economic, technical and cultural matters. Customary law developing in many respects as a result of the continuous changes taking place in the continent, but the African dependencies were mere spectators in the game. African dependencies' contribution, if any, lay in

39. For a critique see A. Afigbo, *The Poverty of African Historiography* (1977).
40. N. S. Rembe shares the view that sovereignty is a 'legal concept and one of the cardinal principles recognized in international law'. N. S. Rembe, *Africa and International Law of the Sea* (1980), at 5. Rembe goes ahead to elaborate on the internal and external attributes of state sovereignty. In part, he observes that 'the various attributes of sovereignty generate a feeling of unity and nationhood which is a condition of development'. Ibid., at 6.
41. Elias also quotes another of his most often cited books, *The Nature of African Customary Law*, *supra* note 1, in which he shows 'striking similarities' between African customary law and European or Western rule-of-law-oriented regimes.
42. According to S. F. Moore, Fortes and Evans-Pritchard were among a group of 'Africanists at Oxford, Cambridge, London and eventually Manchester [who] constituted a ready-made, informed audience for each others' work and ideas', and, continues Moore, '[n]ot only were they all active in each others' seminars and in the international African Institute in London, but they were in close communication with colleagues in the research institutes in Africa'. S. F. Moore, *Anthropology and Africa: Changing Perspectives on a Changing Scene* (1994), at 30–1.
43. Elias, *supra* note 18, at 19.

> the fact that they were suppliers of the raw material for evolving rules and practices of international relations . . .

This extract from Elias's book portrays Africa's sovereignty as being in abeyance during colonial rule. Independence restored the sovereignty of individual African states, while membership of the United Nations guaranteed their sovereign equality with all other states. It is for this reason that Elias is optimistic and confident about the 'equal participation' of African states in the United Nations. Elias writes,

> Independence has led to membership of the United Nations and its organs and the consequent widening of the international horizon of all member nations, resulting in the establishment of new institutions and processes and in the enlargement of participation in the making and development of contemporary international law. *No longer is the law of the world court to be confined within the sometimes narrow limits set for it by the older few; modern international law must be based on a wider consensus, in the sense that it must be a reflection of the principal legal systems and cultures of the world* . . . The contribution which the third world in general, and Africa in particular, is making to contemporary international law will in time increase both in quantity and quality especially within the framework of the United Nations.[44]

The foregoing quotation excellently summarizes one of Elias's most enduring insights about modern international law. He emphasizes that the equal participation and contribution of newly independent states within the international community were the most significant achievements of formerly colonized countries. As Elias argued in his masterful work *The United Nations Charter and the World Court*, 'universality rather than limited application . . . must now be the catchword in the expanding frontiers of international law under the United Nations charter'.[45] Elias emphasized the 'equal dignity and worth' of all members of the United Nations and the need not only to abolish inequalities among them, but for both new and old states to co-operate with goodwill to achieve the goals of the United Nations.[46] Thus in Elias we see a commitment to a view of sovereignty and human dignity informed by the UN Charter. This Elias calls 'modern international law'.

Elias's double move of asserting equality of new and old states as well as emphasizing the role of international law in advancing reforms to meet the goals of the United Nations falls right within the broad tradition of post-Second World War international lawyers generally. For example, the late Louis Sohn, very much like Elias, argued that the 'modern rule of international law concerning human rights . . . spread around the world, destroying idols to which humanity had paid obeisance for centuries . . . States have had to concede that individuals are no longer mere objects, mere pawns in the hands of States.'[47] Sohn here is of course referring to the demise of sovereignty with the coming of age of the recognition of human rights. In this respect, Sohn and Elias, as well as many international legal scholars from every part of the world, are indistinguishable. The emergence of the United Nations and

44. Ibid., at 33 (emphasis added).
45. Elias, *supra* note 30, at 2.
46. Ibid., at 8.
47. L. B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States', (1982) 32 *American University Law Review* 1.

the modern international human rights treaties is classically treated as a watershed moment of transformation for international law.[48] It is also the moment of the recognition of the right to self-determination of peoples that was soon followed by decolonization in Africa and Asia.[49] In framing concerns of the newly independent countries in terms of human rights and the equality of nations embodied in the UN Charter as well as the right to self-determination, Elias was asserting the triumph of an international law that had overcome its legacy of excluding African participation within it.

Elias's project was therefore not that of exploring how the equality of nations in the United Nations era could play a role in disguising the unequal North–South relationships as other African international legal scholars of his time observed.[50] Elias's primary concern was the rehabilitation of Africa within the international community. This project of correcting the image of Africa on the basis of its similarity with Western societies and its achievement of sovereignty falls short of unearthing the various ways in which the colonial apparatuses of international law were carried forward in the UN era.[51]

Thus, at the end of chapter 2 of the book, which examines the close similarity between African law and international law, Elias states,

> So the correlation between African law and [sovereign] law in general has been demonstrated. This has led the present author, after an exhaustive examination of the nature of law in general and of the reasons why it is obeyed, to proffer this all-inclusive definition: 'The law of a given community is the body of rules which are recognized as obligatory by its members.'[52]

This is a brilliant move by Elias. Fully aware of the anthropological literature on African customary law showing how there was order without law,[53] Elias juxtaposes this insight with similar insights about international law, such as Louis Henkin's

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48 A leading international law teaching text in the United States, L. Henkin et al., *International Law Cases and Materials* (1993), at xxviii, states that '[t]he creation of the United Nations Organization was a major development in the international political system . . . Organizations were formed to address a broad range of ills plaguing the world community. Most of these organizations lack executive powers and make only limited encroachments upon the traditional prerogatives of national sovereignty, but their creation confirmed a new pattern of international conduct.'

49. One of the major developments of the post-Second World War period that 'signalled a new departure in the development of international law' was the 'growing importance of states representing non-Western civilizations as members of the family of nations. This . . . development raised the question of the compatibility of the basic cultural values and institutions of these non-Western societies with the system of international law developed by a relatively small group of Western nations'. Ibid., at xxvii–ix.

50. Rembe, *supra* note 40, at 7, opines that 'although state sovereignty presupposes legal equality, states may be greatly unequal in size, population, economic and military capabilities . . . [yet] despite the influence of other factors in inter-state relations, the concept of sovereign equality of states remains an important aspect in the conduct of state relations'. Rembe also places hope in the fact that though African states lack real power, 'their numerical strength has increased their voting power'. Ibid. Similarly, the economic inequality between newly independent and old states was not lost on mainstream scholars of international law, who were in many respects much like Elias. For example, Henkin, *supra* note 48, at xxix, argues that the 'growing gap between the economically developed and the economically less developed countries' was a major development of the post-Second World War period that 'signaled a new departure in the evolution of international law'.

51. For an excellent exploration see A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

52. Elias, *supra* note 18, at 33.

53. See Moore, *supra* note 42, at 30–48, for a listing of some these anthropologists of the period.

observation that most states obey international law most of the time.[54] Remarkably, even nineteenth-century jurists had argued that order more than anything else was the basis of obligation in international law.[55]

Elias's critique of sovereignty as the 'true basis' of the international legal order may have been surprising, since, as he was a jurist from a newly independent African country, it would have been assumed that he was not ready to jettison it just at the moment it had become a political reality for formerly colonized countries. Yet, as we have seen above, Elias was joining a tradition of international legal scholars who embraced sovereignty while at the same time not elevating it as a totem of autonomy which cannot be derogated from. Thus he saw sovereignty as 'an inconvenient and unnecessary postulate introduced by the analytical jurists to confuse the nature of law with its political presuppositions'.[56] According to Elias,

> sovereignty has stood in the way not only of a universal acceptance of public international law and other necessary customary bodies of law as law properly so called, but also making it possible for the nation-states of the world to accept a supranational authority as the cornerstone of a world government.[57]

As a consequence, Elias argued that 'sovereignty has given birth to the recurrent crisis of the modern nation-states'.[58]

Paradoxically, it may be surmised that Elias saw decolonization as representing the emancipation of international law, as much as he celebrated it for emancipating Africa from colonial rule.[59] Such a view contrasts sharply with that of Antony Anghie's recent masterful study of the emergence of sovereignty in international law.[60] According to Anghie, sovereignty did not emerge to maintain order among sovereigns as classical renditions have it. Rather, sovereignty emerged from the encounter between the incommensurable cultural differences of Europeans and non-European.[61] According to this view, sovereignty was forged as a doctrine to manage nations with different cultures and histories rather than to maintain order among sovereigns. Celebrating the use of the ability freely to enter into consensual treaties that comes with sovereignty thus reproduced the hierarchical relations between Europeans and non-Europeans that were predicated on the superiority of European ideas such as contract that were ostensibly replacing rather than

54. L. Henkin, *How Nations Behave* (1979), at 26, arguing that '[t]he fact is, lawyers insist that nations have accepted important limitations on their sovereignty, that they have observed these norms and undertakings, that the result has been substantial order in international relations'.
55. See Riles, *supra* note 15, at 723–40 (analysing the work of Thomas J. Lawrence, a British international lawyer who wrote at the beginning of the twentieth century and proposed that order rather than sovereignty was the organizing principle in international law).
56. Elias, *supra* note 18, at 45.
57. Ibid.
58. Ibid.
59. I am grateful to an anonymous reviewer for pointing this out to me.
60. Anghie, *supra* note 51.
61. For Anghie, the 'sovereignty of the non-European entity is determined in nineteenth century international law by applying the standard of civilization to determine the status of territory; the sovereignty of the non-European entity in the post-colonial period is determined by the framework of contracts. There is a broad shift, then, from status to contract.' Ibid., at 241–2.

replicating unequal colonial relations.[62] Anghie concludes that having emerged in a crucible of inequality, sovereignty carries within it both the agenda of decolonization as well as reinforcement of the historically unequal relations between European and non-European states.[63]

1.4. The agenda of international law in Elias's international legal tradition

The Elias tradition, in my opinion, holds sway in the study and teaching of, and research on international law in Africa.[64] Elias wrote several other books in addition to his masterpiece – *Africa and the Development of International Law*. In one of them, *New Horizons in International Law*,[65] Elias elaborates his belief that the foundation of the international legal order is the equal participation of states. Participation and community are two of the most dominant themes in the book's analytic framework. In another, he elaborates a rather traditional approach to the law of treaties.[66]

New Horizons in International Law proceeds from the proposition that '[t]o the discerning student of public international law today [presumably in or around 1980 when the book was published] there can be no doubt that certain new trends are visible on the horizon.'[67] International law, in Elias's view, had *expanded* 'not only in terms of its subject matter but also in terms of content and orientation'.[68] There is a celebratory mood in the emergence of new areas such as 'international constitutional law, law of international institutions, international economic law, law

62. Thus in presenting his argument about how the use of the doctrine of sanctity of contracts replaced conquest as the way in which Third World states continued to be dominated by Western corporations and states, Anghie notes that '[c]ontractual approaches to international law further serve to obscure the imperial past. The whole framework of contracts is crucial to the attempt to establish that international law is neutral, that the arbitrators are doing no more than enforcing the agreements that had been freely entered into by sovereign states on the one hand and MNCs [multinational corporations] on the other. The point, however, is that it is international law that legitimized, through doctrines of conquest and by upholding unequal treaties, the imbalances and inequalities in social and political power that are reflected in international contracts which are then characterized as expressing the free will of the parties'. Ibid., at 241.
63. According to Anghie, decolonization 'did not ... resolve colonial problems. Instead, the enduring consequences of colonialism became a central issue for the discipline, rather than a peripheral concern, as the emergence of these 'new states', as they were termed in the literature of the period, posed major questions of international law at both the theoretical and doctrinal levels'. Ibid., at 197.
64. Even scholars living outside Africa but writing on Africa share Elias's commitment to showing Africa's contribution to international law. See, e.g., J. Levitt, 'The Law on Intervention: Africa's Pathbreaking Model', (2005) 7 *Global Dialogue* 50, available at http://www.drjeremylevitt.com/files/The_Law_on_Intervention.pdf (last visited 1 January 2008), who argues in part that the 'evolution of the intervention regime in Africa reveals that it is the first region to advance a comprehensive collective security and intervention regime'. A forthcoming book – J. Levitt (ed.), *Africa: Mapping New Boundaries in International Law* (2008) – is advertised in the following contributionist terms: 'The principal aim of this work is to provide a forum for leading international lawyers with experience and interest in Africa to address a broad range of intellectual challenges concerning the contribution of African states and peoples to international law.' Another scholar, A. J. G. M. Sanders, in *International Jurisprudence in an African Context* (1979), at 49–64, follows with approval and additional insights Elias's revisionist historiography. It is notable, however, that Sanders's analysis of the colonial episode focuses on the political economy of European exploitation of African colonies, unlike Elias, whose project was different. Notably, a festschrift paying tribute to Judge Taslim Olawale Elias, describes him as 'the leading African exponent of International Law to date'. E. Bello and B. Ajibola, *Essays in Honour of Judge Taslim Olawale Elias* (1992). On contributionism, see also K. Kithure, 'Contributions of the International Criminal Tribunal for Rwanda to the Development of International Humanitarian Law', (2001) 33 *Zambia Law Journal* 34–50.
65. T. O. Elias, *New Horizons in International Law* (1980).
66. T. O. Elias, *The Modern Law of Treaties* (1974).
67. Elias, *supra* note 65, at xvii.
68. Ibid.

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of space, human rights law and international humanitarian law'.[69] In this respect Elias shared much in common with Western liberal scholars of his generation in his enthusiasm for reforming international law through the functional competencies of the United Nations and other post-Second World War international institutions. One such scholar with whom Elias has much in common is Wolfgang Friedman. Friedman's critique of sovereignty as standing in the way of using international law for reform is particularly similar to that of Elias.[70]

Elias's generally positive attitude towards international law is, however, tempered in precisely the same ways in which liberal scholars today temper their idealism with a sense of realism and pragmatism.[71] Elias, for example, remarks that

> Either because or in spite of this *expansion* of its [international law's] frontiers, traditional notions and attitudes are beginning to show resilience and adaptability: the rigid assertion that only sovereign states are the subjects of international law is giving place to the idea that other entities, notably certain international organizations like the United Nations itself, as well as individuals, are now also subjects of international law for most practical purposes.[72]

Elias therefore identifies attachment to sovereignty as the major limitation to the success of the expanded international law. He divides up the new and expanded international law into

> three fairly recognizable, though not mutually exclusive, periods (a) from 1945 to about 1960, which may be regarded as the formative years during which the UN Organization was trying to find its feet, so to speak, and to map out a program of future action and experiment with a number of approaches to post-war problems; (b) from 1960 to about 1969, in which the greatest developments concerned the phenomenal growth of new states and the preoccupation of the world body was with the problem of self-determination of people; and (c) the period since 1970, often referred to as the decade of development, especially regarding economic and social growth for the world community in general and the third world in particular.[73]

The book then proceeds to describe at great length the resolutions, conventions, conferences, codes, cases, declarations, materials, struggles, and institutions involved in each period. Explains Elias,

> Never before in the history of international relations have so many peoples of different races, climes [*sic*] joined together to make and to administer such a plethora of laws for their common welfare, to organize and execute plans for social and economic

69. Ibid.
70. Friedman, for example, argued that 'Human welfare cannot be dealt with on a national level any more than protection against nuclear destruction . . . The greatest challenge to contemporary mankind is presented by the realization that a minimum level in the conservation of human resources is no less a matter of survival than the prevention of nuclear war . . . and that in both respects the organization of international society based upon the national sovereign state is disastrously inadequate.' W. Friedman, 'Half a Century of International Law', (1964) 50 *Virginia Law Review* 1354. He goes on to state, 'But the greatest development of the postwar era lies in the concept of international economic development aid as a permanent and inevitable feature of contemporary international organizations.' Ibid., at 1355. See also W. Friedman, *The Changing Character of International Law* (1964); and Friedman, 'The Relevance of International Law to the Processes of Economic and Social Development', (1966) 60 *American Society of International Law Proceedings* 8.
71. See R. Howse, 'Book Review, Anne-Marie Slaughter, *A New World Order*, 2004', (2007) 101 AJIL 231.
72. Ibid., at xvii (emphasis added).
73. Elias, *supra* note 65, at 3–4.

> development. Fresh vistas of a brave new world of law and public order have been opened under the aegis of the United Nations.[74]

International law is here represented as a giant snowball accumulating experience and resolving problems on its self-correcting path to perfection and completion. Asia and Africa, which initially had no 'sufficient scale of trained manpower on the international plane',[75] had through forums such as the Asian-African Consultative Committee (founded in 1956) trained a group of Asians and Africans to participate in the elaboration of new norms and the reform of old ones.[76] Chapter 2 of the book, entitled 'The Contribution of Asia and Africa to the Contemporary Law of the Sea', describes the individual contributions of African and Asian states to the formulation of standards and norms in various areas of international law. The chapter demonstrates his view of international lawmaking as a highly technical rather than a politicized subject.[77] Elias's project is not so much an exploration of the history of, and reasons for disappointment with, the efforts seeking recognition of the right to development, the failure of the West to support the New International Economic Order (NIEO) and the Charter on Economic Rights and Duties of States (CERDS), the withdrawal of the United States from UNESCO after the Third World successfully supported the New International Information Order (NIIO), among other similar events. Rather, Elias sought 'to emphasize the formulation of legal frameworks and mechanisms to complement the concepts of state participation and state sovereignty'.[78] Certainly Elias is not oblivious to the imperative to address the challenges of development in poor countries. Like Wolfgang Friedman,[79] Elias advocated international development aid, technical assistance, and other forms of international co-operation as ways of establishing and maintaining 'a just and equitable economic order through the achievement of more rational and equitable international economic relations and structural changes in the world economy'.[80]

Elias was also in favour of an international legal regime that acts as a catalyst for development as contained in resolutions of the United Nations, declarations, and charters such as CERDS.[81] His belief in the efficacy of what he termed 'law in development' is exemplified in the manner in which, for example, he advances the elaboration of the rights and duties of states in these international legal instruments.

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74. Ibid., at 19.
75. Ibid., at 21.
76. Ibid., at 21–2.
77. On the composition of the international law commission, for example, Elias notes that 'once elected [members] represent only themselves as legal scientists and not as individual representatives of the governments of the countries from which they hail. The result has been to make the commission behave more as a group of jurists than as a group of statesmen intent on ensuring the maintenance of the "vital" interests of their several countries'. Ibid., at 79.
78. S. Sathirathai, 'An Understanding of the Relationship between International Legal Discourse and Third World Countries', (1984) 25 *Harvard International Law Journal* 397. This comment/book review reviews Elias's book *International Court of Justice and Some Contemporary Problems* (1983).
79. W. Friedman states, 'But the greatest development of the postwar era lies in the concept of international economic development aid as a permanent and inevitable feature of contemporary international organizations'. Friedman, *Changing Character*, *supra* note 70, at 1355. See also Friedman, 'Relevance of International Law', *supra* note 70.
80. Elias, *supra* note 30, at 35.
81. Ibid., at 45.

A good example of his work in this respect is his incisive enumeration and evaluation of the rights and duties between states under the Charter on the Rights and Duties of States.[82]

Elias's commitment to the unity and coherence of international law leads him to advise against the development of regional or special chambers of the International Court of Justice (ICJ), since there is a 'risk of different chambers in course of time laying down differing rules of international customary law or the interpretation of international conventions and codes'.[83] After reviewing other proposals to reform the ICJ, Elias concludes, '[i]n sum, the unity of international law and its progressive development would suffer a set-back'.[84] Elias's assertion here could well be a response to views among certain scholars and countries of the Third World at the time that international law should be seriously reconsidered by newly independent countries. For his part, Elias would remain under the wing of international law rather than reject it. After all, he argues,

> The United Nations has by its hitherto vigorous policy of decolonization, especially in Asia and Africa, succeeded in replacing the two previously dominant Anglo-American and civil law political and legal hegemonies with a plethora of independent and increasingly separate ones of the newly independent states and has encouraged the increased articulateness of the third world as a whole.[85]

This view is consistent with his very eloquent and extensive commentary on the reluctance of the United Kingdom and the United States to collaborate in ending apartheid in South Africa.[86] In an extensive and incisive commentary of the failure of the United Kingdom under Margaret Thatcher to lead the Commonwealth club of nations to impose economic sanctions against South Africa for its continued policy of apartheid, Elias goes outside the UN framework in addition to questioning the efficacy of states in addressing the continuation of apartheid, which was in his view clearly inconsistent with international law. In this piece, Elias is at his best as a scholar/activist. He cites newspaper editorials from around the world extensively to demonstrate the lacklustre support for what he considers a most worthy cause. He does not press so much the illegality of apartheid, as one would have expected of a legal analysis of the subject, but rather the lack of empathy and political will and support as well as the cold-hearted calculations of the Thatcher administration in particular. This analysis of the inadequate attention given to apartheid is consistent with Elias's major contribution of asserting the dignity of

82. Elias, *supra* note 65, at 16–17, where he notes that the NIEO and the CERDS 'envisage clearer and bolder definitions of the rights and duties of states as between developed and developing ones than had hitherto been attempted or accepted in customary international law. The Declaration and the Charter reflect the new spirit. Elsewhere, Elias notes that CERDS provides that the 'responsibility for the development of every country rests primarily upon itself but that concomitant and effective international cooperation is an essential factor for the full achievement of its own development goals'. Elias, *supra* note 30, at 36.

83. Ibid., at 81.

84. Ibid.

85. Ibid., at 75. Elias's' commitment to the 'new' international legal edifice is illustrated by his assertion that pursuant to Article 9 of the Statute of the ICJ, the ICJ is enjoined by the provisions relating to 'the main forms of civilizations' and 'the principle legal systems of the world' to represent 'the divergent ways of political thought and social action', by which he apparently means to refer to the Third World. Ibid., at 75.

86. Ibid., at 130–53.

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the African person. Elias's concern about the racism of apartheid arose from the same motivation as for rewriting international legal history to assert a place for the African where the contribution of the African had been completely overlooked.

1.5. Some concluding remarks on Elias's international legal tradition

The Elias tradition is primarily predicated on a rejection of Western frames of analysis that understate African involvement and participation in the making of international law. Elias emphasized how Africa is and has been a co-equal player, participant, and shaper of international legal norms. Thus a major project of the Elias tradition is to displace the Eurocentric cultural or ethnocentric bias in international law. An important preoccupation of this scholarship is resisting the view that international law was a cultural achievement specific to west European countries, rather than one shared by African kingdoms. In the process of establishing these claims of similarity, these scholars failed, however, to examine some of the particular ways in which international law justified expropriation under claims of European superiority based on racial, cultural, and indigenous difference. Scholars adopting Elias's view may in effect have validated a kind of Africanity that does not seriously engage the colonial origins of international law. But I would think this is precisely what Elias was trying to displace. His revisionist legal historiography was to disallow any reading of international law as exclusively European or colonial. In this respect, he defended the unity and coherence of international law as a truly universal discipline and is a very different scholar from Mohammed Bedjaoui, who saw modern international law as the overcoming of a colonial tradition. By contrast, Elias looks back, in effect telling us that if you want to understand nineteenth-century international law, do not just look to what European states were doing, or take the writings of Wheaton or Lorimer to be definitive. Look to Africa, too.

The argumentative strategy employed by scholars such as Elias was aimed at establishing accommodation for an African cultural heritage as a part of the international civilization that contributes to international law. Thus, in this Elias tradition, scholars sought to displace the view embodied in international law that Africans were neither Christian nor civilized, and as such were not entitled to enjoy sovereignty over their land or their people. They sought to reverse the view in Eurocentric international law that Africa was backward and uncivilized and therefore never participated in the collective enterprise of building customary international law.

In the process of seeking to adapt international law to reflect African viewpoints and cultures, scholars like Elias invoked notions of liberal equality and assumed that these notions were grounded in neutral principles of general and, indeed, universal applicability. They therefore dismissed 'old' public international scholarship as being in violation of liberal equality.

Coming from societies whose identity, culture, and entire way of life had been suppressed as supposedly backward, uncivilized, and primitive, the commitment embodied in the decolonizing project of the Elias tradition was undoubtedly a major move forward from the racist images that had shaped international legal norms and

practices. That at last the African was acknowledged as an equal to the white person cannot therefore be underestimated, as these scholars emphasized. This scholarship was in a large measure inspired by the work of liberal anthropologists, especially in England, in the 1940s and 1950s. This anthropological scholarship has sought to establish the specific ways in which the African's achievements were similar to those of the white person. Human rights norms and the four Geneva Conventions of 1949 are good examples of legal concepts shared between African customary law and public international law identified by scholars in this tradition, as we shall see shortly.

For Elias, the 'intercourse between certain countries of Africa on the one hand, and those of Europe and Asia on the other . . . must have thrown up certain general principles of international behavior, certain universally accepted standards of international conduct between one state and another'.[87] Elias therefore comes to the conclusion that

> The way is thus clear for the emergent states of Africa today to be willing and ready to enter into new international relationships with other states, without feeling too much like strangers in the international legal community . . . African customary law shares with customary international law the acceptance of the fundamental principle of *pacta servanda sunt* [*sic*] as the basis for the assurance of a valid world order. In sum, the ruler, like the ruled, must be under the law.[88]

Another fascinating account of the similarity of African customary law and norms of international law is the analogy of the principles enshrined in the Geneva conventions and the 'laws of armed conflict in pre-colonial Africa'. In an article that falls within the Elias tradition, E. Bello traces these similarities in minute detail.[89] Ali A. Wafi, in remarkably similar article, argues through direct comparisons between sharia law and international human rights norms that the latter are consistent with the former.[90] So in this respect Elias's work opened up or became part of a tradition of revisionist historiography of international lawyers from newly independent states.

The underlying assumption in this Elias-style analysis is the outside world's lack of proper knowledge and information that traditional African customary law systems were very similar to European ones. It was therefore a mistake to view African customary law as primitive. In other words, Elias warns against seeing international law from a distorted perspective that fails to incorporate all the components of its 'universal character'. He proceeds from the view that all 'legal traditions' and 'civilizations' (such as the 'African' one) constitute a 'civilization' or 'legal order'. In so doing, he understates the extent to which his claim of the universality of international law is in many respects aspirational in that customary international law norms survived almost intact on the independence of African and Asian states in the post-Second World War period.

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87. Elias, *supra* note 65, at 45.
88. Ibid.
89. E. Bello, 'Shared Legal Concepts between African Customary Norms and International Conventions on Humanitarian Law', in R. Gutiérrez Girardot et al. (eds). *New Directions in International Law: Essays in Honour of Wolfgang Abendroth* (1982), 386.
90. A. A. Wafi, 'Human Rights in Islam', (1967) 11 *Islamic Law Quarterly* 64.

Elias's project of revisionist historiography was also shared by the UN Training Research Programme (UNITAR). A seminar was organized in 1971 'to break new ground by bringing to light aspects of inter-state law which has existed in Africa prior to the scramble for colonial territories'.[91] The justification for the conference was stated as setting the record straight, since

> [F]or a long time an image has been conveyed of Black Africa before colonization as a collection of primitive tribes living under anarchy or under the arbitrary rule of a chief, perpetually at war with each other, yet, the existence of sophisticated forms of government in pre-colonial Africa is now beyond doubt.[92]

Indeed, Elias wrote extensively on customary law in this tradition. As we saw above, his work on Africa's contribution to international law relied heavily on views of an African past developed by a particular school of African anthropologists sympathetic to an idyllic vision of the African past that had been erased by colonial rule. These anthropologists sought to establish that colonial rule that had been a short and unfortunate interlude in the otherwise long history of Africa. They demonstrated pre-colonial commerce and diplomatic contacts between Europe and African kingdoms. Elias argued that these links indicate that Africa was privy to the formulation of customary international law. After all, there were African kingdoms that had commercial and diplomatic links with Europe. International law, for Elias, was therefore not totally alien to Africa. Colonial rule was a short interlude that interfered with its development.

To arrive at an appropriate image of the African that could match, if not surpass, Western 'standards' of civilization, it was strategic for these scholars to deploy a variety of stylistic approaches. In deploying these approaches they borrowed from scholarly work sympathetic to their nationalist cause. However, in so doing, a few problems emerged: first, they overlooked the fact that the presumed African heritage or culture that they glorified had been Europeanized and changed to coincide with the goals of the colonial political economy; second, they ignored the fact that colonial rule was in large measure justified on the basis of African primitivity in the universal hierarchy of civilization; and, third, they regarded colonial rule as being a small interlude in Africa's historical development. In other words, Africa and Africans had survived colonial rule and any self-respecting African would strengthen his or her African identity rather than an imposed foreign one.

These scholars relied on a particular interpretation of African tradition as a stable category and showed that it was perhaps more egalitarian than and superior to Western liberal notions of equality. This notion of African egalitarianism was no different from that embodied in the notion of African socialism, which its exponents contrasted with analogous Western values which they argued were

91. Sinha Prakash opined that the purpose of the seminar was 'to arrest the possibility of African and Asian states retreating into an exclusive regional system of international law, like that called for in the early 19th century in Latin America'. S. Prakash, *New Nations and the Law of Nations* (1976), at 26.
92. M. Brown, *African International Legal History* (1975), at i.

inferior.[93] Kwame Nkrumah described an all-African socialist reconstruction in the following terms:

> We postulate each man to be an end in himself, not merely a means; and we accept the necessity of guaranteeing each man equal opportunities for his development. The implications of this for socio-political practice have to be worked out scientifically, and the necessary social and economic policies pursued with resolution. Any meaningful humanism must begin from egalitarianism and must lead to objectively chosen policies for safeguarding and sustaining egalitarianism.[94]

Thus the pursuit of the legitimacy of African participation within a system of nations after independence occurred simultaneously with a search for narratives celebrating the cultural and social achievements of Africa and Africans. These narratives, as told by academics like Elias, therefore became a limitation in critically engaging the repressive origins of colonial rule, with its colonial concepts such as *terra nullius*. The reason was that they underplayed the role that international law had played in legitimizing colonial rule. In effect, within the Elias tradition, stereotypes of Africans embodied within international law were simply inverted through the process of glorifying a mythical and glorious African past. In this literature the primitive images of African cultures created to justify colonial rule now became benign and harmless. By arguing that Africa had participated in the making of international law these scholars sought to see international law as a cultural achievement which Africa shared with the rest of the world.

These moves proceeded from the premise that international law could help in resolving the problems of newly independent African countries. In fact, this is a primary theme of the Elias tradition. Today, there is an unsurprising number of adherents to this view among those writing on international law in relation to Africa.[95] Western scholars of international law have traditionally urged African governments to adopt liberal solutions such as embracing civil and political rights as an antidote to the perennial governance challenges.[96] Such an approach presupposes that problems such as abuse of power could be addressed by simply embracing international human rights norms.[97] Makau wa Mutua has referred to this simplistic view as abolitionism and argues that it fails to take into account the historical

93. Julius Nyerere, for example, argued that African communalism (the rough equivalent of socialism) was an antidote to 'western predatory evil'. D. N. Kaphagwani, 'Some African Perceptions of Person: A Critique', in I. Karp and D. A. Masolo (eds.), *African Philosophy and Cultural Inquiry* (2000), at 73.

94. K. Nkrumah, 'African Socialism Revisited' (1967), available at http://www.marxists.org/subject/africa/nkrumah/1967/african-socialism-revisited.htm (last visited 28 December 2007).

95. For example, P. Mutharika, 'The Role of International Law in the Twenty-First Century: An African Perspective', (1994) 18 *Fordham Journal of International Law* 1706, argues that 'Africa's diverse economic and cultural realities have provided unparalleled opportunities for lawyers to develop and apply international law to the specific problems of the African continent'.

96. E.g., R. Howard, 'The "Full Belly" Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from sub-Saharan Africa', (1983) 5 *Human Rights Quarterly* 467–90. Even the World Bank has strongly advocated the adoption of liberal rights as an antidote to economic underperformance and as a product of market reforms. For a critique see K. Rittich, 'Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates', (2005) 55 *University of Toronto Law Journal* 853.

97. M. wa Mutua, 'The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa', (1995) 17 *Michigan Journal of International Law* 339.

association of international law with colonial conquest and Western domination in Africa.[98] The suspicion and circumspection with which some African scholars and states have treated international law are therefore explicable in part on this basis.

Elias's view of international law as a cultural achievement did not focus on its role in gaining and perpetuating positions of power for Europe and the attendant disadvantage to Africa this engendered. It is important to note that it could be argued with good reason that scholars who wrote in this tradition may very well have represented a middle class created by the colonial education system to increase the collaborative base of colonial rule as it neared its end. These scholars were regarded by the departing colonial powers as a responsible middle class that would guarantee the continuity of the colonial political economy after independence.[99] That is why Frantz Fanon argued that 'it would be easy to prove, or to win the admission that the black man is equal of the white. But my purpose is different. What I want to do is to help the black man free himself from the arsenal of complexes that has been developed by the colonial encounter'.[100] Elias's revisionist historiography easily showed that blacks were not inferior to whites, but perhaps fell short of exposing the various ways in which colonialism had established its hegemony over non-European peoples. In addition, Elias's hope of using international law for reforms that favour non-European countries is, in a manner of speaking, using the tools that had helped erect colonialism and other structures of European subordination of non-European peoples. Perhaps, as Dianne Otto has argued, it is not advisable to rely on the very same 'liberal concepts' that had established Western domination over non-Western societies to restructure international relations in favour of developing societies.[101] Yet precisely because Fanon's recommendation of violence was not an option that Elias could have taken, his choice of using international law in his reformist agenda continues to be subscribed to even by critical international scholars of the present generation.[102]

2. An alternative to the Elias tradition

2.1. Overview

Before ending this essay I want to briefly outline an alternative school of thought to the Elias tradition among African international scholars of the same time period as Elias. Indeed, since my review of Elias's early scholarly work has suggested that it was not centred on the structural and economic underpinnings of the place in the world of the newly independent African states, it is only apposite to provide a

98. See M. wa Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights', (2001) 42 *Harvard Journal of International Law* 201.
99. See G. Wasserman, 'The Independence Bargain: Kenya Europeans and the Land Issue 1960–1962', (1973) 11 *Journal of Commonwealth Political Studies* 99.
100. F. Fanon, *Black Skin White Masks*, (1967), at 30.
101. D. Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference', (1996) 5 *Social and Legal Studies* 348.
102. For example in Anghie, *supra* note 51, at 320, Anghie argues that the role of a critical project 'is not to condemn the ideals of the "rule of law," "good governance," and "democracy" as being inherently imperial constructs, but rather to question how it is that international law and institutions seem so often to fail to make these ideals a reality.'

brief overview of those that took that path. While Elias identified sovereignty as one of the biggest challenges to reforming international law, other scholars of the immediate post-Second World War era in Africa focused on questions of power and wealth imbalances between African countries and the rest of the world as reasons to be sceptical of the possibilities for reform within or through international law.

A primary project of this group of alternative scholars was a critical examination of the imperial and colonial character of international law. They carried out a critique of the post-colonial state as well as of the international political economy. One of the scholars in this tradition captures the basic assumptions of this school as follows:

> [I]nternational law is simply ... transforming itself into [a] public and private law of neo-colonialism and imperialism, with some facade of progressiveness due to the narrow and nominal inclusion of human rights principles and de-recognition of the rightfulness of formal colonialism and overt forms of discrimination.[103]

For this school, self determination through political independence was the onset of a new period of subjugation to the history of Europe through a statehood modelled on European lines. Hence, unlike in the Elias tradition, self-determination was not merely a moment to return Africa to a past of glory characterized by contact with Europe; rather it was a moment of betrayal. In this alternative tradition the analysis of early African contact with Europe laid emphasis on issues such as the slave trade and colonial rule, while in the Elias tradition commerce and diplomatic relations with non-African states were emphasized. For the alternative tradition, customary international law was therefore regarded not as having originated in the course of commercial and diplomatic links between Africa and Europe, but rather as a consequence of industrial capitalism in the West and the territorial ambitions of Western powers. For this alternative tradition, international law was regarded as a handmaiden of the expansion of the economic interests of colonizing countries.

In short, scholars in the tradition that I argue to be an alternative to the Elias approach identified the shortcomings of public international law to be fourfold. First, its geographic origins in Europe meant that international law embodied a value system exclusive to Europe and not shared by the outside world. Second, international law had mercantilist economic foundations. As a result scholars in the alternative tradition to Elias argued in favour of an egalitarian international economic order achieved not merely through the lawmaking process of the United Nations but also through a jettisoning of current rules that among other things would renounce if necessary foreign economic presence, subject foreign capital to domestic laws, abolish discriminatory trade practices in international economic relations, and ensure stable and fair prices for primary commodities. The Elias tradition's support of the New International Economic Order (NIEO) had much in common with the alternative school, although Elias's reformist agenda did not accommodate the outright rejection of rules of international economic law that were inimical to the interests of newly independent states of Africa and Asia. Third, scholars in the alternative

103. S. B. O. Gutto, 'Responsibility of States and Transnational Corporations for Violation of Human Rights in the Third World in the Context of the New International Economic Order', in F. Snyder and S. Sathirathai (eds.), *Third World Attitudes toward International Law* (1987) 275, at 287.

tradition argued that the political goals of international law were imperialist; they supported self-determination and non-interference in all spheres of the internal affairs of newly independent countries. For them non-intervention extended beyond armed intervention to all forms of outside intervention whether political, cultural, social, or economic. Fourth, these scholars argued that international law had a Christian religious foundation.[104]

Unlike the Elias tradition, which regards independence as a means to restore Africa to its own history, the alternative tradition regarded independence as a moment of betrayal, since it continued the colonial relationship under the guise of political independence. More particularly, the World Bank and the International Monetary Fund were regarded as agencies for the preservation of dependence and colonialism. This school of thought expresses frustration at the failure of the nationalist struggle to transform colonial inequities between the North and the South and the failure of the now independent African states to correct post-colonial excesses and abuses by the North. The aspirations of this school of thought were strongly represented by the Non-Aligned Movement, the struggles to advance the cause of the Third World in the then better funded United Nations Conference on Trade and Development (UNCTAD), and the Group of 77.

2.2. On the history of the discipline

U. O. Umozurike's *International Law and Colonialism in Africa*[105] is one of the best texts tracing the history of the discipline in this tradition. Unlike the Elias school, here emphasis is laid on the slave trade and colonialism as two of the foremost experiences of Africans as a result of contact with the Europeans. Umozurike contends that 'international law was used to facilitate or acquiesce in the imposition of both afflictions [slave trade and colonialism]'.[106] Umozurike then argues that while international law helped to establish the slave trade and colonialism, it was now being used in their eradication.[107] The underlying thesis in Umozurike's account was that 'an evil system [such as that embodied in international law]' cannot 'alter its essential nature'.[108] Umozurike opined, however, that 'in the present age of international law, self-determination remains an important factor in securing rights [that are] internationally recognized'.[109] There is a frustration with the inequality of

104. U. O. Umozurike, *International Law and Colonialism in Africa* (1979), at 9–10.
105. Ibid.
106. Ibid., at 1. According to another account of the history in this tradition, the world has gone through the following stages: (i) the crumbling of the feudal order and the emergence of mercantilist trade; (ii) industrial revolution and the establishment of a world capitalist system that colonized the third world; and (iii) the crumbling of formal colonialism and the rise of a multilaterized world with a centre and a periphery. See O. O. Ombaka, 'Law and the Limits of International and National Reform : Institutions of the International Economy and Underdevelopment', SJD thesis, Harvard Law School, 1977.
107. Umozurike wrote his Ph.D. thesis on self-determination at Oxford, published as *Self Determination in International Law* (1972).
108. Umozurike, *supra* note 104, at x.
109. Ibid., at x. T. A. Aguda states that 'until quite recently, the tragedy of the position was that the newly founded faculties in Africa were manned by Europeans and Americans, most of whom lacked imagination and were too dogmatic to make any useful contribution to an African approach to international law. As we all know, the joint major achievement of African countries was the formation of the Organization of African Unity, which in the way of achievements has not turned out to be much worse than the United Nations Organization

international relations in this tradition. Umozurike is therefore somewhat hopeful when he writes, 'There is as yet no supra-national authority dispensing justice and enforcing rights and obligations among nations. We shall therefore indicate what the OAU [Organization of African Unity] can and should do to ensure the rights of African people.'[110]

So whereas in the Elias tradition scholars argued without caution in favour of the full participation of African states in international organizations such as the United Nations, in the alternative tradition one can see some hesitation. Some scholars in the alternative tradition went even further and called for a withdrawal from the exploitative international relations that had characterized colonial relationships and were carried forward into the post-independence period. Rather than embrace the view that Africa had 'everything to gain through contact with the Europeans', this tradition condemns the international system as 'inhuman and immoral'.[111]

Umozurike traces the history of the transatlantic trade in African slaves and concludes quite exaggeratedly that it was 'carried out by Europeans exclusively'[112] and that the profits that were accrued were so enormous as to form part of the foundation for the prosperity of the Western world. The certainty with which this assertion is made is of course subject to serious debate, especially given that African and Arab traders were similarly involved in the transatlantic slave trade. This view that attributes the slave trade exclusively to Europeans is, however, consistent with the alternative tradition's view of international law and its history. In this tradition, the role of international law is not merely that of regulating relations between states, thereby reducing frictions and promoting co-operation and development. Instead, international law in this tradition is regarded as the law that governed relations of the civilized and Christian Europe *inter se* and was therefore 'the law of which the so called "primitive people" kn[e]w nothing and therefore [it could] not protect them, [and] . . .was used to promote the trade in Africans for the economic benefit of Europeans'.[113] European scholars such as Alexandrowicz embraced this view. For example, Alexandrowicz endorsed the Eurocentric view embodied in the Berlin Treaty of 1885 of European states having a duty to watch over and improve the conditions of native populations.[114] It was for this reason that the Berlin conference of European powers that parcelled out the African continent between them at the same time sought to ban what the participants termed the odious trade – slavery. For

itself which has brought much skepticism as to its ability to attain its goals. But speaking for myself I think that OAU has achieved a lot, although like its elder brother – the United Nations – has failed to attain much that was hoped for.' T. A. Aguda, 'The Dynamics of International Law and the Need for an African Approach', in K. Gunther and W. Benedek (eds.), *New Perspectives and Conceptions of International Law: An Afro-European Dialogue* (1985), at 9.

110. Umozurike, *supra* note 104, at x.

111. Ibid. Umozurike uses extensive historical reference to show how the slave trade negated political, economic, cultural, and social development, stultified the growth of civilization, and destroyed what civilization there was. Ibid., at 4.

112. Ibid., at 14.

113. Ibid.

114. C. Alexandrowicz, 'The Juridical Expression of the Sacred Trust of Civilization', (1971) 65 AJIL 149; Alexandrowicz, 'The Afro-Asian World and the Law of Nations (Historical Aspects)', (1968-II) 13 *Recueil des cours* 117, at 123.

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these colonial powers, free trade was an antidote to trade in slaves.[115] This contrasts sharply with Elias's effort to rewrite international legal history in order to reinscribe Africa in international law by undermining the self-serving paternalism of colonial powers. One thing to note here, perhaps, is the relationship between the process of colonization and the anti-slavery movement – as exemplified in the final act of the Berlin Conference of 1884–5.

In another take on the history of international law,[116] Umozurike divides it into 'old' and 'new'.[117] He traces the history of 'old' international law to antiquity – to ancient Egypt, China, India, and Ghana and other ancient African kingdoms – very much like Elias in the first tradition. He acknowledges Grotius as one of the greatest European writers of international law. He uses Grotius's book, *Mare Liberum*, as an authority for the view that international law applied to all people and knew no religious or racial bounds.[118] Umozurike then traces the development of 'old' international law to the rise of European states in the nineteenth century. In his discussion of the Congress of Vienna (1815), Umozurike argues that a few of the European states 'arrogated themselves to the circle of the civilized world', and it was at this point that 'the law of Christian states changed gradually to the law of civilized states through the use of military power. European expansion to all points of the world and new inventions increased their hegemony over the rest of the world'.[119]

Umozurike then traces the proliferation of international law 'in its branches – law of the sea, outer space, international institutions, human rights among other subjects'.[120] Noting that a historical analysis of the development of international law reveals that it has been used to meet challenges and to promote and protect the interests of its active users, Umozurike calls on 'states . . . [to] . . . consciously evolve a more *relevant and just* law that will protect the interests of all states and peoples'.[121]

For Umozurike, the 'new' international law therefore emerged in the post-1960 period following decolonization and recognition of the 'principle of *peaceful co-existence* in a world of differing cultures' as 'emphasized in the principles of

115. For an exploration of these and other themes see J. Gathii, 'How American Support for Freedom of Commerce Legitimized King Leopold's Territorial Ambitions in the Congo', in P. Alai, T. Broude and C. B. Picker (eds.), *Trade as the Guarantor of Peace, Liberty and Security? Critical, Historical and Empirical Perspectives*, American Society of International Law Studies in Transnational Legal Policy (2006), at 97.

116. U. O. Umozurike, *Introduction to International Law* (1993). This book, which he published for teaching international law (in Africa), 'draws as many examples from the African situation while of course giving prominence to the popular cases and situations cited in Western test-books'. Ibid., at vii. According to Konrad Gunther, at a seminar on 'International Law and African Problems' held in Lagos in 1967, it was recognized that, first, 'Africa as the newest continent had the duty to enrich international law with its own experiences, its values and ideas, in defence of legitimate interests, second, that traditional international law had to be re-evaluated in the African context [since] . . . Africans were living on borrowed knowledge and which hardly coincided with the interests of African states, and finally . . . that one of the ways of encouraging the study of international law in Africa was the production of text books and the publication of materials and documents written and compiled from the African experience and point of view'. K. Gunther, 'Introductory Remarks, New Perspectives and Conceptions of International Law and the Teaching of International law', in Gunther and Benedek, *supra* note 109, at 4–5.

117. Ibid., at 7.

118. Ibid., at 8–9.

119. Ibid., at 9–10.

120. Ibid., at 11.

121. Ibid., at 11–12 (emphasis added).

sovereignty and consent'.[122] Although the views of the history of international law in this alternative tradition recognize the nature of international law as inimical in many respects to the interests of newly independent countries, the tradition nevertheless accepts international law in its new or post-1960 phase. In this respect, the alternative tradition, Elias, and indeed most liberal international lawyers are really on the same page. All of them accept in varying degrees the possibility of using the post-United Nations international law to address the problems of the newly independent states. This, too, is a familiar trope across almost all areas of law in post-independence Africa – the aspiration for reform, even when it is recognized that while reforming the very structures and doctrines that subjugated Africa under colonial rule the daunting challenges and the implications of international law have to be acknowledged. Thus while the Elias tradition espouses an integrationist agenda for reform in which newly independent countries are regarded not as outsiders but as part of the international community, the alternative tradition places hope in post-1960 international law to overcome its legacy of involvement in the enslavement and colonization of African peoples. Another point on which this alternative tradition has similarities with the Elias tradition is the strong emphasis on the rejection of racism within international law.[123] Both traditions condemn racism in its colonial and post-colonial forms and call for its eradication.

2.3. On the role of sovereignty in the alternative tradition

While in the Elias tradition the denial of sovereignty on the part of Africans within colonial international law is considered somewhat inadvertent, in the alternative tradition the denial of sovereignty to Africans is regarded as a 'major legal technique for the imposition of colonialism'.[124] Umozurike argues, somewhat like Elias, that African peoples were in fact sovereign because they, like their Western counterparts, 'observed certain norms of conduct in their external and internal relations . . . [but] did not possess sufficient military might to withstand the onslaught of the Europeans who were thus able to ignore or to deny their sovereignty'.[125]

In his analysis of the debates of European scholars who regarded Africa as *terra nullius* (which European states could freely occupy),[126] Umozurike cites the separate opinion of Judge Ammon, who vigorously contested that idea, in the ICJ's decision in the first *South West Africa* case.[127] Thus in the alternative tradition, international law cannot decide the internal legitimacy or otherwise of the government of a state. The internal legitimacy of a state is a matter for municipal law applicable to that state. Legitimacy under municipal law is different and not subject to international

122. Ibid., at 13 (emphasis added).
123. Du Bois is one of the Africanists Umozurike frequently cites in *International Law and Colonialism in Africa*, *supra* note 104. See, e.g., ibid., at 17, n. 1 and an extended narrative at 140. For example, Umozurike states that 'International law was embedded in white racism and this promoted the interests of the whites while rigorously subordinating those of others. White racial discrimination was thus a fundamental element of international law during the period in question.' Ibid., at 37.
124. Ibid., at 19.
125. Ibid., at 21.
126. Ibid.
127. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, Judgment of 21 June 1971, [1971] ICJ Rep. 16, at 26.

law.[128] This assertion that internal legitimacy is a matter of internal self-rule served in an interesting way to legitimate African leaders who sought to ward off criticisms of their abusive governance by claiming that certain matters were within their exclusive domestic jurisdiction. Thus the role served by the non-intervention norm for the alternative tradition in post-independent Africa was analogical to the role played by cultural nationalism in the Elias tradition. In other words, as we saw above, nationalist assertions of a homogeneous African identity served post-independent leaders well, since they could argue that one-party rule was consistent with the homogeneity of African peoples. In the same way, post-independent African governments rejected notions of 'limited sovereignty', which in their view would have allowed other states to interfere with their internal affairs. Such interference was also, in their view, a violation of the right to self determination which allows 'all people to freely determine their political status and freely pursue their economic, social and cultural development'.[129]

This streak of independence and self-determination was in part a strategy to exorcise and pre-empt the effects of what the alternative tradition referred to as neo-colonialism in Africa. Umozurike quoted President Nkrumah's definition of neo-colonialism: 'The imperialists of today endeavor to achieve their ends not merely by military means, but by economic penetration, cultural assimilation, ideological domination, psychological infiltration, and subversive activities even to the point of inspiring and promoting assassination and strife.'[130] Umozurike, like other scholars in this tradition, used the analytical framework of John Hobson[131] and Lenin[132] in their examination of imperialism. Lenin argued that capitalist expansion in peripheral areas served the interests of private profit-seekers, while Hobson argued that surplus capital from industrialized economies of the late nineteenth and early twentieth centuries was economic imperialism.[133] The study of imperialism in Africa coincides with theories of dependency and neo-colonialism according to which colonial possessions were used by colonizing economies not only as sources of cheap inputs like cotton, but also as captive markets for the resulting products with the consequence of stultifying the growth of native industries.[134] While dependency theory has received critical attention,[135] it is still widely accepted among some 'progressive thinkers and activists in Africa and the development community in advanced capitalist countries, including academics and students of development'.[136] While Umozurike, like most other scholars in this tradition,

128. E. K. Quanshigah, 'Legitimacy of Governments and the Resolution of Intra-national Conflicts in Africa', (1995) 7 *African Journal of Comparative and International Law (RADIC)* 248.
129. The Declaration on Granting Independence to Colonial Territories and Peoples, UN Doc. A/Res/1514 (XV), 14 December 1960.
130. Umozurike, *supra* note 104, at 126.
131. See for example, ibid., at 31, where Umozurike quotes one of Hobson's articles, 'Imperialism: A Study', in H. M. Wright (ed.), *The New Imperialism* (1976), at 24.
132. See e.g., ibid., where Umozurike quotes Lenin's *Imperialism, the Highest Stage of Capitalism.*
133. See generally Gathii, *supra* note 25.
134. See K. Nkrumah, *Neo-colonialism: The Last Stage of Imperialism* (1965); W. Rodney, *How Europe Underdeveloped Africa* (1973).
135. C. Leys, *The Rise and Fall of Development Theory* (1996).
136. Ibid., at 150.

analyses the aspirations of the NIEO, there was a very clear streak of dependency thinking within this alternative tradition of scholarship in international law in Africa.[137]

2.4. The alternative tradition's international law agenda

The most vocal proponents of the alternative tradition in Africa and elsewhere called for fundamental reform of the international political economy as a condition for Third World participation. Some scholars in this tradition in fact called for a complete rejection of the international legal order.[138] Mohammed Bedjaoui's *Towards a New International Economic Order*[139] is perhaps the most well-known text that best exemplifies both the case for rejection of the international legal order and also the optimism of reformism in this alternative tradition, particularly in the climate of the 1970s and 1980s. Declared Bedjaoui, '[T]he embryonic new order constitutes a challenge to international law. International law is thus "concerned" about the economic forces now at work on a world scale.'[140] He expressed disappointment that 'a very simple debate . . . has become extremely confused. This is regrettable because the stakes are now higher than ever and involve the establishment of the new international economic order, which is to say the lives of billions of human beings.'[141]

Among the factors introducing confusion into the debate on the NIEO, according to Bedjaoui, is the misguided 'legal paganism'[142] that 'law is immutable'.[143] Bedjaoui claimed that the arguments of Western governments to the effect that the NIEO constituted a departure from the traditional and immutable conception of sovereignty 'turn[ed] law into a new religion centered on itself'.[144] Legal paganism, in Bedjaoui's view, perpetuates 'the supremacy of developed states',[145] since it focuses on the form

137. Samir Amin was among the most vocal exponents of this radical dependency perspective. As recently as 1994, another leading proponent of the dependency analysis, Colin Leys, revised his thesis of underdevelopment in part since the East Asian miracle questions some of the fundamental assumptions of dependency thinking. In 1974 Bill Warren, a one-time editor of the radical *African Political Economy Review*, resigned from the editorial board after he changed his radical political perspective by alleging that capitalist development was possible anywhere in the world. The economic reform programmes now advocated by the World Bank and other multinational financial institutions, referred to as the Washington Consensus, advocate market reform to replace the state in the management of the economy.

138. R. P. Anand explores this theme in a chapter entitled 'Confrontation or Cooperation: The General Assembly at Cross-Roads' in R. P. Anand, *Confrontation or Cooperation? International Law and the Developing Countries* (1984).

139. M. Bedjaoui, *Towards a New International Economic Order* (1979).

140. Ibid., at 97.

141. Ibid.

142. Bedjaoui refers to it as 'intoxication with sovereignty'. Ibid., at 99. This intoxication, in his view, 'is paving way to "instability of legal situations" and 'anomy in the State's power of decision, or in other words, a power of decision subject to no rules'.

143. Ibid., at 98. Notice that while in the first tradition formalism was embodied in the view that law is the command of the sovereign, here Bedjaoui claims that it is embodied in law's immutability.

144. Ibid., at 100.

145. Ibid.

of the legal concept while 'the social reality of developing countries [especially in meeting their 'survival' needs][146] . . . is lost sight of'.[147]

This immutability therefore pre-empts international law's 'ability to change in response to world economic changes . . . and . . . as a factor of change acting to promote a new international economic order'.[148] In Bedjaoui's view, 'international law does not reflect an accurate and balanced reflection of the international community and does not express that community's needs'.[149] Unsurprisingly he therefore refers to legal paganism as an 'idolatrous notion'.[150]

The NIEO was not the first time developed countries had frustrated the exercise of sovereignty by the developing countries. Bedjaoui revisited the 1973 energy crisis, 'when third world oil producing countries decided to raise the nominal price of oil products'. Noting that the developed countries '"stigmatized" the developing countries' act as an intolerable "right of unilateral action", a constant repudiation of agreements", a lawless power of decision, and an "intoxication" with sovereignty',[151] Bedjaoui argues that the accusation of wrongful exercise of sovereignty by developing countries when they had just acquired it presupposes that 'there is . . . a principle in international law . . . which says that the economies of advanced industrial countries should have cheap energy and raw materials at their disposal, at prices fixed, moreover by themselves'.[152]

Proceeding from the view that international law 'derives its obligatory character from the economic and political power it expresses',[153] Bedjaoui argued that international law is a 'distorting mirror magnifying the facts of domination, if any, through its factitious nature and now excessive gap between it and reality'.[154] He was not, however, dismissive of the view that international law offers hope for reform. Rather, he argued that 'it is naive to think that international law can by itself become the cornerstone of change and development [as] it is equally wrong to say that international law can only represent the ratification and conservation of already established norms'.[155] This statement evidenced the dilemma that confronted newly independent African countries that I mentioned at the outset of this essay. They could not simply embrace or reject international law – either choice would have been to throw the baby out with the bathwater. Instead, more creative responses were sought. In the process a kind of 'schizophrenia' in rejecting international law and then accepting it is apparent.[156]

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146. Ibid., at 103–4.
147. Ibid., at 99. Bedjaoui also explores an antinomy 'existing in law, which implies conservatism, and development, which calls for change'. Ibid., at 97–8, 109.
148. Ibid. Bedjaoui cites the law of the sea as an admirable example of the 'law's capacity to change'. Ibid., at 106.
149. Ibid., at 100.
150. Ibid., at 100. Bedjaoui criticizes the fact that '[t]he price the new states have to pay for its entry into the international order is . . . the stability of international law and of international relations.' Ibid., at 101.
151. Ibid., at 104.
152. Ibid.
153. Ibid., at 111.
154. Ibid.
155. Ibid., at 114.
156. On this see K. Mickelson, 'Rage and Rhetoric: Third World Voices in International Legal Discourse', (1998) 16 *Wisconsin Journal of International Law* 353.

Much of the optimism that accompanied the NIEO and other initiatives on the part of the Third World such as sovereignty over their natural resources and the New International Information Order subsequently waned, as many aspects of these initiatives fell through with the significant opposition of developed states. One of the significant victories of the NIEO was the acceptance in the General Agreement on Tariffs and Trade (GATT) that developing nations ought to be granted differential and more favourable treatment in trade agreements. However, special and differential treatment was not mandatory on the part of developed countries, since GATT did not require them to extend to developing countries privileged access to their markets on non-reciprocal terms.[157] In any event, today special and differential treatment has undergone significant erosion even as a soft commitment in international trade.[158]

3. Conclusions

Much has happened on the African international legal scene since the Elias and alternative traditions took root in the immediate post-independence period. It would be impossible to recap these developments in concluding this essay. Suffice it to say that Elias remains an important and enduring feature of international legal scholarship in and on Africa. In many ways, Elias's effort to use history to reclaim or claim a place in international legal history for Africa was as innovative for an international lawyer as it was important. It was innovative because Elias sought not to reject international law for its legacy and participation in the colonization of Africa, but rather sought to use these legal tools as best as he could to reform international law to serve the newly independent countries. In this respect he is like many contemporary international lawyers in Africa and elsewhere. In particular, his singling out of sovereignty as a barrier to reforming international law is shared by generations of international legal scholars who have criticized states for placing too high a premium on their sovereignty, thereby placing insuperable barriers to their acceptance of egalitarian goals such as the international bill of human rights. Second, Elias is very much like the international lawyers of the alternative tradition who focused on the dark sides of international law. Today, scholars of the Third World approaches to international law (TWAIL) who do so nevertheless express optimism in using international law to achieve egalitarian reforms. For example, in his important book *Imperialism and the Making of International Law*, Antony Anghie traces how international law invented the sovereignty doctrine to legitimize colonial rule and how this legacy continues to date.[159] However, he does not in any way recommend a jettisoning of international law. He sees hope for reform. Many international lawyers in Africa today share this dual sensibility – a sense that Africa

157. D. Tarullo, 'Book Review, *Foreign Trade in the Present and a New International Economic Order*', (1991) 85 AJIL 245.
158. See J. Gathii, 'The High Stakes of WTO Reform' (book review), (2006) 104 *Michigan Law Review* 1361.
159. Anghie, *supra* note 51.

and the Third World are treated differently in the international order, but at the same time a sense of hope that international law can lead to an alternative future.

One of the most significant ways in which the Elias tradition can be seen to have an influence is the manner in which many contemporary international lawyers in Africa have stopped short of tracing Africa's social, economic, and political problems to international factors such as neo-colonialism. Rather than tracing them to external actors or factors, scholarship has traced it more and more to the poor economic policy choices on the part of African leaderships, particularly their resistance to integrating their countries fully into the international political economy in the immediate post-independence period and to the disastrous and authoritarian character of African leaderships. The solutions for these problems chiefly centred on integrating African countries into world markets and the adoption of political pluralism and respect for human rights. These solutions especially in so far as they were centred on integrating Africa into the global economy resonate extremely well with Elias's method of historical recovery tracing Africa's forgotten participation in the evolution of international law. Thus, as the Elias tradition turned to history to trace Africa's integral location in international legal history, contemporary international lawyers have looked outward to international integration for solutions to Africa's economic, social, and political problems. The Elias tradition also has much in common with contemporary international lawyers in Africa, who continue to express optimism in the transformative possibilities that international law offers to Africa's various challenges.

In the recent past, examples of optimism in reforming international law include the excitement related to the enactment of the law of the sea, the emergence of a governance agenda in the institutional framework of multilateral and bilateral donor policies, and the institutionalization of human rights and environmental safeguards in bilateral and multilateral development programmes. These scholarly attitudes project international law as an important arena for the resolution of newly emerging transnational problems such as the HIV/AIDS pandemic, the promotion of human rights,[160] and liberal democracy.

However, not all international lawyers in Africa today share in this optimism of what may be called 'democratic self-determination'.[161] The alternative tradition lives on in the work of TWAIL scholars. These scholars have traced recurrent African problems such as civil war, state collapse, and general economic, political, and social failure in sub-Saharan Africa to the legacy of unequal relations between the former colonial powers and their colonies, still embedded in international legal doctrines and practices, and to contemporary abuses of power. Thus while international law provides a manner of thinking about reform that could easily be deployed to

160. A new range of rights are alleged to have emerged. These include the right to democratic governance, the human rights of women, and a right to humanitarian intervention to prevent state collapse and defend human rights.

161. See N. Berman, 'Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and "Peaceful Change"', 65 *Nordic Journal of International Law* 421–79, at 422. For an excellent critique see B. Chimni, 'Third World Approaches to International Law: A Manifesto,' in A. Anghie et al. (eds.), *The Third World and International Order: Law, Politics and Globalization* (2003). See also M. Koskenniemi, *The Gentler Civilizer of Nations* (2001).

disguise inequalities and projections of authority through claims of universality, interdependency, peace, and security, the alternative tradition continues to live on in exploring the dark sides of both public and private international law and its contemporary legacies in national and international life. Such work has explored not simply the shortcomings of international law but the manner in which developed- and developing-country elites use doctrines and principles of international law such as sovereignty and self-determination to disguise the ways in which they advance and protect their interests.[162] In short, to appreciate fully the Elias tradition one has to locate it in relation to the alternative tradition, as I have tried to do in this essay.

162. S. Adelman and A. Paliwala (eds.), *Law and Crisis in the Third World* (1992), and wa Mutua, *supra* note 98, are good examples of such an approach.

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