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Scholars, States, and Human Rights
A Comparison of Third World Approaches to International Law with Diverging State-Actors’ Stances in the UN Human Rights Council

Abstract: This article investigates the similarities between different critiques towards the international human rights system from academia and state-actors. On the one hand, there are the critiques from scholars of the Third World Approaches to International Law (TWAIL) movement. On the other hand, there are critical points raised towards the international human rights system by China, Cuba, and Egypt in the reports from the first three cycles of their respective Universal Periodic Review (UPR) within the United Nations Human Rights Council (UNHRC). Through a literature review, the TWAIL critiques were first categorized and then worked into a framework of three basic pillars: the culture critique, the rhetoric critique, and the model critique. This framework was subsequently applied to the reports by way of a simplified Qualitative Content Analysis in order to extrapolate the similarities of the critiques from these two unlikely groups of actors.

Keywords: TWAIL, UN Human Rights Council, China, Cuba, Egypt

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1. Introduction

The starting point for the master’s thesis on which this article is based was an ostensible resemblance of two very unlikely actors. When an inherently contentious topic, such as human rights, receives seemingly similar critique from somewhat oppositional sources, the need for clarification arises. The TWAIL movement, an acronym standing for Third World Approaches to International Law,¹ is concerned with articulating “a critique of the history, structure and process of contemporary international law from the standpoint of third world peoples, in particular marginal and oppressed groups”.² Part of this critique is the Eurocentric nature and politicized use of the international human rights system against non-Western states. Similar points have been raised from outside of academia, specifically from certain states. While China and Cuba, for instance, frequently condemn the alleged manipulation and politicization of human rights by Western states,³ Egypt supports a vision of human rights that is not dominated by a “Western perspective”.⁴ This seeming convergence of activist critical legal scholars and authoritarian leaning nation-states in their critique towards human rights was the point of inquiry for the thesis.⁵ The research question therefore read: “What similarities are there between TWAIL critiques on the international human rights system and state-actor’s critical positions in the Universal Periodic Review?”

2. Methodology

The basic research rationale of the thesis was divided into three steps. In a first step, TWAIL critiques of the international human rights system were collected through a thorough literature

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review. In a second step, these critiques were categorized and compiled into a framework of three basic pillars, namely the culture critique, the rhetoric critique, and the model critique. In a third step, this framework was applied to UPR documents in order to extrapolate similarities of the selected countries’ critical positions towards the international human rights system in comparison with TWAIL critiques. In a subsequent discussion, the findings were presented and contextualized. As the most significant tool of the UNHRC, the UPR was chosen as the field of this examination because all UN members are obliged to participate in this periodic peer-reviewed mechanism. This provided a uniform database for the examined countries. The UPR’s stated objectives are the “improvement of the human rights situation on the ground”, the fulfillment of states’ human rights obligations, and the sharing of best practices. The roughly four-year cycle is made up of the submission of three key reports, an interactive dialogue session with recommendations from states to the state under review and a subsequent implementation period for the accepted recommendations, after which the cycle starts anew.

In terms of the nature of TWAIL, some commentators have at times raised concerns regarding TWAIL’s objectivity and legitimacy as a legal theory due to its proximity to political activism. Addressing such concerns and guided by definitions by some of TWAIL’s most prevalent authors, the research focused on TWAIL’s “descriptive-analytic” capabilities and only briefly touched upon its “activist-normative” side.

The comparison of the TWAIL critique was restricted to UPR documents from China, Cuba, and Egypt. These countries were chosen on the basis of four criteria: (1) representation of UN Regional

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Groups; (2) representation of political interest groups; (3) colonial historical link; (4) and a prior study that investigated cultural relativism in the UPR. The examination of each country was conducted through a documentary analysis and was respectively based on the three major reports for each of the first three UPR cycles. These reports were the national report, the UN report, and the stakeholder report. The reports were evaluated using a simplified Qualitative Content Analysis. Instead of creating a coding frame, the TWAIL critiques were first compiled into a framework of three categories (the culture critique, the rhetoric critique, and the model critique). Before engaging with the reports, additional, country-specific literature and commentaries were consulted in order to understand contexts, terminologies, and concepts mentioned in the UPR documents. Subsequently, each country’s UPR documents were repeatedly read through. During this process, passages that corresponded to one of the three TWAIL critiques were marked as such and further divided into sub-categories. These highlighted passages, assorted by TWAIL category and topical sub-category, combined with the additional literature, formed the basis for the actual comparison with which the research question was answered.

14 This was to serve as a counterpart since much of TWAIL scholarship comes from people in or from the Global South and is closely linked to postcolonialism. Luis Eslava and Sundhya Pahuja, “Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law,” Verfassung und Recht in Übersee 45 (2012): 197–98.
17 If available, certain additional documents, such as the reports of the working groups and their addenda were taken into consideration as well. All in all, a total of more than 50 UPR documents were looked at with lengths ranging between around 10 to 30 pages.
3. TWAIL

The TWAIL movement is often presented in different generations called TWAIL I and TWAIL II. TWAIL I is a collective term that has retrospectively been applied to a first generation of scholars from the 1950s up to around the 1970s. Their work was influenced by the aftermath of World War II and produced in the context of the founding of the UN and national independence struggles in the era of decolonization. The symbolic birthplace of TWAIL is often cited to have been the Bandung Conference in 1955. Dominant themes for TWAIL I were associated with fights for national independence, the right of peoples for self-determination and sovereignty, the integration and accession to the international community, and the advocacy for corrective measures to ensure more equitable global economic relationships. TWAIL I scholars considered national sovereignty a “hard won prize of their long struggle for emancipation” and took a “non rejectionist” approach towards international law, instead trying to work from within the system.

After the end of the Cold War, a “new generation of African and Asian scholars brought forth a second, stronger wave of TWAIL”, known as TWAIL II. The term TWAIL first emerged in 1996 at Harvard Law School and has since steadily gained scholarly importance. The main difference to TWAIL I is TWAIL II’s disillusionment with international law and sovereignty as altruistic “tools of empowerment”. Through detailed historical analysis, TWAIL II scholars have shown that the colonial encounter of the West with non-Western peoples was no marginal event but at the very heart of the development of international law and concepts like sovereignty. They claim that time and time again, imperial forces created new tools (like the mandate system) to

26 Obregón, “Peripheral Histories of International Law,” 443.
steer political and economic policies in the Third World under the guise of seemingly benevolent rhetoric, such as various forms of the ‘civilizing mission’ or concepts like good governance. TWAIL II scholars further claim that the Bretton Woods system with the corresponding international financial institutions as well as the UN, and particularly the UN Security Council, are inherently biased against the Third World and largely act as tools designed to advance imperial policies. Colonial power relations have thus not ended with the conclusion of colonialism but are kept in place by an intrinsically discriminatory international legal system. TWAIL II thus claims that a “systematic process of resistance to the negative aspects of international law must be accompanied with continuous claims for reform”. Mutua describes TWAIL’s core concerns as the following. First, he writes that TWAIL is antihierarchical, fighting against notions of racial superiority, “othering”, and advocating for the “moral equivalency of cultures”. Second, TWAIL is counterhegemonic, concerned with giving a voice to the powerless and disenfranchised, and calls for the “full democratization of the structures of […] governance”. Third, TWAIL is “Suspicious of Universal Creeds and Truths”, especially questioning “norms and practices that are European in origin, thought, and Experience” which are then portrayed as universal. Lastly, TWAIL is a “Coalitionary Movement”, drawing inspiration from other disciplines and approaches such as Critical Legal Studies, Marxism, feminism, postcolonialism, or Subaltern Studies.

4. TWAIL’s Critiques of the International Human Rights System

The thesis’ three categories of TWAIL critique, which are presented here in an abbreviated version, were loosely inspired by a taxonomy created by R. Bachand and compiled through a thorough literature review of TWAIL scholarship. First, the culture critique entails all arguments tied to the notions of Eurocentrism, hierarchies of rights, and cultural relativism. TWAIL’s understanding of Eurocentrism is somewhat reminiscent of D. Chakrabarty’s notion of Europe as
the “silent referent”. The critique is that international human rights law was developed in a particular European setting but was then presented as abstract, objective, and ahistorical, essentially universalizing it by a “veiling of its own locus of enunciation”. This practice then leads to the legitimization of “supposedly universal and objective international human rights norms and principles that were fundamentally Eurocentric in their substance and origins”. The debate around hierarchies of rights contrasts individualist versus collectivist approaches or differentiated understandings of the relationship between rights and duties. It also describes the inherent bias in the international human rights system towards an overemphasis of civil and political rights and a lack of economic, social, and cultural rights. In terms of cultural relativism, TWAIL scholars in general seem to “support cultural- and value-pluralism” but stop short of embracing “the moral relativism of many post-modernists”.

Second, the rhetoric critique is about uncovering the ways in which the modern human rights discourse continues the colonial legacy of the ‘civilizing mission’ with adapted and adaptive vocabulary in order to legitimize the West’s intervention and interference in the Third World. TWAIL scholars argue that the vocabulary and rhetoric of the human rights discourse is essential in this endeavor, creating distinct categories with specific attributes which can then in turn generate a legitimate, often violent response. This is for instance done through a “Heaven/Hell Binary” that “draws fairly neat and bright lines between ‘the Good West’ and ‘the bad Third World’”. Another example constitutes Mutua’s “Savage-Victim-Savior Metaphor”. This three-dimensional metaphor depicts the non-West as simultaneously barbarian, violating, and anti-democratic.
but also as powerless, helpless, innocent and thus in need of the Western “redeemer, the good angel who protects, vindicates, civilizes, restrains, and safeguards”. The ultimate goal of such rhetoric is the legitimization of intervention. Through the creation of distinct categories, such as the notions of civilized or barbarian societies, the West first fabricates supposedly universal standards. The “failure of non-Western states to adhere to these standards” then denotes “a lack of civilization that [justifies] intervention and conquest”. While international human rights law has a definite “progressive dimension” it can “easily be abused to threaten third world leaders and peoples unless they are willing to accept the dictates of the first world”. The charge here is thus not against the content of the norms but the instrumentalization of the system in order to further political interests and legitimize interference. Western states, and the US in particular, are meanwhile accused of profiting from double standards and exceptionalism.

Third, the model critique is about trying to unveil the various mechanisms which covertly propagate the modern, democratic nation-state and neo-liberal market policies as the benchmarks to be judged against. These arguments critique the imposition of a certain kind of political and economic organization and framework. Concerning models of political organization, TWAIL laments that the modern state is at times as much violator as it is guarantor of human rights, and that political democracy specifically is often “viewed as a panacea”, with viable alternatives being ignored. In terms of the imposition of an economic system, TWAIL’s charge is that “human rights seem to come hand-in-hand with neo-liberal policies”. NGOs, for instance, are thus accused of prioritizing civil and political rights which in turn creates a global environment which is conducive to open market policies. The rationale is that the language of the human rights discourse is then effectively deployed to implement “the rights to private property, and

47 Ibid., 203–4, 227–33.
48 Ibid., 204.
all that goes along with it”. The majority of the criticism, however, is directed at International Financial Institutions, such as the World Bank, the IMF, and the WTO. TWAIL accuses them of having reworked their mandates and now embracing a “market-friendly conception of human rights”. Through vague concepts such as the “rule of law” and “good governance”, these institutions “use their considerable powers to reform the political and social structures”, aiming for neo-liberal “economic reconstruction”, all the while eschewing “any discussion of [their own] accountability”.

To recapitulate, the culture critique condemns the universalization of particular European norms and experiences, the rhetoric critique denounces the essentializing ways in which the human rights discourse depicts Third World peoples, by doing so legitimizing Western interference, and the model critique lays bare the manners in which the international human rights system propagates the interests of global capitalism.

5. Analysis

5.1 China

For the culture critique, the most significant overlap with China turns around the notion of hierarchies of rights. The key issue concerns the debate around civil and political versus economic, cultural and social rights. China specifically discusses the rights to subsistence and development.
and designates them as a top priority for the government. It is in relation to these rights where the (in)famous notions of national realities and conditions, the level of development, and various terms with ‘Chinese characteristics’ come into play. The objective is to subject rights to the conditionalities and circumstances on the ground, thus relativizing them. International standards and measurements of comparison for human rights consequently lose a certain degree of validity and meaning as they become a question of preference and the judgement of priorities by national governments. The advantage of this approach is that it does not constitute a direct attack against established norms on an abstract level but simply introduces a hierarchy by way of prioritization during the implementation of human rights. Concerning the rhetoric critique, China explicitly states its opposition of “human rights politicization and ‘double standards’” and repeatedly advocates for non-selectivity, objectivity, and impartiality on human rights issues. Furthermore, China accuses other nations of using human rights “as an excuse to interfere in its internal affairs and undermine its sovereignty and territorial integrity”. China’s focus on the principles of sovereignty, territorial integrity, but also non-intervention makes sense within the rationale of using them to “counter criticism of China’s domestic human rights situation”. Ultimately, a progressively absolute conception of such principles leads to the immunization


65 There is mention of at least one of these notions in each of China’s national reports, the working group reports and the available addenda. WGUPR, A/HRC/WG.6/4/CHN/1, China, 10 November, 2008, § 6; WGUPR, A/HRC/11/25, China, 3 March, 2009, § 33; WGUPR, A/HRC/WG.6/17/CHN/1*, China, 5 August, 2013, § 4; WGUPR, A/HRC/25/5/Add.1, China, 27 February, 2014, 2; WGUPR, A/HRC/25/5, China, 4 December, 2013, § 185; WGUPR, A/HRC/WG.6/31/CHN/1*, China, 20 August, 2018, § 4; WGUPR, A/HRC/40/6, China, 26 December, 2018, § 7; WGUPR, A/HRC/40/6/Add.1, China, 15 February, 2019, § 2.


69 WGUPR, A/HRC/40/6, China, 26 December, 2018, § 27.

from external critique, which is desirable from the state’s perspective.71 Lastly, in terms of the model critique, China does not directly challenge the imposition of a certain model as TWAIL does. However, China does seem to challenge the dominant narrative in certain ways. While their UPR documents are quite abundant with terms such as the rule of law, democracy, or equality before the law, some commentators point out that the Chinese Communist Party under Xi Jinping has defined such terms in a very specific way, often qualifying them with the suffix “with Chinese characteristics”.72 The common theme throughout all three categories of critiques is that China does not seem to directly attack established norms and frameworks but instead tries to redefine the meaning of entrenched terms in a way that is favorable to their national strategy. This practice is then complemented by the introduction of new, positive-sounding terms such as mutually beneficial cooperation (huli hezuo) or win-win cooperation (hezuo gongying). With the meaning of such terms being rather vague and ambiguous, the danger is ultimately a weakening of fundamental human rights principles.73

5.2 Cuba

For the Cuban UPR documents, the only noteworthy point in terms of the culture critique arises in relation to cultural relativism. The Cuban government thus repeatedly mentions the importance of defending or preserving Cuba’s cultural identity74 and actively restricts content that is judged to represent “counter-revolutionary” values.75 The literature describes this to be “a form of cultural relativism based on […] revolutionary discourse”.76 Coming to the rhetoric critique, this is where the biggest overlap between Cuba and TWAIL can be found. Cuba insists in its reports that interactions at the UNHRC must be non-politicized77 and cautions against an increasingly “confrontational stance and double standards”.78 They furthermore accuse the US of conducting

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78 WGUPR, A/HRC/WG.6/16/CUB/1, Cuba, 7 February, 2013, § 162(h).
an anti-Cuban smear campaign and manipulating human rights institutions for its own political agenda. Cuba skillfully manipulates the rules and builds up a narrative framework which supports its main theme throughout its reports: the condemnation of the US embargo which Cuba classifies as economic warfare, at times even calling it an act of genocide. From the US perspective, the embargo serves the purpose of bringing Cuba to transition into democracy, give up on communism, adopt free market policies, and most importantly, respect human rights. The result is a situation where measures that are officially intended to improve human rights for the Cuban people end up disproportionally hurting them. The charge is therefore that human rights are used as a pretext to legitimize power politics. This is precisely what the second TWAIL critique condemns and points out. Lastly, in terms of the model critique, Cuba rejects outside influence by neither accepting “the existence of a unique or universal democracy model” nor the “imposition of political systems of the western industrialized countries” and writes that there is no “one single model of democracy or an agreed formula in that regard”.

5.3 Egypt

For Egypt, TWAIL’s culture critique was most significantly reflected in terms of cultural relativism. Most poignantly, this was seen in the way Egypt claimed to want to preserve and protect the Egyptian family as the basic unit of society. Women in this vision have a “natural role within the family” which is shown for instance when the private sphere (as opposed to the

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85  Ibid., 272–73.
86  WGUPR, A/HRC/24/16, Cuba, 8 July, 2013, § 11.
public sphere) is specifically left out when talking about equality between women and men or when the mention of marital rape is explicitly removed before partially accepting recommendations concerned with violence against women. This family vision is furthermore unsurprisingly depicted as a “heterosexual family based on ‘religion, morality and patriotism’”. While homosexuality is not explicitly criminalized in Egypt, the UN and stakeholder reports claim Egypt’s domestic “debauchery” (fujūr) law is used as somewhat of a catch-all legislation that can be interpreted as needed to persecute people for their sexual orientation or gender identity. Oftentimes, a link is then created between the persecution of homosexuality and forms of religion-based charges, such as blasphemy, heresy, or atheism, one charge frequently leading to or validating the other, and vice versa. For the rhetoric critique, the only thing to point out is Egypt’s repeated reminder not to politicize human rights. Egypt writes, for instance, that the UPR is not a “process of blame in which it has to refute allegations” and reminds other countries not to “twist facts for political or personal interests”. In terms of the model critique an interesting picture emerges. Instead of rejecting the concepts and vocabulary associated with the modern nation-state, Egypt seems to fully adopt the corresponding terminology in order to profit from its legitimizing effect. Against allegations around fair trial rights for instance, Egypt defends itself by refuting the charges using the same vocabulary. Egypt thus assures the accused persons before military tribunals for example “the same safeguards as they would [have] before the ordinary courts” and restricts such tribunals to “exceptional circumstances”. Similar tactics are used to defend the introduction of domestic anti-terrorism or NGO legislations which are criticized.

92 Virgili, Islam, Constitutional Law and Human Rights: Sexual Minorities and Freethinkers in Egypt and Tunisia, 73.
93 Ibid., 136–40.
96 WGUPR, A/HRC/WG.6/7/EGY/1, Egypt, 16 November, 2009, 2.
100 WGUPR, A/HRC/WG.6/34/EGY/1, Egypt, 21 August, 2019, § 21.
for further eroding individual rights and stifling oppositional voices. Egypt rationalizes such measures in order to “keep citizens safe” and ensure their “human rights to the full” as well as to prevent “incitement to violence or discrimination”. The rationale with which rights are restricted is thus presented as the necessity of striking a balance between certain equally legitimate human rights such as personal security concerns against individual freedoms or preventing incitement to violence against the freedom of speech. Contrary to TWAIL, Egypt thus appears to not discredit the modern nation-state and notions that go with it but rather to make use of the established discourse and anchor its reasoning within that discourse.

6. Discussion

Starting with the culture critique, the analysis has produced two noteworthy points. First, both TWAIL and certain states seem to emphasize rights other than civil or political rights. This is most noticeable with the right to development and China legitimizing its focus on this right by referring to its national conditions. However, while TWAIL I scholars in particular advocated for the right to development, TWAIL II scholars are also conscious of the darker aspects of development, such as its veiling of certain forms of suffering, like economic violence, or its misuse in order to justify dictatorships. This last aspect highlights a feature where the states’ rhetoric and arguments appear to correspond to the TWAIL critiques but exhibit divergent intentions upon further inspection. In this regard, TWAIL’s activist-normative side shines through, as they claim to ultimately be concerned with addressing the suffering of people. State actors, on the other hand, can be assumed to be predominantly guided by more political considerations, such as the acquisition and preservation of power. In terms of development, for instance, this would

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102 WGUPR, A/HRC/WG.6/34/EGY/1, Egypt, 21 August, 2019, § 80. See also: Ibid., §§ 81–85.
103 WGUPR, A/HRC/WG.6/34/EGY/1, Egypt, 21 August, 2019, § 12.
104 Ibid., §§ 12–13, 80–85; WGUPR, A/HRC/43/16, Egypt, 27 December, 2019, § 18.
106 Ibid., 230–32.
translate into the accumulation of economic power. Second, a similar trend is observable in relation to cultural relativism. In the global arena, the states advocate for tolerance for alternatives to a perceived dominant Western understanding of culture and society. Examples include human rights with ‘Chinese characteristics’, the notion of a Cuban identity, or the Egyptian conception of the traditional family. This seems to be in line with TWAIL’s mentioned “moral equivalency of cultures”. However, if one zooms in to the local level, the states themselves suddenly become the dominant actors. At this level, notions of tolerance towards divergent understandings of culture or identity quickly fade. This is exemplified in Egypt’s debauchery law, Cuba’s repression of anti-revolutionary material and can easily be applied to any oppression of ethnic or cultural minorities. Whereas the states demand tolerance for themselves but do not enact it towards others, TWAIL would supposedly speak up against oppressive practices and not embrace an absolute moral relativist stance, instead standing with the marginalized and powerless.

Turning to the rhetoric critique, a major overlap could be seen in the common reproach of the biased application as well as the instrumentalization of human rights for political goals. The Cuban embargo appears to be a prime example of this practice, where human rights are used to legitimize power politics. However, while TWAIL’s intentions lean towards a people-centric approach concerned with the alleviation of suffering of Third World peoples, the examined states’ strategy ultimately aims for the immunization from critique. This was shown, for instance, through the reinforcement of the sovereignty principle. This results in two opposing positions where the states try to shut down criticism, whereas TWAIL advocates for more but equitable criticism between Western and non-Western states. It would thus seem that human rights are instrumentalized for political goals by Western and non-Western states, some for offensive and others for defensive purposes.

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111 The UPR documents mention the examples of the Bedouins, Nubians, or Berbers in Egypt and Tibetans, Uighurs, or Mongolians in China. WGUPR, A/HRC/WG.6(31)/CHN/2, China, 27 August, 2018, § 59; WGUPR, A/HRC/WG.6(34)/EGY/2, Egypt, 2 September, 2019, § 58.
112 Sunter, “TWAIL as Naturalized Epistemological Inquiry,” 489–90.
Lastly, the model critique is where similarities were least observable. In general, instead of fundamentally questioning the international system around the modern nation-state, as TWAIL does, the states rather tried to adjust and interpret existing notions to their specific needs and anchor their arguments in the existing prevalent terminology. From a standpoint of self-preservation this makes sense, as it would be tantamount to self-sabotage if the states started undermining the fundaments of a system of which they are an integral part.

With these answers to the research question, the goal of this article has been to provide a more nuanced understanding of TWAIL’s critiques towards the international human rights system and how they relate to critical positions of China, Cuba, and Egypt in their respective UPR. The value in this endeavor has been in the mapping out of different categories of critiques, their relation to each other and the examination of which actor subscribes to which critique. A differentiated engagement with critiques from various actors can prevent a dismissal in toto of such critiques, which in turn raises the possibility that potential flaws in the object of critique, but also the critiques themselves, can be revealed. The result is ideally a more productive, precise, and coherent discourse to which this article hopes to have contributed in a small way. While the research has shown certain tendencies of the examined states, one should be wary of broad generalizations. To formulate more concrete claims, further research should thus focus on a more comprehensive sample size of documents, which could include resolutions from the UNHRC or the UN General Assembly as well as perhaps national policy documents, such as national human rights action plans.
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