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Space and the Future of Humanity: A TWAIL Critique of International Space Law and Space Discourse

Perpetua Akoth Adar*

Abstract
There is growing concern over different areas in the space sector, particularly as more rockets and satellites are being launched into space, and our dependency on space technology increases. New technologies, national ambitions and investments, and private space actors are some of the many variables propelling space activities forward. With increased space activities, there are also emerging and aspirant space actors joining from Latin America, Middle East, Africa, and Southeast Asia. International Space Law (ISL) needs to develop to respond to current and future activity. This article uses Third World Approaches to International Law (TWAIL) to analyse space discourse and the ISL regime. Specifically, the author uses three TWAIL techniques to reveal the ways in which space discourse and the ISL regime manifest coloniality. Although ISL as revealed by TWAIL analytical critique seems dire, the author offers areas for reform and resistance. The author submits that a TWAIL sensibility offers potential areas of research in the pursuit of a just world on earth and for the future of humanity in space.

Key words
Third World; international space law; colonialism; outer space

1 Introduction
The importance of space in the future of humanity has been steadily increasing over the last few years. The number of countries investing in space programs is growing

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and global government space expenditure is also rising annually.¹ Contributing to this world space spending growth are emerging or aspirant space actors from Latin America, the Middle East, Africa and Southeast Asia.² The space sector has developed from the participation of a few countries, such as the early space race between the Union of Soviet Socialist Republics (USSR) and the United States of America (US), to one in which China, India, Nigeria, and South Africa are among several Third World states with well-established space agencies.³ This is partly because governments consider it a valuable means to support socio-economic, strategic, and technological development.⁴ For instance, a 2018 article showed that almost 40 percent of Sustainable Development Goals (SDGs) directly benefit from the use of space technology and services.⁵ Notably, although outside the scope of this article, a further development is the increase in activities by private space actors with interests in space tourism, exploration, resource exploitation and settlement on the Moon and other celestial bodies.⁶ Most prominent is the competition between billionaires Jeff Bezos (Blue Origin), Richard Branson (Virgin Galactic) and Elon Musk (SpaceX).

As more entrants participate in the space sector, International Space Law (ISL), the legal regime which governs space, plays an important role. This article uses Third World Approaches to International Law (TWAIL) to analyse space discourse and the ISL regime. TWAIL is a growing movement of scholars and activists engaged in intellectual and political work on reform and resistance of international law. TWAIL has grown in scholarly discourse to reflect the concerns of the Third World, of which the emerging and aspirant space actors from Latin America, Middle East, Africa, and Southeast Asia are key stakeholders. Using a TWAIL technique and sensibility, this article analyses ISL and explores what insights TWAIL can contribute to space discourse and the ISL regime.

This article begins with a brief description of the four analytical techniques and sensibilities used in TWAIL scholarship (Section 2). Following this, an analysis of the ISL regime and space discourse is undertaken using three TWAIL analytical techniques. First, using the TWAIL technique of an inclusive global history, this article analyses the language and ideology prevalent in space discourse and examines the historical context in which the ISL regime developed (Section 3). Second, guided by the TWAIL technique which emphasises the equality of Third World people, three key legal developments in the ISL regime are discussed (Section 4). These are the Declaration of the First Meeting of Equatorial Countries 1976 (Bogotá Declaration), the Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of developing Countries 1997 (Space Benefits Declaration), and the 2020 Artemis Accords. Lastly, in the spirit of the TWAIL tendency to offer ideas for resistance and reform in international law, this article contributes five areas for consideration in ISL and space discourse (Section 5): decolonising the language and ideology of space discourse and the ISL regime, decolonising the history of the development of the ISL regime, contextualising the right to development in ISL, contextualising the right to international solidarity in ISL, and opportunities for development of space resource legal models.

This article provides an analysis of the specific manifestations of coloniality in the ISL regime and space discourse. Although the situation from the perspective of the Third World may seem dire, this article concludes that TWAIL offers opportunities for reform and resistance that provide hope. This article identifies potential areas of research for the pursuit of a just world and for the future of humanity in space.

### 2 Third World Approaches to International Law

TWAIL is developing as a scholarly enterprise. It is a mixture of older and newer ideas that continue to expand as new scholars infuse their passion into its central concerns. TWAIL scholars continuously question and seek an alternative international law that would truly serve the ongoing project of attaining a just world for all. This article

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adopts Okafor’s approach which identifies four analytic techniques and sensibilities used across TWAIL scholarship.10

Firstly, the technique and sensibility of moving towards an inclusive global history. TWAIL meaningfully takes global history, not merely Western history, into account in understanding international law. This means that a holistic view of the roots and evolution of international law are a concern, as they significantly shaped the discipline.11 This technique is a key aspect of TWAIL as it facilitates a critical analysis of how the colonial encounter played and continues to play a role in international institutions, systems, relations, and law today. In this article, an exploration of an inclusive global history is utilised to facilitate an understanding of the ISL regime.

Secondly, taking equality of Third World peoples seriously is a key analytic technique in TWAIL. Third World scholars insist that all engagement in international law and relations proceed on the ‘assumption that Third World peoples deserve no less dignity, no less security and no less rights or benefits from international action than do citizens of Northern States.’12 This is asserted in the preamble of the Charter of the United Nations which reaffirms ‘faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.’13 However, TWAIL goes beyond this formal equality and recognises the reality: ‘international relations was built on sovereign hierarchies in which there were “nations big and small.”’14 Therefore, beyond formal equality, TWAIL equality includes the rejection of international norms that seek to equally prohibit the rich and poor from sleeping under bridges.15 This article uses this technique to analyse developments in the ISL regime, which raises questions for the equality of Third World peoples.

Thirdly, the technique of questioning and unpacking assertions: Okafor, Mutua, Anghie and Chimni are among several TWAIL scholars that challenge international law’s claim to be universal and the ostensible position that the United Nations (UN) is the neutral, universal, and fair guardian of global order.16 Essentially, TWAIL is

‘suspicious of glib assertions of universality’.\(^\text{17}\) This technique questions the assertion of formal equality of international law that holds that all subjects (states) are held to identical standards (universality).\(^\text{18}\) TWAIL scholars urge the unpacking of assertions that tend to mask underlying politics of domination.\(^\text{19}\) This article proposes that in the ISL regime there are specific fundamental principles asserted that require questioning and unpacking. These include the notion that space is the province of all humankind, the freedom principle that asserts that all states are entitled to exploration and use of outer space without discrimination, and the prohibition of national appropriation.\(^\text{20}\)

The final TWAIL technique and sensibility is possibly one of the most challenging. TWAIL scholars think through and offer ideas for resistance and reform to international law.\(^\text{21}\) Eslava and Pahuja describe this characteristic in TWAIL as being ‘more interested in overcoming international law’s problems while still remaining committed to the idea of an international normative regime largely based on existing international structures’.\(^\text{22}\)

This article organizes its discussion of the ISL regime and space discourse using the first, second and fourth techniques, though the analysis touches on the third technique as well.

### 3 Inclusive Global History

A key characteristic of TWAIL to be borne in mind throughout this article is that it is important to contextualise the lived history of Third World peoples in international law.\(^\text{23}\) States can sometimes act against the interests of their peoples. However, it is the needs and interests of Third World peoples rather than Third World states that TWAIL and this article seek to support. TWAIL scholars aspire to look through the

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\(^\text{19}\) Okafor (2005) 179.


\(^\text{21}\) Eslava & Pahuja (2012).

\(^\text{22}\) Ibid.

lens of Third World peoples to ‘transform international law from a language of oppression to a language of emancipation’.  

3.1 Language and Ideology of Conquest, Colonialism and Frontierism

TWAIL emphasises the importance of history in a critical analysis of how the colonial encounter played and continues to play a role in international institutions, systems, relations, and law today. Considering this emphasis, there are several phrases and terms used in space discourse that link to colonial ideology and drive legal and political approaches to space activities. These include the colonisation of space, the Moon, and other celestial bodies; the conquest of space; and space as the new, next, and final frontier. These are all terms reminiscent of Euro-Western domination and subjugation of the Third World. To clarify, this article is not implying that there is a causal link between colonial language and legal or policy approaches. Rather, it is proposed that the colonial language used is a retelling of the history of colonialism and has a role to play in understanding the underlying ideology in ISL regime and policy.

First, language carries history, and by using these terms when we talk about space the effect is that we are erasing the history of colonisation and in some ways editing it. This article is not premised on an argument about whether there is life beyond Earth to colonise. Rather, the issue here is that the idea of a colony (or colonisation) on the Moon, for example, sanitises and erases the genocide, cultural subordination, economic exploitation, and other harms experienced by colonisation on Earth. Similarly, the conquest of space is removed from its historical use of force, editing the history of enslavement, widespread violence and resource exploitation in Africa, Asia, and Latin America. When it comes to space, the terms are used to invoke a romantic and heroic image of hard-working people overcoming the harsh environment of space for the benefit of humanity. What does it mean for Third World peoples when the lived experience of colonialism, conquest and frontierism on earth is used in space discourse in this manner? What does a retelling of the colonial encounter do to the approach to space discourse, ISL and future of humanity in space?

The second effect of this language is that it can create, reflect, and transfer an ideological framework for our current engagement and future in space. In the history of the United States, as with other nations with colonies or territories, frontierism is one of the socio-psychological beliefs responsible for the ideology of the nation’s

economic and political greatness. Marshall references the Frontier Thesis, coined by historian Fredrick Jackson Turner in 1893, as ‘the driving force of American expansionism throughout the late 19th and 20th centuries’. The thesis is guided by the conviction that the United States is uniquely qualified to dominate world affairs and is often manifested in the attitudes of exceptionalism by politicians, policymakers and even in legislation. For instance, former US Vice President Mike Pence, when discussing the creation of the Space Force, stated that ‘we continue to carry American leadership in space, so also will we carry America’s commitment to freedom into this new frontier’. Furthermore, in discussing space, US Texas Senator Rafael Edward ‘Ted’ Cruz said, ‘I think it is every bit as vast and promising a frontier as the New World was some centuries ago’. Perhaps it is this ideology that shapes the US-led strategy behind the Artemis Accords, which are discussed below at Section 4.3.

The normative language of space discourse, and of policy not only from the United States but that of the international community, is one which continues to reaffirm assumptions which are ‘rooted in coloniality, specifically the conceptions of humankind, peace, nature and economic relations.’ The future of humanity, through these concepts, is held hostage to the past. These concepts in space discourse are presented and socialised as innocuous, but beneath are shackles. Treviño asserts that, ‘by not rooting out coloniality from space exploration, space exploration will always be space exploitation of humans and nature’. This article seeks to provide this Third World context and disrupt the reinforcing reproduction of colonial norms as though they are humanity’s triumphs in space, denying, erasing, and remaking Third World memories.

Further, the history of the language and ideology used in space discourse points to manifestations of coloniality in the ISL regime. Coloniality as defined by Quijano is:

One of the specific and constitutive elements of global model of capitalist power. It is based on the imposition of a racial/ethnic classification of the global population as the cornerstone of that model of power, and it operates on every level, in every arena

30 Ibid.
32 Ibid, 28.
and dimension (both material and subjective) of everyday social existence and does so on a societal scale.\textsuperscript{33}

A deconstruction of language in space discourse points to a global power that is predicated on dominance, where certain racial and ethnic identities are inferior, and where Western primacy in natural resource extraction is legitimated, among other features. Does the international community seek to maintain or depart from coloniality in the future of humanity in space? The analysis in this article indicates maintenance of coloniality in space. However, using TWAIL techniques and sensibilities, it is hoped that this article will elicit thinking about ways to avoid a \textit{fait accompli} in the future of humanity in space.

\textbf{3.2 Development of the Law Governing Space Activities}

The ISL regime is comprised of treaties, customary international law, and soft law. Specifically, the \textit{corpus juris spatialis} or the fundamental law governing space activities can be found in five international treaties that were concluded by the Committee on the Peaceful Uses of Outer Space (COPUOS), set up by the UN General Assembly in 1959.\textsuperscript{34} The treaties, which are commonly referred to as the five UN treaties on outer space are the Outer Space Treaty,\textsuperscript{35} Rescue Agreement,\textsuperscript{36} Liability Convention,\textsuperscript{37} Registration Convention,\textsuperscript{38} and the Moon Agreement.\textsuperscript{39} The Outer Space Treaty (OST) is viewed as the principal treaty of space law, as it establishes the general principles for the use and exploration of outer space.\textsuperscript{40} Furthermore, it contains ‘principles of customary international law which bind not only State parties to the treaty but also non-signatories’.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{33} Anibal Quijano, ‘Coloniality of Power and Social Classification’ (2000) 6 \textit{Journal of World Systems} 342.
\item \textsuperscript{34} UNGA Res. 1472 (XIV), 12 December 1959.
\item \textsuperscript{35} Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 19 December 1966, entered into force 10 October 1967) 8843 UNTS 610 (Outer Space Treaty).
\item \textsuperscript{36} Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (adopted 19 December 1967, entered into force 3 December 1968) 672 UNTS 119 (Rescue Agreement).
\item \textsuperscript{37} Convention on International Liability for Damage Caused by Space Objects (adopted 29 November 1971, entered into force 1 September 1972) 961 UNTS 187 (Liability Convention).
\item \textsuperscript{38} Convention on Registration of Objects Launched into Outer Space (adopted 12 November 1974, entered into force 15 September 1976) 1023 UNTS 15 (Registration Convention).
\item \textsuperscript{39} Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (Moon Agreement).
\end{itemize}
The history of the development of the *corpus juris spatialis* is an important guidepost to understanding the factors that shape the present legal regime. Most literature references the United States and USSR space race during the Cold War when describing the historical context and the agenda influencing the development of the ISL regime. Indeed, at the time, the United States and USSR were the dominant space actors, and western concern was two-fold. First, the concern was that space might become a site for warfare. The catastrophic potentialities included the use of space as a highway to launch destructive mechanisms from one earth point to another, from space to earth, or that earthbound conflicts would expand into space. The second was a concern about how to manage potential sought after space resources.

Additionally, there were Third World concerns part of ISL’s history. These included concerns raised by the Heads of States or Governments of Non-Aligned Countries in the Belgrade Declaration regarding nuclear disarmament, the use of space for only peaceful purposes, economic imbalance inherited from colonialism and imperialism, among others. It was resolved that the Declaration would be forwarded to the UN and brought to the attention of all other States. The language in the Declaration is notable as it is maintained across the five UN treaties. Other notable contributions from the Third World relevant to the development of the ISL regime include the proposals of the New International Economic Order (NIEO)/G-77 movement, the principle of permanent sovereignty over natural resources (PSNR)

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with its roots linked to sovereignty and right of self-determination,\textsuperscript{47} as well as the doctrine of common heritage of humankind.\textsuperscript{48}

While some literature references the process of decolonisation and self-determination that was underway at the time of the negotiation of the five UN treaties, they merely refer to decolonisation without any analysis of the implications thereof.\textsuperscript{49} Perhaps this is due to the belief that decolonisation played a secondary role, if any, in the development of the ISL regime. TWAIL scholars recognise that Third World states saw the potential of becoming members of the UN system.\textsuperscript{50} Third World states tried to use their sovereign rights in the international system to ensure that the way international law was implemented no longer reflected the interests and prejudices of the West.\textsuperscript{51} For example, in the UN General Assembly Mr Odaka of Uganda welcomed the agreement between the USSR and the United States that culminated in the conclusion of the OST remarking, ‘it is our firm belief that it is the United Nations that can offer assurance for peace’.\textsuperscript{52} Another statement from Mr Luisi of Uruguay referenced the development of a new space-age, stating his hope that the Third World ‘will not become the proletariat on the periphery’ in the future of humanity in space.\textsuperscript{53}

When the COPUOS was initially established in 1959, it had 24 Member States with Third World representation from Argentina, Brazil, India, Iran, Lebanon, Mexico, and the United Arab Republic (now Egypt and Syria).\textsuperscript{54} A brief look at the membership evolution of COPUOS between 1959 and 1979 when the last UN treaty on outer space was adopted shows a correlation between the independence of African states and their membership.\textsuperscript{55} Liberation was the priority on the agenda of Third World states and efforts had to continuously be made to oppose coloniality.

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\footnotesize
\textsuperscript{48} See Karin Mickelson, ‘Co-Opting Common Heritage: Reflections on the Need for South-North Scholarship’ in Obiora Chinedu Okafor & Obijiofor Aginam (eds.), Humanizing Our Global Order: Essays in Honour of Ivan Head (University of Toronto Press, 2003).
\textsuperscript{50} David P Fidler, 'Revolt against or from within the West - TWAIL, the Developing World, and the Future Direction of International Law' (2003) 2 Chinese Journal of International Law 29.
\textsuperscript{51} Ibid.
\textsuperscript{52} UNGA Verbatim Records (2 October 1967) UN Doc A/PV 1575, at 158.
\textsuperscript{53} UNGA Verbatim Records (26 September 1967) UN Doc A/PV 1569, at 5.
\textsuperscript{54} UNGA Res 1472 (XIV) (12 December 1959).
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The UN General Assembly meetings in 1966 indicate a variety of agendas discussed including international cooperation on the peaceful use of space and other aspects that would inform the adoption of the OST in 1967. Notably, a significant number of interventions on the issue of space were from Western states while Third World states’ interventions appeared focused on agendas such as the granting of independence to colonial countries and peoples. Although this is merely one example, concern about the UN becoming a colonial instrument was noted in plenary discussions. Mr Bouttoura, the representative from Algeria stated, we have always strenuously opposed, and will continue to oppose, certain Powers, first among them the United States of America, which are trying to convert the United Nations into an instrument for their imperialist and colonialist policies, the tragic consequences of which, particularly in Asia, Africa, and Latin America, are constantly being felt and are causing the peoples the most dreadful sufferings.

TWAIL is critical of the UN structure as a central body within the framework of international law, particularly the Security Council. Mutua regards the structure ‘as completely indefensible’, arguing that the UN is a front for big powers that ‘simply changed the form of European hegemony, not its substance’. How did the dominance of Western powers shape the development of the law governing space activities? The next section considers developments in the ISL regime that brought into question the equality of the Third World. Specifically, it discusses developments that relate to aspects of the OST and Moon Agreement.

4 Equality of the Third World

Using the TWAIL technique that emphasises the equality of Third World peoples, this section first considers the Declaration of the First Meeting of Equatorial Countries 1976 (the Bogotá Declaration), which raises issues related to Article II of the OST. Second, the section puts into perspective the Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing

56 UNGA Verbatim Records (13 December 1966) UN Doc A/PV 1491.
57 UNGA Verbatim Records (19 December 1966) UN Doc A/PV 1499, at 12.
Countries 1997 (the Space Benefits Declaration),\(^61\) which raises issues related to Article I of the OST. Third, this section also deals with the 2020 Artemis Accords, which raise issues related to Article I and II of the OST as well as Article 11(1)-(4) of the Moon Agreement. It is argued that these three developments raise questions about the equality of Third World peoples and Third World states and point to manifestations of coloniality in the ISL regime.

4.1 Bogotá Declaration
In 1976, seven States traversed by the Equator – Colombia, Congo, Ecuador, Indonesia, Kenya, Uganda, and Zaire, with Brazil as an observer State (the ‘Bogotá 8’) – proclaimed the Bogotá Declaration to assert their rights over geostationary orbit (GEO).\(^62\) GEO, a special type of geosynchronous orbit, is a circular orbit above the belt of the Earth’s equator that follows Earth’s rotation from west to east. GEO is the vantage point which satellites are considered best placed to communicate with the planet below.\(^63\) To an observer on Earth, a satellite will appear fixed in the same spot and a key feature of GEO is that it offers maximum coverage of the Earth’s surface using the minimum number of satellites.\(^64\) With three evenly spaced satellites in GEO, the entire surface of the planet can be covered. The Bogotá 8 asserted that GEO was a natural resource unfairly removed from their sovereignty.\(^65\) They expressed concern that satellite positions in GEO were limited and would become increasingly unavailable to non-space faring nations, particularly for Third World states without current technical and financial means.\(^66\) A central concern on the limitation is the maximum number of satellites that can be placed in GEO while ensuring avoidance of satellite collision and interference.\(^67\) One of the key concerns was that a rejection of the claims of the Bogotá 8 would lead to neo-colonialism in space.\(^68\) Specifically, ‘the

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\(^61\) UNGA Res 51/122 (4 February 1997); UN Doc A/RES/51/122.

\(^62\) Declaration of the First Meeting of Equatorial Countries (3 December 1976).


\(^64\) Rafał Kopec, 'Geostationary Belt- State’s Territory or Province of Mankind' (2018) 8 Review of Nationalities 167.


\(^68\) Agama (2017).
space-capable nations would be able to obtain information about resources in the territories of non-space-capable nations, which is either made unavailable to the latter or is sold to them at a profit. Indeed, GEO was and remains one of the most valuable orbits for telecommunication satellites.

The International Telecommunication Union (ITU), through a special agreement with the UN, is charged with managing space-related allotment and is critical for the global management of the radio-frequency spectrum and satellite orbits. Essentially, the arenas of decision-making on the use of the geostationary orbit are the UN General Assembly, COPUOS and the ITU.

The Bogotá 8 asserted that there was no satisfactory definition of outer space to support the argument that GEO was in outer space, and therefore the OST should not be applied here. To date, COPUOUS has not concluded a universal agreement on the definition and delimitation of outer space (or space). Whatever the motivation of the Bogotá 8, they raised important questions about the OST and how to implement the principle of ‘benefit and interests of all countries’. The reality is that GEO is a limited resource, which is currently unequally shared, and the technologically and financially capable states are dominating that orbital space. On 16 February 2022, in the Scientific and Technical Subcommittee (STS) Session of COPUOS, some delegates stated that the interest of developing States and equatorial countries were adversely affected. They held the view that

the utilization by States of the geostationary orbit on a “first come, first served” basis was unacceptable and that the Subcommittee, with the involvement of ITU, should therefore develop a regime guaranteeing equitable access to orbital positions for States.

According to Anghie, colonialism ‘profoundly shaped the character of international institutions’, and this historical context illuminates the ‘operations and character of contemporary international institutions’. Considering TWAIL observations about the international system, what can be done to promote a COPUOS and ITU that emphasises the equality of the Third World? Given that only a few satellites from the Third World are in GEO, how is the equality of the Third World protected?

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71 Article II of Outer Space Treaty.


73 Anghie (2005) 117.
4.2 Space Benefits Declaration

Article I of the OST has three aspects of relevance for this article: it requires that space activities are undertaken for the ‘common benefit of all mankind’; it provides a general parameter that the free exploitation and use of space shall be without discrimination and based on equality; and it emphasises that there shall be freedom of scientific investigation and states shall facilitate and encourage international cooperation. Given this framing, it has been argued that Article I of the OST, particularly in the context of international cooperation and benefits, placed merely a moral obligation on states, not a legal obligation. Even if one were to accept that there was a legal obligation, the meaning of the concepts still raises issues of interpretation. For example, to what extent shall Third World states expect facilitation using the principle of international cooperation? Similarly, to what extent shall benefits be equitably shared?

It is notable that these concepts are often referenced as merely aspirational on the one hand and on the other they are historical signals of the international community learning lessons about the harms of colonialism and a commitment to not repeat past mistakes.

In 1986, the Venezuelan delegation proposed an agenda for the Legal Subcommittee of COPUOS on ‘equitable access by States to the benefits derived from space’. Third World countries sought to integrate issues of outer space into the concept of the New International Economic Order (NIEO) and framed principles which boldly sought to force cooperation and automatic transfer of financial and technological resources from the global North to the global South. Furthermore, the proposal was interpreted as an attempt at ‘redistributive revolution in international space cooperation’, which space faring countries refused to even talk about. Aganaba argues that this response and much of the Western academic analysis on Third World

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74 Art I Outer Space Treaty.
77 Ibid, 3.
79 Ibid, 140.
proposals were predicated on misinterpretation.\footnote{Timiebi U. Aganaba-Jeanty, ‘Cosmopolitan Approaches to International Law: Finding the Right Lens to View the Freedom of Outer Space’ (Doctor of Civil Law Thesis, McGill University 2016).} Additionally, Western analyses failed to consider the qualifications that accompanied ‘some of the so-called unacceptable “demands”’.\footnote{Ibid, 89.} The potential commercial value of space activities was apparent, and therefore the broader debate touched on issues related to GEO, potential space resources from the Moon and other celestial bodies, as well as the use of data from remote sensing activities.\footnote{Benko & Schrogl (1997).} Third World countries believed that any genuine international cooperation required a precise definition of the scope of the access to the benefits vaguely stated in Article I of the OST.

A working paper from France and Germany in 1995 paved way for the Space Benefits Declaration, adopted in 1996. Even though the Space Benefits Declaration in its title contains the phrase ‘taking into particular account the needs of developing countries’, the objective of securing a legally binding regime ensuring space benefit sharing failed. Instead, the Space Benefits Declaration grants states the freedom to determine specific aspects of international cooperation only as it relates to exploration and use of space, and the issue of regulating the exploitation of space resources is not addressed.\footnote{Stephan Hobe, ‘Adequacy of the Current Legal and Regulatory Framework Relating to the Extraction and Appropriation of Natural Resources’ (2007) XXXII Annals of Air and Space Law 204.} TWAIL scholars contend that there is an ‘intimate relationship between capitalism, imperialism, and international law, which accounts for the fact that it has always disadvantaged Third World peoples’.\footnote{BS. Chimni, ‘Capitalism, Imperialism and International law in the Twenty-First Century’ (2012) 14 Oregon Review of International Law 17.} The Space Benefits Declaration exemplifies this as it is clearly to the disadvantage of Third World peoples that there is no mechanism for the division of benefits derived from space. However, it has been argued that, even with this failed objective, the efforts made towards the distribution of the benefits on an equitable basis may be a step in the path toward establishing a new order of international cooperation.\footnote{Aganaba-Jeanty (2016) 3.} Will this be enough to ensure equality for Third World peoples?

The position of this article is that there are numerous Third World experiences, whether with the World Bank, the International Monetary Fund, or Bilateral cooperation agreements, that suggest that this will not be enough. Based on the production of COVID-19 vaccines reported by the International Federation of Pharmaceutical Manufactures and Associations, it was determined that the target of the World Health Organisation to vaccinate 70 percent of the global population was...
achievable by mid-2022. Nevertheless, vaccination in the Third World remains remarkably low compared to global North countries. Third World people require more than aspirational rhetoric to ensure equality. The production and distribution of COVID-19 vaccines is instructive on how the freedom to interpret international cooperation and shared benefits will be to the detriment of Third World peoples. The COVID-19 pandemic has shown that, even when stakes are high, the freedom to determine the extent of international cooperation or benefit sharing by States and private corporations will disadvantage the Third World.

4.3 Artemis Accords

An important reason for states and private actors’ interest in reaching the Moon and other celestial bodies is the possibility of being able to mine natural resources that can be used for commercial purposes. It is this unavoidable future that necessitated the Space Declaration. It is important to reiterate the importance of Article I and II of the OST, which together with the Moon Agreement clarify the legal status of the Moon and other celestial bodies. Article II affirms that space is ‘not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means’. Article I establishes the principles of freedom of exploration, access and use of space. Furthering this, the Moon Agreement seeks ‘to promote on the basis of equality the further development of cooperation among States on the use of the Moon and other celestial bodies’. It declares the Moon and its natural resources to be the ‘common heritage of mankind’. The expectation therein was that, when it became feasible, an international regime would be established to govern the exploitation of


88 Art I of OST.

89 Preamble, Moon Agreement.

90 Art 11 Moon Agreement.
such resources. However, as of 1 January 2022, only 18 States have ratified the Moon Agreement.

Prominently, the United States position has for several decades been that ‘the OST prohibition does not limit a claim on natural resources that have been removed from their “place” or natural location on celestial bodies and that such removal is allowed under the OST’. Furthermore, on 6 April 2020, the United States clarified its position that it does not view space as a global commons and affirmed its position against the Moon Agreement. It has been argued that the Artemis Accords are ‘a continuation of the US Administration’s underlying foreign policy strategy: unilateral dominance over international cooperation’. In a process led by the United States, the Artemis Accords were signed on 13 October 2020 by 8 founding members: Australia, Canada, Italy, Japan, Luxembourg, the United Arab Emirates, the United Kingdom and the United States. The Accords are borne of the Artemis Programme, which aims to return humans to the Moon and establish permanent lunar presence. The Accords state that, on space resources, the Accords are meant to reinforce Article II of the OST. However, contrary to the Moon Agreement, the Accords indicate that the signatories affirm that the extraction of space resources does not inherently constitute national appropriation and ‘utilisation of space resources can benefit humankind’.

There are three notable issues regarding the Accords of relevance to this article. First, the Accords have given rise to several security concerns about new strategic alignments and cooperation. Despite having well-developed space programmes, Russia, China, Germany, France, and India are absent from the Accords, and furthermore no African or Latin American country was part of the Accords when it


92 Armenia, Australia, Austria, Belgium, Chile, Kazakhstan, Kuwait, Lebanon, Mexico, Morocco, Netherlands, Pakistan, Peru, Philippines, Saudi Arabia, Turkey, Uruguay and Venezuela: COPUOS, ‘Status of International Agreements relating to Activities in Outer Space as at 1 January 2022’, UN Docs A/AC.105/C.2/2022/CRP.10.


96 Sec 10 (2) Artemis Accords.

97 See Sec 10 Artemis Accords (emphasis added).
was signed. However, in June 2021, Brazil became the first Latin American country to sign the Accords. Notably, despite decades of cooperation in NASA’s International Space Station, Russia has announced an agreement with China to construct a lunar station. Will other Third World states join the Accords or align themselves with Russia and China, and what will the implications be? Australia is a signatory of the Accords and state party to the Moon Agreement, but given the arguable differences in the two, what are the legal and diplomatic implications for Australia? What are the implications of the Accords for the other state parties to the Moon Agreement?

Second, from a formal perspective, the practice has been that the UN, particularly COPOUS, has the mandate to negotiate principles to govern the ISL regime. However, this United States-led approach is reflective of ‘the cusp of a wider trend in the law-making process for outer space, sitting at the crossroads of multilateralism and unilateral national legislation’. What does this development mean for the expectation by the UN Office for Outer Space Affairs (UNOOSA) that an international regime would be established to govern the exploitation of space resources? For the avoidance of doubt, a US-led approach (or any other global superpower-led approach) to establish principles to govern the ISL regime will not represent the needs of Third World peoples and therefore is not supported by the author. TWAIL scholars have analysed the UN system’s similar shortfalls in representing the needs of Third World peoples in other fields of law. However, as will be discussed in Section 5, this article offers TWAIL as a way to meaningfully address this shortfall and engage in international law-making regarding frameworks to govern space activities. Although inherently imperfect as within the UN system, COPOUS is a mechanism where a counterhegemonic approach can be advanced, and a reform agenda can be calibrated to represent the needs of the Third World more adequately.


Third, the Accords affirm that extraction of space resources do not inherently constitute national appropriation under Article II of the OST. It is this third aspect that should perhaps be of most concern for Third World states. The Accords make no mention or commitment to the Space Benefits Declaration. The Accords state that ‘signatories note that the utilisation of space resources can benefit humankind by providing critical support for safe and sustainable operations’,\(^{103}\) which is notably different to the Space Benefits Declaration’s assurance ‘to the use of resources for the benefit and in the interest of all States, taking into particular account the needs of developing countries’.\(^{104}\) Looking at what we know about history on Earth regarding exploitation of natural resources and the current situation regarding exploitation of space resources, what assurance of future equality can Third World states expect? Emphasising the needs and interests of Third World peoples, what hope is there for equality in space use, exploration, and development, as well as in the future of humanity?

5 Reform and Resistance

Anghe’s work on the colonial origins of international law has offered TWAIL models for analysing certain aspects of past events to predict and intervene in future events. This article has used two of Okafor’s TWAIL techniques, of an inclusive global history and emphasising the equality of Third World peoples, to present a model of the ISL regime towards a similar purpose. In sum, the model is one in which space discourse contains language and ideology linked to coloniality; the history told on the development of the ISL regime ignores non-Western political and legal realities; and the issue of equality of Third World peoples in the ISL regime continues to be a source of concern. Using this model, this article offers five areas for thinking about reform and resistance in a process that Eslava and Pahuja refer to as ‘destabilisation and renewal of international law’s history and operation’.\(^ {105}\)

The first area is decolonising the language and ideology of space discourse and the ISL regime. Several issues were raised in the earlier discussion on inclusive history, including what continued use of colonial language in space discourse does to Third World peoples’ lived experience of colonialism, conquest and frontierism on Earth; what a retelling of the colonial encounter does to space discourse and ISL; and whether the international community seeks to maintain or depart from coloniality in the future of humanity in space. Efforts to change language and scholarly discourse is often faced

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\(^ {103}\) Sec 10(1) Artemis Accords.

\(^ {104}\) Title, Space Benefits Declaration.

\(^ {105}\) Eslava & Pahuja (2012) 204.
with criticism of merely being about political correctness. For instance, the change from the term ‘mankind’ to the inclusive gender-neutral ‘humankind’ or from ‘manned’ to ‘crewed’ space shuttles. Such issues raised by language and ideology go beyond political correctness. Rather, they are about how we envision and plan to shape the future of humanity. Difficulties in knowing what the appropriate language should be have allowed for inaction.

There are works such as that by Treviño that explore extensively the use of colonial language in space discourse and its prominence in policy, advocacy, and the media. TWAIL emphasises the importance of equality, diversity and inclusion, and space is a domain where peace, cooperation, and benefits for all are continuously evoked. As space discourse continues to grow in importance for the future of humanity, a TWAIL lens offers a starting point for the elimination of language that translates to subordination, genocide, and economic exploitation, among other terminology reminiscent of colonialism. This article argues for critical thinking and recommendations on the reform of the language in the ISL regime and space discourse. It is a difficult challenge but ‘if there is no struggle, there is no progress’.106

Decolonising the history of the development of the ISL regime is the second area. Some issues raised in the earlier discussion of an inclusive global history include, what impact the process of decolonisation has had on the nature of engagement of the Third World in space treaty negotiations, and how the dominance of Western powers shaped the development of law governing space activities. This article theorises that decolonisation played a role in the development of the ISL regime but the nature and extent of the role it played is unclear. To give voice and value to Third World peoples, this article argues for TWAIL historical accounts of the legal and political landscape, as a means of better understanding the formation of the ISL regime and space discourse and thereby shaping a more inclusive future. This is particularly important for current discussions on the development of legal models to govern space activities.

Thirdly, references to the notion of the right to development can be found in preparatory work on the 1948 Universal Declaration of Human Rights.107 Later, the decolonisation process in the 1960s was a precursor to the early articulation of the right to development. It was reflected as necessary to Africa’s ‘newly acquired political emancipation from their colonial masters’.108 The first explicit reference at the international level was in 1977,109 followed by a recognition that the right exists in

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106 Philip Foner & Yuval Taylor Frederick Douglass: Selected Speeches and Writings (Lawrence Hill Books, 1999).
1979,\textsuperscript{110} paving the way for the Declaration on the Right to Development (RTD Declaration) adopted in 1986.\textsuperscript{111} Since the adoption of the RTD Declaration, it has faced a lot of criticism that has contributed, in part, to the impeded implementation of the right.

TWAIL scholarship has analysed the right to development in the context of decolonisation, the postcolonial period, and in contemporary international law.\textsuperscript{112} As is often the case, the position of TWAIL scholars on the right to development varies, including questioning the approach which ‘bequeathed the right to development to international human rights’.\textsuperscript{113} As aforementioned, a 2018 SDG study finds that almost 40 percent of SDGs directly benefit from use of space technology and services.\textsuperscript{114} It is recognised among scholars from the Third World that there is a need to increase these benefits to all countries, particularly to developing countries.\textsuperscript{115} However, it is important that this outlook is also reflected in the benefits derived from natural resources on the Moon and other celestial bodies. As state space actors, particular the wealthy few, discover further benefits from space, Third World states are facing an increasingly unequal world. A failure to address this future will make obsolete any attempts that have thus far been made to bridge, even moderately, the disparity between Third and First World peoples. Perhaps in such an increasingly unequal world, the legal gains made will be lost, particularly those meant to remove obstacles to development and full enjoyment of human rights.

The RTD Declaration is ‘the only international human rights instrument that addresses the need for joint international action to tackle the human rights consequences of global economic arrangements’.\textsuperscript{116} This article proposes that policy relevant research and analyses on the specific ways in which the right to development can be realised, particularly in the ISL regime, is required to foster just, comprehensive, sustainable, global development. Second, supranational unity to harness current and future gains in the space sector is required among Third World states if there is any hope of participating on an equal footing. A first step, for example, is the establishment of the African Space Agency (AfSA) as an organ of the African Union (AU) in 2018.\textsuperscript{117}

\textsuperscript{110} CHR Res. 5 (XXXV), 2 March 1979.
\textsuperscript{111} UNGA Res. 41/128, 4 December 1986.
\textsuperscript{113} Ibid, 48.
\textsuperscript{114} UNOOSA (2018).
\textsuperscript{115} UNGA Res. 74/82, 26 December 2019.
\textsuperscript{117} AU Statute of the African Space Agency, 29 January 2018.
Although AfSA is not yet operational, the 2022 AU Assembly adopted the organogram of AfSA and its full establishment shall be phased over a period of 3 years. Meanwhile, since 2020, Botswana, Rwanda, Namibia, Burkina Faso, Djibouti, and Zambia have initiated space programs.

Connected to the RTD Declaration is the right to international solidarity. Unlike the right to development, the right to international solidarity has yet to be adopted though it is articulated in the UN Draft Declaration on the Right to International Solidarity (RIS Draft Declaration). Adoption of the Draft would be a positive expression of commitment to reject all the trappings of coloniality in favour of a fuller realisation of a democratic and equitable international order. Indeed, the Human Rights Council established the UN Independent Expert on Human Rights and International Solidarity in 2005, but work still needs to be done towards the adoption of a legal framework and enabling environment for the objectives of international solidarity.

The final and pressing area that TWAIL can offer thinking is on the development of space resource legal models. From 31 May to 11 June 2021, the Legal Subcommittee of COPOUS met to discuss, among other agenda items, potential legal models for activities in exploration, exploitation, and utilisation of space resources. A new Working Paper was introduced by Greece, together with Australia, Belgium, the Czech Republic, Finland, Germany, Slovakia, and Spain on the ‘establishment of a working group for the development of an international framework for the utilisation and exploitation of space resources’. This gave rise to several important issues highlighted in statements by different states, including the conflict between the Artemis Accords and the Moon Agreement, and the need to take a consensus-based multilateral approach through COPOUS to explore the issues raised in the Working Paper. The G-77 and China underscored the importance of this discussion for future

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118 AU, ‘35th Ordinary Session of the Assembly of the Union, 5-6 February 2022’ AU/Dec.813-838 (XXXV).
cooperation and that they would ‘not depart from the basic principles of non-appropriation, equitable access, and common province of humankind’.123

It was agreed by consensus in 2021 to establish a five-year workplan on methods of work for the Working Group on Legal Aspects of Space Resource Activities, which held its first meeting in 2022.124 In a statement from the US in the 2022 Session, there was a recognition that the OST is not comprehensive on space resource utilisation activities and that nations are engaged in space resource activities. However, the position taken by the US was that the Artemis Accords represents the fundamental beliefs needed, and there is no need or practical basis to create a regime for space resource utilisation activities.125 The G-77 and China shared a different position, that the present scenario requires urgent consideration to not exclude developing countries.126 Okafor and other scholars have written about circumstances similar to the present situation, highlighting blindness to the reality and history of dispossession, and destruction and exploitation of the Third World which have enabled global powers to maintain a posture of innocence.127 TWAIL offers to the development of legal models the ability to take the shared histories, experiences and aspirations of Third World peoples seriously and to foster ‘deep ideational change and epistemic transformation’ that meets the aspiration for a more equal, fair and just future in space.128 Given the issues raised in ISL and their impact on Third World peoples, TWAIL must be central to the development of any ISL legal models.

6 Conclusion

This analysis points to the specific manifestations of coloniality in the ISL regime and space discourse. Using TWAIL sensibilities, it offers ways in which to reform and resist colonial ISL. Although the situation from the perspective of the Third World may seem dire, this article contends that TWAIL offers opportunities for reform and


resistance that provide hope. TWAIL techniques raise helpful questions that lay the groundwork for further research. The proposals made in this article are preliminary and further analysis is required, including the questioning and unpacking of ISL assumptions. As with the issue of space benefits sharing, it is important to demystify the underlying politics of ISL assumptions if there is any hope of addressing or mitigating them. Third World peoples – and the TWAIL movement – urgently need to invest in a multi-sectoral approach to capacity building, knowledge sharing and coalition building in the space sector and in ISL.

TWAIL is an embodiment of diversity, and a diversity of approaches are accommodated within this scholarly enterprise. TWAIL can coalesce around and resonate with various categories of persons who for many years have been marginalised, rendered voiceless and left vulnerable due to the global imbalances and asymmetries of power. Space is an interface for the future of humanity where all the subordinated should unite in the development of a legislative, policy and regulatory framework. With a recognition of our interconnectedness and openness to innovative thinking, the international community is in a pivotal juncture of possibilities to pursue a just world on Earth and for the future of humanity in space.

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